UNITED NATIONS *Office on Drugs and Crime*

THE GLOBAL PROGRAMME AGAINST CORRUPTION

UN ANTI-CORRUPTION TOOLKIT

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FOREWORD
THE ANTI-CORRUPTION TOOLKIT

Since 1994, unprecedented efforts have been made to raise awareness about corruption, its insidious nature and the damaging effects it has on the welfare of entire nations and their peoples. Corruption not only distorts economic decision-making, it also deters investment, undermines competitiveness and, ultimately, weakens economic growth. Indeed, there is evidence that the social, legal, political and economic aspects of development are all linked, and that corruption in any one sector impedes development in them all.

There is now increasing recognition throughout the public and private sector that corruption is a serious obstacle to effective government, economic growth and stability, and that anti-corruption policies and legislation are urgently required at the national and international level. Serious efforts to combat corruption are still believed to be in their infancy in most countries, and reliable information about the nature and extent of domestic and transnational corruption is difficult to obtain. The problems are compounded by the very broad nature of the phenomenon and a lack of consensus about legal or criminological definitions that could form the basis of international and comparative research.

Nevertheless, some jurisdictions have developed successful anti-corruption measures. The Anti-Corruption Toolkit is based on those and on lessons learned from the technical cooperation activities facilitated by the Global Programme against Corruption. The Toolkit provides, based on the recently adopted UN Convention against Corruption, an inventory of measures for assessing the nature and extent of corruption, for deterring, preventing and combating corruption, and for integrating the information and experience gained into successful national anti-corruption strategies.

The nature and effects of corruption are unique to each country and society. The Toolkit is intended to provide a range of options that will enable each country to assemble an integrated strategy that will be as effective as possible in meeting its own needs.

Antonio Maria Costa
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EQUIP YOURSELF

The Toolkit is part of a larger package of materials intended to provide information and resource materials for countries developing and implementing anti-corruption strategies at all levels, as well as for other elements of civil society with an interest in combating corruption. The package consists of the following major elements:

The United Nations Guide on Anti-Corruption Policies, which contains a general outline of the nature and scope of the problem of corruption and a description of the major elements of anti-corruption policies, suitable for use by political officials and senior policy-makers.

The United Nations Anti-Corruption Handbook for Investigators and Prosecutors, which contains descriptions of specific issues and options confronting criminal justice professionals in domestic and transnational corruption cases.

The United Nations Anti-Corruption Toolkit, which contains a detailed set of specific Tools intended for use by officials called upon to elaborate elements of a national anti-corruption strategy and to assemble these into an overall strategic framework, as well as by officials called upon to develop and implement each specific element. Case Studies, setting out practical examples intended to illustrate the use of individual tools and combinations of tools in actual practice, are included in the Toolkit. They provide information about the conditions under which a particular programme will or will not work and how various tools can be adapted or modified to suit the circumstances in which they are likely to be used.

Compendium of International legal instruments on Corruption, in which all of the major relevant global and regional international treaties, conventions, agreements, resolutions and other instruments are compiled for reference. These include both legally binding obligations and some "soft-law" or normative instruments intended to serve as non-binding standards.

The Legislative Guide for the implementation of the United Nations Convention against Corruption. At the request of the General Assembly, the Secretariat will prepare materials to support and assist the efforts of Member States to ratify the Convention. Prepared in consultation with Member States, these will include information to assist in the preparation of legislative, regulatory, administrative and other measures needed to enable each State to ratify the Convention, and implement its provisions when it comes into force. The package is expected to include samples of legislation implementing the various provisions in different legal systems as these become available. Once finalised, the Guide will be made available through UNODC.

An example of **Country Assessments**, as well as all four publications, are available on the Internet on the United Nations Office of Drug Control and Crime Prevention (UNODCCP) web page:

http://www.ODCCP.org/corruption.html

To assist users who do not have Internet access, individual publications will also be produced and updated as necessary. Elements of the Toolkit may also form the basis for other publications, tailored to meet the needs of particular regions or target audiences, such as judges, prosecutors or law enforcement agencies.

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The publication of this 2nd edition of the Anti´-Corruption Toolkit would not have been possible without the invaluable support of our colleagues, Chris Ram and Oliver Stolpe, who drafted and/or redrafted a good number of the Tools, Jeremy Pope who facilitated the process, including the selection of experts for the expert group meeting in 2000 and Kathryn Platzer who was responsible for the final editing and layout.

Among the international experts who have contributed to the United Nations Anti-Corruption Toolkit as co-authors and/or advisers, the *United Nations Office on Drugs and Crime* would like to thank: Ms. Anna Alvazzi Del Frate, Dr. Neil Andersson, Mr. Per Oyvind Bastoe, Mr. Daniel Blais, Mr. Daryl M. Balia, Mr. David Browser, Mr. Richard Buteera, Judge Gherardo Colombo, Mr. Peter Csonka, Dato' Param Cumaraswamy, Mr. Roberto de Michele, Chief Justice Odoki of Uganda, Judge Pius Langa, Dr. Nihal Jayawickrama, Mr. Roberto de Michele, Mr. Bertie de Speville, Professor Alan Doig, Mr. Kevin J. Ford, Mr. Michel Gauthier, Ms. Irma Hutabarat, Justice Michael Kirby of the High Court of Australia, Mr. Robert Manchin, Dr. Mette Mast, Mr. Bulelani Ngcuka, Mr. Luis Moreno Ocampo, Dr. Denis Osborne, Chief Justice Ben Odoke, Ms. Elena A. Panfilov, Mr. David Pezzullo, Professor Mark Pieth, Mr. Augustine Ruzindana, Mr. Fabrizio Sarrica; Mr Harald Stokkeland, Arthur Sydnes, Mr. Alexander Stoyanov, Ugi Zveckic and Chief Justice M.L. Uwais. Justice Odoki of Uganda, Judge Christopher Weeramantry, Vice-President of the International Court of Justice,

EDITORS' NOTE TO SECOND EDITION

Since the completion of the first edition of the *Anti-corruption Toolkit,* Member States of the United Nations have successfully finalised The United Nations Convention against Corruption. An open-ended intergovernmental ad-hoc committee was established by the General Assembly in late 2000, and negotiations were concluded in Vienna on 30 September 2003 after two years of deliberations.[1] The new treaty was adopted and declared open for signature and ratification by the General Assembly in its resolution 58/4 of 31 October 2003. The Convention marks a major step forward in international cooperation against corruption, and a brief history and summary of the content of the instrument have been included in the introductory part of this *Toolkit.* References to specific provisions of the Convention have been added throughout the *Toolkit* as appropriate, and a more detailed review has been included as part of Annex [---] dealing with international legal instruments. Countries seeking to ratify and implement the Convention may also wish to refer to the *Legislative Guide to the Convention against Corruption*, available from the United Nations Office on Drugs and Crime (UNODC), Vienna.[2]

[1] The Committee was actually established by resolution 55/61 of 4 December 2000. See also resolutions 55/188, 56/186, 56/260, 57/169 and 57/244 dealing with terms of reference, timing and other matters. Under paragraph 5 of resolution 58/4, the Committee remains in existence until the Convention is in force and it has produced its final product, draft rules of procedure for the Conference of States Parties established by Article 63 of the Convention.

[2] Forthcoming.

CHAPTER I
INTRODUCTION

WHAT IS CORRUPTION?

THE MEANING OF "CORRUPTION" AND A SURVEY OF ITS MOST COMMON FORMS

There is no single, comprehensive, universally accepted definition of corruption. Attempts to develop such a definition invariably encounter legal, criminological and, in many countries, political problems.

When the negotiations of the United Nations Convention against Corruption began in early 2002, one option under consideration was not to define corruption at all but to list specific types or acts of corruption. Moreover, proposals to require countries to criminalize corruption mainly covered specific offences or groups of offences that depended on what type of conduct was involved, whether those implicated were public officials, whether cross-border conduct or foreign officials were involved, and if the cases related to unlawful or improper enrichment. [3]

Issues relating to attempts to define corruption for purposes such as policy development and legislative drafting are discussed in more detail in the United Nations Manual on Anti-Corruption Policy, Part II.

Many specific forms of corruption are clearly defined and understood, and are the subject of numerous legal or academic definitions. Many are also criminal offences, although in some cases Governments consider that specific forms of corruption are better dealt with by regulatory or civil law controls. Some of the more commonly encountered forms of corruption are considered below.

"GRAND" AND "PETTY" CORRUPTION

Grand corruption is corruption that pervades the highest levels of a national Government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability.[4] Petty corruption can involve the exchange of very small amounts of money, the granting of minor favours by those seeking preferential treatment or the employment of friends and relatives in minor positions.

The most critical difference between grand corruption and petty corruption is that the former involves the distortion or corruption of the central functions of

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[3] Initial proposals for the UN Convention against Corruption were gathered at an informal preparatory meeting held in Buenos Aires from 4-7 December 2001 and compiled in documents A/AC/261/3, Parts I-IV. Proposals to define "corruption" are in Part I, and proposals to criminalize acts of corruption are found in Part II.

[4] See, for example, Rose-Ackerman, S., "Democracy and 'grand corruption' " UNESCO, 1996 (ISSI 149/1996), reprinted in Williams, R., ed. Explaining Corruption, Elgar Reference Collection, UK, 2000, pp.321-336.

Government, while the latter develops and exists within the context of established governance and social frameworks.

"ACTIVE" AND "PASSIVE" CORRUPTION

In discussions of transactional offences such as bribery, "active bribery" usually refers to the offering or paying of the bribe, while "passive bribery" refers to the receiving of the bribe.[5] This, the commonest usage, will be used in the Toolkit.

In criminal law terminology, the terms may be used to distinguish between a particular corrupt action and an attempted or incomplete offence. For example, "active" corruption would include all cases where payment and/or acceptance of a bribe had taken place. It would not include cases where a bribe was offered but not accepted, or solicited but not paid. In the formulation of comprehensive national anti-corruption strategies that combine criminal justice with other elements, such distinctions are less critical. Nevertheless, care should be taken to avoid confusion between the two concepts.

BRIBERY

Bribery is the bestowing of a benefit in order to unduly influence an action or decision. It can be initiated by a person who seeks or solicits bribes or by a person who offers and then pays bribes. Bribery is probably the most common form of corruption known. Definitions or descriptions appear in several international instruments, in the domestic laws of most countries and in academic publications.[6]

The "benefit" in bribery can be virtually any inducement: money and valuables, company shares, inside information, sexual or other favours,

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[5] See, for example Articles 2 and 3 of the European Criminal Law Convention on Corruption, ETS #173.

[6] Provisions that define or criminalize bribery include: article 8 of the UN Convention Against Transnational Organized Crime, GA/Res/55/25, Annex and article VI of the Inter-American Convention against Corruption of 29 March 1996 (OAS Convention), which require Parties to criminalize offering of or acceptance by a public official of an undue advantage in exchange for any act or omission in the performance of the official's public functions. Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Article VIII of the OAS Convention require Parties to criminalize the offering of bribes by nationals of one State to a Government official of another in conjunction with a business transaction. Articles 2 and 3 of the European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or officials of Member States of the European Union, Journal C 195, 25/06/1997, pp.2-11 (1997), requires Parties to criminalize the request or receipt by a public official of any advantage or benefit in exchange for the official's action or omission in the exercise of his functions ("passive bribery"), as well as the promise or giving of any such advantage or benefit to a public official ("active bribery"). The Council of Europe's Criminal Law Convention on Corruption, ETS No. 173 (1998), goes further by criminalizing "active" and "passive" bribery of, inter alia, domestic public officials, foreign public officials, domestic and foreign public assemblies, as well as private sector bribery, trading in influence and account offences. See also UN Declaration against Corruption and Bribery in International Commercial Transactions, GA/Res/51/191, Annex (1996), calling for the criminalization of corruption in international commercial transactions and the bribery of foreign public officials; and Global Forum on Fighting Corruption, Washington, 24-26 February 1999, "Guiding Principles for Fighting Corruption and Safeguarding Integrity among Justice and Security Officials" document E/CN.15/1999/CRP.12, Principle #4. The working definition used in this Tool Kit and by the CICP's Global Programme against Corruption (GPAC) is "the misuse of (public) power for private gain". The United Nations Manual on Anti-Corruption Policy discusses models based on the idea that all forms of corruption involve either the creation of conflicting interests or the exploitation of such interests that already exist.

entertainment, employment or, indeed, the mere promise of incentives. The benefit may be passed directly or indirectly to the person bribed, or to a third party, such as a friend, relative, associate, favourite charity, private business, political party or election campaign. The conduct for which the bribe is paid can be active: the exertion of administrative or political influence, or it can be passive: the overlooking of some offence or obligation. Bribes can be paid individually on a case-by-case basis or as part of a continuing relationship in which officials receive regular benefits in exchange for regular favors.

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.

** United Nations Convention against Corruption*

Once bribery has occurred, it can lead to other forms of corruption. By accepting a bribe, an official becomes much more susceptible to blackmail.

Most international and national legal definitions seek to criminalize bribery. Some definitions seek to limit criminalization to situations where the recipient is a public official or where the public interest is affected, leaving other cases of bribery to be resolved by non-criminal or non-judicial means.

In jurisdictions where criminal bribery necessarily involves a public official, the offence is often defined broadly to extend to private individuals offered bribes to influence their conduct in a public function, such as exercising electoral functions or carrying out jury duty. Public sector bribery can target any individual who has the power to make a decision or take an action affecting others and is willing to resort to bribery to influence the outcome. Politicians, regulators, law enforcement officials, judges, prosecutors and inspectors are all potential targets for public sector bribery. Specific types of bribery include:

- Influence-peddling in which public officials or political or Government insiders peddle privileges acquired exclusively through their public status that are usually unavailable to outsiders, for example access to or influence on Government decision-making. Influence-peddling is distinct from legitimate political advocacy or lobbying.
- Offering or receiving improper gifts, gratuities, favours or commissions. In some countries, public officials commonly accept tips or gratuities in exchange for their services. As links always develop between payments and results, such payments become difficult to distinguish from bribery or extortion.

- Bribery to avoid liability for taxes or other costs. Officials of revenue collecting agencies, such as tax authorities or customs, are susceptible to bribery. They may be asked to reduce or eliminate amounts of tax or other revenues due; to conceal or overlook evidence of wrongdoing, including tax infractions or other crimes. They may be called upon to ignore illegal imports or exports or to conceal, ignore or facilitate illicit transactions for purposes such as money-laundering.
- Bribery in support of fraud. Payroll officials may be bribed to participate in abuses such as listing and paying non-existent employees ("ghost workers").
- Bribery to avoid criminal liability. Law enforcement officers, prosecutors, judges or other officials may be bribed to ensure that criminal activities are not investigated or prosecuted or, if they are prosecuted, to ensure a favourable outcome.
- Bribery in support of unfair competition for benefits or resources. Public or private sector employees responsible for making contracts for goods or services may be bribed to ensure that contracts are made with the party that is paying the bribe and on favourable terms. In some cases, where the bribe is paid out of the contract proceeds themselves, this may also be described as a "kickback" or secret commission.
- Private sector bribery. Corrupt banking and finance officials are bribed to approve loans that do not meet basic security criteria and cannot later be collected, causing widespread economic damage to individuals, institutions and economies.
- Bribery to obtain confidential or "inside" information. Employees in the public and private sectors are often bribed to disclose valuable confidential information, undermining national security and disclosing industrial secrets. Inside information is used to trade unfairly in stocks or securities, in trade secrets and other commercially valuable information.

EMBEZZLEMENT, THEFT AND FRAUD.

In the context of corruption, embezzlement, theft and fraud all involve the taking or conversion of money, property or valuable items by an individual who is not entitled to them but, by virtue of his or her position or employment, has access to them.[7] In the case of embezzlement and theft, the property is

[7] A number of recent international legal instruments have sought to ensure that Parties have offences addressing this type of conduct with varying degrees of specificity. These include the Organization of American States' Inter-American Convention Against Corruption (1996) and the European Union's Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (1995). Article XI(1)(b) and (d) of the Inter-American Convention call upon Parties to consider criminalizing a government official's improper use or diversion of government property, including money and securities, regardless of the person or entity to whom the property is diverted, while Article XI(1)(a) calls upon Parties to consider criminalizing the improper use of classified information by a government official. Article IX requires, subject to a Party's Constitution and the fundamental principles of its legal system, criminalization of "illicit enrichment," meaning "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions." Addressing the narrow area of protection of the financial interests of the European Community from fraud and corruption, Article 1 of the European

taken by someone to whom it was entrusted. Fraud, however, consists of the use of false or misleading information to induce the owner of the property to relinquish it voluntarily. For example, an official who takes and sells part of a relief donation or a shipment of food or medical supplies would be committing theft or embezzlement; an official who induces an aid agency to oversupply aid by misrepresenting the number of people in need of it is committing fraud.

As with bribery and other forms of corruption, many domestic and international legal definitions are intended to form the basis of criminal offences. Thus, they include only those situations involving a public official or where the public interest is crucially affected. "Theft", per se, goes far beyond the scope of corruption, including the taking of any property by a person with no right to it. Using the same example of the relief donation, an ordinary bystander who steals aid packages from a truck is committing theft but not corruption. That is why the term “embezzlement”, which is essentially the theft of property by someone to whom it was entrusted, is commonly used in corruption cases. In some legal definitions "theft" is limited to the taking of tangible items, such as property or cash, but non-legal definitions tend to include the taking of anything of value, including intangibles such as valuable information. In the Toolkit, the broader meaning of "theft" is intended.

Examples of corrupt theft, fraud and embezzlement abound. Virtually anyone responsible for storing or handling cash, valuables or other tangible property is in a position to steal it or to assist others in stealing it, particularly if auditing or monitoring safeguards are inadequate or non-existent. Employees or officials with access to company or Government operating accounts can make unauthorized withdrawals or pass to others the information required to do so. Elements of fraud are more complex. Officials may create artificial expenses; "ghost workers" may be added to payrolls or false bills submitted for goods, services, or travel expenses. The purchase or improvement of private real estate may be billed against public funds. Employment-related equipment, such as motor vehicles, may be used for private purposes. In one case, World Bank-funded vehicles were used for taking the children of officials to school, consuming about 25 per cent of their total use.

EXTORTION

Whereas bribery involves the use of payments or other positive incentives, extortion relies on coercion, such as the use or threat of violence or the exposure of damaging information, to induce cooperation. As with other forms of corruption, the "victim" can be the public interest or individuals adversely affected by a corrupt act or decision. In extortion cases, however, a further "victim" is created, namely the person who is coerced into cooperation.

While extortion can be committed by Government officials or insiders, such officials can also be victims of it. For example, an official can extort corrupt

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Union's Convention requires Parties to criminalize the use or presentation of false or incorrect representations or non-disclosure of information the effect of which is the misappropriation or wrongful retention of funds from the budget of the European Communities. For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption) or the GPAC compendium *International Legal Instruments on Corruption*

payments in exchange for a favour or a person seeking a favour can extort it from the official by making threats.

In some cases, extortion may differ from bribery only in the degree of coercion involved. A doctor may solicit a bribe for seeing a patient quickly but if an appointment is a matter of medical necessity, the "bribe" is more properly characterized as "extortion". In extreme cases, poor patients can suffer illness or even death if medical services are allocated through extortionate methods rather than legitimate medical prioritizing.

Officials in a position to initiate or conduct criminal prosecution or punishment often use the threat of prosecution or punishment as a basis for extortion. In many countries, people involved in minor incidents, such as traffic accidents, may be threatened with more serious charges unless they “pay up”. Alternatively, officials who have committed acts of corruption or other wrongdoings may be threatened with exposure unless they themselves pay up. Low-level extortion, such as the payment of "speed money" to ensure timely consideration and decision-making of minor matters by officials, is widespread in many countries.

ABUSE OF DISCRETION

In some cases, corruption can involve the abuse of a discretion, vested in an individual, for personal gain. For example, an official responsible for Government contracting may exercise the discretion to purchase goods or services from a company in which he or she holds a personal interest or propose real estate developments that will increase the value of personal property. Such abuse is often associated with bureaucracies where there is broad individual discretion and few oversight or accountability structures, or where decision making rules are so complex that they neutralize the effectiveness of any accountability structures that do exist.

FAVOURITISM, NEPOTISM AND CLIENTELISM

Generally, favouritism, nepotism and clientelism involve abuses of discretion. Such abuses, however, are governed not by the self-interest of an official but the interests of someone linked to him or her through membership of a family, political party, tribe, religious or other group. If an individual bribes an official to hire him or her, the official acts in self-interest. If a corrupt official hires a relative, he or she acts in exchange for the less tangible benefit of advancing the interests of family or the specific relative involved (nepotism). The favouring of, or discriminating against, individuals can be based on a wide range of group characteristics: race, religion, geographical factors, political or other affiliation, as well as personal or organizational relationships, such as friendship or membership of clubs or associations.

CONDUCT CREATING OR EXPLOITING CONFLICTING INTERESTS

As noted in the United Nations Manual on Anti-corruption Policy, most forms of corruption involve the creation or exploitation of some conflict between the professional responsibilities of a corrupt individual and his or her private

interests. The acceptance of a bribe creates such a conflict of interest. Most cases of embezzlement, theft or fraud involve an individual yielding to temptation and taking undue advantage of a conflict of interest that already exists. In both the public and private sector, employees and officials are routinely confronted with circumstances in which their personal interests conflict with those of their responsibility to act in the best interests of the State or their employer.

IMPROPER POLITICAL CONTRIBUTIONS

One of the most difficult challenges in developing anti-corruption measures is to make the distinction between legitimate contributions to political organizations and payments made in an attempt to unduly influence present or future activities by a party or its members once they are in power. A donation made because the donor supports the party and wishes to increase its chances of being elected is not corrupt; it may be an important part of the political system and, in some countries, is a basic right of expression or political activity protected by the constitution. A donation made with the intention or expectation that the party will, once in office, favour the interests of the donor over the interests of the public is tantamount to the payment of a bribe.

Regulating political contributions has proved difficult in practice. Donations may take the form of direct cash payments, low-interest loans, the giving of goods or services or intangible contributions that favour the interests of the political party involved. One common approach to combating the problem is to introduce measures that seek to ensure transparency by requiring disclosure of contributions, thus ensuring that both the donor and recipient are politically accountable. Another is to limit the size of contributions to prevent any one donor from having too much influence.

LESSONS LEARNED

It has been suggested that the most significant achievement in governance during the 1990s was the shattering of the taboo that barred discussion of corruption, particularly in diplomatic circles and intergovernmental institutions (6). The topic is now out in the open, and the recognition that Governments alone cannot contain corruption has led to new and powerful coalitions of interest groups and other stakeholders. The Toolkit is based largely on what has been learned by the international community in its efforts against corruption during well over a decade. Perhaps the most important lesson is that corruption is a widespread and diverse phenomenon, and that anti-corruption measures must be carefully considered and tailored to the forms encountered and the societies and cultures within which they are expected to function.

Viable anti-corruption strategies have been constructed with varying degrees of success around the world. There is much to be learned both from success and failure. For the sake of clarity and brevity, the most important of those lessons are synopsized below[8].

NEGATIVE IMPACT OF CORRUPTION

1. Corruption tends to concentrate wealth, not only increasing the gap between rich and poor but providing the wealthy with illicit means to protect their positions and interests. That, in turn, can contribute to social conditions that foster other forms of crime, social and political instability and even terrorism.

CONDITIONS FACILITATING CORRUPTION

2. Without proper vigilance and effective countermeasures, corruption can occur anywhere. Recent corruption cases exposed in the World Bank, the United Nations and other multilateral and bilateral organizations have shown that any society or organization is susceptible, even where well established checks and balances are in place.

3. Combating corruption, building integrity and establishing credibility require time, determination and consistency. When anti-corruption strategies are first instituted, a long-term process begins, during which corrupt values and practices are gradually identified and eliminated. In most cases, a complex process of interrelated elements is involved: reforms to individual institutions take place in stages as problems are identified; countermeasures are developed and implemented; personnel are reoriented and retrained.

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[8] Langseth. P. (Ed.) 2003, United Nations Guide on Anti Corruption Policy; Vienna Austria

Often, progress at one stage or in one area cannot be achieved until other elements of the strategy have come into effect. Generally speaking, training personnel to place the long-term interests of integrity before the more immediate benefits of corruption, is a longer, more gradual process than direct measures such as criminal prosecutions or specific administrative reforms. Similarly, the establishment of a popular expectation that favours integrity over corruption, furthers credibility for the reforms and inspires public confidence in the integrity of the reformed institutions will always lag behind actual progress.

4. Systems with excessive individual discretion and overly complex rules on discretionary powers, as well as systems lacking structures to effectively monitor the exercise of discretion and hold decision-makers accountable, tend to be more susceptible to corruption than those that do not.

5. Systems in which individual offices, departments or agencies operate in isolation from one another tend to be more susceptible to corruption. One reason may be that systems where individual elements operate in a coordinated fashion and communicate regularly with one another, tend to carry out mutual "monitoring" both of activities and individuals.

CONDITIONS REQUIRED TO PREVENT CORRUPTION

6. Systems in which individual offices, departments or agencies operate in isolation from one another tend to be more susceptible to corruption. One reason may be that systems where individual elements operate in a coordinated fashion and communicate regularly with one another, tend to carry out mutual "monitoring" both of activities and individuals.

7. Systems with operational transparency are less susceptible to corruption than those that operate in secrecy. Transparency is created by such elements as access to information policies and the activities of a healthy independent media. A free media is a powerful instrument, not only for exposing corruption and holding those responsible legally and politically accountable but also as for educating the public and instilling high expectations of integrity.

8. Public trust in Government, anti-corruption agencies and anti-corruption policies and measures is key when a country invites the public to take an active role in monitoring the performance of its Government.[9] It takes political will, institutional ability and integrity to execute reforms to fight corruption. Political will is required to develop, implement and sustain the strong measures needed to identify and eliminate corrupt values and behaviour. Institutional ability is required to ensure that political commitments are actually carried out, often in the face of entrenched informal organizations within public

[9] Jeremy Pope, "Confronting Corruption", Transparency International Source Book 2000.

institutions intent on blocking or limiting reforms. Curbing systemic corruption is a challenge that will require stronger measures, more resources and a longer time frame than most politicians and "corruption fighters" will acknowledge or can afford.

Fundamental to all reforms, however, is integrity and the perception of integrity, especially at the highest levels of Government and in entities responsible for anti-corruption measures. Without integrity, any steps taken to combat corruption will lack credibility, both as positive examples of how public officials and institutions should behave and as deterrents to corrupt behaviour.

9. Deterrence is a single but important element of anti-corruption strategies. By definition almost, corruption is a calculated and premeditated activity and can be deterred. Deterrence includes not only conventional prosecution and punishment but also administrative, regulatory, financial and economic deterrence. Where personal or corporate risks, uncertainties and punishments are minimal, corruption tends to increase. Conversely, reforms that increase uncertainties and the risk of criminal punishment or financial losses tend to reduce corruption. Generally, reforms must be broad-based and systemic, or corrupt conduct may simply be displaced into other areas or activities.

INVOLVING ALL KEY STAKEHOLDERS

10. The participation of civil society in assessing the problem of corruption and in formulating and implementing reforms is now seen as an important element of anti-corruption strategies. Anti-corruption measures and the commitment needed to make them work must be based on a full assessment of the extent of corruption and its harmful effects. The participation of civil society is vital to the assessment. Policies and practical measures are most likely to succeed if they enjoy the full support, participation and "ownership" of civil society. Finally, only a well developed and aware civil society ultimately has the capacity to monitor anti-corruption efforts, expose and deter corrupt practices and, where measures have been successful, credibly establish that institutions are not corrupt.

11. It is important to involve victims in any plan aimed at reducing corruption. Anti-corruption initiatives, and the interest of donors who support such efforts, tend to involve those paid to fight corruption rather than those victimized by it. Victims are often socially marginalized individuals and groups who are harder to reach, but they have an important role to play, particularly in areas such as establishing and demonstrating the true nature and extent of the harm caused by corruption. As victims are often the strongest critics of anti-corruption efforts, securing their approval can also assist greatly in establishing the credibility of a programme.

12. Raising public awareness is an element of most anti-corruption strategies, but it must be accompanied by measures that visibly address the problem, otherwise the increased public awareness can lead to widespread cynicism and loss of hope that may, in some cases, contribute to further corruption.

THE LINKS BETWEEN CORRUPTION AND MONEY-LAUNDERING

13. Identifying and recovering stolen assets is important, particularly in cases of "grand corruption", where the amounts are large and often needed by a new Government trying to remedy problems arising from past corruption. Very senior officials involved in corruption generally find it necessary to transfer looted proceeds abroad, making identification and recovery in most cases a multinational project.[10] The legal and logistical difficulties of pursuing complex investigative and legal proceedings while rebuilding national institutions and infrastructures are great. Not only that, successor Governments usually have to establish their own international credibility and integrity before obtaining the necessary legal assistance and cooperation from abroad.

14. There are important links between corruption and money-laundering. The ability to transfer and conceal funds is critical to the perpetrators of corruption, especially large-scale or "grand corruption". Moreover, public sector employees and those working in key private sector financial areas are especially vulnerable to bribes, intimidation or other incentives to conceal illicit financial activities. A high degree of coordination is thus required to combat both problems and to implement effective measures that impact on both areas.

CONSTRUCTING AN ANTI-CORRUPTION STRATEGY: AN INTEGRATED APPROACH

Developing a national anti-corruption strategy requires the successful merger of "universal" elements, namely those that have proved effective against corruption regardless of where it occurs, and elements that take into account country-specific circumstances.

An integrated approach will be: fact-based; transparent; simultaneously non-partisan and multi-partisan; inclusive; comprehensive; impact-oriented; and flexible.

Country-specific will include problems that may be unique to the country involved plus other national variables such as:

- Legal or constitutional constraints,
- The nature of political and legislative structures,
- The extent to which the media, academic sources and other elements of civil society are willing and able to participate in the strategy, and
- The availability and extent of domestic and other resources.

[10] The Government of Nigeria, for example, has been pursuing proceeds of corruption transferred during the 1908s and 1990s, estimated in the tens and even hundreds of billions of dollars

The early stages of planning frequently involve a preliminary assessment of the nature and extent of corruption in the country concerned and the relative strengths and weaknesses of governmental and societal elements called upon to combat it. That allows priorities to be set and efforts to be focused on the weakest and most vulnerable elements or on elements that require reform as a precondition for progress in other areas.

COMMON BASIC ELEMENTS OF ANTI-CORRUPTION STRATEGIES

Specific needs will vary from country to country but experience suggests that the elements listed below must be addressed as a priority before significant progress can be achieved.

- Effective rule-of-law structures, including judicial and legislative elements, are needed at an early stage. A professional, unbiased and independent judiciary is critical to the development and implementation of law enforcement and criminal justice measures; it is also necessary in areas such as the making and enforcement of legal contracts and the use of civil litigation as a means of identifying, exposing and obtaining redress for corrupt practices. Also required is an open and transparent legislature that formulates policy, creates laws in the public interest and provides a role model for other institutions.
- There must be transparency in public communications and mechanisms to give the public broad, straightforward and timely access to information. Government cannot begin to achieve credibility unless the public understands what it is doing.
- A professional, politically neutral and uncorrupted public service is one of the fundamental objectives of anti-corruption strategies. Establishing professionalism and neutrality will require a combination of legal standards and cultural reforms. The public service should be encouraged to adopt high standards of professionalism and integrity, and the general population should be encouraged to expect those high standards and take action when they are not met.
- Strong and independent elements are needed in several areas of civil society. The most important of these is a free, clean and independent media that disseminates important public information and provides criticism and commentary that is independent of political and public service influences. A free media can identify and expose corruption or other improper practices in Government; it can also validate Government measures that are neither corrupt nor improper.
- Periodic assessment of corruption and the effectiveness of anti-corruption strategies, as well as the flexibility to adjust strategies to take account of assessments, are also important. Experience has shown that efforts to combat corruption often have unforeseen consequences, for example, displacement effects. Displacement, where action against corruption in one sector effectively displaces it into other areas, should be identified quickly and the strategy adjusted to incorporate effective countermeasures. Assessment and adjustment

also entail identifying and replicating measures that have proved successful.

AN INTEGRATED APPROACH TO DEVELOPING AND IMPLEMENTING STRATEGIES

The development and implementation of an effective anti-corruption strategy require the coordination and integration of many disparate factors. Elements must be integrated internally to form a single, unified and coherent anti-corruption strategy and externally with broader national efforts to bring about the rule of law, sustainable development, political or constitutional reforms, major economic and criminal justice reforms. In some cases, they must also be coordinated with the efforts of aid donors, international organizations or other countries.

In most cases, national strategies will be complex. To achieve a few basic goals, many interrelated elements will be required. Individual reform efforts must be carefully sequenced and coordinated over extended periods of time. Many information sources and other inputs must be integrated during strategy development and subsequently, at frequent intervals, as the strategy is implemented, assessed and adjusted.

Strategies require the support and concerted effort of individuals and organizations in the public sector, civil society and the general population. Some elements of national strategies must also be integrated with the strategies of other countries or with regional or global standards or activities. That will allow them to deal more effectively with transnational forms of corruption and to meet the commitments of instruments such as the Conventions adopted by the Organization of American States (OAS), The Organisation for Economic Cooperation and Development (OECD) and, ultimately, the United Nations Convention against Corruption.

To ensure integration, the following approaches should be adopted in developing, implementing, assessing and adjusting strategies[11]:

The need for development, implementation and adjustment based on assessment and on fact.

It is important for strategies to be fact-based at all stages. Preliminary assessments of the nature and extent of corruption and the resources available to fight it are needed to develop a comprehensive strategy and to set priorities before the strategy is implemented. Upon implementation, further assessments of individual elements and overall performance should be undertaken, so that the strategy can be periodically adjusted to take advantage of successes and compensate for failures.

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[11] Langseth, P. 2002, *Global Dynamics of Corruption, the Role of United Nations*, in Strengthen Judicial Integrity and Capacity in Nigeria; State Integrity Meeting in Lagos, May 2002

The need for transparency.

Transparency in Government is widely viewed as a necessary condition for effective corruption control and, more generally, for good governance. Open information and understanding are also essential to public participation in and ownership of anti-corruption strategies. Lack of transparency is likely to result in public ignorance when, in fact, broad enthusiasm and participation are needed. It can also lead to a loss of credibility and a perception that the programmes are corrupt or that some elements of Government may have avoided or opted out of them. In societies where corruption is endemic, such an assumption will usually be widespread and can be rebutted only by programmes being publicly demonstrated to be free of corruption. Where transparency does not exist, popular suspicions about the programmes may well be justified.

The need for non-partisan or multi-partisan support.

The perception that the fight against corruption is a partisan political issue can impede anti-corruption strategies and more general efforts to establish good governance, the rule of law and regular, stable political structures. The fight against corruption will generally be a long-term effort and, in most countries, is likely to span successive political administrations. That makes it critical for anti-corruption efforts to remain politically neutral, both in the way they are administered and in their goals. Regardless of which political party or group is in power, reducing corruption and improving service delivery to the public should always be priorities. The partisan scrutiny of Governments and political factions for corruption or other malfeasance is a valuable factor in combating corruption. Vigilance is important, but excessive partisanship can lead to retaliatory cycles in which each faction, on gaining office, corruptly rewards its supporters and punishes its opponents. Such behaviour corrupts and politicizes key functions such as the appointment of public servants and the awarding of public contracts. It also degrades the professionalism of the public service by replacing merit with political criteria in staffing, promotion and critical advisory and decision-making functions.

The need for inclusiveness.

It is important to include the broadest possible range of participants or stakeholders to ensure that all significant factors are considered and a sense of "ownership" of and support for the strategy are instilled. The elements of the strategy will work in virtually every sector of Government and society. Thus, information and assessments from each must be included so that advantages or strengths can be used to the best advantage and impediments or problems can be dealt with early on. Broad-based consultation and participation also address the concerns and raise the expectations of everyone involved, from senior officials, politicians and other policy makers to members of the public. Bringing otherwise marginalized groups into the strategy empowers them, providing them with a voice and reinforcing the value of their opinions. It also demonstrates that they will influence policy-making, giving them a greater sense of ownership of the policies that are developed. In societies where corruption is endemic, it is the marginalized

groups that are most often affected by corruption and thus most likely to be in a position to take action against it in their everyday lives and through political action.

The need for comprehensiveness

The need for a comprehensive approach to developing, implementing and evaluating an anti-corruption approach is vital, with all sectors of society from the central Government to the individual being involved at every stage. That includes elements from the public and private sector, as well as international organizations, national non-governmental institutions and donor Governments.

The need for impact-oriented elements and strategies.

Clear and realistic goals must be set; all participants in the national strategy must be aware of the goals and the status of progress achieved to date. Thus, measurable performance indicators must be established, as well as a baseline against which the indicators can be measured. While elements of the strategy and the means of achieving specific goals may be adjusted or adapted as the strategy evolves, the basic goals themselves should not be changed if that can be avoided, with the occasional exception of time lines.

The need for flexibility.

While strategies should set out clear goals and the means of achieving them, the strategies and those charged with their implementation should be flexible enough to permit adaptations to be made based on information from the periodic progress assessments. Compliance should not be reduced by suggesting to those adversely affected by the strategy that, by opposing it, they might secure adaptations that would be more favourable to their interests.

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The United Nations Convention against Corruption, finalised on 30 September 2003 and adopted by the General Assembly in its resolution 58/4 of 31 October 2003, represents a major step forward in the global fight against corruption, and in particular in the efforts of UN Member States to develop a common approach to both domestic efforts and international cooperation. The treaty can be seen as the product of a series of both procedural and substantive developments.

Procedural background

From a procedural standpoint, the Convention against Corruption arises out of discussions in the U.N. Commission on Crime Prevention and Criminal Justice[12] and in the open-ended intergovernmental ad-hoc committee established by the General Assembly to develop the *United Nations Convention against Transnational Organized Crime* between January 1999 and October 2000.[13] That *Convention* contains two general provisions (Art.8 and 9) requiring basic anti-corruption offences and preventive measures, but many delegations recognised the fact that corruption was too complex and diverse to be dealt with effectively in a more general instrument dealing with transnational organized crime.

As a result of these discussions and other developments, in its resolution 54/128 of 17 December 1999 the General Assembly requested the Ad Hoc Committee to consider the feasibility of a further international legal instrument dealing specifically with corruption, and if it concluded that such an instrument was desirable, whether it should be developed as a further Protocol to the Convention against Transnational Organized Crime or as a separate instrument.[14] The Committee did so during its eighth session, on 21 January 2000, and concluded that such an instrument would indeed be desirable. It also expressed the view that it would be preferable to develop a separate Convention rather than a subordinate Protocol, principally because the problem of corruption was seen as broader in scope than domestic or transnational organised crime. While there were frequently links between organised crime and corruption, many forms of corruption did not necessarily

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[12] The Commission has considered corruption and related topics on a regular basis since its inception. See, for example E/CN.15/1999/12, paragraphs 21-23 and E/CN.15/1998/11, Chapter III. Many of these produced resolutions placed before the General Assembly and/or Economic and Social Council. These included GA/RES/51/59 (Code of conduct for Public Officials) and GA/RES/51/191 (UN Declaration against Corruption and Bribery in International Commercial Transactions). All of the major resolutions leading to the development of the Convention originated with the Commission.

[13] The Committee was established by the Assembly in its resolution 53/111 of 9 December 1998, and the Convention was adopted by resolution 55/25 of 15 November 2000. In addition to considering the anti-corruption articles ultimately included in the Convention against transnational organized crime, the Committee specifically addressed the matter of corruption and the desirability of a further international legal instrument at its eighth session. See below.

[14] Resolution 54/128 was in turn a product of discussions by the Commission on Crime Prevention and Criminal Justice at its 8th session. See E/CN.15/1999/12, paragraphs 21-23 and draft resolution IV.

involve " organised criminal groups" as defined by the original Convention and would not fall within its scope. The Committee also called for the commencement of preliminary work, including the preparation of an analysis of the previously-existing anti-corruption instruments and the review of preparations by the UN Commission for Crime Prevention and Criminal Justice at its 9th (2000) session.[15]

The matter was duly taken up by the Commission, which transmitted a draft resolution to the General Assembly, *via* the Economic and Social Council, calling for the establishment of a further committee to produce a second Convention dealing specifically with corruption once work on the Convention against Transnational Organized Crime was completed. Recognising the need to clarify and refine the mandate for negotiations, the resolution also called for the convening of an intergovernmental open-ended expert group to prepare draft terms of reference for the new Committee.[16] These proposals were adopted by the General Assembly in its resolution 55/61 of 4 December 2000. The required terms of reference were produced by the expert group at a single session held on 30 July 2001, in Vienna, and transmitted to the General Assembly,[17] which adopted a further resolution, 56/260, setting out the terms of reference for the work of the Ad Hoc Committee it had previously established in resolution 55/61.

The Committee commenced its work almost immediately following the adoption of the first resolution. Following a preparatory meeting held in Buenos Aires from 4-7 December 2001 to discuss preliminary issues and gather the written proposals of Member States for specific provisions of the new instrument, it held seven sessions beginning on 21 January 2002 and concluding on 30 September 2003.[18] The new Convention was then submitted to the General Assembly, which adopted it and declared it open for signature at a signing conference held in Merida, Mexico from 9-11 December 2003. Official records of the deliberations of the Ad Hoc Committee, the Merida conference and several of the preliminary discussions can be found in all official languages of the United Nations at the website of the United Nations Office on Drugs and Crime:

http://www.unodc.org/unodc/en/crime_convention_corruption.html#documentation

The Convention is open for signature from 9 December 2003 to 9 December 2005, after which further countries may still join by accession. In accordance with the provisions of the Convention itself, it will come into force on the 90th day following ratification or accession by the 30th country to do so. Countries wishing to inquire about the substantive requirements for ratification and implementation should contact the United Nations Office on Drugs and Crime

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[15] Report of the Ad Hoc Committee at its 8th session, A/AC.254/25, Part IV, paragraphs 20-21.
[16] Report of the Commission on Crime Prevention and Criminal Justice at its 9th session, 18-20 April 2000, E/CN.15/2000/7, draft resolution III.
[17] A/AC.260/2, and A/AC.260/2/Corr.1
[18] In its resolution 56/260, the General Assembly had called for "no fewer" than 6 sessions over two years. An abbreviated seventh session, held from 29 September to 1 October 2003 was needed to successfully complete the text.

either directly or through their Permanent Missions in Vienna.[19] Countries wishing to inquire about the procedural requirements for filing instruments of ratification or accession should contact the Treaty Section of the United Nations Office of Legal Affairs either directly or though their Permanent Missions in New York.[20]

Substantive background

From a substantive standpoint, the new Convention can be seen as the most recent of a long series of developments in which experts have recognised the far-reaching impact of corruption and the need to develop effective measures against it at both the domestic and international levels. It is now widely accepted that measures to address corruption go beyond criminal justice systems and are essential to establishing and maintaining the most fundamental good governance structures, including domestic and regional security, the rule of law and social and economic structures which are effective and responsive in dealing with problems, and which use available resources as efficiently and with as little waste as possible.

The gradual understanding of both the scope and seriousness of the problem of corruption can be seen in the evolution of international action against it, which has progressed from general consideration and declarative statements,[21] to the formulation of practical advice,[22] and then to the development of binding legal obligations and the emergence of numerous cases in which countries have sought the assistance of one another in the investigation and prosecution of corruption cases and the pursuit of proceeds. It has also progressed from relatively narrowly-focused measures directed at specific crimes such as bribery to broader definitions of corruption and more broadly-focused measures against it, and from regional instruments developed by groups of relatively like-minded countries such as the Organisation of American States,[23] the African Union (formerly Organisation of African Unity),[24] the OECD,[25] and the Council of Europe[26] to the globally-

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[19] [XXXInsert relevant telephone and e-mail contacts for whoever is running the pre-ratification programme at CICP hereXXX]

[20] Information about technical assistance available can be found on line at *http://untreaty.un.org/ola-internet/Assistance/Section1.htm* (for languages other than English see the general U.N. site at *www.un.org*. The Treaty Section can be contacted directly at: Tel. (212) 963-5048, Fax (212) 963-3693 or by e-mail at *treaty@un.org*.

[21] See, for example GA/RES/51/59 and 51/191, annexes, and the discussion held at the 9th U.N. Congress on the Prevention of Crime and Treatment of Offenders, held in Cairo from 29 April – 8 may 1995 (A/CONF.169/16/Rev.1, paragraphs 245-261.

[22] See, for example, the United Nations Manual *Practical Measures against Corruption* , ECOSOC Res.1990/23, annex, recommendation #8 and International Review of Criminal Policy, Special Issue, Nos. 41 and 42, New York 1993. This has since been revised and updated and is a companion volume to this Tool-kit.

[23] Inter-American Convention Against Corruption, OAS General Assembly resolution AG/res.1398 (XXVI-0/96) of 29 March 1996, annex.

[24] African Union Convention on Preventing and Combatting Corruption, Maputo Mozambique, 11 July 2000, available from the AU on-line at: http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Treaties_Conventions_&_Protocols.htm.

based U.N. Convention.[27] A series of actions on specific issues within specific regions has become more general and global in order to deal most effectively with the problem.

These trends were represented in the discussions which developed the terms of reference for the negotiation of the Convention and in the Convention itself. In formulating the terms of reference, the Intergovernmental Open-ended Expert Group concluded that the instrument should be "comprehensive" in the sense that it should deal with as many different forms of corruption as possible, and "multidisciplinary" in the sense that it should contain the broadest possible range of measures for doing so.[28] The Expert Group began the development of a broad inventory of specific forms of corruption, including areas such as trading in official influence, general abuses of power, and various acts of corruption within the private sector which had not been dealt with in many of the earlier international instruments.[29]

Building on the broad range of measures included in the *Convention against Transnational Organized Crime*, it also called for criminal offences and investigative and prosecutorial powers. Subsequent efforts to reconcile individual national constitutional requirements, laws, policies and social and cultural factors generated extensive negotiations of the details, but all of these basic elements appear in some form in the finished Convention, with criminal offences specifically tailored to corruption.[30] Going beyond the scope of the Convention against Transnational Organized Crime, a series of specific anti-corruption measures were then added to promote transparency and high standards, particularly in the public service and applying both social and situational approaches to preventing corruption.[31] A further significant development was the inclusion of a specific chapter of the treaty dealing with the recovery of assets, a major concern for countries which are pursuing the assets of former leaders and senior officials accused or found to have engaged in corruption.

The text of the Convention covers the following major areas.

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[25] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* OECD document DAFFE/IME/BR(97)20.

[26] European Criminal Law Convention on Corruption, 1998, European Treaty Series #173.

[27] For a summary of other international legal instruments dealing with corruption, see *United Nations Manual on Anti-Corruption Policy*, Chapter V, available on-line at: http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf.

[28] Report of the Meeting of the Intergovernmental Open-ended Expert Group, A/AC.260/2, particularly at paragraph 27, and GA/RES/56/260, paragraph 2 calling for a "broad and effective" instrument, and paragraph 3, calling for a "comprehensive and multidisciplinary" approach in developing the instrument.

[29] A/AC.260/2, paragraph 27

[30] For a complete review of the history of the negotiations and consideration of specific issues, see the official records of the Ad Hoc Committee, available from the UNODC web-site at: http://www.unodc.org/unodc/crime_cicp_convention_corruption_docs.html. In particular see the successive texts of the revised draft Convention, A/AC.261/3 and A/AC.261/3/Rev.1 – Rev.5 and the footnotes to specific provisions.

[31] For example, Articles 7 and 8 deal with codes of conduct and other measures specifically directed at public servants and public service situations, whereas Article 13 deals with the more general participation of society in preventing corruption.

General provisions (Chapter I, Art.1-4). The opening Articles of the Convention include a statement of purpose (Art.1) which covers both the promotion of integrity and accountability within each country and the support of international cooperation and technical assistance between States Parties. They also include definitions of critical terms used in the instrument. Some of these are similar to those used in other instruments, and in particular the *Convention against Transnational Organized Crime*, but those defining "public official", "foreign public official", and " official of a public international organization" are new and are important for determining the scope of application of the Convention in these areas.

Preventive measures (Chapter II, Art. 5-14). The Convention contains a compendium of preventive measures which goes far beyond those of previous instruments in both scope and detail, reflecting the importance of prevention and the wide range of specific measures which have been identified by experts in recent years. Specific requirements include the establishment of specialized procedures and bodies to develop domestic prevention measures; private-sector prevention measures; measures directed at general prevention in the public sector as well as at specific critical areas such as public procurement and financial management and the judiciary; and measures to prevent money-laundering.[32]

Criminalization and law enforcement measures (Chapter III, Art.15-44). While the development of the Convention reflects the recognition that efforts to control corruption must go beyond the criminal law, criminal justice measures are still clearly a major element of the package. The Convention calls on States Parties to establish or maintain a series of specific criminal offences including not only long-established crimes such as various forms of bribery and embezzlement, but also conduct which may not already be criminalised in many States, such as trading in official influence and other abuses of official functions. The broad range of ways in which corruption has manifested itself in different countries and the novelty of some of the offences pose serious legislative and constitutional challenges, a fact reflected in the decision of the Ad Hoc Committee to make some of the requirements either optional on the part of States Parties ("…shall consider adopting…") or subject to domestic constitutional or other fundamental requirements ("…subject to its constitution and the fundamental principles of its legal system…"). An example of this is the offence of illicit enrichment (Art.20), in which the onus of proving that a significant increase in the assets of a public official were not illicit would be placed on the official. This has proven a powerful anti-corruption instrument in the hands of many States, but would be impossible

[32] The measures of Chapter II (Art.14) are directed at the prevention of money-laundering in general. Further prevention and other measures relating to laundering and other problems specifically involving proceeds, instrumentalities or other property or assets associated with corruption offences are found in Art.23 (criminalisation of money-laundering) and Chapter V (Asset Recovery). The scopes of Chapters II, III and V vary: some deal with property or assets linked to any form of crime, while others focus only on property or assets linked specifically to either all offences established by the Convention, including optional offences, or on only those Convention offences which have actually been established in the domestic laws of the States Parties concerned in accordance with the Convention.

for others to implement because of constitutional or legal requirements, particularly those regarding the presumption of innocence.[33] Other provisions (Art.34-35) are intended to support the use of non-criminal measures to secure compensation and other remedies to address the consequences of corruption.

Other measures found in Chapter III are similar to those of the 1988 *United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and the 2000 *Convention against Transnational Organized Crime*. These include offences relating to obstruction of justice (Art.25) and money laundering (Art.23), the establishment of jurisdiction to prosecute (Art.42), the seizing, freezing and confiscation of proceeds or other property (Art.31), protection of witnesses, experts and victims and others (Art.32-33), other matters relating to investigations and prosecutions (Art.36-41), and the requirement that some form of civil, criminal or administrative liability must be established for legal persons (Art.26)

Elements of the provisions dealing with money-laundering and the subject of the sharing or return of corruption proceeds are significantly expanded from earlier treaties (see Chapter V), reflecting the greater importance attached to the return of corruption proceeds, particularly in so-called "grand corruption" cases, in which very large amounts of money have been systematically looted by government insiders from State treasuries or assets and are pursued by subsequent governments.

Measures dealing with international cooperation (Chapter IV, Art. 43-49). Chapter IV contains a series of measures which deal with international cooperation in general, but it should be noted that a number of additional and more specific cooperation provisions can also be found in Chapters dealing with other subject-matter, such as asset recovery (particularly Art. 54-56) and technical assistance (Art.60-62). The core material in Chapter IV deals with the same basic areas of cooperation as previous instruments, including the extradition of offenders, mutual legal assistance and less-formal forms of cooperation in the course of investigations and other law-enforcement activities.

A key issue in developing the international cooperation requirements arose with respect to the scope or range of offences to which they would apply. The broad range of corruption problems faced by many countries resulted in proposals to criminalise a wide range of conduct. This in turn confronted many countries with conduct they could not criminalise (as with the illicit enrichcment offence discussed in the previous segment) and which were

[33] The basic right to be presumed innocent until proven guilty according to law is universal, and found in Art.14, para.(2) of the *International Covenant on Civil and Political Rights*. Some legal systems apply this principle to all essential elements of the offence, including the presumption that unaccounted-for wealth was illicitly acquired. In other systems, the right to be presumed innocent is considered to have been satisfied by proof by the State of only some elements of an offence. In such cases, proof that wealth has been acquired is seen as sufficient to raise an evidentiary burden on the accused official to demonstrate that it was acquired by legitimate means, or in some cases to at least establish a reasonable doubt as to illicit acquisition.

made optional as a result. Many delegations were willing to accept that others could not criminalise specific acts of corruption for constitutional or other fundamental reasons, but still wanted to ensure that countries which did not criminalise such conduct would be obliged to cooperate with other States which had done so. The result of this process was a compromise, in which dual criminality requirements were narrowed as much as possible within the fundamental legal requirements of the States which cannot criminalise some of the offences established by the Convention.

This is reflected in several different principles. Offenders may be extradited without dual criminality where this is permitted by the law of the requested State Party.[34] Mutual legal assistance may be refused in the absence of dual criminality, but only if the assistance requested involves some form of coercive action, such as arrest, search or seizure, and States Parties are encouraged to allow a wider scope of assistance without dual criminality where possible.[35] The underlying rule, applicable to all forms of cooperation, is that where dual-criminality is required, it must be based on the fact that the relevant States Parties have criminalised the conduct underlying an offence, and not whether the actual offence provisions coincide.[36] Various provisions dealing with civil recovery[37] are formulated so as to allow one State Party to seek civil recovery in another irrespective of criminalization, and States Parties are encouraged to assist one another in civil matters in the same way as is the case for criminal matters.[38]

Asset recovery (Chapter V, Art. 51-59) As noted above, the development of a legal basis for cooperation in the return of assets derived from or associated in some way with corruption was a major concern of developing countries, a number of which are seeking the return of assets alleged to have been corruptly obtained by former leaders or senior officials.[39] To assist delegations, a technical workshop featuring expert presentations on asset recovery was held in conjunction with the 2nd session of the Ad Hoc Committee,[40] and the subject-matter was discussed extensively during the proceedings of the Committee.

Generally, countries seeking assets sought to establish presumptions which would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the incorporation of language which might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure,

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[34] Art.44, para.2.
[35] Art.46, para.9.
[36] Art.43, para.2.
[37] See, for example, Art. 34, 35 and 53.
[38] Article 43, paragraph 1 makes cooperation in criminal matters mandatory and calls upon States Parties to consider cooperation in civil and administrative matters.
[39] This was the subject of extensive research and discussion for some time prior to the mandate of the Ad Hoc Committee. See, for example, reports of the Secretary General to the General Assembly at its 55th session (A/55/405, see also GA/RES/55/188); 56th session (A/56/403) and 57th session (A/57/158).
[40] See A/AC.261/6/Add.1 and A/AC.261/7, Annex I.

forfeiture and return of such assets. From a practical standpoint, there were also efforts to make the process of asset recovery as straightforward as possible, provided that basic safeguards were not compromised, as well as some concerns about the potential for overlap or inconsistencies with anti-money-laundering and related provisions elsewhere in the Convention and in other instruments

The provisions of the Convention dealing with asset recovery begin with the statement that the return of assets is a "fundamental principle" of the Convention, with annotation in the *travaux preparatoires* to the effect that this does not have legal consequences for the more specific provisions dealing with recovery.[41] The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. A further issue was the question of whether assets should be returned to requesting State Parties or directly to individual victims if these could be identified or were pursuing claims. The result was a series of provisions which favour return to the requesting State Party, depending on how closely the assets were linked to it in the first place. Thus, funds embezzled from the State are returned to it, even if subsequently laundered,[42] and proceeds of other offences covered by the Convention are to be returned to the requesting State Party if it establishes ownership or damages recognised by the requested State Party as a basis for return.[43] In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.[44] The chapter also provides mechanisms for direct recovery in civil or other proceedings (Art.53) and a comprehensive framework for international cooperation (Art.54-55) which incorporates the more general mutual legal assistance requirements, *mutatis mutandis*. Recognizing that recovering assets once transferred and concealed is an exceedingly costly, complex, and all-too-often unsuccessful process, the chapter also incorporates elements intended to prevent illicit transfers and generate records which can be used should illicit transfers eventually have to be traced, frozen, seized and confiscated (Art.52). The identification of experts who can assist developing countries in this process is also included as a form of technical assistance (Art.60, para.5).

Technical assistance and information exchange (Chapter VI, Art. 60-62). The provisions for research, analysis, training, technical assistance and economic development and technical assistance are similar to those developed with respect to transnational organised crime in the 2000 Convention, modified to take account of the the broader and more extensive nature of corruption and to exclude some areas of research or analysis seen as specific to organized crime. Generally, the forms of technical assistance under the Convention against Corruption will include established criminal justice elements such as investigations, punishments and the use of mutual legal assistance, but also institution-building and the development of strategic

[41] Art. 51 and A/58/422/Add.1, para.48
[42] Art.57, subpara. 3(a).
[43] Art.57, subpara. 3(b).
[44] Art.57, subpara. 3(c).

anti-corruption policies.[45] Also called for is work through international and regional organizations (many of who already have established anti-corruption programmes), research efforts, and the contribution of financial resources both directly to developing countries and countries with economies in transition and to the United Nations Office on Drugs and Crime,[46] which is expected to support pre-ratification assistance and to provide secretariat services to the Ad Hoc Committee and Conference of States Parties as the Convention proceeds through the ratification process and enters into force.[47]

Mechanisms for implementation (Chapter VII, Art.63-64). The means of implementation expected of individual States Parties are generally dealt with in each specific provision, which sets out what is expected, whether it is mandatory, optional, or entails some element of discretion.[48] Chapter VII deals with international implementation through the Conference of States Parties and the U.N. Secretariat. As with the 2000 Convention against Transnational Organized Crime, the Secretary General is called upon to convene the first meeting of the Conference within one year of the entry of the Convention into force,[49] and the Ad Hoc Committee which produced the Convention is preserved and called upon to meet one final time to prepare draft rules of procedure for adoption by the Conference, "well before" its first meeting.[50] The bribery of officials of public international organizations is dealt with in the Convention only on a limited basis (Art.16), and the General Assembly has also called upon the Conference of States Parties to further address criminalization and related issues once it is convened.[51]

Final Provisions (Chapter VIII, Art. 65 – 71). The final provisions are based on templates provided by the United Nations Office of Legal Affairs and are similar to those found in other U.N. treaties. Key provisions include those which ensure that the Convention requirements are to be interpreted as minimum standards, which States Parties are free to exceed with measures which are "more strict or severe" than those set out in the specific

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[45] Art.60, para.1.
[46] Art.60, paras.3-8.
[47] GA/RES/58/4, paras. 8 and 9 and Convention Art.64. UNODC is already designated as the secretariat for the Ad Hoc Committee pursuant to GA/RES/55/61, paras, 2 and 8 and GA/RES/56/261, paras. 6 and 13. By convention, the General Assembly calls on the Secretary General to provide the necessary resources and services, leaving to his discretion the designation of particular U.N. entities and staff to do so.
[48] Apart from the basic formulations specifying that States "shall" or "may" carry out the specified activities, some provisions either require them to at least consider doing so, or impose mandatory requirements to act, while leaving to the States themselves discretion to choose the specific means of meeting the requirement. An example of the latter is Article 8, paragraph 1, which requires actions which "…promote, inter alia, integrity, honesty and responsibility…" among public officials without specifying what those actions should consist of, although some possibilities, including the 1996 International Code of Conduct for Public Officials, are specifically mentioned. Generally, discretion is reserved in the prevention Chapter, where measures must often be tailored to individual societies and institutions, and in the criminalization chapter, where some offences cannot be implemented in some countries due to constitutional or other fundamental legal constraints.
[49] Art.63, para.2.
[50] GA/RES/58/4, para.5.
[51] GA/RES/58/4, para.6.

provisions,[52] and the two Articles governing signature and ratification and coming into force. As noted at the beginning of this segment, the Convention is open for signature from 9 December 2003 to 9 December 2005, and to accession by States which have not signed any time after that. It will come into force on the 90th day following the deposit of the 30th instrument of ratification or accession with the Office of Legal Affairs Treaty Section at U.N. Headquarters in New York.[53]

[52] Art.65, para.2.

[53] Art. 67 (*signature, ratification, acceptance, approval and accession*) and 68 (*Entry into force*) For further information see the segment on procedural history and footnotes 10 and 11 (sources of assistance), above.

United Nations Convention against Corruption
Table of Provisions

Article 9 - *Public procurement and management of public finances*

1. Public procurement systems
   (a) Public distribution of information relating to procurement
   (b) Establishment of conditions in advance
   (c) System of accounting, auditing and oversight standards
   (d) System for risk management
   (e) Regulation of procurement personnel
2. Management of public finances
   (a) Transparency and accountability
   (b) Reporting of revenue and expenditure
   (c) Accounting and auditing standards
   (e) Corrective action
3. Preservation of books, records, statements and other documents

Article 10 - *Public reporting*

Transparency in public administration
   (a) Transparency and accountability
   (b) Public information on organization, decision-making, decisions and legal acts
   (c) Publication of information, including periodic reports on risks of corruption

Article 11 - *Measures relating to the judiciary and prosecution services*

1. Measures to strengthen integrity and prevent corruption (judiciary)
2. Measures to strengthen integrity and prevent corruption (prosecution service)

Article 12 - *Private sector*

1. General measures to prevent corruption, enhance oversight standards and establish appropriate penalties for breach
2. Specific measures for the private sector:
   (a) Cooperation between private sector and law-enforcement
   (b) Standards and procedures to safeguard integrity, prevent conflicts of interest and promote good commercial practices
   (c) Promotion of transparency
   (d) Prevent misuse or regulatory procedures
   (e) Prevention of conflicts of interest (employment of public official or former official)
   (f) Internal audit controls
3. Maintenance of books, records, financial disclosures, and accounting and auditing standards to prevent or detect:
   (a) Off-the books accounts
   (b) Off-the-books transactions
   (c) Non-existent expenditures
   (d) Incorrect identification of liabilities
   (e) Use of false documents
   (f) Intentional destruction of documents
4. Disallowance of tax deduction for bribes and other corrupt expenses

Article 13 - *Participation of society*

1. Ensure participation of non-public sector individuals and groups and raise awareness of existence causes and gravity of corruption and threat of corruption by:
   (a) Enhancing transparency and public contribution to decision-making
   (b) Public access to information
   (c) Public information about non-tolerance of corruption
   (d) Freedom to publish information about corruption
      (d) (i) Legal restrictions on publication permitted to protect individual rights or reputations
      (d) (ii) Legal restrictions on publication permitted to protect national security, *ordre public*, public health or morals

2. Ensure public awareness of anti-corruption bodies and access to bodies for reporting, including anonymous reporting

Article 14 - *Measures to prevent money-laundering*

(a) Comprehensive domestic regulatory and supervisory regime for banks and other financial institutions

(b) Ensure ability to cooperate and exchange information, consider establishment of Financial Intelligence Unit (FIU)

2. Measures to detect and monitor movement of cash etc. across borders, including requirement to report transfers

3. Measures regarding information about originator of transfer

(a) On forms for electronic transfer

(b) Maintain information throughout payment chain

(c) Enhanced scrutiny where transferor information incomplete

Chapter III
Criminalization and law enforcement

Article 15 - *Bribery of national public officials*

(a) Active bribery of domestic public official

(b) Passive bribery in relation to domestic public official

Article 16 - *Bribery of foreign public officials and officials of public international organizations*

1. Active bribery of foreign public official or official of international organization, in relation to conduct of international business

2. Passive bribery of foreign public official or official of international organization

Article17-*Embezzlement, misappropriation or other diversion of property by a public official*

Article 18 - *Trading in influence*

(a) Active bribery of public official in relation to abuse of influence

(b) Passive bribery of public official in relation to abuse of influence

Article 19 - *Abuse of functions* (illegal performance or failure to perform act for undue advantage)

Article 20 - *Illicit enrichment* (significant increase of assets not reasonably explicable by lawful income)

Article 21- *Bribery in the private sector*

(a) Active bribery of person in private sector in the course of financial or commercial activities

(b) Passive bribery of person in private sector in the course of financial or commercial activities

Article 22 - *Embezzlement of property in the private sector*

Article 23 - *Laundering of proceeds of crime*

1.(a)(i) Conversion or transfer for purpose of concealing or disguising illicit origin

1.(a)(ii) Concealment or disguise of true nature, etc.

1.(b)(i) Acquisition, possession or use

1.(b)(ii) Participation, association, conspiracy, attempts etc.

2.(a) Application to widest range of predicate offences

2.(b) Comprehensive range of offences established by Convention

2.(c) Offences committed within and outside jurisdiction

2.(d) Notify Secretary General of laws

2.(e) Money-laundering offences not applicable to predicate offender where required by fundamental principles of domestic law

Article 24 – *Concealment* (concealment or continued retention knowing property resulting from Convention offence)

Article 25 - *Obstruction of justice*

(a) Obstruction in relation to testimony or other evidence

(b) Obstruction in relation to exercise of official duties

Article 26 - *Liability of legal persons*

1. Requirement to establish liability for participation of legal persons in Convention offences
2. Liability my be civil, criminal or administrative
3. Liability of legal person without prejudice to liability of natural person(s) for same offences
4. Effective, proportionate and dissuasive sanctions

Article 27 - *Participation and attempt* (offences established in accordance with Convention)

1. Participation in any capacity
2. Attempt to commit
3. Preparation

Article 28 - *Knowledge, intent and purpose as elements of an offence*

Article 29 – *Statute of limitations* (extension where offender has evaded administration of justice)

Article 30 – *Prosecution, adjudication and sanctions*

1. Sanctions to take into account gravity of offence
2. Balance between privileges and immunities of public officials and effective investigation, prosecution, etc.
3. Use of discretionary measures to maximize effectiveness and with due regard for deterrence
4. Conditions on release pending trial
5. Considerations on parole release
6. Removal, suspension or reassignment of public official
7. Disqualification from public and other office
8. Other disciplinary powers not affected
9. Offences, defences and other principles reserved for domestic law
10. Reintegration of convicted persons into society

Article 31 – *Freezing, seizure and confiscation*

1. Confiscation of proceeds or other property used or destined for use in Convention offence
2. Measures necessary for identification, tracing, freezing or seizure
3. Establishment of powers to administer frozen, seized or confiscated property
4. Liability of converted property
5. Liability of intermingled property
6. Liability of income or other benefits from property
7. Access to records of banks and other records notwithstanding bank secrecy
8. Requirement that offender demonstrate lawful origin of alleged proceeds or other property
9. Preservation of rights of 3rd parties
10. Measures to be defined, implemented by domestic law

Article 32 – *Protection of witnesses, experts and victims*

1. Protection etc., for witnesses and experts who testify concerning Convention offences

2.(a) Procedures for physical protection

2.(b) Procedures for protection while giving testimony

3. Arrangements with other States for relocation
4. Provisions to include victims who are also witnesses
5. Expression of views and concerns by victims in criminal proceedings

Article 33 – *Protection of reporting persons* (persons who report facts concerning Convention offences

Article 34 – *Consequences of acts of corruption* (measures to address consequences of corruption, including recission of contracts and other legal remedies or remedial actions)

Article 35 – *Compensation for damage* (right of victims etc. to initiate legal proceedings against those responsible)

Article 36 – *Specialized authorities* (independent body or bodies combatting corruption through law enforcement)

Article 37 – *Cooperation with law enforcement authorities*

1. Measures to encourage cooperation with law enforcement
2. Possibility of mitigation of punishment
3. Possibility of granting immunity
4. Protection (under Art.32)
5. Possibility of mitigation or immunity where cooperation with foreign law enforcement agency

Article 38 – *Cooperation between national authorities* (national public authorities, public officials, investigative and prosecution authorities)

Article 39 – *Cooperation between national authorities and the private sector* (individuals and other entities)

Article 40 – *Bank secrecy* (mechanisms to overcome in domestic investigations)

Article 41 – *Criminal record* (consideration of prior foreign conviction)

Article 42 – *Jurisdiction*

1. Mandatory jurisdiction (offence committed in territory, on vessels etc.)
2. Optional jurisdiction (foreign offences where national or resident is offender or victim, conspiracies etc. involving money-laundering, offence committed against the State)
3. Mandatory jurisdiction where offender not extradited due to nationality
4. Optional jurisdiction where offender not extradited for other Reason
5. Requirement to consult and coordinate
6. Domestic criminal jurisdiction preserved

Chapter IV
International cooperation

Article 43 – *International cooperation*

1. Mandatory cooperation in criminal matters, optional cooperation in civil and administrative matters relating to corruption
2. Dual-criminality requirements, if any, fulfilled where underlying conduct criminalised in both States

Article 44 – *Extradition*

1. Scope of extradition requirements
2. Dual criminality not required if not required by national law
3. Inclusion of additional offences not otherwise extraditable under Art.44
4. Deemed inclusion of corruption offences in existing treaties
   Offences established in accordance with Convention not to be considered political offences
5. Convention may be legal basis where no other extradition treaty applies
6. Where treaty required, notification of UN whether Convention accepted as legal basis and obligation to seek to conclude bilateral treaties in cases where Convention not acceptable as basis for extradition.
7. Recognition of corruption and related offences as extraditable where no treaty required
8. Conditions or limits of domestic law (including minimum penalty requirements) apply
9. Requirement to expedite proceedings and simplify evidentiary requirements

10. Custody and other measures to ensure appearance
11. Obligation to prosecute where offender not extradited due to nationality
12. Conditional extradition meets extradition requirement
13. Punishment where extradition to serve sentence not possible due to nationality
14. Due process and fair treatment
15. Extradition not required where purpose is discriminatory prosecution
16. Extradition not refused where offence considered fiscal offence
17. Requirement to consult prior to refusing extradition
18. Conclusion of further bilateral or multilateral agreements or arrangements

Article 45 – *Transfer of sentenced persons*

Article 46 – *Mutual legal assistance*

1. Widest measure of assistance
2. Assistance where accused or suspect is a legal person
3. Forms of legal assistance to be provided
4. Voluntary or spontaneous assistance (without request)
5. Protection and disclosure of information provided without request
6. Legal assistance obligations under other treaties still apply
7. Where no other treaty applies, Art.46 sufficient basis for assistance
8. Bank secrecy not a basis for refusal of assistance
9. Where dual criminality requirement not met, obligation limited to forms not requiring coercive actions
10. Transfer of person detained or serving sentence
11. Treatment and return of persons transferred under paragraph (10)
12. No further prosecution, detention etc. of person transferred under paragraph (10)
13. Establishment of central authority, notification of UN etc.
14. Form of legal assistance requests
15. Content of legal assistance requests
16. Request for additional information
17. Request executed under laws of requested State Party
18. Use of hearings by video-conference where possible
19. Confidentiality of information
20. Notification where information must be disclosed
21. Basis for refusal of legal assistance
22. No refusal on basis offence involves fiscal matters
23. Reasons to be given for refusal
24. Execution of requests, progress or status reports etc.
25. Postponement to protect other investigations or proceedings
26. Requirement to consult prior to refusal or postponement
27. Safe conduct etc. for witnesses
28. Costs of executing request
29. Provision of government records, documents, etc.
    (a) Where records etc. available to public
    (b) Where records etc. not available to public
30. Conclusion of further agreements or arrangements

Article 47 – *Transfer of criminal proceedings* (transfer to most convenient jurisdiction, consolidation of proceedings etc.)

Article 48 – *Law enforcement cooperation*

1. States Parties to cooperate to enhance effectiveness of law enforcement
    (a) Establishment of channels of communication
    (b) Cooperation in conducting inquiries (list of forms of cooperation)
    (c) Provision of substances for analysis

(d) Means and methods used to commit offences

(e) Coordination, including exchange of personnel and posting of liaison officers

(f) Early identification of offences

2. Further agreements or arrangements

3. Use of modern technology

Article 49 – *Joint investigations*

Article 50 – *Special investigative techniques*

1. Use of techniques, including controlled delivery and electronic surveillance, and admissibility of evidence obtained

2. Other agreements or arrangements

3. Decisions made case-by-case, financial arrangements

4. Controlled delivery

Chapter V
Asset recovery

Article 51 – *General provision* (fundamental principle of return)

Article 52 – *Prevention and detection of transfers of proceeds of crime*

1. Identification of customers and beneficial owners
   Enhanced scrutiny of persons having prominent public functions

2. Implementation

   (a) Advisories on accounts and transactions for enhanced scrutiny

   (b) Notification of institutions re: targets of enhanced scrutiny

3. Maintenance and content of records

4. Limit on establishment of banks where no physical presence etc.

5. Financial disclosure by public officials

6. Reporting of interest or authority of public official in foreign account

Article 53 – *Measures for direct recovery of property* (acquired through commission of offence established in accordance with the Convention)

(a) Allow another State Party to initiate civil action

(b) Permit courts to order compensation or damages to another State Party

(c) Permit courts to recognize ownership claims of other States Parties in confiscation proceedings

Article 54 – *Mechanisms for recovery of property through international cooperation in confiscation*

1. Requests under Art.55(1) or 55(2)

   (a) Enforcement of foreign confiscation orders

   (b) Domestic order confiscating property of foreign origin

   (c) Confiscation where no criminal conviction (*in rem* confiscation)

2. Requests under Art. 55(2) only

   (a) Enforcement of foreign freezing or seizure orders

   (b) Domestic order freezing or seizing property of foreign origin

   (c) Preservation of property for confiscation

Article 55 – *International cooperation for purposes of confiscation*

1. Receipt of requests for confiscation of proceeds, property, instrumentalities etc.

   (a) Obtain domestic confiscation order on request of other State Party

   (b) Give effect to confiscation order of court of other State Party

2. Measures to identify, trace, freeze or seize on request of other State Party

3. Other mutual legal assistance provisions apply, *mutatis mutandis*
   Additional information to be included in requests

   (a) Description of property, statement of facts etc.

   (b) Legally admissible copy of foreign confiscation order, where

applicable, and statement of measures taken to notify interested *bona fide* third parties, etc.

(c) Statement of facts and legally admissible copies of orders relied on for identification, tracing, freezing or seizure

4. Actions taken subject to domestic laws, procedures and bilateral or multilateral agreements or arrangements
5. Notification of U.N. of relevant laws and regulations
6. Convention to be treated as sufficient treaty basis for actions
7. Refusal where lack of evidence, property of *de minimus* value
8. Notification prior to lifting provisional measures
9. Rights of *bona fide* third parties preserved

Article 56 – *Special cooperation* (forwarding of information on proceeds without prior request)

Article 57 – *Return and disposal of assets*

1. Property to be disposed of pursuant to Art.57, para.(3)
2. Measures to enable return of confiscated property
3. (a) Return of embezzled public funds to requesting State Party

   (b) Return of other proceeds to requesting State Party where ownership established or damage recognized

   (c) Return to requesting State party, prior legitimate owners or compensation of victims in other cases
4. Reasonable expenses may be deducted
5. Agreements or arrangements for final disposal after return

Article 58 – *Financial intelligence unit* (for receiving, analyzing and disseminating reports of suspicious transactions)

Article 59 – *Bilateral and multilateral agreements and arrangements*

Chapter VI

Technical assistance and information exchange

Article 60 – *Training and technical assistance*

1. Training of personnel

   (a) Prevention, investigation etc.

   (b) Strategic policy

   (c) Legal assistance requests

   (d) Evaluation and strengthening of institutions

   (e) Preventing and combatting transfer of proceeds

   (f) Detecting and freezing transfer of proceeds

   (g) Surveillance of proceeds

   (h) Return of proceeds

   (i) Protection of victims and witnesses

   (j) Training in regulations and languages
2. Widest range of technical assistance
3. Use of international and regional organizations
4. Evaluations, studies and research
5. Identification of asset recovery experts
6. Subregional, regional and international conferences and seminars
7. Voluntary contributions (general)
8. Voluntary contributions (to UNODC)

Article 61 – *Collection, exchange and analysis of information on corruption*

1. Analysis of corruption trends and circumstances
2. Development and sharing of information and expertise (common definitions etc., and best prevention practices)
3. Monitoring of policies and measures to assess effectiveness and efficiency

Article 62 – *Other measures: implementation of the Convention through economic development and technical assistance*

1. Measures for implementation to take into account negative effects on society and sustainable development
2. Concrete efforts
   (a) Enhancement of cooperation with developing countries
   (b) Enhancement of material and financial assistance to support anti-corruption efforts of developing countries
   (c) Voluntary contributions to designated U.N. fund
   (d) Encouragement of other States and financial institutions
3. Contributions to be without prejudice to other commitments
4. Bilateral or multilateral agreements or arrangements for material and logistical assistance

Chapter VII
Mechanisms for implementation

Article 63 – *Conference of States Parties to the Convention*

1. Establishment
2. To be convened within one year following entry into force
3. Adoption of rules of procedure (see also GA/RES/58/4, para.5, re drafting of rules by Ad Hoc Committee)
4. Activities, procedures and methods of work (listed)
5. Acquisition of knowledge concerning implementation measures and difficulties
6. Provision of relevant information by each State Party
7. Power to establish further mechanism or body to assist in effective implementation

Article 64 – *Secretariat*

1. Secretary General to provide
2. Duties of Secretariat

Chapter VIII
Final provisions

Article 65 – *Implementation of the Convention*

1. Obligation to take necessary measures to ensure implementation
2. States Parties may adopt more strict or severe measures

Article 66 - *Settlement of disputes*

Article 67 – *Signature, ratification, acceptance, approval and accession*

1. Open for signature from 11 December 2003 to 9 December 2005
2. Open for signature by regional economic integration organizations
3. Deposit of instruments
4. Open for accession by regional economic integration organizations

Article 68 – *Entry into force*

1. In force on 90th day after deposit of 30th instrument
2. In force in respect of each State or organization on 30th day after deposit of instrument by that State or organization

Article 69 – *Amendment*

1. Proposal and adoption of amendments by Conference of States Parties
2. Voting of regional economic integration organizations
3. Ratification, acceptance or approval of amendments
4. Entry into force of amendments

Article 70 - *Denunciation*

Article 71 – *Depositary and languages*

THE TOOLKIT

AN INTRODUCTION TO THE TOOLKIT: ITS AIMS AND INTENDED USES.

As mentioned, the Toolkit is based on lessons learned from the technical cooperation activities facilitated by the Global Programme against Corruption (GPAC) under the framework of United Nations Centre for International Crime Prevention (CICP). GPAC activities have adopted a modular approach that draws from a broad set of “Tools", anti-corruption policies and other measures. The anti-corruption Tools presented in the present publication form a highly flexible Toolkit. Tools may be utilized at different stages and levels of an anti-corruption strategy, as well as in a variety of combinations, according to the needs and context of each country or sub-region.

The purpose of the Toolkit is threefold:

- To help Governments, organizations and the public understand the insidious nature of corruption and the damaging effects it can have on the welfare of entire nations and their peoples;
- To provide an inventory of measures to assess the nature and extent of corruption in order to deter, prevent and combat it more successfully; and
- To combine and integrate the various "Tools" into successful national anti- corruption strategies.

Individual tools may be used to augment existing anti-corruption strategies but, as a general rule, Tools should not be used in isolation. No serious corruption problem is likely to respond to the use of a single policy or practical measure. It is expected, therefore, that countries will develop comprehensive anti-corruption strategies consisting of a range of elements based on individual Tools. The challenge is to find combinations or packages of Tools that are appropriate for the task in hand, and to apply Tools in the most effective combinations and sequences possible. The Tools used must thus be considered and coordinated in a careful fashion. Regarding combining and packaging, for example, codes of conduct for public officials are usually directed both at the officials involved, to establish the standards they are expected to meet, and at the general public, to advise on the standards they have a right to expect. Regarding timing or sequencing, Tools intended to raise public expectations can do more harm than good unless tools intended to deliver those expected higher standards have had time to work.

The relationship between individual Tools or policy elements is complex, and may vary from one country to another. It will depend on factors such as the nature and extent of corruption and the degree to which the institutions and procedures needed to combat corruption are already present or need to be established. With that in mind, the description of each Tool includes a list of other, related Tools and some discussion of the nature of the relationships involved.

The choice and sequencing of tools is complex. In some situations, it could be seen as desirable to use certain tools in combination or to choose one on an exclusive basis, although, as mentioned, that is not desirable. Further

complexities are added when the relationships between multiple packages or combinations of tools are considered.

There is no universal blueprint for fighting corruption. The Toolkit offers suggestions and information as to how other countries have successfully used the Tools. Generally, it is expected that countries will first make an assessment of the nature and scope of corruption problems. Next, they will develop an anti-corruption strategy, setting overall priorities and coordinating specific programmes and activities into a comprehensive framework. Then, specific elements of the strategy will be developed and implemented. Throughout the process, progress will be monitored and information about what is or is not effective will be used to reconsider and modify each element and the overall strategy, as necessary.

The Toolkit covers prevention, enforcement, institution building, awareness raising, empowerment, anti-corruption legislation and monitoring. It is an extensive, but by no means exhaustive, collection of theoretical and practical approaches and their applications developed from anti-corruption research and technical assistance activities, including the comprehensive Country Assessments undertaken by the Global Programme of the United Nations and other organizations and nations worldwide.

As the Toolkit is, by its very nature, being continuously developed and refined, the UN ODC' Global Programme against Corruption (GPAC) welcomes comments and inputs to improve its scope and content to provide greater insight and understanding of individual anti-corruption measures. It is important to bear in mind that lessons are learned from success and perhaps even more so from failure. Users of the Toolkit are thus urged to provide comments regardless of whether or not their initial implementation of anti-corruption measures was seen as successful or not, and the most useful comments and experiences will be identified, refined and incorporated into the Toolkit. It is expected that further Tools will be added, as required, and that the existing content will be revised periodically to take account of lessons learned and the recommendations of countries using the Toolkit.

USING THE TOOLKIT

Toolkit has been designed for maximum flexibility, and can be used by Governments or agencies as they think best. Elements can be used, inter alia, to provide basic information on corruption for training officials, and to provide advice or assistance in gathering and assessing information. The fundamental purpose of the Toolkit, however, is to suggest elements for a comprehensive national anti-corruption strategy and to assist Governments in developing, integrating, implementing and assessing those elements.

That will generally involve the following steps:-

Initial assessment

Prior to considering specific tools or anti-corruption measures, countries should engage in a transparent and extensive assessment of the nature and extent of the corruption problem and of the strengths and weaknesses of the institutions that will be called upon to take measures against it. Transparency is therefore all-important. Transparency will ensure that the assessment results are a valid

reflection of the actual problem and thus a solid basis for planning and for the setting of priorities. It will also guarantee the basic credibility of the national strategy, which is essential to the participation and compliance of those affected by corruption, especially the general public who are the ultimate clients of the public services.

Ongoing assessment

The initial assessment is unlikely to remain either valid or accurate once the implementation of the strategy has begun. The impact of some elements will often be unpredictable; certain consequences, such as the displacement of corrupt conduct, may adversely affect other strategic elements or create the perception that the strategy is not working, thus eroding support. Ongoing assessments and periodic adjustments, dealt with on the same transparent basis as the initial assessment, are thus required. They should be undertaken on a comprehensive basis, at intervals, to assess overall progress. They may also focus on specific issues or areas if the need for information and possible adjustment becomes apparent.

Who will use the tools?

The Tools in the Toolkit are drafted on the assumption that the primary users will be the public officials responsible for the development, implementation, assessment and/or adjustment of individual elements of national strategies. Others, however, will also find them useful. As the Tools identify and, in some cases, provide, relevant international standards, they may be used by elements of civil society to hold Governments and public officials accountable for meeting those standards. They may also be used by academics or institutions concerned with the assessment of corruption from social, legal, economic or other standpoints.

Resources required

Specific resources will vary from Tool to Tool and, to some extent, with the context in which the Tool will be implemented and the seriousness of the problems it addresses. The overall resource requirements for anti-corruption strategies, however, are clearer. Generally, the scope of reforms will require the commitment of substantial resources; and as the reforms will necessarily be of long duration, an ongoing and stable commitment of adequate resources will also be required. Fighting corruption is a major undertaking that cannot be accomplished quickly or cheaply. It requires an extensive commitment in political terms and the dedication of social and financial resources that tend to materialize only when the true nature and extent of the problem and the harm it causes to societies become apparent.

Progress is also difficult to achieve, and may be difficult to measure. The creation of popular expectations about standards of public service and the right to be free of corrupt influences has been identified as an important element of many anti-corruption strategies. The difficulties inherent in making progress, however, mean that those expectations must be carefully managed. Convincing populations that corruption must be extinguished may lead to cynicism and even worse corruption problems if the expectations are too high to be met in a realistic timeframe.

Resource allocations will, in some cases, require safeguards. Experience has shown that anti-corruption agencies often compromise their independence and credibility by having to seek and justify operational funding. The commitment of

resources includes not only financial resources, although these are critical, but also the commitment of human and technical resources. In developing countries, expertise in economics, law and other relevant specialties may be even more difficult to secure than the funding needed to pay the experts. The commitment and allocation of resources must also be an integrated part of the overall strategy: under-funding can result in under-utilization of human or other resources. There have also been cases where too much funding from multiple donors or uncoordinated programmes have overloaded institutional capacities and resulted in wasted resources and less-than-favourable outcomes.

The dedication of the necessary resources can be seen as a form of investment, in which relatively small amounts can generate larger benefits. The benefits come both in the form of economic efficiencies, as corrupt influences are reduced, and in improved social environments and a better quality of life, as public resources are allocated and used more effectively. As with other investments, however, it is necessary to convince the "investors" that the proposed dividends and profits are realistic goals that are likely to result if the initial commitment of resources is made.

TOOLKIT OVERVIEW

SUMMARIES OF THE INDIVIDUAL TOOLS

The Toolkit is divided into eight chapters, as follows:

I. ASSESSMENT OF CORRUPTION AND OF INSTITUTIONAL CAPABILITIES AGAINST CORRUPTION
II. INSTITUTION BUILDING
III. SITUATIONAL PREVENTION
IV. SOCIAL PREVENTION AND PUBLIC EMPOWERMENT
V. ENFORCEMENT
VI ANTI-CORRUPTION LEGISLATION
VII MONITORING AND EVALUATION
VIII. INTERNATIONAL JUDICIAL COOPERATION
IX. REPATRIATION OF ILLEGAL FUNDS

Most chapters are followed by a number of case studies showing how various anti-corruption measures, as outlined in the Toolkit, are actually being implemented in countries around the world.

For ease of reference and to give an overview of the contents of the Toolkit, a précis of each Tool is provided here.

I. ASSESSMENT OF CORRUPTION AND OF INSTITUTIONAL CAPABILITIES AGAINST CORRUPTION: TOOL#1 THROUGH TOOL #2

The need for impact-oriented elements and strategies.

Clear and realistic goals must be set; all participants in the national strategy must be aware of the goals and the status of progress achieved to date. While elements of the strategy and the means of achieving specific goals may be adjusted or adapted as the strategy evolves, the basic goals themselves should not be changed if that can be avoided, with the occasional exception of timelines.

TOOL #1

Assessing the nature and extent of corruption

Tool #1 is intended for use in identifying the nature and extent of corruption. It describes specific methods, including surveys, interviews, desk reviews, case studies, and other means, that can be used to gather information about corruption to support both quantitative and qualitative assessments.

Quantitative assessments examine the extent of corruption both generally and in specific sectors. A quantitative assessment allows for comparisons and establishes a baseline against which future progress in each area can be assessed.

Qualitative assessments focus more closely on the nature of corruption, examining typical cases in detail to determine how corruption actually works, who is involved, who benefits and who is victimized or adversely affected.

Such assessments are used to develop and refine specific measures. For example, codes of conduct for certain public servants may be adjusted to take account of the history of a particular corrupt practice or of pressures to engage incorruption that are specific to the duties performed. They may also be used as the basis for conclusions about the substantive effects of the anti-corruption measures taken, which will allow various strategic elements to be adapted wherever necessary. For example, staff who begin to resist attempts at bribery may then find themselves confronted with more coercive or threatening advances, and may require security and protection.

In dealing with corruption, both the perception and the reality are important, and are often (but not always) interdependent. For that reason, qualitative and quantitative assessments should include both objective and subjective assessments.

Objective assessments draw together information from diverse sources in order to compensate for biases and errors and help to develop an accurate picture of what is actually occurring. Subjective assessments examine the perceptions of those involved, those affected and the general population to determine whether the measures taken are effective or not.

TOOL #2

Assessment of institutional capacities and responses to corruption

Tool #2 uses similar methods of assessment as Tool #1 but focuses on the assessment of institutions as opposed to the assessment of corruption itself. Institutional assessment is intended to provide information about the extent to which institutions are affected by corruption, how far they may be utilized in the implementation of anti-corruption measures, and the extent to which their participation in the anti-corruption strategy is needed and at what stage(s). At the developmental stage, such information can be used to set priorities. Early efforts will focus on institutions where the problem is particularly serious or where it can be addressed quickly (to establish precedents and produce credibility for the strategy in the early stages), or where early reforms are needed as the basis for reforms in other areas at later stages of strategy implementation.

In many cases, the institutional analysis will lead to an early focus on the judiciary. If the judiciary is assessed as being free of corruption, other strategic elements can focus on criminal prosecution and civil litigation practices whose correct functioning depends on fair and independent judges. If a problem of corruption is identified in the judiciary, reforms will usually be a top priority. The functioning of many other strategic elements depends on the rule of law and independent judges and, if reforms succeed and are seen to be successful, the high status of judges in most societies will set an important precedent.

II. INSTITUTION BUILDING
TOOL #3 THROUGH TOOL #13

TOOL #3

Specialized anti-corruption agencies

Tool #3 is intended for use in assessing if a country should establish a specialized anti-corruption agency (ACA), if it should adapt existing law enforcement institutions to combat corruption or if it should use some combination of the two. The Tool looks at topics such as the possible relationship of an ACA with other institutions, its political, legal and public accountability, how efficient such an institution may be and the importance of having public credibility. The many advantages in setting up a separate agency are discussed, such as the "fresh start" it will give to anti-corruption efforts, the high degree of specialization and expertise it can accomplish, as well as the faster and more efficient work that a dedicated ACA can achieve.

While a separate ACA will undoubtedly send a clear message that the Government "means business", the Tool also discusses the possible downside, such as costs, rivalries, isolation and the undermining of existing institutions already engaged against corruption. To counter such problems, a scenario is put forward where dedicated anti-corruption units might be established within existing law enforcement agencies, allowing greater coordination of overall efforts.

Nevertheless, where it is decided to establish a completely separate agency, it must be afforded a high degree of autonomy, something that would probably be achieved only by statutory enactment and even constitutional change. The likely mandate of a separate ACA is also discussed. Though dependent on several country-specific variables, the mandate will require certain predetermined substantive elements: an investigative and, initially, a prosecutorial function; an awareness-raising function; an analysis, policy-making and legislative function; and a preventive function. Tool #3 discusses the scope and implications of each.

TOOL #4

Auditors and audit institutions

Tool #4 deals with the auditing process, outlining the purposes of audits and what they are expected to achieve. Audits can cover, inter alia, legal and financial issues, ensuring conformity with established standards or reviewing the performance of institutions and individuals. Particularly emphasized is that audits work through transparency and that their real power resides in the fact that most audit reports are made public. Even where national security matters or sensitive economic or commercial information are concerned, certain procedures can be put in place to assure the overall transparency of the audit.

Audits differ in terms of size, scope, the powers of auditors, their degree of independence from the bodies or persons they are auditing and what happens to their findings. From the most specific task, such as a review of public sector contracts, to the workings of large Governments, the overarching requirement is that an audit institution be as independent as possible. As public audit agencies are ultimately subordinate to and employed by the State, complete independence is impossible; nevertheless, major public sector auditors generally require a degree of independence roughly equivalent to that of judges

or national anti-corruption agencies. Additional safeguards include security of tenure, as much financial and budgetary independence as possible, and respect for the integrity of the reporting procedures of auditors; those to whom the audit report is made should not, for instance, be permitted to alter or withhold it.

Tool #4 also discusses the difficult issue as to whether an audit body should have the power and responsibility to audit the democratically elected legislature and its members. Where an audit function has been established by the legislature, the importance of reporting to the entire legislature or a committee representing all political factions is underlined. Care must also be taken, when auditing the non-political elements of Government and public administration, not to interfere with the functioning of Government and possibly compromise its political accountability. As Tool #4 indicates, it is primarily for this reason that professional auditors are not empowered to implement their own recommendations.

A number of further safeguards should be integrated into the audit process, such as ensuring audit staff have the requisite professional qualifications and that standardization of audit procedures are in place. Tool #4 examines the scope of the work of auditors: its increasing national and transnational reach, taxation audits, public contracts and public works including any private sector component of the contract, audit of electronic data-processing facilities, audit of enterprises or institutions subsidized by public money, and the audit of international and supranational institutions. Tool #4, while cautioning against unrealistic aims and expectations, emphasizes the need for political will to ensure that an audit institution achieves maximum impact. Moreover, the need to bring public pressure to bear on Government is vital to avoid audit recommendations not being implemented or even suppressed.

TOOL #5
Ombudsmen

Tool #5 provides an overview of the mandates and functions of an ombudsman which, in most countries, generally go beyond corruption cases to include maladministration attributable to incompetence, bias, error or indifference. As many complainants will not know or suspect the presence of corruption, the ombudsman can play an important role in determining this and referring such a case to an anti-corruption agency or prosecutor for further action. Further advantages of ombudsman structures are their informality, which allows them to be used in relatively minor cases and their powers to fashion a suitable remedy for the complainant. In some countries, ombudsmen have taken a more proactive role in studying the efficiency and operational policies of public institutions in an effort to prevent injustices occurring in the first place.

Tool #5 outlines the necessity for the independence of the ombudsman, the need for a broad mandate and jurisdiction to allow the ombudsman to consider complaints that are not within the purview of other forums such as the courts or administrative tribunals, as well as a requirement for adequate investigative powers, operational transparency, accessibility and resources. Tool #5 also discusses extensively the role of the ombudsman and similar institutions as an element of anti-corruption strategies in international organizations and activities where mandates would focus primarily on areas of external complaint about the

functions of the organization itself. The same operational safeguards would apply to ombudsmen in international organizations as those at the national level. The United Nations, it is made clear, has its own internal auditing mechanisms.

TOOL #6

Strengthening judicial institutions

As the senior, most respected and smallest criminal justice institution, the judiciary is relatively accessible to early, small-scale anti-corruption efforts. Moreover, it is at the judicial level that corruption does the greatest harm and where reforms have the greatest potential to improve the situation. Thus, measures directed at judges themselves should generally be implemented as a first step towards strengthening judicial institutions against corruption. A balance must, however, be struck between ensuring the independence of the judiciary and making it accountable.

Training in professional competence and integrity, as well as the development or review of a judicial code of conduct and informal discussions on ethical, substantive and procedural issues all form part of the process of strengthening the judiciary. Tool #6 discusses efforts at integrity-building, education about the nature and extent of corruption and the establishment of adequate accountability structures. It expresses the strict proviso that any proposals for judicial training and accountability must be developed by, or in consultation with, the judges themselves in order to protect judicial independence, although it does recommend that input be sought from other key groups including prosecutors, justice ministries and bar associations.

While the responsibilities of the judiciary are stressed, for example with regard to adhering to a code of conduct, ensuring the transparency of legal proceedings and disclosing assets and possible conflicts of interest, the judges and their families must also be afforded protection against corruption, especially from powerful and well resourced interests. Such measures should be backed by wide-ranging court reforms to address corruption problems, including providing proper remuneration and working conditions for judges and other court personnel, improvement of court management structures and the statistical management of cases to identify patterns that may indicate bias or corruption. Public education will be key to raising awareness of the standards to be expected of judges and the courts.

TOOL #7

Civil service reform to strengthen service delivery

In many countries, the inadequate management and remuneration of civil servants are among the chief causes of corruption and, consequently, of inadequate public service delivery. With significant investment by the donor community in civil service reform since 1990 having failed to reach the desired objectives, Tool #7 provides an insight into typical problems of civil services around the world and how they foster corruption. It also gives an overview of the integrated, long-term and sustainable policies needed to help build integrity within the civil service to curb corruption and improve service delivery.

Tool #7 provides a vision of a well performing civil service whose main focus is to improve general security (rule of law) and the quality, timeliness, cost and coverage of service delivery to the public. It also puts forward a strategic framework to help achieve such a civil service, the main components of which are the importance of paying a minimum living wage to public servants and implementing evidence-based or results-oriented management. The example of civil service reforms in Uganda, which saw a retrenchment of some 150,000 civil servants, provide an insight into how successful well managed, broad-based and visionary civil service reforms can be.

Tool #7 puts the case for integrating the various components of civil service reform by linking pay and employment reform to sound financial management, empowerment of the public to increase the accountability of public servants, extensive administrative reform, including soundly based decision-making on devolution and decentralization of staff, functions and resources, and emphasis on institutional reform in key sectors, such as health and education, that are particularly prone to corrupt influences. Indeed, the move away from the project-based approach to the integrated approach is ongoing with many donors applying various high-impact, non-lending operations and a new range of operational instruments for a looser, more country-driven approach to reform. The public and private sectors are discussed. Particular focus is given to the need for impartiality in discharging public duties and the requirement that public officials declare interests that might raise conflicts of interest and take steps to avoid them in the exercise of their duty. As public officials frequently have access to a wide range of sensitive information, rules prohibiting and regulating disclosure are also examined.

TOOL #8

Codes and standards of conduct

Tool #8 comprehensively examines additional rules that might be applied to key public sector groups, such as police and law enforcement officials; members of legislative bodies and other elected officials and judicial officers, including judges.

Tool #8 recognizes that the extent to which private sector codes will feature in national anti-corruption programmes will depend to some degree on the extent to which private sector activities are considered to affect the public interest. For example, the public interest would be triggered if corrupt practices entered stock market trading given that a clean market is necessary to the economic prosperity and stability of a country. A code of conduct for the media is also given prominence in Tool #8 as the question of public accountability of institutions and officials is a vital part of anti-corruption programmes and the media provide information that allows members of the public to make informed choices about governance and other important matters.

TOOL #9

National anti-corruption commissions, committees and similar bodies

Tool #9 distinguishes between an anti-corruption agency and a national anti-corruption commission. While the former is a standing body established to implement and administer prevention and enforcement elements of a national

strategy, the latter is a standing or ad hoc body designed to develop, launch, implement and monitor the strategy itself.

The basic mandate of such a commission is to formulate the national strategy, making adjustments, as required, during its implementation. As with an anti-corruption agency, some degree of independence, entrenchment of mandate and security of tenure is needed to safeguard the work of the commission against undue influence, and membership should be selected with a view to ensuring expertise in a range of areas that reflects the country as a whole. Tool #9 provides guidelines for drafting legislation to establish a national anti-corruption commission.

Tool #9 also discusses the establishment of a national integrity unit to coordinate anti-corruption activities and the precise functions of the various institutions working against corruption. The mandate of such a unit as well as the functions it can perform are outlined. Tool #9 cautions that the public credibility of any commission

TOOL #10

National integrity and action-planning meetings

Tool #10 discusses the need for bringing together a broad-based group of stakeholders at meetings or "workshops" to develop a consensual understanding of the types, levels, locations, causes and remedies for corruption. Such meetings should occur at different phases during the development, implementation and evaluation of an anti-corruption strategy. They ensure that stakeholders are well informed and, if necessary, mobilize their support for the ongoing process.

Tool #10 emphasizes the need to strike a balance at such meetings between procedural and substantive issues. It provides comprehensive information on how to organize and successfully run meetings, organize working groups, prepare materials and make material available to a wider readership after the meetings. The roles of organizers and other key personnel are discussed in detail.

TOOL #11

Anti-corruption action plans

Anti-corruption action plans set clear goals, timelines and sequencing for the achievement of specific goals. Not only do such plans place pressure for action those expected to contribute to the anti-corruption effort, but they clarify the various issues involved, making both current and more advanced planning easier.

A national plan is likely to be an extensive document providing detailed coverage of all segments of Government and society. It will contain input from insiders and outsiders, including donor and other foreign Governments. Such diversity is important, as are wide consultations, transparency, popular support and political will. Plans will normally encompass five substantive issues: awareness-raising, institution building, prevention, anti-corruption legislation, and enforcement and monitoring.

Tool #11 sets out a number of action plan objectives for the executive and public sector areas. It also establishes objectives for specific groups such as

the law enforcement community, prosecutors, legislators and legislative bodies, and civil society and the private sector. Tool #11 advises on the risks of setting overly ambitious or unrealistic goals that, if not achieved, will erode public confidence. It also warns of the need to overcome resistance wherever reforms need to be made. Such issues must be dealt with as they arise to retain momentum.

TOOL #12

Strengthening local governments

While many elements of anti-corruption strategies are conceived and planned at the national level, their effectiveness depends on being implemented willingly at the local level. Tool #12 offers suggestions on how to adapt national tools and institutions for local use, how to facilitate vertical and horizontal integration of local efforts and encourage public participation.

In developing countries, decentralization has increased citizen participation in local decision-making with advantages and disadvantages for the control of corruption. Tool #12 describes how local leaders can increase their efforts and capacity to execute local reforms, and how local corruption can be assessed and formed into a framework for action. Obtaining local participation and "ownership" of programmes is vital to public education and mobilization, as is ongoing evaluation and monitoring. While "outside" help, from central Government, donor and foreign

Governments, will undoubtedly be necessary in bringing anti-corruption values and activities to the local populace, such influences should in no way be allowed to dominate local proceedings.

TOOL #13

Legislatures and their efforts against corruption

Tool #13 discusses ways in which legislatures can strengthen their role in areas that are critical to combating corruption, such as transparency and accountability in Government, as well as special areas such as the formulation and adoption of anti-corruption laws and the independent oversight of anti-corruption bodies.

Anti-corruption efforts in legislative bodies may be directed at the institutions themselves or at individual members. Accountability of members may be set down by codes of conduct covering, inter alia, conduct of election campaigns, or they may cover rules of participation in legislative functions. A disciplinary mechanism can be instituted to investigate complaints and enforce disciplinary action where necessary. The legislature itself should conduct business in a transparent way to strengthen its political accountability without legislators being divested of any of their traditional immunities.

Tool #13 outlines a number of ways in which transparency and accountability can be furthered, for instance by the use of the committee system which distributes subject matter between many committees, some with overlapping functions and responsibilities. Open access to information and sittings, media transmissions of parliamentary proceedings, modern technological aids, such as web sites, and publications are among the transparency structures cited by Tool #13. So-called watchdog institutions can be set up to exercise some oversight over legislatures.

III. SITUATIONALPREVENTION

TOOL #14 THROUGH TOOL #21

TOOL #14

Disclosure of assets and liabilities by public officials

Tool #14 describes ways of increasing transparency with respect to the assets and liabilities of public officials in order to deter illicit enrichment from sources such as bribery or investments made with insider knowledge. The obligation to disclose can be established by legislative means or as a contractual condition of employment. It is neither necessary or practical for every member of the public service to sign a disclosure document. It should be required only on reaching a certain fixed level of seniority or being promoted into a position where there is sufficient potential for illicit enrichment. That includes some disclosure with respect to associates and relatives of officials, as it is not unusual for officials to use family members as a conduit for ill-gotten gains. Tool #14 stresses the importance of striking a balance between disclosure requirements and invasion of privacy in such matters.

TOOL #15

Authority to monitor public sector contracts

Tool #15 shows how a specialized authority might be created to monitor key contacts and transactions in areas where corruption is widespread. Such an authority could be established within a country but in many cases it would need to be international to put it beyond the reach of corruption. With many development projects failing because of corruption, international organizations have, for several years, been focusing increasing attention on corrupt practices in economic, social and political development. Dubious practices within international agencies and non-governmental organizations that have resulted in aid not being maximized have come under scrutiny.

Discussions between the World Bank (WB) and the Global programme against Corruption (GPAC) have mooted the establishment of a mechanism, currently referred to as an Anti-Corruption Forum (ACF) that would assist in the implementation and application of current and future anti-bribery conventions adopted by multilateral institutions. It would be a domestic institution, established by legislation or executive appointment or CICP would provide three experts from a pool of internationally renowned experts to staff an international authority for a requesting State. The ACF would assist in the review of public sector contracts and monitor international commercial transactions and, in the interests of transparency, produce a public report on its findings. A United Nations ombudsman is also envisaged to allow civil society a complaints mechanism regarding maladministration in the delivery by United Nations agencies of specific projects and services.

The challenges regarding the establishment of an ACF would lie in its location, addressing the issues of sovereignty that such an institution would provoke, the scope of its activities and identifying the key people to involve.

TOOL #16

Curbing corruption in the procurement process

Few activities create greater temptations or offer more opportunities for corruption than the procurement process. Goods and services are purchased by every level of Government and every kind of Government organization, often in large quantities and involving much money. Tool #16 discusses a number of methods for getting to grips with what is seen as the most common form of public corruption.

Tool #16 lays out a number of principles for fair and efficient procurement and shows how corrupt behaviour on the part of the purchaser and the supplier can work to undermine them. It also provides a number of key principles to be followed to combat corruption in procurement, the most powerful of which is currently public exposure. Only the United States has criminalized under its domestic laws the bribery of foreign officials to gain or maintain business. While the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development aims to internationalize the approach of the United States, there is obviously a need at the national level for a sound and consistent framework establishing the basic principles and practices to be observed in public procurement. Tool #16 sets the possible content and principles of such a framework. Tool #16 also notes the advances made in online procurement via the Internet, while also noting some of the possible loopholes in procedures.

The influence of Transparency International with its "islands of integrity" initiative, being developed in areas of Government activity that are particularly susceptible to corruption, for example revenue collection, is looked at in some detail. The approach proceeds from the fear that many of the pressures to engage in corruption arise from concerns that competitors will do so. It argues that if an island of integrity can be created by ensuring that a particular agency, department, segment of Government or transaction is not corrupt, then competitors can be secure in the knowledge that refraining from corrupt practices themselves will not put them at a disadvantage.

TOOL #17

Integrity pacts

Integrity pacts, as discussed in Tool #17, perform a similar function to islands of integrity, but are focused on specific contracts or transactions rather than ongoing institutional arrangements. An integrity pact consists of a contract in which the responsible Government office and other bidders or interested parties agree to refrain from corrupt practices. The agreement should include clear sanctions and remedies for all parties, including the possible referral of improprieties to law enforcement agencies.

TOOL #18

Reducing procedural complexity

The purpose of Tool #18 is to outline ways in which excessive administrative complexity, a major breeding ground for corruption, can be reduced. Tool #18 uses as an example the procedure for issuing a building permit. If user surveys

show that obtaining such a permit is overly time-consuming, the bureaucracy in question should be studied and lack of efficiency, excessive complexity and unpredictability of administrative procedures should be noted with a view to identifying and implementing administrative reforms. Tool #18 cautions that, in many cases, elements of complexity are generated by employee initiatives and that streamlining reforms are often met with internal resistance.

TOOL #19

Reducing and structuring discretion

Tool #19 sets out a method for structuring discretionary powers to ensure that they are limited only to what is necessary to a given administrative function. Excessive substantive and procedural discretion in the provision of public services reduces accountability and transparency, thereby creating conditions in which corruption can flourish. Structuring discretion to take account of rules and criteria for decision-making, transparency and effective review mechanisms will reduce opportunities for corruption but, as under Tool #18, changes in employee attitudes will be required and there may be vested interests opposed to reforms.

TOOL #20

Results- or fact-based management

Tool #20 deals with the concept of results-based management (RBM) to increase overall accountability and make it more difficult for corruption to thrive. Results-based management, also known as fact-based management sets clear goals for achievement as well as criteria and processes for assessing if goals have been achieved. Such systems therefore function as both a management system and as a performance-reporting system. Tool #20 sets out the conditions required before such a system can be instituted. For example, an RBM will be difficult to apply to occupations or structures in which performance is difficult to quantify. Tool #20 also warns that genuinely effective qualitative criteria, in other words a realistic assessment of the quality of the service provided, may be virtually impossible to produce or monitor for some public sector activities.

TOOL #21

The use of positive incentives to improve employee culture and motivation

Positive incentives can prevent or combat corruption in various ways. For example, adequate wages can pre-empt the need for an employee to seek "compensation" from other sources and can be linked to improvements in performance generally and in relation to anti-corruption measures. Tool #21 provides an overview of the types of incentives that can be offered as well as the linkages that should be made between incentives and other reforms. The linkages are important because the conferring of extra remuneration may be beyond the means of many developing countries without reducing the number of employees and thus requiring a smaller number of employees to perform the work more successfully. Employees must also be made aware of the desired outcome for individuals and organizations, which will require performance-related goals and ongoing assessment. The main challenges in this area is the

availability of financial resources to provide the positive incentives to carry out reforms. Such reforms may, sometimes, be supported by aid donors.

IV.SOCIALPREVENTION

TOOL #22 THROUGH TOOL #27

TOOL #22

Access to information

Increasing public access to information is a powerful mechanism of accountability, enabling civil society to oversee the State. Tool #22 discusses access-to-information laws and the four methods they use in enforcing transparency in Government: the requirement of a Government to publish an annual statement of its operations; a legally enforceable right of access to documented information; the right of an individual to amend any information relating to himself or herself that is incomplete or incorrect; and the establishment of independent bodies for appeal where access is denied. The need for confidentiality in certain matters does, however, entitle a Government to withhold certain information. Tool #22 states that the initial fear of Governments to provide information has proved groundless over two decades of successful practice and it is now recognized that the public has a "right to know". Various legislative initiatives will be required to supplement access-to-information laws. They are laid out in Tool #22.

TOOL #23

Mobilizing civil society through public education and awareness-raising

Tool #23 sets out the essentials of an awareness-raising programme and its desired impact. Empowering the public to oversee the State is an important aspect of anti-corruption programmes, as is building trust in the individual branches of Government: the executive, the legislative and the judiciary. Tool #23 describes how public trust can be won and subsequently managed in efforts against systemic corruption. New institutions, such as anti-corruption commissions, ombudsman offices and telephone "hot-lines" can provide citizens with easier access to credible new institutions for their grievances. The Internet can be used to raise awareness, its wide appeal, influence and use countering the attempts of totalitarian Governments to stifle information and news from outside sources. Governments should post their national integrity action plans, as well as survey and integrity workshop results, on the Internet to facilitate broad participation of interested parties in the discussions. Tool #23 does, however, caution that the Internet has less influence in poorer, developing countries and that printed media, radio and television are also important in reaching the public: advertisements in journals or magazines, posters, TV and radio public-awareness spots and leafleting in populous areas.

Tool #23 underlines the importance of public education. The public should learn not to pay bribes, to report corrupt incidents to the authorities, not to sell their vote, and to teach their children the right values. Tool #23 cites the experiences of the Independent Commission against Corruption of Hong Kong as a successful example of the use of the mass media as well as in-depth, face-to-face contact, as a means of combating corruption.

For any awareness-raising campaign to work effectively, there must, cautions Tool #23, be a political and financial commitment by the Government; and,

given that public attitudes are notably difficult to change, the efforts must also be long-term and consistent.

TOOL #24

Media training and investigative journalism

Journalists play a major role in interfacing between the Government and the people. The purpose of Tool #24 is to strengthen the credibility, integrity and capability of the media to provide unbiased and responsible broadcast of corruption cases and anti-corruption initiatives. Tool #24 outlines some of the critical issues involved in Government-media relations. They include: autonomy from Government interference; the possession of sufficient legal, technical, economic and other expertise to enable to assess anti-corruption efforts critically; adequate professional standards in place regarding professional competence and objectivity; access to as much of the population as possible; and building an information network about what Government bodies are active in the anti-corruption field. Attention must also be given to the risks and responsibilities involved in investigative journalism and ways of controlling the credibility of sources of information discussed. As Tool #24 makes clear, however, media training will be a wasted effort unless the media is free and independent of political influence and if access to information is not sufficiently guaranteed.

TOOL #25

Social control mechanisms

Tool #25 explains the concept behind social control boards, a mechanism that helps Governments work more efficiently and helps society participate more fully in building an environment where there is equitable and sustainable growth, leading to timely and cost-effective service delivery to the public.

Social control boards provide an mechanism that is external to the public service and that provide an additional incentive for public servants to comply with the law and follow Government policy. The boards are composed of specialized NGOs sitting side by side with Government representatives. Effectively, civil society is being incorporated into Government programmes and given a voice to express its concerns and needs. It is thus able to play a decisive role in bottom-up monitoring of the delineation and implementation of reforms, and in assessing their value.

Tool #25 discusses various initiatives implemented to drive sustainable socially driven anti-corruption reforms. Anti-corruption advocacy through creative mechanisms such as community meetings, street theatre, art and informal dialogue are being carried out alongside more formal interventions, such as the establishment of a network of Anti-Corruption Observatories developed under the aegis of the International Law and Economic Development Center at the University of Virginia School of Law. Civic projects using social control boards have been successfully implemented in Venezuela and Paraguay. They have empowered individuals, communities and Governments by disseminating information and promoting transparency in the public sector.

Tool #25 stresses that three approaches have been harnessed to drive the socially driven anti-corruption movement: decentralization with strong social

controls; high-level political will; and the introduction of enforceable internal and external checks and balances. A chart is provided showing the two-year percentage changes in perceived frequencies of corruption, effectiveness, access to institutions and user perceptions of administrative complexity at a municipality in Venezuela. Significant improvements in all factors are noted.

TOOL #26

Public complaints mechanisms

All persons, confronted with corrupt practices or maladministration, should have the means to complain about it, without suffering personal disadvantage. External mechanisms are possible, such as the office of the ombudsman. Internal reporting procedures are more complicated as there is a need to deal with potential dishonesty and the complicating factors of supervisory and personal relationships. It is thus essential for institutions to have well developed procedures in place to clarify what constitutes a reportable incident and what the correct reporting channels should be. Tool #26 makes the point that citizens must be kept informed about how and where to report corrupt behaviour and, for that purpose, it may be necessary to establish new channels or simplify existing ones.

TOOL #27

Citizens' charters

Tool #27 covers the concept of citizens' charters and shows how they operate in the United Kingdom. Citizens' charters set down standards regarding quality, timeliness, cost, integrity and coverage of public services as the standard that users can reasonably expect and against which performance should be measured. Charters must be published, as must performance. Charters must provide full and accurate information available in plain language about how the service is run; there must be regular consultation with users; standards are set for courtesy and helpfulness, and if things go wrong an apology and swift remedy must be supplied. Services must provide value for money.

An overview of citizens' charters in the United Kingdom is given, as well as their administration and complaints mechanisms. There are 40 national charters covering the public services in the United Kingdom, including the Patients' Charter, the Parents' Charter and the Passengers' Charter.

V. ENFORCEMENT

TOOL #28

Guidelines for successful investigations into corruption

For the law enforcement community, Tool #28 sets out some general guidelines for investigating corruption. It is important that officials or bodies responsible for investigating corruption should be independent or autonomous. Tool #28 explains the mechanics of functional independence for investigative and prosecutorial staff where they are carried out by non-judicial staff. The problem of *quis custodiet ipsos custodes?* (Who will watch the watchman?) applies in such instances as sufficient independence must be subject to sufficient oversight and accountability to prevent abuses creeping into the system. While it is important for anti-corruption investigators to interact with other agencies, where corruption is rife, complete autonomy is advisable.

Adequate resources and training must also be available for investigators, as well as specific skills and knowledge training.

As well as encouraging individuals to report instances of corruption, other methods of bringing it to light can be used, such as requiring public employees to make a periodic disclosure of their assets, and carrying out audits and inspections, including "sting" operations or other integrity-testing tactics. As Tool #28 points out, such operations, although effective, are undoubtedly effective and are a powerful instrument for deterring corruption and detecting and investigating offenders.

Electronic surveillance, search and seizure and other such investigative methods are also the subject of Tool #28. It is stressed that human rights safeguards usually prohibit their use unless there is substantial evidence that a crime has been committed, or is about to be. The use of forensic accounting to detect fraud or track illicit proceeds by examining financial records for unusual patterns or amounts is also covered, as used by auditors or by criminal investigators.

Tool #28 discusses the various legal remedies available when corruption is identified but points out that in some cases “corrupt” behaviour may not be an actual crime. Moreover, the available evidence may not support prosecution of an individual involved because the burden of proof in criminal cases is high. In some cases, it may be deemed not in the public interest to prosecute an offender for example where large numbers of offenders could be involved making the costs of litigation and incarceration prohibitive. Nevertheless, it is important to view criminal prosecution and punishment as one among many sanctions available.

Corruption investigations tend to be large, complex and expensive, thus there must be an efficient use of resources. One of the key aspects is the relationship investigators have with the media. If the transparency and credibility of the investigations is assured, for example, witnesses will be encouraged to come forward. Managing the security of investigations and investigators is also a critical function, not just to ensure safety of personnel but to prevent leakages of information and safeguard physical evidence.

The management of grand corruption cases or those with transnational aspects raise the challenge of recovering proceeds that have been transferred abroad

and to deal with delicate issues arising from allegations that senior officials are implicated.

Given the extent of corruption and the range of cases likely to exist, prioritizing which cases to pursue and what outcomes to seek will be necessary, involving the exercise of a great deal of discretion. Tool #28 lists the criteria that should be evaluated when proceeding to investigate corruption cases.

A range of investigative techniques that have proved highly effective in the investigation of widespread, large-scale corruption cases are provided by Tool #28.It is stressed here that various types of financial investigations into suspected corrupt individuals are often the most direct and successful method of proving criminal acts. Information on the factors that are likely to place an investigation at risk are outlined in Tool #28.

TOOL #29

Financial investigations and the monitoring of assets

Tool #29 deals with financial investigations that can be used as a starting point for further investigations or as back-up evidence for corruption allegations. Financial investigations aimed at targeting indicators of corruption, such as living beyond one's means, require expert use of available resources and careful consideration as to who will be targeted and why in order to conserve scarce resources. Thus, the likelihood of uncovering corruption should be borne in mind before beginning an investigation, as well as the potential scale. For example, investigators should direct available efforts towards reviewing disclosures by employees whose public duties expose them to a higher money value of bribes. Tool #29 reviews evaluation of key lifestyle indicators, the screening individuals under suspicion as well as those with whom they have strong ties, such as spouses and family members, and discusses alternative sources of information such as public registers and contracts. It also considers the difficulties of obtaining foreign assistance in identifying and recovering stolen assets if there is no mutual legal assistance treaty in place.

Some jurisdictions have now introduced measures that, in cases of suspected illegal enrichment, assigns the responsibility for providing satisfactory explanations as to the origins of the property to the official under scrutiny rather than to the prosecuting agency. Tool #29 stresses that national laws must, as a prerequisite, provide for comprehensive registration of assets and identification of their beneficial owners. Anonymity of ownership is, it states, the natural enemy of transparency and accountability and makes financial monitoring and investigation for the most part unfruitful.

TOOL #30

Integrity testing

Tool #30 provides a description of the activities that comprise integrity testing, a procedure used to determine whether or not a public servant or branch of Government engages in corrupt practices and thereby increases the perceived risk for corrupt officials of being detected.

Tool #30 gives an account of the significantly criticized "sting" type of operation, a very powerful tool against corruption but one that can cause "entrapment" if

the investigator oversteps the boundaries and does not act with the strictest discipline: that is, instead of just creating opportunities for a suspect to commit an offence the investigator actually offers an encouragement to him or her to do so.

Integrity testing can be targeted or random. It has been carried out in the London Metropolitan Police, the police force of Queensland, Australia, and in the New York Police Department. It has been shown not to be effective on a one-off basis. Follow-up must be performed to "clean up" an area of corruption.

TOOL #31

Electronic surveillance operations

Electronic surveillance encompasses all information gathering by use of electronic means, both covert activities such as wire-tapping, video recording or eavesdropping and consensual recording where at least one of the parties knows and has consented to the conversation or activity being recorded. The first option where the Government effectively spies on the parties with no knowledge or consent by any of the parties, is not well tolerated by the public who strongly believe in the right to privacy.

All Government wiretaps and eavesdropping should require a court order based on a detailed showing of probable cause. Tool #31 presents an example of the process usually required for obtaining court consent and the information an application should contain. The various determinations that need to be made by a judge prior to issuing a court order are also set out.

The concept of minimization, whereby law enforcement officers should limit interception of communications, where feasible, to the offences specified in the court order, is explained. The flexibility afforded to law enforcement officers by consensual recording operations, due to the collaborator being privy to information about the transaction in question, is also demonstrated in Tool #31.

VI. ANTI-CORRUPTION LEGISLATION

TOOL #32 THROUGH TOOL #38

TOOL #32

International and regional legal instruments

Tool #32 provides an overview of the international and regional instruments in place against corruption or containing anti-corruption provisions. They are:

United Nations instruments

- The United Nations Convention against Corruption
- The United Nations Convention against Transnational Organized Crime
- The United Nations International Code of Conduct for Public Officials
- The United Nations Declaration against Corruption and Bribery in International Commercial Transactions

Instruments and documents of the Organisation for Economic Co-operation and Development (OECD)

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- Revised Recommendations of the OECD Council on Combating Bribery in International Business Transactions
- Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials

Council of Europe Instruments and Documents

- Criminal Law Convention on Corruption (1998)
- Civil Law Convention on Corruption (1999)
- The Twenty Guiding Principles for the Fight Against Corruption (1997)
- Model Code of Conduct for Public Officials (2000)

European Union Instruments and Documents

- Convention of the European Union on the Protection of its Financial Interests (1995) and Protocols thereto (1996 and 1997)
- Convention of the European Union on the Fight against Corruption involving Officials of the European Community or officials of Member States (1997)
- Joint Action of 22 December 1998 on Corruption in the Private Sector by the Council of the European Union

Instruments and documents of the Organization of American States (OAS)

- Inter-American Convention against Corruption (1996)

TOOL #33

National legal instruments

With regard to the criminal law, Tool #33 considers the ways in which national laws deal with the sanctioning of corruption and related acts and the difficulties

of defining certain behaviours, such as favouritism, nepotism, conflict of interest and contributions to political parties as corruption and thus devising suitable sanctions against them. Even slush funds, created "off the books" to pay bribes is not necessarily illegal in many national legal systems. There is, however, an increasing tendency at national and international levels to criminalize the possession of unexplained wealth. Tool #33 also notes that legal persons, in particular corporate entities, often commit business and high-level corruption and many jurisdictions have developed normative solutions regarding their criminal liability.

The confiscation of the proceeds of crime is also discussed under Tool #33. Confiscation should be obligatory and where proceeds are unavailable, an equivalent value of the proceeds should be confiscated. Various national legislators have introduced provisions to ease the evidentiary requirements to establish the illicit origin of corrupt proceeds. Both the United Nations Convention against Transnational Organized Crime and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) provide useful models with respect to easing the burden of proof and shifting the onus of proving ownership of excessive wealth on to the beneficiary.

Money-laundering statutes contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. Identification of the true beneficiary in such cases can, however, be difficult as accounts are often anonymous. Tool #33 makes it clear that the onus should be on financial institutions not only to register all information regarding a client but to report all suspicious transactions. Bank secrecy laws and professional secrecy should be limited to allow more access to accounts and a greater possibility of confiscation.

Access-to-information legislation can also assist in uncovering corruption and administrative procedures give civil society a tool to challenge abuse of authority. In that regard, through the creation of judicially enforceable procedural administrative rights, the public can bring suits against political or bureaucratic abuses of power.

TOOL #34

Dealing with the past: amnesty and other alternatives

Granting amnesty offers a chance to make a fresh start. It helps to ensure compliance with newly created laws by removing the burden of the past and allowing everyone to concentrate on the present and future. In some jurisdictions amnesty is granted automatically in some cases to those who report a corrupt action. Broad amnesty can be declared when a new law takes effect or a new anti-corruption authority comes into being. Tool #34 makes the point, however, that exceptions to broad amnesty should be contemplated in cases where the crime is so offensive as to require investigation and prosecution regardless of the burdens thus imposed on a new anti-corruption authority.

Amnesty would carry certain responsibilities, such as a public admission of the act, identification of others involved in the offences and restoration of corruptly acquired monies and property into an integrity fund.

TOOL #35

Standards to prevent and control the laundering of corruption proceeds

The link between money-laundering and corruption goes deep, eroding and undermining financial systems. Various forums have noted that a comprehensive anti-corruption strategy must also contain provisions to prevent and control the laundering of corrupt proceeds, using preventive (regulatory) and sanction-oriented measures.

Regarding the regulatory approach, Tool #35 describes the "Know Your Customer" Rule that aims to prevent financial institutions doing business with unknown customers. It sets out the implications of the "due diligence" rules that have been promoted at the international and national levels for some time and urges revision of existing "Red Flag" catalogues under which financial institutions are obliged to pay special attention to all complex, unusual transactions. Bank personnel acting as whistleblowers should be accorded protection and non-complying institutions and operators should be identified.

Criminal law sanctions are also considered by Tool #35. In most legal systems, corruption has not yet been made a predicate offence to money-laundering. Tool #35 recommends that the issue be studied from a technical standpoint as it could be a crucial instrument for making large-scale transnational bribery more risky and costly. Other ways of strengthening efforts against corruption put forward in Tool #35 would be the introduction of minimum standards on international cooperation, criminalization of slush funds and the introduction of corporate criminal liability.

Various international forums have expressed concern that inadequate company regulations prevent the disclosure of the true identity of beneficiaries. Tool #35, while acknowledging that this area needs further study, urges that steps be taken to make the 40 Recommendations of the intergovernmental Financial Action Task Force, set up to combat money-laundering, enforceable through proper training, controls and sanctioning. At the international level there should be harmonized substantive standards for under-regulated financial centres, including listing and isolation of uncooperative jurisdictions.

TOOL #36

Legal provisions to facilitate the gathering and use of evidence in corruption cases.

Unlike most crimes, corruption offences usually have no obvious or complaining victim. Usually, those involved are beneficiaries having an interest in preserving secrecy. Tool #36 puts forward an argument for easing the burden of proof necessary to convict corrupt individuals and sets out a number of ways in which this may be achieved, such as increasing the significance of circumstantial evidence, criminalizing the possession of inexplicable wealth, confiscation of inexplicable wealth, instituting a property penalty and other measures to remove illegally earned goods, and allowing for civil or administrative confiscation or disciplinary action as an alternative to criminal proceedings. Tool #36 acknowledges, however, that such measures may be criticized for violating human.

TOOL #37
Whistleblower protection

The main purpose of whistleblower laws, as described under Tool #37, is to provide protection for those who, in good faith, report cases of maladministration, corruption and other illicit behaviour within their organization. Experience shows, however, that the existence of a law alone is not enough to instill trust into would-be whistleblowers. The law has to provide a mechanism that allows the institution to deal with the content of the message and not the messenger, even if the message of the whistleblower proves false or the whistleblower was breaking the law by breaching confidentiality. The only onus on the whistleblower should be that he or she acted in good faith and was not making false allegations. Thus protection should be accorded, as well as compensation should victimization or retaliation occur. It should also be made clear who to turn to report suspicions or offer evidence. To ensure effective implementation of whistleblower legislation, people or institutions that receive disclosures must be trained in dealing with whistleblowers to ensure that they last the distance during what, for many, can be a highly stressful, drawn-out and complex process.

TOOL #38
Service Delivery Surveys

Tool #38 covers service delivery surveys (SDS) which originate from a community-based, action research process developed in Latin America in the mid-1980s. Since then, these stakeholder information systems have been implemented in several countries.

The SDSs were designed to build capacity while accumulating accurate, detailed and "actionable" data rapidly and at low cost. Representative samples of communities are selected in which a baseline of service coverage, impact and costs is established via a household survey on use of services, levels of satisfaction, bribes paid and suggestions for change. Typically the production of actionable results from design stage to reporting takes 8 weeks. Tool #38 shows the impact of SDSs as a social audit process and as a way in which the Government and the governed can work as a partnership to produce and implement results-oriented development planning. SDSs effectively give the community a voice and reveal options for the achievement of goals rather than underscoring deficiencies.

There are certain challenges to measuring the impact of anti-corruption strategies. Data must be analysed by a competent institution; monitoring should never be an end in itself but should stimulate swift and effective application of findings into national policies and legislation. They should also be accompanied by targeted assistance programmes as many countries will lack financial, human and technical resources needed to implement what all agree are "best practices". Nevertheless, the utility of data collection is shown in the fact that the public is now far more aware of the levels, types, causes and remedies of corruption and thus the accountability of the State towards its public has been increased.

VII. MONITORING AND EVALUATION

TOOL #39 THROUGH TOOL #40

TOOL #39

United Nations country assessment

United Nations country assessments are described under Tool #39. The assessments aim to produce a clear and coherent picture of the condition of a country with respect to the levels, locations, types and cost of corruption; the causes of corruption and the remedies for corruption. Tool #39 provides a description of the methodology used and the advantages of such assessments.

TOOL #40

Mirror statistics as an investigative and preventive tool

The purpose of Tool #40 is to uncover the levels of corruption by assessing secondary indicators such as the extent of the grey sector of an economy which includes such commodities as illegally imported cigarettes, liquor and such items. The link between the grey economy and corruption is important as corrupt practices usually "enable" the inflow and outflow of resources to and from this sector. Tool #40 describes two methods to estimate the size of the grey economy by using mirror statistics and shows how information thus obtained can be used as an investigative tool and as a preventive tool.

TOOL #41

Measurable performance indicators for the judiciary

Tool #41 gives an account of the aims and the achievements of the first Federal Judicial Integrity and Capacity meeting held to initiate an evidence-based approach to the reform of the judiciary in Nigeria. Having agree to reform objectives, the meeting identified key reform measures and measurable performance indicators, allowing the establishment of a baseline against which progress could be measured.

VIII. INTERNATIONAL JUDICIAL COOPERATION

TOOL# 42 THROUGH TOOL #43

TOOL #42

Extradition

Tool #42 gives an overview of extradition, extraditable offences, bars to extradition and the procedural issues concerned.

TOOL #43

Mutual legal assistance

Mutual legal assistance is an international cooperation process by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases and in tracing, freezing, seizing and ultimately confiscating criminally derived wealth.

Tool #43 gives an overview of a United Nations expert working group meeting at Vienna in December 2001 to facilitate the providing of effective mutual legal assistance. The meeting is synopsized under the following headings:

- Enhancing the effectiveness of mutual legal assistance treaties and legislation;
- Strengthening the effectiveness of central authorities;
- Ensuring awareness of national legal requirements and best practices;
- Expediting cooperation through use of alternatives, when appropriate;
- Maximizing effectiveness through direct personal contact between central authorities of requesting and requested States;
- Preparing effective requests for mutual legal assistance;
- Eliminating or reducing impediments to the execution of requests in the requested State;
- Making use of modern technology to expedite transmission of requests
- Making use of the most modern mechanisms for providing mutual legal assistance;
- Maximizing availability and use of resources; and
- Role of the United Nations in facilitating effective mutual legal assistance.

IX. REPATRIATION OF ILLEGAL FUNDS

TOOL #44

Recovery of illegal funds

Illegal funds can vary from kickbacks through extortion to the looting of the national treasury and diversion of aid money. Repatriation of such assets have become a pressing concern for many States affected by the large-scale illegal transfer of funds by corrupt political leaders, their friends and associates. Repatriation success has, however, been very limited so far.

Tool #44 looks at some of the reasons hindering repatriation, including a lack of political will in the victim country; lack of an effective legal framework within countries whose assets have been diverted; insufficient technical expertise to

prepare the groundwork at the national level, such as filing charges against offenders; any specialized technical expertise there is being mainly limited to expensive private lawyers who have no interest in building national capacity; reluctance of victim States to improve their national institutional framework which may result in even further looting.

Tool #44 shows how the United Nations Convention on Transnational Organized Crime, currently under consideration for ratification, will provide some solutions to such problems. The only problem is that it does not make the returning of assets mandatory, thus this may remain problematical, especially where the proceeds of corruption are involved. Tool #44 recommends that countries hesitant to seek repatriation of assets because they fear that they will become prey to corrupt practices again should devote some of their returned assets to strengthening the national institutional and legal framework

CASE STUDIES

Listing of individual case studies

CHAPTER II

ASSESSMENT OF THE NATURE AND EXTENT OF CORRUPTION

TOOL #1

ASSESSMENT OF THE NATURE AND EXTENT OF CORRUPTION

Tool #1 is used to provide quantitative measurements of the extent of corruption in a country or within specific sectors of a country. It also provides qualitative assessments of the types of corruption that are prevalent, how corruption occurs and what may be causing or contributing to it.
Tool #1 will generally be used prior to the development of the national anti-corruption strategy:

- In the preliminary phase, to assist with the development of the national anti-corruption strategy, to help set priorities, to make a preliminary estimate of how long the strategy will last and to determine the resources required to implement it. The preliminary assessment should cover all sectors of the public administration and, if necessary, the private sector, to ensure no detail is overlooked. The data gathered at this stage will be the baseline against which future progress will be assessed.
- In the follow-up phase, to help assess progress against the baseline data gathered at the preliminary stage, to provide periodic information about the implementation of strategic elements and their effects on corruption, and to help decide how strategic elements/priorities can be adapted in the face of strategic successes and failures.
- To help in setting clear and reasonable objectives for the strategy and each of its elements, and measurable performance indicators for those objectives.
- To raise the awareness of key stakeholders and the public of the true nature, extent and impact of corruption. Awareness-raising will help foster understanding of the anti-corruption strategy, mobilize support for anti-corruption measures and encourage and empower populations to expect and insist on high standards of public service integrity and performance.
- To provide the basis of assistance to other countries in their efforts against corruption.

TYPES OF DATA TO BE SOUGHT

- **Information about where corruption is occurring.**

  Such information may include the identification of particular public or private sector activities, institutions or relationships. Data are often gathered about particular Government agencies, for example, or about

relationships or processes, such as public service employment or the making of contracts for goods or services.

- **Information about what types of corruption are occurring.**

  While an overall assessment of what types of corruption are prevalent may be undertaken, a more detailed focus will be usually involved on what types of corruption tend to occur in each specific agency, relationship or process for which corruption has been identified as a problem. Research may show that bribery is a major problem in Government contracting, for example, while public service appointments may be more affected by nepotism.

- **Information about the costs and effects of corruption.**

  Understanding the relative effects of corruption is critical to setting priorities and mobilizing support for anti-corruption efforts. Where possible, information should include the direct, economic costs plus an assessment of indirect and intangible human consequences.

- **Factors that contribute to or are associated with corruption.**

  There is seldom a single identifiable cause of a particular occurrence of corruption but a number of contributing factors will usually be identifiable. They often include factors such as poverty or the low social and economic status of public officials that makes them more susceptible to bribery; the presence of specific corrupting influences, such as organized crime; or structural factors, such as overly broad discretionary powers and a general lack of monitoring and accountability. Information about such factors is critical to understanding the nature of the corruption itself and to formulating countermeasures. The presence of known contributing factors may also lead researchers or investigators to identify previously unknown or unsuspected occurrences of corruption.

- **The subjective perception of corruption by those involved or affected by it.**

  All assessments of corruption should include objective measurements (of what is actually occurring) and subjective assessments (of how those involved perceive or understand what is occurring). The information is needed because the reactions of people to anti-corruption efforts will be governed by their own perceptions. The following specific areas should be researched:

  - The impressions of those involved (offenders, victims and others) about the types of corruption occurring;
  - The impressions of those involved about relevant rules and standards of conduct, and whether corruption is in breach of those standards;
  - The impressions of those involved about the actual impact or effects of the corruption; and
  - The views of those involved as to what should be done about corruption and which of the available remedies may prove effective or ineffective in their particular circumstances.

METHODS OF GATHERING DATA

Corruption is, by its nature, a covert activity. It makes accurate information hard to obtain and gives many of those involved a motive for distorting or falsifying any information they do provide. To obtain an accurate assessment, therefore, it is essential to obtain information from as many sources as possible and to ensure diversity in the sources and methods used. That enables biases or errors due to falsification, sampling or other problems to be identified and either taken into account or eliminated. The major techniques for gathering information include:

Desk Review.

An early step is usually to gather as much data as possible from pre-existing sources: previous research or assessments by academics, interest groups, public officials, auditors-general or ombudsmen, as well as information from media reports.

Surveys.

Conducting surveys is an important means of assessment. Surveys gather information from responses to written questionnaires or verbal interviews. They may be directed at general populations or be samples specifically chosen for comparison with other samples. They may gather objective data (for example, the nature or frequency of occurrences of corruption known to the respondent) or subjective data (the views, perceptions or opinions of the respondent).

A wide range of data can be obtained about the types, nature, extent and locations of corruption, the effectiveness of efforts against it and the public perceptions of all of those. Considerable expertise is needed, however, to gather valid data and to interpret them correctly.

When conducting a survey, it is important to choose representative samples of the population, as the nature of the sample is a major factor in assessing the survey results. A general public survey may show that only a small part of the population has experienced public sector corruption; a sample selected from among those who have had some contact with the Government or a particular governmental area or process, such as employment or contracting, may produce a different result. Results of samples from Government insiders may also differ from samples based on outsiders.

The comparison of data taken from different samples is one valuable element of such research but comparisons can be valid only if the samples were correctly selected and identified in the first place. For general public surveys, care must be taken to sample all sectors of the population. A common error is to oversample urban areas, where people are more accessible at a lower cost, and to undersample rural or remote populations. Valid results will not be yielded if the reality or perception of corruption is different in urban and rural areas. Samples selected more narrowly, for example by asking the users to comment on a particular service, must also ensure that a full range of service-users is approached. Anonymity and confidentiality are also important; corrupt officials will not provide information if they fear disciplinary or criminal sanctions, and many victims may also fear retaliation if they provide information.

The formulation of survey instruments is critical. Questions must be drafted in a way that can be understood by all those to be surveyed, regardless of background or educational level. The question must be understood in the same way by all survey respondents. In cases where many respondents are illiterate or deemed unlikely to respond to a written questionnaire, telephone or personal interviews are often used. In such cases, it is essential to train interviewers to ensure that they all ask the same questions using the same terminology.

Focus Groups.

Another diagnostic technique used in country assessments is focus groups, whereby targeted interest groups in Government and society hold in-depth discussion sessions. The technique usually produces qualitative rather than quantitative assessments, including detailed information concerning views on corruption, precipitating causes of corruption and valuable ideas on how the Government can combat it. Specific agendas for focus groups can be set in advance, or developed individually, either as the group starts its work or by advance consultations with the participants. Focus groups can also be used to generate preliminary assessments as the basis of further research, but should not be the only method used for such assessments. A focus group of judges may well be useful in developing research into corruption in the legal or criminal justice system, for example, but others, such as law enforcement personnel, prosecutors or court officials, may yield different results.

Case Studies.

Following basic quantitative and qualitative assessments that identify the extent of corruption and where it is occurring, case studies can be used to provide more detailed qualitative information. Specific occurrences of corruption are identified and examined in detail to identify the type of corruption involved, exactly how it occurred, who was involved and in what manner, what impact the occurrence had, what was done as a result, and the impact of any action taken. Information is usually gathered by interviewing those involved, although other sources, such as court documents or reports, may also be used if reliable. Case studies are particularly useful in assessing the process of corruption and the relationships that exist between participants, observers and others, as well as between causal or contributing factors. They are also useful in educating officials and members of the public about corruption. As with other areas of research, care in the selection or sampling of cases is important. Cases may be chosen as "typical" examples of a particular problem, for example, or attempts may be made to identify a series of cases that exemplify the full range of a particular problem or of corruption in general.

Field Observation.

Observers can be sent to monitor specific activities directly. If they are well trained, they can obtain very detailed information. Field observation, however, is too expensive and time-consuming to permit its widespread use; it is usually limited to the follow-up of other, more general, methods and to detailed examinations of particular problem areas.

Field observers can be directed to gather and report information about any aspect of the activity being observed, and this can generate data not available using the majority of other methods, for example the speed, efficiency or courtesy with which public servants interact with the public. In one recent example, as part of a comprehensive assessment of judicial integrity and capacity in Nigeria, field observers attended courts and reported on whether they were adjourning on time and how many hours a day they were actually sitting.

In many cases, it can be difficult to distinguish between the use of observers, whose function is simply to gather data for research purposes, and investigative operations, the function of which is to identify wrongdoers and gather the evidence needed for prosecution or discipline. That is particularly true where observers are working under cover or anonymously, which will often be the case so as to ensure that their presence does not influence the conduct they are observing. Officials working in countries where constitutional or legal constraints apply to criminal investigations should bear in mind that constraints may apply to covert or anonymous observation or may operate to prevent the use of information thus obtained against offenders in any subsequent prosecution. Observers should also be given appropriate rules or guidelines governing whether or when to notify law enforcement agencies if serious wrongdoing is observed.

Professional assessment of legal and other provisions and practices

In most countries, criminal and administrative law provisions intended to prevent, deter or control corruption already exist and range from criminal offences to breaches of professional codes of conduct or standards of practice. The most important of these usually include: criminal offences, such as bribery; public service rules, such as those governing disclosure and conflict of interest; and the regulations and practices of key professionals, such as lawyers and accountants. Other sectors, such as the medical or engineering professions and the insurance industry, may also have codes or standards containing elements relevant to efforts against corruption. An assessment of those, conducted and compiled by researchers who are professionally qualified but independent of the sectors or bodies under review, can be conducted. Where appropriate, professional bodies can also be requested to review and report.

Reviews should be compiled to generate a complete inventory of anti-corruption measures that can then be used for the following purposes:

- Comparison of each individual sector with the inventory to determine whether elements present in other sectors are absent and, if so, whether they should be added;
- Comparison of parallel or similar rules adopted by different sectors to determine which is the most effective and to advise improvements to others;
- Survey of members of the profession and their clients, once the measures have been identified, to assess their views as to whether each measure was effective, and if not, why not; and
- Identification of gaps and inconsistencies and their closure or reconciliation.

The entire legislative anti-corruption framework should be assessed which will require some initial consideration of which laws could or might be used against corruption and how. Such an assessment will include:

- Criminal laws including the relevant offences; elements of criminal procedure; laws governing the liability of public officials, and as well as laws governing the tracing and seizure of the proceeds of corruption and, where applicable, other property used to commit or in connection with such offences;
- Elements treated as regulatory or administrative law by most countries, including relevant public service standards and practices and regulations governing key functions, such as the operation of the financial services sector (for example, banking and the public trading of stocks, securities and commodities), the employment of public servants and the making of Government contracts for goods and services;
- Other areas of law, including legislation governing court procedures and the substantive and procedural rules governing the use of civil litigation as a means of seeking redress for malfeasance or negligence attributable to corruption; and
- Any area of professional practice governed by established rules, whether enacted by the State or adopted by the profession itself, may also be open to internal or external review. Critical areas include the legal and accounting professions and subgroups, such as judges and prosecutors; but other self-governing professional or quasi-professional bodies may also be worth examining. It should be noted that the primary purpose of such examination is not necessarily to identify corruption but to assess what measures have been developed against it, so that they can be used as the basis of reforms for other professions, or to identify and deal with inconsistencies or gaps.

Assessment of institutions and institutional relationships.

Most of the assessment of institutions and institutional relationships will involve consideration of their capacity or potential capacity to fight corruption (Tool #2). They should also be assessed to determine the nature and extent of corruption within each, as well as in the context of the relationships between them. The assessment should include public agencies and institutions as well as relevant elements of civil society, including the media, academe, professional bodies and relevant interest groups. The methods set out under Tool #1 can be used for this purpose.

PRECONDITIONS AND RISKS

The major risks associated with assessment are that data obtained will be inaccurate, or that they will be misinterpreted, leading to the development of inappropriate anti-corruption strategies or to incorrect conclusions about progress against corruption, both of which represent a serious threat. If initial strategies are too conservative, a country can fall short of its potential in dealing with corruption and, if they are too ambitious, the strategies are likely to fail. If populations are convinced that the national strategy is not working, either because it was too ambitious or because the data used to assess

progress are not valid, compliance with anti-corruption measures will decline, leading to further erosion of the strategy.

The methods for gathering, analysing and reporting data and conclusions must therefore be rigorous and transparent. Not only must the assessments be valid, but they must be perceived to be valid by independent experts and by the population as a whole.

TOOL #2

ASSESSMENT OF INSTITUTIONAL CAPABILITIES AND RESPONSES TO CORRUPTION

Tool #2 deals with the assessment of institutions. Its aims are:

- To determine the potential of each institution to participate, at the outset, in the anti-corruption strategy; and
- To measure the degree of success achieved at each stage to determine the role each institution could or should be called upon to play in subsequent stages.

Institutional assessment is also important for the development of strategies and the setting of priorities. In many areas, it will overlap with the assessment described in Tool #1. For example, an assessment of judges or courts showing high levels of institutional corruption using Tool #1 would also, in most cases, indicate that the potential of judges to fight corruption was relatively low. That could, in turn, lead to giving the reform of the judiciary a high priority in the early stages of the strategy. Elements of the strategy depending heavily on the rule of law and impartial judges and courts would have to be deferred until a further assessment showed the judiciary had developed sufficient capacity against corruption.

DETERMINING WHICH INSTITUTIONS REQUIRE ASSESSMENT, AND SETTING PRIORITIES

The broad and pervasive nature of corruption may require that virtually every public institution, as well as many elements of civil society and the private sector, should be assessed at some point. To conserve resources, however, and maintain a relatively focused national strategy, priorities must be set.

In many cases, determining which institutions should be given priority in the assessment process will depend on factors individual to the country involved. Those factors may vary over time, particularly if the strategy is relatively successful. Indeed, periodic reassessment may show that institutions have progressed from being part of the problem of corruption to becoming part of the solution. Alternatively, the assessments may raise warnings that previously corruption-free institutions are coming under pressure from corrupt influences displaced from areas where anti-corruption efforts have been successful. In assessing the roles to be played by various institutions, therefore, it is important to consider their existing or potential roles in the major areas, (social, political, economic, legal and other), in which anti-corruption efforts are generally required. In most countries, that will include the following areas:

Assessment

Reliable assessment, as set out in Tool #1 and Tool #2, will be needed at the beginning of and at various points during the anti-corruption process. Those

public and private sector institutions that gather statistical and other information from original sources will need to be involved, as well as those that compile and analyse information obtained from other sources. Where the assessment suggests that such institutions are unreliable, the establishment of specific, dedicated agencies may be necessary.

Prevention

Many institutions can be called upon to play a role in corruption prevention. Some elements of the criminal justice system can be classified as preventive, for example, those handling prosecutions and those charged with imprisoning or removing from office individuals convicted of corruption. More generally, institutions such as schools, universities and religious institutions, can play a role in awareness-raising and mobilizing moral and utilitarian arguments against corruption. Social and economic institutions can play a similar role, as well as developing and implementing institutional, structural and cultural measures to combat corruption in their own dealings.

Reaction

Reactive roles are generally those assigned to the criminal justice system and to institutions with parallel or analogous civil functions, in other words any institution charged with detecting, investigating, prosecuting and punishing corruption and recovering the corrupt proceeds. In many countries, non-criminal justice institutions deal with matters such as the setting of integrity and other relevant standards, the discharge or discipline of those who fail to meet them and the recovery of proceeds or damages through civil litigation.

In general, assessment and reforms will, as a matter of priority, focus on public sector institutions and their functions. The nature of corruption, however, and the reluctance of populations to fully trust public officials and institutions in environments where corruption is a serious problem will provide elements of civil society with an important role in monitoring public affairs and anti-corruption efforts and in providing accurate and credible information to validate (or invalidate) those efforts.

A similar process of assessment in respect of the relevant civil society elements or institutions should therefore be undertaken with particular focus on the media, academia, professional bodies and other relevant interest groups. The assessment of each element will usually include consideration of what roles it is already playing or could be playing in efforts against corruption, its capacity to fulfill that role, and the relationship between each element and other elements of Government and civil society.

Consideration of the media, for example, may include an assessment of the types of media present (computer networks video, radio, print media) and their availability to various segments of the society (literacy rates, access to radios, televisions and computers); the role being played by each medium in identifying corruption; the capacity of each to expand that role; as well as other relevant factors, such as the ability of the media to gain access to the information needed to review and assess Government activities.

The institutions or agencies that perform one or more of these functions will usually include the following:

- **Political institutions**, such as political parties (whether in power or not), and the partisan political elements of Government;
- **Legislative institutions**, including elements of the legislature and public service that develop, adopt or enact and implement constitutional, statutory, regulatory and other rules or standards of a legislative nature;
- **Judicial institutions,** including judges at all levels, quasi-judicial officials and those who provide input or support to judicial proceedings, such as prosecutors and other lawyers, court officers, witnesses, law enforcement and other investigative personnel;
- **Criminal justice institutions**, including those responsible for investigation, prosecution, punishment and assessment of crime;
- Other **institutions with specific anti-corruption responsibilities**, such as auditors, inspectors and ombudsmen;
- **Civil society institutions**, in particular those involved in transparency, such as the media; in the setting of standards, such as professional bodies; and in assessment or analysis, such as academic institutions; and,
- **Private sector institutions**, in particular those identified as susceptible to corruption, such as Government contractors, and those who provide oversight, such as private auditors.

Assessment of institutions and institutional relationships.

Once specific institutions have been identified, they should be assessed both individually and in the context of their relationships with other institutions and relevant extrinsic factors. The overall assessment of the potential role of judges, for example, may be affected not only by their degree of professional competence and freedom from corruption but also by the competence and integrity of prosecutors and court personnel. The nature of the legislation judges will have to apply in corruption cases will also affect the role they play.

The primary purpose of assessment using Tool #2 is to determine the potential capacity of each institution to act against corruption. Inevitably, however, that will be linked to the assessment, using Tool #1, of the nature and extent of corruption within the institution and linked entities. Judges cannot be relied upon to combat corruption if they themselves, or those they depend upon, such as court officials or prosecutors, are corrupt. In such cases, a finding using Tool #1 that corruption is present in an institution would normally suggest that reform of that institution should be a priority. Until reforms are in place, the potential of the institution to combat corruption elsewhere will be relatively limited.

The major objectives of institutional assessment include the following:

- The drawing up, within each institution, of an analysis of strengths and weaknesses to form the basis of a strategy and action plan for anti-corruption efforts within the institution. The individual plans, thus elaborated, can be compared and harmonized across the full range of institutions.

- Within each institution, identification of specific areas of corruption and/or areas at risk of corruption.
- Development of a complete inventory of institutions and agencies. The inventory would include a brief outline of the establishment and mandate of each institution and the responsibilities each has in corruption-related efforts. It would be used to make institutions aware of their mutual existence and roles which, in turn, would facilitate cooperation and coordination of mandates and activities.
- An assessment of the mandates and activities of each institution to identify and to address gaps or inconsistencies. Consideration could then be given to enhancing mandates or resources in areas identified as weak or under-resourced.

Methods of gathering data or information for use in assessing institutions

The data-collection methodology for assessing the potential roles of institutions is essentially the same as that used for assessing the extent of corruption (Tool #1), and many of the same caveats apply.

To obtain an accurate assessment, information must be obtained from a diversity of sources and methods to allow biases or errors, due to falsification, sampling or other factors, to be identified and either taken into account or eliminated. As institutions rather than individuals are being assessed, there may be a greater reliance on subjective assessments of whether an institution is functioning effectively or not, for example, the opinions of those served by the institution, those who work in it or other interested parties. The required procedural mechanisms, for example that statistics or other records be kept or specific incidents or occurrences reported, can be incorporated into institutional rules. In many cases, such a requirement amounts to asking the institution to compile and assess data about itself. Thus safeguards against manipulation or falsification may be required in some cases.

As with Tool #1, it is important to survey representative samples of the population, as the nature of the sample is a major factor in assessing the survey results. For example, a general public survey may show that only a small part of the population has experienced public sector corruption, while a sample selected from people who have had contact with the Government or particular facets of Government, such as employment or contracting, may produce a different result. Results of samples from within Government may also differ those based on outsiders.

The comparison of data taken from different samples is a valuable element of research but such comparisons can be valid only if the samples were correctly selected and identified in the first place. For general public surveys, care must be taken to sample all sectors of the population. A common error is to oversample urban areas, where people are more accessible at a lower cost, and to undersample rural or remote populations. Valid results will not be yielded if the reality or perception of corruption is different in urban and rural areas. Samples selected more narrowly, for example by asking the users to comment on a particular service, must also ensure that a full range of service-users is approached. Anonymity and confidentiality are also important; corrupt officials will not provide information if they fear disciplinary or criminal

sanctions, and many victims may also fear retaliation if they provide information.

The formulation of survey instruments is also critical. Questions must be drafted in a way that can be understood by all of those to be surveyed, regardless of background or educational level, and that will be understood in the same way by all survey respondents. In cases where many respondents are illiterate or deemed unlikely to respond to a written questionnaire, telephone or personal interviews are often used and, in such cases, it is essential to train interviewers to ensure that all are asking the same questions using the same terminology. The main techniques for gathering information include the following.

Desk Review.

An early step is usually to gather as much data as possible from pre-existing sources: previous research or assessments by academics, interest groups, public officials, auditors-general or ombudsmen, as well as information from media reports.

Surveys.

Surveys gather information from responses to written questionnaires or verbal interviews. They may be directed at general populations or be samples specifically chosen for comparison with other samples. They may gather objective data (for example, the nature or frequency of occurrences of corruption known to the respondent) or subjective data (the views, perceptions or opinions of respondents). A wide range of data can be obtained about the types, nature, extent and locations of corruption, the effectiveness of efforts against it and the public perceptions of all of those. Considerable expertise is needed, however, to gather valid data and to interpret them correctly.

When conducting a survey, it is important to choose representative samples of the population as the nature of the sample is a major factor in assessing the survey results. Where a particular institution is assessed, those surveyed must be selected on the basis of having information that is being sought about the institution. In many cases, questions or doubts may arise about the size of the sample and possible inherent bias factors. The smaller the number of people with the requisite information, the less reliable the sample becomes, and the easier it is for the results to be influenced or biased by extrinsic factors unrelated to the assessment. For example, if four persons convicted of homicide by a particular judge in a given year have a negative opinion of the judge, that may have more to do with the fact of their conviction than with the competence of the judge. If a large number of offenders convicted over a long period of time make allegations of corruption, and the allegations are corroborated by survey results from other groups, such as accused offenders who were acquitted, defence lawyers and prosecutors, a much more reliable indicator of what actually occurred would be provided.

The comparison of data taken from different samples is one valuable element of such research but comparisons can be valid only if the samples were correctly selected and identified in the first place. For surveys used to compare institutions, care must be taken to sample similar or equivalent sectors of the population for each institution. The two most common groups

will be those who work within each institution and those served by it, but other interested parties may also be surveyed where available. Samples of the users of a particular service must also ensure that a full range of service users is approached. Anonymity and confidentiality are also important: corrupt officials will not provide information if they fear disciplinary or criminal sanctions, and many victims may also fear retaliation if they provide information.

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Focus Groups.

Another diagnostic technique used in country assessments is the use of focus groups, whereby targeted interest groups in government and society hold in-depth discussion sessions. This technique generally produces qualitative rather than quantitative assessments, including detailed information concerning views on corruption, precipitating causes and valuable ideas on how the institutions concerned can fight it. Specific agendas for focus groups can be set in advance, which allows more direct comparison of the results from a series of groups, or developed individually, either as the group starts its work or by advance consultation with the participants.

Case Studies.

Case studies involve the close examination of actual or typical cases of corruption, and are therefore more useful in surveying the nature and extent of corruption (see Tool #1) than the real or potential capabilities of institutions to combat it. Finished case studies are, however, useful tools in conjunction with other methods, such as focus groups, to illustrate to participants the true nature of corruption and stimulate creative discussion and ideas about how they and the institutions they represent could contribute anti-corruption efforts.

Field observation.

Field observation is also primarily used to assess the nature and extent of corruption (see Tool #1). It can also be used to assess institutional capability, as long as trained observers are used. The observers can be used to present problems calculated to test such matters as the knowledge and resourcefulness of officials or the adequacy of technical facilities. In extreme situations, this can become "integrity testing", in which officials are offered corrupt opportunities to ascertain whether they will accept corrupt practice; in such cases, however, the purpose would be to assess the overall quality of

the institution rather than identify and prosecute or discipline corrupt individuals[54]

In many cases, it can be difficult to distinguish between the use of observers, whose function is simply to gather data for research purposes, and investigative operations, the function of which is to identify wrongdoers and gather the evidence needed for prosecution or discipline. That is particularly true where the observers are covert or anonymous, which will often be the case to ensure that their presence does not influence the conduct they are observing. Officials working in countries where constitutional or legal constraints apply to criminal investigations should bear in mind that constraints may apply to covert or anonymous observation or may operate to prevent the use of information so obtained against offenders in any subsequent prosecution. Observers should also be given appropriate rules or guidelines governing whether or when to notify law enforcement agencies if serious wrongdoing is observed.

Professional assessment of legal and other provisions and procedures.

Most countries already have criminal and administrative law provisions intended to prevent, deter or control corruption. They range from criminal offences to professional codes of conduct or standards of practice. They are not "institutions", per se, but will often need to be assessed where they are the product of institutions, for example, the laws made by a particular legislature or regulatory body, or where substantive laws, procedural laws and institutional practices are so closely linked as to make combined assessment necessary.

Thus, an assessment of the courts would have to include an assessment of the legal procedures for establishing courts, appointing judges and day-to-day court administration. It would also usually include a review of the laws establishing criminal procedure and, to the extent that they are used to identify and seek redress for corruption, both civil procedure and administrative law rules. Apart from law-making and law enforcement rules and institutions, the external or self-regulatory elements of some key professions, such as those governing the practice of law and accounting, should be evaluated, as should the codes of conduct governing other professions, insofar as they deal with corruption and allied areas.

From a legislative standpoint, the entire legal anti-corruption framework should be assessed, requiring an initial consideration of which laws could or might be used against corruption and how. Such an assessment will include:

- Criminal laws including the relevant offences; elements of criminal procedure; laws governing the liability of public officials, and as well as laws governing the tracing and seizure of the proceeds of corruption and, where applicable, other property used in connection with such offences;
- Elements treated as regulatory or administrative law by most countries, including relevant public service standards and practices and

[54] Integrity testing is an effective way to determine whether targeted individuals are corrupt, but raises some concerns about selectivity and potential abuses of power, as well as legal concerns about entrapment in systems where this imposes a limit on investigation or prosecution. For details, see "Integrity testing", Tool #30.

regulations governing key functions, such as the operation of the financial services sector (for example, banking and the public trading of stocks, securities and commodities), the employment of public servants and the making of Government contracts for goods and services; and

- Other areas of law, including legislation governing court procedures and the substantive and procedural rules governing the use of civil litigation as a means of seeking redress for malfeasance or negligence attributable to corruption.

Any area of professional practice governed by established rules, whether enacted by the State or adopted by the profession itself, may also be open to internal or external review. Critical areas include the legal and accounting professions and subgroups, such as judges and prosecutors; but other self-governing professional or quasi-professional bodies may also be worth examining. It should be noted that the primary purpose of such examination is not necessarily to identify corruption but to assess what measures have been developed against corruption, so that they can be used as the basis of reforms for other professions, or to identify and deal with inconsistencies or gaps.

There should be a review of specific laws against corruption, as well as of institutions and anti-corruption measures taken by them, so that a complete institutional inventory can be compiled. The inventory can be used as follows:

- To comprehensively review legislation in order to identify provisions that can be used effectively as part of the initial anti-corruption strategy, as well as areas of deficiency requiring amendment or the addition of new measures. International legal instruments and the model laws and practices of other countries may provide assistance in identifying deficiencies and suggesting areas and methods of law reform.
- To assess each institution or sector individually against the inventory. If the institution lacks anti-corruption elements that are present in other sectors, a decision can be taken as to whether those “new” elements should be taken on board.
- To allow parallel or similar rules adopted by different institutions to be compared and the most effective identified. That will assist in advising improvements to other institutions.
- Once the anti-corruption measures of an institution have been identified, surveys of their “clients” can take place to ascertain if the measures have been effective and, if not, why not.
- Gaps and inconsistencies in anti-corruption measures can be identified and reconciled or closed.

CHAPTER III
INSTITUTION BUILDING

A BROAD CONCEPT OF "INSTITUTION BUILDING". TOOL #3 THROUGH TOOL #13

It is generally accepted that institutional changes will form an important part of most national anti-corruption strategies. Elements of institution-building are found in most if not all of the international treaties, plans of action and specific development projects which deal either with corruption or more general topics such as good governance.[55] As many factors related to institutional cultures and structures influence the levels and types of corruption that occur, institutional reforms may be used to try to counteract or reduce such influences. Reforms may include the introduction[56] of elements of accountability into organizations, the de-layering or simplification of operations to reduce errors and opportunities to conceal corruption, as well as more fundamental reforms seeking to change the attitudes and beliefs of those who work in an institution. In some cases, institutions may be completely eliminated or restructured for a fresh start, or completely new institutions may be created.

In the past, institution building has focused on the creation or expansion of institutions and the technical skills needed to operate them. In many cases, results have fallen short of expectations because the attitudes and behaviour that supported or condoned corruption were carried forward into the new

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[55] Much of the 2003 United Nations Convention against Corruption can be seen as institution-building in some form, particularly in the broad sense used in this Tool Kit. Of particular importance are Chapter II, Articles 5-13, which deal with prevention, in many cases by strengthening public- and private-sector institutions and training those who work in them, and Article 60, subparagraph 1(d), which calls for technical assistance in evaluating and strengthening institutions. Articles 6 and 36 deal with the establishment of specific anti-corruption bodies within the prevention and law enforcement sectors, Article 63 establishes a Conference of States Parties to deal with international issues arising under the Convention, and Article 62 calls for countries in a position to do so to make voluntary contributions to the work of various institutions, either through the United Nations Office on Drugs and Crime, or in direct bilateral assistance. Other international initiatives addressing this issue include: the United Nations Convention Against Transnational Organized Crime (2000), Article 9 (requiring Parties to provide anti-corruption authorities with adequate independence to deter inappropriate influence on their actions); the Council of Europe Criminal Law Convention on Corruption (1998), Article 20 (establishing specialized anti-corruption authorities); the Organisation of American States' Inter-American Convention Against Corruption (1996), Article III (preventative measures); the Global Forum on Fighting Corruption's Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials (1999) and the United Nations Convention against Corruption. See also Plans of acion for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, GA/RES/56/261, Annex, Plan II, Action against corruption, subparagraphs 7(d) and (e).

[56] With respect to recent relevant international initiatives addressing this issue, see e.g., the United Nations Convention Against Transnational Organized Crime (2000), Article 9 (requiring Parties to provide anti-corruption authorities with adequate independence to deter inappropriate influence on their actions); the Council of Europe Criminal Law Convention on Corruption (1998), Article 20 (establishing specialized anti-corruption authorities); the Organisation of American States' Inter-American Convention Against Corruption (1996), Article III (preventative measures); the Global Forum on Fighting Corruption's Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials (1999) and the United Nations Convention against Corruption

institutions. It is now accepted that reforms must deal not only with institutions but also with the individuals who work in them. There is also a need for results-based leadership that promotes and applies integrity, accountability, transparency, as well as a general acceptance of the mind-set, beliefs and customs that favour integrity over corruption.

Thus, a broader concept of institution building has now been adopted by many donors and organizations. Donors now work as facilitators with clients to establish standards and ground rules for public service leaders. Integrity has become a critical consideration for administrators when filling civil service positions and for voters when comparing candidates for elected or political office. Integrity is now promoted through any means possible, including the introduction of leadership codes, codes of conduct, declarations and monitoring of personal assets, and transparency in political administration.

The realization that institutions are interrelated and that reforms must often be coordinated has also led to an expansion of the meaning of "institution" and of the list of institutions commonly included in anti-corruption strategies. While much of the focus remains on key elements of public administration, including financial agencies, the court system, prosecutorial law enforcement and other criminal justice agencies, as well as bodies that deal with public service staffing and the procurement of goods and services, it is now understood that other institutions of government and civil society require attention as well. Many of the same fundamental principles apply to institutions of all sizes and at all levels of Government.

Mechanisms for greater transparency in public administration are much more effective if accompanied by the development of an independent, vigilant media equipped with sufficient expertise and resources to review and assess the information available and ensure that it is disseminated among the population. Similarly, rule-of-law and legal accountability reforms require not only reforms to legislation and the institutional practices of government but also the development of an independent and capable private legal profession to provide legal advice and conduct litigation.

The target group at which institution-building reforms are directed must also be widened to include all parts of society interested in creating and maintaining national integrity. The focus of donor attention has traditionally been public administration institutions. The new approach requires coordinated elements to address stakeholders extrinsic to those institutions but whose participation and support are nevertheless necessary if effective reforms are to take place. In constructing overall strategies, institutional reforms can be grouped into "pillars of integrity" (see Figure 1) that are mutually supportive and include elements from government and elements of civil society.

Key public-sector groups that must usually be included in such strategies are the executive and legislative branches of Government at the national, regional and local levels; the judicial branch and its supporting institutions; key "watchdog" agencies, such as auditors or inspectors; and law enforcement agencies and other elements of criminal justice systems.

From the private sector, there should also be inclusion of the media, relevant academic individuals and institutions, and other organizations, such as trade unions, professional associations and general or specific interest groups, who

play a vital role in promoting integrity and ensuring transparency and accountability.

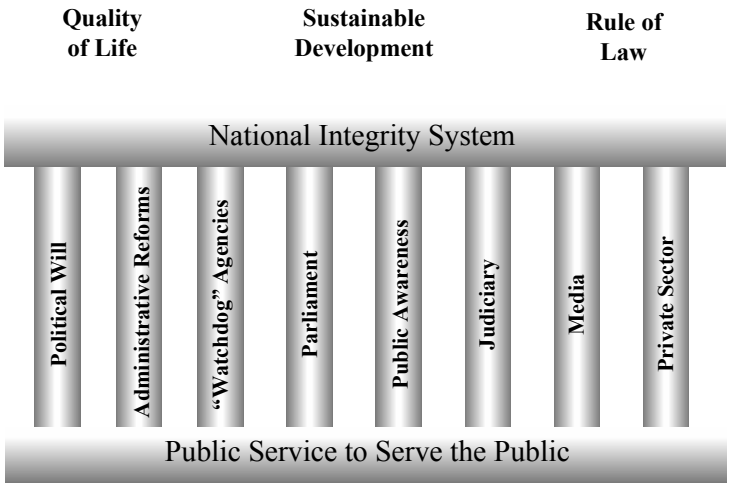

Figure 1: The Pillars of Integrity

The final pillar is the general population itself; public awareness of reforms and expectations of the standards set by those reforms ultimately hold the reformers and the institutions accountable for the success or failure of programmes

The following diagram illustrates some of the key "pillars" that may need to be incorporated into institution-building projects[57]

As with the pillars of a physical building, the pillars of integrity are interdependent. A weakening of one pillar will result in an increased load being shifted on to the others. The success or failure of the overall structure will thus depend on the ability of each element to support the loads expected of it. If several pillars weaken collectively, or if any one pillar weakens to an extent that cannot be compensated for by the others, the entire structure will fail.

Developing a successful anti-corruption structure requires an assessment of the demands made on each of the elements, of the strengths and weaknesses of each element, and of how these relate to the strengths and weaknesses of other elements. Attention may then be focused on setting priorities and addressing significant weaknesses. In the 15 countries that have so far embraced the reform efforts of the U.N. Global Programme against Corruption, inadequate rule-of-law elements have been seen as a critical area that has undermined the effectiveness of other reforms. Rule-of-law reforms are also viewed by most as a major priority because the necessary legal and judicial skills and expertise cannot simply be imported. They take time, in most cases 10 to 15 years, to produce.

[57] Petter Langseth, Rick Stapenhurst, and Jeremy Pope.(1997), The Role of a National Integrity System in Fighting Corruption. Washington, D.C.: EDI Working Papers Series, World Bank, based on earlier work by Ibriahim Seushi.

THE MECHANICS OF INSTITUTION BUILDING

A number of measures may be applied to establish new structures or to reform existing ones. As noted previously, it will usually be necessary to bring about not only formal structural changes but also changes in attitude and support for reforms on the part of the individuals who make up those institutions, and in many cases, those who do business with them as well.

Formal structural changes may require legislative changes to statutes or delegated legislation, and will virtually always require administrative reforms. In some areas, such as the independence of judicial offices, even reforms to constitutions or fundamental laws may be required. Legislation may be used to create, staff and fund new institutions. Existing institutions established by statute will generally require amendments to implement fairly fundamental reforms or to abolish them. The administrative rules and procedures under which an institution operates on a daily basis may be based on delegated legislation, in which the ultimate legislative power delegates the authority to make and amend operational rules, within established constraints, to an individual or body established for that purpose. As the legislature itself need not participate, this allows a greater degree of expertise and specialization in rule making, and provides flexibility for making amendments.

Both statutes and delegated legislation are relatively amenable to anti-corruption reforms. It is important for legislatures and political party structures to be supportive of anti-corruption initiatives in general and educated with respect to the specific amendments proposed. Given the long-term nature of such initiatives, multi-partisan support is also important.

Delegated legislative authorities can be appointed to operate under the oversight of the legislature where more detailed technical knowledge of corruption is needed. Essentially, the legislature is called upon to decide to combat corruption, to set general principles, and to enact key provisions, such as statutes creating anti-corruption authorities or establishing criminal offences and punishments. Delegated authorities are then called upon, in the context of each institution, to consider how best to implement reforms in each institution, to create the necessary rules and, periodically, to review and amend them.

In many cases, the problem will be to obtain the necessary degree of understanding, support and commitment for the reforms on the part of those who work in the institutions and the outsiders with whom they deal. Legislative anti-corruption reforms must be accompanied by campaigns to train and educate workers about the nature of corruption, the harm it causes and need for reform, as well as the mechanics of the reforms being proposed. Since those who profit from corruption lack positive incentives to change their behaviour, elements of surveillance and deterrence will also usually be needed.

It will also be important to ensure that any restructuring is kept as simple and straightforward as possible. Overly complex structures tend to create further opportunities for corruption. Complexity also makes new procedures more difficult to learn and may provoke resistance from officials who see them as an obstacle to the performance of their duties. Reforming institutional cultures also requires time as those accustomed to the old values come to understand and adopt new ones.

Reform programmes must seek to accomplish change as quickly as possible, and incorporate as many incentives for change as possible. Nevertheless, objectives and expectations must be reasonable. The pace of change should not be forced to the point where it triggers a backlash. Where anti-corruption reforms are developed in reaction to high-profile corruption, scandals or other major public events that generate political pressure to act quickly, a moderate pace of reform may conflict with political agendas.

JUDICIAL INSTITUTIONS

The reform or rebuilding of judicial institutions is often identified as a major priority in anti-corruption strategies. Judicial independence is ia necessary condition for the effective rule of law and is commonly understood to require independence from undue influence by non-judicial elements of Government or the State. In practice, however, true judicial independence requires the insulation of judicial affairs from all external influences.

The process of interpreting law and resolving disputes before the courts involves a carefully structured process in which evidence is screened for reliability and probative value, presented in a forum in which it can be tested through such means as the cross-examination of witnesses and used in support of transparent legal arguments from all interested parties. Such a process ensures basic diligence, quality and consistency in judicial decision-making, and inspires public confidence in the outcomes.

intimidation on the part of law enforcement officials or prosecutors, and such privileges may also shield corrupt judges. If a judge is criminally prosecuted, it may be very difficult to ensure that he/she is tried fairly.

Any strategy for the reform of judicial institutions should be carefully considered in light of the state of judicial independence in a country and the specific constitutional, legal and conventional measures used to protect it. Before anti-corruption reforms are instituted, it may be necessary to ensure that basic judicial independence is in place and operating effectively. In many cases, the prime considerations will be the selection, training and appointment of judges. Judicial candidates should be carefully investigated and screened to identify any incidents of past corruption; judicial training before elevation to the bench and for serving judges, should emphasize anti-corruption aspects. Ongoing freedom from any sign of corruption should also be an essential criterion for promotion to senior judicial positions. Only thus will it be possible to ensure the integrity of the appeal process and that senior appellate courts are in a position to pass judgment on corruption cases involving more junior judges.

The extensive autonomy enjoyed by judges also makes efforts to change their mind-set or culture a critical element of judicial institution building. Truly independent judges are virtually immune from most of the anti-corruption safeguards that the State can develop, leaving only the internalization of anti-corruption attitudes and values as an effective control. Conversely, a well trained, competent and corruption-free judiciary, once established, makes possible a high degree of judicial independence. That can be critical to the promotion of other rule-of-law reforms and to the use of the law as an instrument for implementing not only anti-corruption measures but reforms in all areas of public administration. Finally, the high status of judges within

public administration makes them a vital example for other officials. Judges who cannot be corrupted inspire and compel corruption-free conduct in society as a whole.

INSTITUTION BUILDING IN LOCAL AND REGIONAL GOVERNMENTS

In most countries, to be effective against corruption, reforms at different levels of government must be developed and integrated. Virtually all countries have separate structures for the administration of central government and local communities, and those with federal constitutional structures also have regional, provincial or state governments. Such governments have varying degrees of autonomy or even sovereignty with respect to the central government and, in many cases, are based on distinct formal or informal political structures. They can pose challenges for the development and implementation of anti-corruption strategies. "Top-down" reforms developed for central government institutions take longest to reach local governments. In many cases, however, it is the reform of local government institutions, delivering basic services, that will make the greatest difference for average people. Locally, political agendas may be quite different from those at central government level and may also vary from one community to the next. Such factors must be taken into account to secure local participation and cooperation. Adapting and promoting anti-corruption measures will often need to be done village by village, preferably with the participation of local people and taking local values into account.

The corruption of judicial institutions frustrates all those mechanisms, allowing judicial decisions to be based on improper influences and untested assertions. It also denies litigants basic fairness and the right to equality before the law. The ultimate result is inconsistent, ad hoc decision-making, a lack of public credibility and, in systems based on judge-made law, poor legal precedents.

Judicial corruption also greatly reduces the usefulness of judicial institutions in combating corruption itself. The courts are essential not only to the prosecution and punishment of corruption offenders, but also to other accountability structures, such as the civil litigation process (for unsuccessful contract or job applicants), as well as the judicial review of anti-corruption measures and agencies themselves. All such elements are rendered ineffective, or even counter-productive, if the judges themselves or their supporting institutions are corrupt.

The reform of judicial institutions is rendered more difficult and complex by many of the very structures that are intended to ensure the independence of judges from corrupt or other undue influences. Judicial independence and security of judicial tenure generally make the discharge or discipline of corrupt judges very difficult, if not impossible. Many countries also extend some degree of legal immunity to judges to prevent domination or intimidation on the part of law enforcement officials or prosecutors, and such privileges may also shield corrupt judges. If a judge is criminally prosecuted, it may be very difficult to ensure that he or she is tried fairly.

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In most countries, to be effective against corruption, reforms at different levels of Government must be developed and integrated. Virtually all countries have separate structures for the administration of central government and local communities, and those with federal constitutional structures also have regional, provincial or state governments. Such governments have varying degrees of autonomy or even sovereignty with respect to the central government and, in many cases, are based on distinct formal or informal political structures. They can pose challenges for the development and implementation of anti-corruption strategies. "Top-down" reforms developed for central government institutions take longest to reach local governments. In many cases, however, it is the reform of local government institutions, delivering basic services, that will make the greatest difference for average people. Locally, political agendas may be quite different from those at central government level and may also vary from one community to the next. Such

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[58] Many sources have set out what are seen as requirements for judicial independence, and as this is generally seen as a matter for more general rule of law reforms than anti-corruption strategies, it is not discussed in detail here. See, for example, "Basic Principles on the Independence of the Judiciary", Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF/121/22/rev.1, UN Sales # E.86.IV.1, Part I.D.2, reprinted in United Nations: Compilation of International Instruments, Vol.1 Part 1 and International Commission of Jurists, Declaration of Delhi (1959), reprinted in The Rule of Law and Human Rights: Principles and Definitions (I.C.J., Geneva, 1966). See also Nemetz, N.T., "The concept of an independent judiciary" (1986) 20 U. of British Columbia L. Rev. pp.285-96, Rosenn, K.S., "The protection of judicial independence in Latin America", (1983) 19 U. Miami L. Rev, pp.1-35, and Stevens, R. Independence of the Judiciary: The View From the Lord Chancellor's Office (1993), reprinted at (1993) see also (1988) 8 Oxford J. of Leg. Stud. pp.222-48.

factors must be taken into account to secure local participation and cooperation. Adapting and promoting anti-corruption measures will often need to be done village by village, preferably with the participation of local people and taking local values into account.

Failure to deal with corruption at all levels in a coordinated manner will, at best, result in reforms that are only partly effective and, at worst, in the displacement of corrupt activity away from levels where effective controls and countermeasures are in place. For example, a corrupt company, unable to bribe legislative officials to produce the legislation it desires, may resort to bribing local officials to ensure the legislation it opposes is not enforced.

Local government in developing countries is increasingly run by elected officials. Greater decentralization has also opened up opportunities for citizen participation in decision-making at the local level. As a result, this "first generation" of democratic leadership is being required to carry out key government functions, such as construction and maintenance of basic infrastructure, delivery of basic services and provision of social services. Thus, access to additional resources for local governments, compatible with an increased level of responsibility, do require institutional safeguards to assure integrity. As that occurs, good governance practices should be deepened and strengthened through transparent decision-making mechanisms that are open to citizen participation.

TOOL #3

SPECIALIZED ANTI-CORRUPTION AGENCIES

Anti-corruption strategies will usually have to consider whether to establish a separate institution or institution such as an anti-corruption agency (ACA) to deal exclusively with corruption problems, whether to modify or adapt existing institutions, or some combination of both. A number of legal, policy, resource and other factors should be considered in this regard.

The United Nations Convention against Corrruption requires the establishment of such agencies, unless they already exist in some form, in two specific areas:
preventative anti-corruption bodies (Article 6) and bodies specialized in combating corruption through law enforcement (Article 36).Whether this requires two separate bodies is left to the discretion of governments: the agreed notes for the *Travaux Preparatoires* specify that State Parties may establish or use the same body to meet the requirements of both provisions. [59]

In implementing the Convention and their national strategies, countries will need to consider whether to establish new entities, whether existing ones will meet the requirements, with or without modifications, and whether the most effective approach will involve a single centralized entity or the establishment of separate ones. In doing so, they should also bear in mind that the Convention sets minimum standards only[60] and that the most important considerations will be the effectiveness of the bodies in the context on domestic laws, procedures and practices.

A number of legal, policy, resource and other factors should be considered in establishing specialized anti-corruption agencies.

THE MAJOR ADVANTAGES OF A SEPARATE ANTI-CORRUPTION INSTITUTION ARE:

- A high degree of specialization and expertise can be achieved;
- A high degree of autonomy can be established to insulate the institution from corruption and other undue influences;
- The institution will be separate from the agencies and departments that it will be responsible for investigating;
- A completely new institution enjoys a "fresh start", free from corruption and other problems that may be present in existing institutions,
- It has greater public credibility,
- It can be afforded better security protection;
- It will have greater political, legal and public accountability;

[59] A/58/422/Add.1, paras. 11 and 39.
[60] See Article 65, paragraphs 2 regarding the freedom to apply measures which are “more strict or severe” than those required by the Convention itself.

- There will be greater clarity in the assessment of its progress, successes and failures; and
- There will be faster action against corruption. Task-specific resources will be used and officials will not be subject to the competing priorities of general law enforcement, audit and similar agencies.

THE MAJOR DISADVANTAGES OF A SEPARATE ANTI-CORRUPTION INSTITUTION ARE:

- Greater administrative costs;
- Isolation, barriers and rivalries between the institution and those with which it will need to cooperate, such as law enforcement officers, prosecution officials, auditors and inspectors; and
- The possible reduction in perceived status of existing structures that are excluded from the new institution.

From a political standpoint, the establishment of a specialized institution or agency sends a signal that the government takes anti-corruption efforts seriously. A separate agency may, however, generate competing political pressures from groups seeking similar priority for other crime-related initiatives. It may also be vulnerable to attempts to marginalize it or reduce its effectiveness by under-funding or inadequate reporting structures.[61] Generally speaking, the dividing up or fragmentation of law enforcement and other functions will reduce efficiency. On the plus side, an ACA will incorporate an additional safeguard against corruption in that it will be placed in a position to monitor the conventional law-enforcement community and, should the agency itself be corrupted, vice versa. The legislative and managerial challenge in this area is to allow just enough redundancy, and even rivalry, to expose corruption if the primary ACA fails to do so. There should not, however, be so much duplication allowed that the flow of intelligence becomes reduced or the investigative and prosecutorial opportunities available to the primary authority is diminished.

Dedicated anti-corruption institutions are more likely to be established where corruption is, or is perceived, to be so widespread that existing institutions cannot be adapted to develop and implement the necessary reforms. In most cases, if the established criminal justice system is able to handle the problem of corruption, the disadvantages of creating a specialized agency will outweigh the advantages. Many of the advantages, such as specialization, expertise and even the necessary degree of autonomy can be achieved by establishing dedicated units within existing law-enforcement agencies. That results in fewer disadvantages in the coordination of anti-corruption efforts with other law enforcement cases.

[61] Note that both Articles 6 and 36 of the United Nations Convention against Corruption both explicitly require the allocation of adequate resources and what both refer to as the "necessary independence", underscoring the importance of these requirements.

ENSURING THE INDEPENDENCE OF SPECIALIZED AGENCIES

Where a completely independent agency must be established, the necessary degree of autonomy can usually be achieved only by statutory enactment or, in some cases, even constitutional reforms. Fundamental rule-of-law principles, such as judicial independence, are often constitutionally based although, in many countries, the aim of reforms is more likely to be ensuring satisfactory interpretation and application of existing constitutional rules than adopting new ones. While anti-corruption agencies may not be considered as judicial in nature, where corruption is sufficiently serious and pervasive to require the establishment of a specialized institution, something approaching accepted standards for the independence of judicial or prosecutorial functions may be required [62]. They may include:

- Constitutional, statutory or other entrenched mandates[63];
- Security of tenure for senior officials;
- Multi-partisan and public review of key appointments, reports and other affairs of the agency;
- Security and independence of budgets and adequate resources;
- Exclusivity or priority of jurisdiction or powers to investigate and prosecute corruption cases and the power, subject only to appropriate judicial review, to determine which cases involve sufficient elements of corruption to invoke this jurisdiction; and,
- Appropriate immunity against civil litigation.

MANDATES OF SPECIALIZED ANTI-CORRUPTION AGENCIES

The exact mandate of a specialized ACA will depend on many factors, not least:

- The nature and extent of the corruption problem;
- The external or international obligations of a country to establish such an agency or agencies;[64]
- Whether the agency is intended as a permanent or temporary measure;

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[62] Many sources have set out what are seen as requirements for judicial independence. See, for example, "Basic Principles on the Independence of the Judiciary", Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF/121/22/rev.1, UN Sales # E.86.IV.1, Part I.D.2, reprinted in United Nations: Compilation of International Instruments, Vol.1 Part 1 and International Commission of Jurists, Declaration of Delhi (1959), reprinted in The Rule of Law and Human Rights: Principles and Definitions (I.C.J., Geneva, 1966). Examples may also be found in the independence granted to some other critical governance functions such as ombudsmen, electoral commissions and independent auditors or financial regulators.

[63] An "entrenched" mandate is one which is established by law and protected by amending procedures which are more difficult than for ordinary legislation, such as time-delays, special majority (e.g., 2/3) votes or additional legislative deliberations.

[64] The major obligation of this type is the requirement established by Articles 6 and 36 of the United Nations Convention against Corruption, but requirements may also be found in other treaties or other arrangements such as contractual agreements to perform specific business dealings in an “island of integrity “environment. See Tool #7, Integrity Pacts and related case studies for examples.

- The mandates of other relevant entities involved in areas such as policy-making, legislative change, law enforcement and prosecution;
- The management and regulation of the public service; and
- Whether the mandate is intended to deal with corruption at all levels (i.e. central, regional and municipal or local) of government.

SUBSTANTIVE ELEMENTS OF SPECIALIZED ANTI-CORRUPTION AGENCIES COULD INCLUDE:

An investigative and initial prosecutorial function.[65]

When a country is emerging from a systemically corrupt environment or corruption in which high-level officials are implicated, the ACA may be the only agency willing to investigate and prosecute or the only body with sufficient independence to do so successfully. Where the existing prosecution service is functioning properly, a separate prosecution mandate may not be required, although the ACA should be able to refer or recommend appropriate cases for prosecution. The exercise of prosecutorial discretion is itself susceptible to corruption and will require safeguards wherever it is vested.

An educational and awareness-raising function.

An established ACA has the information needed to play an important role in educating the public about corruption. Transparency about specific cases of corruption is essential to establishing the credibility of anti-corruption efforts, both for deterrence purposes and as a measure of success. More general education about the true costs and extent of corruption is needed to mobilize popular support for the anti-corruption strategy itself.

An analysis, policy-making and legislative function.

A major element of anti-corruption strategies is the ability to take account of lessons learned and use them to modify the strategy as it proceeds. The ACA will have the necessary information, and should have the necessary expertise, to analyse it and recommend reforms. The ACA should be authorized to make such recommendations to both administrative and legislative bodies, publicly if necessary.

A preventive function.

Apart from basic deterrence and education measures, the ACA should be in a position to develop, propose and, where appropriate, implement preventive measures. For example, it could be granted the power to review and comment on preventive measures developed by other departments or agencies.

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[65] The United Nations Convention against Corruption envisages a simpler structure, comprising specialized agencies only in the areas of law-enforcement (Article 36) and prevention but includes all of the same substantive elements by treating, in general terms, everything other than enforcement and prosecution as forms of prevention.

TOOL #4

THE OMBUDSMAN

The term "ombudsman" derives from the office of the Justitieombudsmannen, created by the Swedish Parliament in 1809 to "supervise the observance of statutes and regulations by the courts and by public officials and employees". The concept has since been taken up by many countries and has been adapted to national or local requirements. Ombudsmen usually consist of individuals or agencies with very general powers that allow them to receive and consider a wide range of complaints not clearly falling within the jurisdiction of other more structured forums, such as law courts or administrative bodies. Ombudsmen fulfill several important functions.

- They provide a means for obtaining an impartial and independent investigation of complaints against Government agencies and their employees. Such informal procedures are usually used to avoid the limitations of other mechanisms, such as legal proceedings, which are out of financial reach for some complainants and impracticable for relatively minor complaints.
- They educate Government insiders about appropriate standards of conduct and serve as a mechanism whereby the appropriateness of established codes or service standards can be considered and, if necessary, adjusted.
- They raise awareness among the population about their rights to prompt, efficient and honest public services; they provide remedies in some cases and help to identify more appropriate forums in others.

ROLE OF THE OMBUDSMAN IN ANTI-CORRUPTION PROGRAMMES

The general nature of the office and the variations established in different countries raise a wide variety of possible roles for the ombudsman. Such roles may depend on the extent to which other similar official bodies exist and are effective. The existence of more structured administrative bodies to which unfavourable decisions can be appealed will divert a portion of the case load away from the ombudsman. Generally, in countries with effective rule-of-law frameworks and well developed alternatives, the ombudsman will focus on cases that fall between the jurisdictions of other bodies or those too small to warrant the costs of making a more formal complaint. In countries where such bodies are lacking or inadequate, the ombudsman may play a much broader role, dealing with more serious cases and larger volumes. Ombudsmen should not be seen as an alternative to more formal proceedings, but they may function as a "stop gap", dealing with corruption cases in the early stages of anti-corruption programmes while other forums are being established.

The mandates of ombudsmen generally go beyond corruption cases, and include incidents of maladministration attributable to incompetence, bias, error or indifference that are not necessarily corrupt. That can be an advantage, as the complainant in many cases will not know of or suspect the presence of corruption. The ombudsman can determine that and, if necessary, refer the matter to an anti-corruption agency or prosecutor for further action. As noted, the informality of ombudsman structures also permits them to be used in

relatively minor cases where legal proceedings would not be feasible. Ombudsmen also generally have powers to fashion a suitable remedy for the complainant, which is often not the case with criminal proceedings. The ombudsman process is usually complaint-driven, which limits its usefulness in tackling corruption and in generating research or policy-related information. Some ombudsmen do, however, compile reports analysing their caseloads or have powers to make general recommendations to Governments in circumstances where complaint patterns suggest that there is some deeper institutional, structural or other problem.

In some countries, ombudsmen have taken a more proactive role in studying the efficiency and operational policies of public institutions in an effort to prevent occurrences of injustice, incivility or inefficiency. As with other functions, the breadth of their role in each country may depend on whether other agencies, such as Auditors-General or Inspectors-General, have been established to monitor various aspects of governance and make recommendations for reform. Where this is not done by other agencies, ombudsmen may perform functions such as making recommendations or proposals to Government departments or making public reports and recommendations. Their functions can also include monitoring the observance of leadership codes and investigating complaints of corruption. In some countries, several specialized ombudsman rather than a single national ombudsman, exist, each being responsible for different private and governmental operations, such as health and legal services, police, defence forces, societies, insurance, pensions and investments.

MANDATES AND FUNCTIONS

As with other watchdog bodies, ombudsmen require a sufficient degree of independence and autonomy to ensure that their enquiries and findings cannot be compromised and that they will enjoy public credibility.

- Mandates should be broad enough to ensure that ombudsmen can consider complaints that do not come within the purview of other forums, such as law courts or administrative tribunals. Indeed, overlap with other forums should be avoided as much as possible. Ombudsmen should not be empowered to consider major cases within the jurisdiction of other bodies. In minor cases, complainants should have a choice between the ombudsman and other proceedings. Mandates should also prevent the ombudsman from being used as an unofficial appeal or for reconsideration of matters already dealt with by other bodies. Since ombudsmen will receive a wide range of cases, they should also be mandated and trained to refer cases to other forums where appropriate.
- Ombudsmen should have the power to fashion remedies for complainants where possible, especially in cases where alternative forums lack such powers. Such remedies could include overturning decisions or referring them to the original decision-maker for reconsideration.
- The extent to which ombudsmen may also generate policy or make general recommendations for reform may depend on the mandates of other bodies in each country, but the following could be considered:

Jurisdiction.

Ombudsmen should have relatively broad jurisdiction in terms of what types of maladministration (including corruption) they may investigate and what institutions of Government they may investigate.

Adequate investigative powers.

Ombudsmen require adequate investigative powers and access to all institutions, persons and documents they consider necessary for the performance of their functions.

Transparency.

Ombudsmen should conduct investigations informally, openly and in a non-adversarial manner. They must expeditiously publish findings from investigations and corrective recommendations in addition to reporting to parliament.

Integrity.

The ombudsman and members of his or her office have essentially the same integrity requirements as those applicable to anti-corruption agencies. A high level of integrity for individual staff members and procedures is required to ensure the validity of results and the credibility of the office.

Public accessibility.

The public must have free, direct and informal access to the ombudsman without introduction or assistance.

Resources.

Ombudsmen must be provided with adequate staff and resources to ensure that their functions can be discharged competently, with due diligence, within a reasonable period of time, and in a manner apparent to the general population. One problem often confronting ombudsmen and the Governments that establish their offices is unexpectedly large case loads, due to the general nature of the mandate combined with inadequate resources and staff. In such cases, even if the office is seen as having integrity, it will not have credibility, either as a complaints mechanism or an element of the national anti-corruption programme.

PRECONDITIONS AND RISKS

Lack of coordination with other agencies.

A country may recognize that fighting corruption requires more than merely enforcing the laws, and may thus adopt a strategy that involves elements of prevention and public education. That may still not be successful, however, if elements of the strategy are not bound together in a coordinated effort. The relatively broad, general mandates of ombudsmen, and the tendency to use them to fill gaps between other mechanisms that perform monitoring and accountability functions or create remedies, makes coordination particularly important in the area of prevention and public education.

Unrealistic aims and expectations.

The broad mandates and easy accessibility of ombudsmen generally limit them to relatively minor matters, with more serious enquiries assigned to better resourced and more powerful entities, such as law enforcement or

specialized anti-corruption agencies. Public expectations about the extent of enquiries that ombudsmen can conduct and the types of remedies they can create and enforce must be carefully managed. Information and mandate materials should set a high standard for ombudsmen without creating unrealistic expectations.

The establishment and use of ombudsmen and similar institutions in international organizations or activities

Unfortunately, cases of corruption or maladministration in international projects, such as the movement and housing of refugees, the delivery of food aid and the management of major international aid projects, have become all too common. The international aspects of the organizations and activities involved represent unique challenges, and ombudsmen can be just effective as an element of anti-corruption strategies in such cases as at the national level.

While efforts have been made to establish appropriate legal and regulatory frameworks for the administration of organizations such as the United Nations, they are seldom as extensive and well equipped as the legislative and enforcement structures of individual countries. The nature of international organizations and programmes also often results in a complex web of interlocking and overlapping jurisdictions with respect to corruption-related subject matter, and that can reduce the effectiveness of countermeasures. The extremely broad range of subject matter and the interplay of different languages, cultures, legal traditions and other factors can also pose challenges for anti-corruption efforts. The impact of all such factors may be reduced to some degree by using ombudsmen or similar officials with broad jurisdiction to hear complaints, fashion remedies or refer matters to other, more appropriate bodies.

Broadly speaking, international ombudsmen could be established in two situations.

1 **By international organizations,** such as the United Nations, as part of their internal management and governance structures. In such cases, an ombudsman would receive complaints from employees and outsiders, potentially dealing with subject matter ranging from internal management issues, such as staffing or the promotion of employees, to complaints or concerns with respect to how the organization executes its various mandates. A key function of an ombudsman here would be to receive and account for a very wide range of complaints, referring many of them to more appropriate bodies or officials.

2 **By individual agencies or organizations** involved in specific projects or programmes of an international nature. In that case, the jurisdiction of the ombudsman can be much more narrowly focused. The aid agency of a donor Government, for example, would probably have existing structures for complaints or concerns at home and rely on an ombudsman only as a means of dealing with complaints generated in the countries where it is active. Such an ombudsman may be established as an ongoing operation or established on a project-by-project basis, as needed. Further mandates for a project ombudsman may arise from the specific nature of the project itself and

knowledge of the exact country or countries where the project is to be conducted.

OMBUDSMEN IN INTERNATIONAL ORGANIZATIONS

Ombudsmen in international organizations would have the following characteristics, in addition to those applicable to all ombudsmen.

1. Offices would be established and mandated by the international equivalent of legislation, preferably with some degree of entrenchment. In the case of the United Nations, for example, a treaty provision, adopted by the General Assembly, ratified by Member States and only amendable by the action of States Parties to the treaty, may be preferable to an ordinary resolution of the General Assembly.
2. Mandates would generally focus on areas of external complaint about the functions of the organization itself. Individual complaints would, however, be received from insiders concerned about the delivery of services and outsiders affected by maladministration or other problems as recipients of the services or observers from civil society.
3. Mandates could also include the review of complaints about internal matters, such as staffing and other management practices, depending on the extent of previously established internal accountability and oversight structures. Where such structures exist, their mandates and procedures, and those of the ombudsman, should be reconciled to avoid duplication of effort and possible inconsistencies.
4. As with other investigative or "watchdog" functions, ombudsmen would require some investigative powers, for example to interview staff and others, and gain access to documents. Employees should be required to cooperate with ombudsmen.
5. To help ensure credibility and independence, ombudsmen or their oversight bodies should ensure some degree of participation by outsiders, such as representatives of the civil societies of countries where the organization is active.
    - Basic transparency should be preserved by requiring open, public reports to the political governing body at regular intervals, for example in the case of the United Nations, the General Assembly.
    - The selection mechanism for the ombudsman requires careful consideration. The office-holder would need to enjoy widespread trust and respect, and be known internationally for his or her personal integrity and professional competence. Sufficient understanding of the inside workings of the organization involved is needed to ensure effectiveness, but sufficient distance from everyday operations is vital to ensure objectivity, credibility and independence.
    - The establishment of ombudsmen in international organizations should usually be accompanied by efforts to inform those who deal with the organization about its existence and mandates, how to raise issues or make complaints, as well as by standard-setting instruments, such as codes of conduct.

OMBUDSMEN IN NATIONAL ORGANIZATIONS CONDUCTING INTERNATIONAL ACTIVITIES

The requirements and considerations for such ombudsmen are essentially the same as those for ombudsmen in international organizations, the only difference being that their geographical and subject matter jurisdiction will often be asymmetrical. An officer called upon to function as ombudsman with respect to a particular aid project, for example, may have a split mandate that is tailored to the respective laws and administrative procedures of the donor and recipient countries. Where the donor country already has an ombudsman or similar institution, it would not be advisable to create a second, parallel office. In such cases, the mandate of the ombudsman may be limited to complaints or cases arising in the recipient country or countries. Another possibility could be to amend the mandate of the existing ombudsman to encompass complaints arising in recipient countries and ensuring that the office is suitably resourced and equipped, for example by hiring local staff in the recipient country to receive and deal with such cases.

RELATED TOOLS

Tools that may be required before an ombudsman institution can be successfully established include:

- Legislation to establish the mandate of the ombudsman, to create powers to investigate cases, conduct proceedings and implement remedies, and to establish procedures to be followed;
- Legislative, judicial and administrative measures to ensure the autonomy or independence of the institution in respect of its mandates, personnel, budgets and other matters;
- Depending on the mandates of the ombudsman, the establishment or upgrading of other institutions with which it is expected to work; and,
- Tools to establish legal or ethical standards for public servants or other employees, such as codes of conduct both for general classes of workers and for those employed by the ombudsman, as well as mechanisms that help raise public awareness and expectations regarding those standards, such as public information campaigns and "citizens' charters" or similar documents

Tools that may be required before an ombudsman can function properly include:

- Legislation and/or administrative measures ensuring that the ombudsman will have access to information, such as access-to-information laws and procedures, as well as effective protection for complainants, "whistleblowers" and others who assist in investigations or proceedings;
- Measures that raise public trust and awareness regarding the institution and its mandate, and that manage public expectations; and,

- Legislative or other measures that establish an effective and credible oversight and monitoring mechanism, such as bodies involving elements of civil society.

Given the general nature of the functions of most ombudsmen, there are probably no tools that cannot be used or should be avoided if an ombudsman is already established. For the same reason, where overlap occurs, careful consideration will be needed of the mandates and powers of the ombudsman and all areas of overlap to minimize inefficiencies, redundancies and the potential for parallel proceedings and inconsistent decisions.

Since the publication of the first edition of this Tool Kit, the General Assembly of the United Nations has established the office of the Ombudsman of the United Nations.[66] The Secretary General has set out the specific terms of reference and mandates of the new office,[67] and on 26 April 2002, appointed the first Ombudsman. Details of the terms of reference and operations of the new office can be found within the web-site of the United Nations at: http://www.un.org/ombudsman/

[66] See GA/RES/55/258 of 14 June 2001, Part XI, paragraph 3, and GA/RES/56/253 of 24 December 2001, paragraph 79.
[67] ST/SGB/2002/12 of 15 October 2002.

TOOL #5

AUDITORS AND AUDIT INSTITUTIONS

The fundamental purpose of auditing is the verification of records, processes or functions by an entity that is sufficiently independent of the subject under audit as not to be biased or unduly influenced in its dealings.

The degree of thoroughness and level of detail of audits vary but, in general, they should fully examine the accuracy and integrity of actions taken and records kept. Corporate audits, for example, consider the substantive position of the company, the decisions made by its officials, whether the audit process itself was inherently capable of producing a valid result and the accuracy of the evidence or information on which decisions or actions were based. Any of those factors, if flawed, would result in an inaccurate or misleading conclusion.

The United Nations Convention against Corruption treats audit requirements as elements of prevention, in both the public sector (Article 9) and the private sector (Article 12), but specific elements of the Convention, such as the requirements to preserve the integrity of books, records and other financial documents make it clear that the functions of deterrence, detection, investigation and prosecution are also contemplated.[68] As with many preventive requirements, audits and auditors prevent corruption by making it riskier and more difficult, while at the same time laying the basis for reactive and remedial measures in cases where it is not prevented or deterred.

Audits work primarily through transparency. While some auditors have powers to act on their own findings, their responsibilities are usually confined to investigation, reporting on matters of fact and, sometimes, to making recommendations or referring findings to other bodies for action. While auditors may report to inside bodies such as Governments or boards of directors, their real power resides in the fact that audit reports are made public.

Once carried out, audits serve the following specific purposes:

- **They independently verify information and analysis,** thus establishing an accurate picture of the institution or function being audited.
- **They identify evidentiary weaknesses,** administrative flaws, malfeasance or other problems that insiders may be unable or unwilling to identify;
- **They identify strengths and weaknesses in administrative structures,** assisting decisions about which elements should be retained and which reformed;
- **They provide a baseline against which reforms can later be assessed** and, unlike insiders they can, in some cases, propose or impose substantive goals or time limits for reforms;

[68] See Article 9, paragraph 3 (integrity of records), as well as Article 9 subparagraph 2 (e) (remedial measures where procedures not followed). Regarding the private sector, see Article 12, subparagraphs 2(f) (requirement for audit controls) and paragraph 3 (prohibition of acts inconsistent with effective audit controls, such as off-the-books accounting, and the intentional destruction of documents).

- In public systems, **they place credible information before the public**, generating political pressure to act in response to problems identified; and,
- Where malfeasance is identified, **they present a mechanism through which problems can be referred to law enforcement or disciplinary authorities** independently of the institution under audit[69].

DIFFERENT TYPES OF AUDIT

Audits vary widely in scope, subject matter, the powers of auditors, the independence of auditors from the institutions or persons being audited, and what is done with reports, findings and other results.

Audits range in size from minor contractual arrangements, in which an auditor may be asked to examine a specific segment or aspect of the business activities of a private company, to the employment of hundreds of audit experts, responsible for auditing the entire range of activities of large Governments[70].

Auditors may be mandated to carry out specific tasks, although that can compromise their independence; or they may be given general powers, not only to conduct audits but to decide which aspects of a business or public service they will examine each year. Public sector auditors are generally in the latter category because of the large volumes of information to be examined, the expertise required and the sensitivity of much of the information under review. The need for a high degree of autonomy and for resistance to undue influence are also important reasons for giving public sector auditors such discretionary authority.

Specific types of audit include:

Pre-audit/post-audit.

Audits of specific activities may be carried out before and/or after the activity itself takes place. Public audit institutions may be called upon to examine proposals for projects, draft contracts or similar materials with a view to making recommendations to protect the activity from corruption or other malfeasance. They may also be called upon, or choose of their own accord, to review an activity in detail after it has taken place. It is important to bear in mind that, while pre-audits may be useful for preventing corruption, the factual information needed for a complete and verifiable audit exists only after the fact. As a result, if an activity is reviewed before it takes place, that should not exempt it from scrutiny afterwards.

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[69] Article 14(3)(g) of the International Covenant on Civil and Political Rights provides the right of any person charged with an offence "Not to be compelled to testify against himself or to confess guilt", and some domestic constitutional guarantees extend this principle to those who may be suspected, whether or not they have been formally charged. In such cases conflicts between the roles of auditors and prosecutors may have to be reconciled. Generally legislation can compel those being audited to positively assist auditors, providing records and written or verbal explanations of actions taken, which in cases of malfeasance, may later lead to or support criminal charges. Some systems deal with this by

[70] One of the larger such institutions, the United States General Accounting Office, presently lists 3,275 employees.

Internal/external audits.

Depending on the magnitude of the audit and the degree of independence needed, audits may be carried out by specialized units, acting from within Government departments or companies, by fully independent Government institutions or by private contractors. Inside audits are useful for fast, efficient review of internal activities and, in some cases, for auditing that requires access to sensitive information. Usually, however, they are under the control of the head of the unit being audited, and may not be made public or reported outside the organization involved. External audits offer much greater independence and better guarantees of transparency and public access to findings.

Non-public audits.

While a general principle of auditing is that the findings or conclusions reached should be publicly reported, that principle can conflict with the need for official secrecy in the public sector. Official secrets, ranging from national security matters to sensitive economic or commercial information, are protected by Governments but matters involving such information should not be exempt from auditing. If auditors are precluded from examining departments or agencies handling sensitive information, corruption or other improper activities are shielded from scrutiny. In such cases, it is preferable to audit sensitive activities, if necessary using auditors who have undergone background checks and cleared under official secrets legislation. There should be a requirement that reports are transmitted only to senior officials who are empowered to act on them or that reports are edited to prevent the disclosure of sensitive information. In such cases, the determination of what information is too sensitive to disclose should be made as independently as possible. One option is to permit auditors dissatisfied with a decision to appeal to the courts, with the requirement that proceedings be closed and any judicial decisions edited or kept secret. Another is to create a structure in which internal audits of sensitive departments are reported directly from the auditors to external civilian or political oversight bodies, that are established and cleared to review the information the audits contain.

Audit subject matter: legal, financial, conformity with established standards and performance.

Auditors may be mandated to examine legal or financial matters, to verify that internal procedures conform to prescribed or common standards or to assess the performance of individuals or institutions. As far as major public sector institutions are concerned, auditors are usually mandated to examine all the above-mentioned aspects of a given institution and to decide whether to audit and, if so, which aspects to audit. Such decisions can be made randomly to ensure general deterrence and/or on the basis of information received. For example, tips from insiders may generate an audit; and information gathered during a preliminary audit may make the auditors decide to examine specific areas or activities of an institution more closely.

ENSURING THE INDEPENDENCE OF AUDIT INSTITUTIONS

The degree of independence enjoyed by auditors varies. The validity and reliability of the audit, however, do depend on some basic degree of autonomy. Major public-sector auditors generally require, and are given, a degree of independence roughly equivalent to that of judges or national anti-corruption agencies. In common with those institutions, public audit agencies are ultimately subordinate to, and employed by, the State, making complete independence impossible. Nevertheless, a high degree of autonomy is essential in matters such as mandate and governance, budgets, staffing, the conducting of investigations, the making of decisions about what to audit and how, and the drafting and release of reports, as follows:

Independence of auditors and staff.

The independence of audit institutions is directly related to the independence of their members, in particular, those with senior responsibilities or decision-making powers. To ensure staff competence, credibility and neutrality, candidates for positions should be carefully reviewed before being hired and, once employed, should be protected from outside influences. To prevent an abuse of their positions, audit staff, like judges, may require security of tenure, and there must be safeguards in the form of performance assessments, disciplinary procedures as well as other "disincentives" to engage in corrupt practices.

Financial and budgetary independence.

Audit institutions must be provided with the financial means to accomplish their tasks. There must also be guarantees that budget reductions will not take place to limit an audit, prevent an audit from taking place or retaliate for a past audit. As Government auditors commonly review the activities of finance ministries and other budgetary agencies, direct access to the legislature or a multipartisan legislative committee may be required by auditors of budgetary matters.

Independence and transparency of reporting.

As noted, the value of public sector audits is based on transparency and public disclosure. An audit report will usually provide information and recommendations for action by inside experts, but the pressure for experts to act on the recommendations is usually exerted by the general public.

The imperative for public disclosure of audit reports is usually made explicit in national legislation; or there may be a requirement that reports be made to a body whose proceedings are required to be conducted in public, such as a legislature or legislative committee. To ensure independence, the recipients of the report should not be permitted to alter or withhold it, and there should be a legal presumption of transparency at all times. While exceptions may be made, as in the case of sensitive information, they must be justified, if information is to be withheld.

RELATIONSHIP BETWEEN AUDIT INSTITUTIONS AND OTHER PUBLIC BODIES

Relationship with the legislature and political elements of Government.

Legislatures are political bodies whose members will not always welcome the independent oversight of auditors and other watchdog agencies. National audit institutions must, therefore, enjoy a significant degree of functional independence and separation both from the legislature and from the political elements of executive Government. One way is by constitutionally entrenching the existence and status of the institution, thereby making interference impossible without constitutional amendment. Where this is impracticable, the institution can be established by an enacted statute. The statute would set out basic functions and independence in terms that make it clear that any amendment not enjoying broad multipartisan support would be seen as interference and generate political consequences for the faction sponsoring it.

The mandate of an audit institution should also deal with the difficult question of whether the institution should have the power and responsibility to audit the legislature and its members. If an auditor has strong powers, there may be interference with the legitimate functions of the legislature and the immunities of its members. If, on the other hand, the legislature is not subject to audit, a valuable safeguard may be lost. One factor to be considered in making such a decision is the extent to which transparency and political accountability function as controls on legislative members. Another is the extent to which internal monitoring and disciplinary bodies of the legislature itself act as effective controls. A third is the degree of immunity members enjoy. If immunity is limited and members are subject to criminal investigation and prosecution for misconduct, then there may be less need for auditing. Where immunity is strong, on the other hand, exposing members to strict audit requirements may compensate for this. A mechanism could be tailored, for example, to ensure political and even legal accountability without compromising legislative functions[71].

The third aspect of the relationship between the legislature and an audit institution lies in the process for dealing with the reports or recommendations of auditors. Auditors established by the legislature are generally required to report to it at regular intervals. As an additional safeguard, reporting to either the entire legislature or any other body on which all political factions are represented ensures multipartisan review of the report. Moreover, constitutional, legislative or

[71] It is worth noting in this context that the function of legislative privileges or immunities is not the protection of members, but the protection of the legislature and the integrity of its proceedings. Thus, for example, the freedom of members to speak without fear of prosecution or action for libel is established, but often limited to speech in the course of legislative proceedings. Similarly, immunities from arrest or detention are often restricted to periods where the legislature is actually sitting or may be called into session. In some countries, privileges and immunities are also extended to participants who are not members, such as witnesses who testify before legislative committees. On the long historical development of immunities in the Parliamentary common-law system of the United Kingdom, see Erskine May's Treatise on the Law, Privileges and Usage of Parliament, chapt.5-8 and Wade, E.C.S. and Bradley, A.W., Constitutional and Administrative Law, 10th ed., chapt.12. For the application of this principle in Canada, see New Brunswick Broadcasting Co. v. Province of Nova Scotia [1993] 1 S.C.R. 319.

conventional requirements that proceedings and documents of the legislature be made public ensures transparency, a process further assisted by the close attention paid to most national legislatures by the media. In some circumstances, auditors may also be empowered to make specific reports, recommendations or referrals to other bodies or officials. For instance, some cases of apparent malfeasance may be referred directly to law enforcement agencies or public prosecutors.

Relationship to Government and the administration.

The relationship between auditors and non-political elements of Government and public administration must balance the need for independent and objective safeguards with the efficient functioning of Government. Auditors should be free to establish facts, draw conclusions and make recommendations, but not to interfere in the actual operations of Government. Such interference would compromise the political accountability of the Government, effectively replacing the political decision-making function with that of a professional, but non-elected auditor. Over time, such interference would also compromise the basic independence of the office of the auditor, which would ultimately find itself auditing the consequences of its own previous decisions. That is the main reason why most auditors are not given powers to implement their own recommendations.

Regarding reporting, the primary reporting obligation of auditors is to the legislature and the public. Specific elements or recommendations of a report may be referred directly to the agency or department most affected, but that should be done in addition to the public reporting and not as an alternative, subject to the possible exceptions set out under "non-public audits", above.

POWERS OF AUDITORS

Powers of Investigation.

The employees of audit institutions should have access to all records and documents relating to the subject matter and processes they are called upon to examine. Subject to rights against self-incrimination, those being audited should also be required to cooperate in a timely manner in locating documents, records and other materials, providing formal, recorded interviews and any other forms of assistance needed to allow auditors to form a full and accurate picture. The duty to cooperate can be applied to public servants as a condition of employment and to companies who deal with the Government and their employees as a general condition or term of Government contracts for goods and services. Audit staff will generally be competent in basic investigative, auditing and accounting practices; they may, however, require additional expertise in areas such as law or forensic and/or other sciences in dealing with some agencies or departments. They should have the power to engage appropriate experts without interference.

Expert opinions and consultations.

Apart from their objective investigative functions, audit agencies may also be used as a source of expert advice for Governments in such areas as the drafting of legislation or regulatory materials dealing with corruption. If permitted, such

input should be used on a strictly limited basis, as it could compromise the basic independence of the auditor[72].

AUDIT METHODS, AUDIT STAFF, INTERNATIONAL EXCHANGE OF EXPERIENCES.

Audit staff.

Audit staff should have the professional qualifications and moral integrity required to carry out their tasks to the fullest extent to maintain public credibility in the audit institution.

Professional qualifications and on-the-job development should include traditional areas, such as legal, economic and accounting knowledge, along with expertise, such as business management, electronic data processing, forensic science and criminal investigative skills. As with other crucial public servants, the status and compensation of auditors must be adequate to reduce their need for additional income and to ensure that they have a great deal to lose if they themselves become corrupted. As far as ordinary public servants are concerned, even if involvement in corruption is not cause for dismissal, it should result in the exclusion of that individual from any audit agency or function.

Audit methods and procedures.

The standardization of audit procedures, where possible, provides an additional safeguard against some functions of the department or agency under audit being overlooked. Where possible, procedures should be established before the nature and direction of enquiries become apparent to those under audit, to avoid any question of interference later. One exception, and a fundamental principle of procedure, is that auditors should be authorized and required to direct additional attention to any area in which initial enquiries fail to completely explain and account for processes and outcomes.

Essentially, the audit process will consist of initial enquiries to gain a basic understanding of what the department or agency does and how it is organized; more detailed enquiries to generate and validate basic information for the report; and even more detailed enquiries to examine areas identified as potential problems. Audits can rarely be all-inclusive, which will generally necessitate either a random sampling approach or the targeting of specific areas identified by other sources as problematic.

Audit of public authorities and other institutions abroad, and joint audits.

National auditors should be given powers to audit every aspect of the public sector, including transnational elements or those outside the country. Where the affairs of other countries are involved, joint audits carried out by officials of both

[72] The situation is similar with respect to the use of supreme courts to provide what are effectively binding legal opinions on matters referred to them directly by governments, as opposed to having been raised by litigants. Some countries allow this practice, while others consider it an impermissible mixing of the judicial and executive branches of government.

countries could prove useful. In such cases, however, there must be a clear working arrangement governing the nature and extent of cooperation between auditors, and the extent to which mutual agreement is required regarding fact finding, drawing conclusions and making recommendations. While cooperation may prove useful, the national auditors of each country should preserve their independence and the right to draw any conclusions that they see fit.

Tax audits.

In many countries, domestic revenue or tax authorities have established internal agencies to audit individual and corporate taxpayers. One of the functions of national audit institutions is to audit those auditors as part of a more general examination of the taxation system and its administration. Such audits are vital, given that tax systems can be a “hot bed” of economic and other corruption.

When such an audit occurs, national audit agencies must have the power to reaudit the files of individual taxpayers. The purpose is to verify the work of the auditors, not to reinvestigate the taxpayers involved. Where malfeasance or errors are discovered, the interests of the taxpayer who has been previously audited and whose account has been settled should not be prejudiced.

National auditors should also have the powers to audit individual taxpayers under some circumstances, for example where there is no specialized tax audit function, where tax auditors are unwilling or unable to audit a particular taxpayer, and where an audit of the tax administration suggests collusion between a taxpayer and an auditor.

Public contracts and public works.

The considerable funds expended by public authorities on contracts and public works justify a particularly exhaustive audit of such areas. The public sector elements will usually already be subject to audit and required to assist and cooperate by law. The private sector elements, however, may not be. In such cases, they should be required, as a term of their basic contracts, to submit to a request for audit and to fully assist and cooperate with auditors. Audits of public works should cover not only the regularity of payments but also the efficiency and quality of the goods or services delivered.

Audit of electronic data-processing facilities.

The increasing use of electronic data storage and processing facilities also calls for appropriate auditing. Such audits should cover the entire system, encompassing planning for future requirements; efficient use of data processing equipment; use of appropriately qualified staff, preferably drawn from within the administration of the audited organization; privacy protection and security of information; prevention of misuse of data; and the capacity of the system to store and retrieve information on demand.

Audit of subsidized institutions.

Auditors should be empowered to examine enterprises or institutions that are subsidized by public funds. At a minimum, that would entail the review of specific publicly funded or subsidized projects or programmes and, in many cases, a complete audit of the institution. As with contractors, the requirement to submit

to auditing and fully assist and cooperate with auditors should be made a condition of the funding or enshrined in any contract.

Audit of international and supranational organizations.

International and supranational organizations whose expenditures are covered by contributions from member countries should also be subject to auditing. That may, however, be problematic, if the institution receives funds from many countries and each insists on a national audit. In the case of major agencies, it may be preferable to establish an internal agency to conduct a single, unified audit, with participating States providing sufficient oversight to ensure validity and satisfaction with the results.

PRECONDITIONS AND RISKS

Inadequate enforcement or implementation of findings or recommendations.

As noted, auditors generally have the power only to report, not to implement or follow up on reports. Their recommendations usually go to the legislature or, occasionally, other bodies, such as the public prosecutor, whose own functions necessarily entail discretionary powers about whether or not to take action. The reluctance to implement recommendations can be addressed only by bringing political pressures to bear through the transparent reporting by the media of the recommendations. Additional attention may be focused by supplementary reports direct to the agencies that have been audited. Auditors can also report on whether past recommendations have been implemented and, if not, why not, through follow-up reports or by dedicating part of their current report to that question.

Inadequate reporting and investigations.

In the course of an audit, it is common for personnel to be diverted from their usual functions. A lack of qualified professional staff and resources therefore makes it difficult for those being audited to render the necessary cooperation and for auditors to successfully complete rigorous audits.

Unrealistic aims and expectations.

The belief that corruption can be eradicated, and in a short time, inevitably leads to false expectations, resulting in disappointment, distrust and cynicism. The mistaken impression may also be given that audit institutions have powers to implement or enforce their recommendations.

Competition and relationships with other agencies.

Audit institutions often operate in an environment in which anti-corruption agencies, law enforcement agencies and, in some cases, other auditors are also active. Roles should be clearly defined and confidential communications established to avoid conflict of audit and law enforcement investigations. The leading role in this regard may lie with the auditors, whose investigations are generally public, as opposed to law enforcement, whose efforts are generally kept secret until charges are laid.

Lack of political commitment and/or political interference.

Political will is essential to the impact of an audit institution. As with other anti-corruption initiatives, there should be as broad a range of political support as possible; oversight should be of a multipartisan nature; and mandates and operational matters should be put beyond the easy reach of Governments. The transparency and the competence of auditors will also help to ensure popular support for their efforts, and as a result, ongoing political commitment.

OTHER RELATED INSTRUMENTS

Instruments that may be required before an audit institution can be successfully established include:

- Instruments, usually in the form of legislation, establishing the mandate, powers and independence of the institution;
- Policy and legislative provisions governing the relationship between the audit institution and other related institutions, especially law enforcement, prosecution and specialized anti-corruption agencies;
- Instruments establishing legal or ethical standards for public servants or other employees, such as codes of conduct, both for general classes of workers and for those employed within the audit institution itself;
- Ways of raising public awareness and expectations regarding the role of the audit institution and its independence of other elements of Government; and
- The establishment of a parent body, such as a strong and committed legislative committee, to receive and follow up on reports.

Instruments that should not be used if audit institutions are in place are generally those involving officials, agencies or organizations whose mandates would be redundant or even inconsistent with the mandates or work of dedicated auditors. Accordingly, the mandates of law enforcement agencies, anti-corruption commissions, independent anti-corruption agencies, prosecutors, ombudsmen and other officials and agencies should be configured or adjusted, as necessary, to take account of the work of the auditors. It may also be advisable to require mechanisms, such as liaison personnel or regular meetings, to coordinate activities.

TOOL #6
STRENGTHENING JUDICIAL INSTITUTIONS

The competence, professionalism and integrity of judges are critical to the success of anti-corruption efforts. The judiciary as an institution is essential to the rule of law, influencing efforts to control and eradicate corruption in many ways.

Judicial decisions that are fair, consistent with one another and based on law support an environment in which legitimate economic activities can flourish and corruption can be detected, deterred and punished. The high status and independence accorded judges in most societies makes them a powerful example for the conduct of others. Judges are called upon to adjudicate corruption cases, establish case law and punish offenders. In some cases, they may perform other critical functions, such as reviewing the appointments or status of anti-corruption officials or passing judgment on governance matters, such as the validity of elections or the constitutionality of laws or procedures. Thus, the judges themselves can become targets of corruption, particularly where efforts to corrupt lesser criminal justice officials have failed.

The independence of judges and their functions makes them a powerful anti-corruption force, but also represents unique challenges. Training in areas such as integrity must be carried out so as not to compromise judicial independence. Accountability structures must be able to monitor judicial activities as well as detect and deal with corruption and other conduct inconsistent with judicial office. At the same time, safeguards must be incorporated to ensure that judges cannot be threatened or intimidated, or judicial decision-making adversely influenced[73]

The unique importance of judicial institutions is recognized in the United Nations Convention against Corruption, which devotes a specific provision (Article 11) to the issues in this area. The Article calls for measures which strengthen integrity and prevent opportunities for judicial corruption itself, to be taken without prejudice to judicial independence. The Article also calls for similar action in respect of prosecutors in systems where they enjoy a similar degree of independence. It does not deal specifically with the question of educating or training judges in the complexities of corruption cases, but to the extent that this does not infringe judicial independence with respect to specific cases, it could be regarded as falling within Articles 7 and 60, on the basis that judges should also be considered as public officials and treated as other public officials, except where their status requires otherwise.

[73] Regarding judicial independence, see Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, "Basic Principles on the Independence of the Judiciary", GA/RES/40/32 of 29 November 1985 and 40/146 of 13 December 1985, and "Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary", ECOSOC resolution 1989/60 of 24 May 1989.

Article 11*
Measures relating to the judiciary and prosecution services

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.

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.

United Nations Convention against Corruption

ANTI-CORRUPTION MEASURES AFFECTING JUDGES

The major focus of anti-corruption efforts should be to strengthen integrity, educate judges about the nature and extent of corruption, and establish adequate accountability structures.

Assessment of the problem of judicial corruption.

As with other anti-corruption measures, efforts to combat judicial corruption should be based on an assessment of the nature and scope of the problem. As

many of the measures pertaining to judges must be developed, maintained and applied by the judges themselves, the assessment should also consider the capacity of the judiciary to undertake such functions.

An objective assessment of the full range of corruption types and the level and locations of courts in which they occur should be examined. All parties involved in anti-corruption efforts within judicial institutions (see "Consultations", below) should be asked about possible remedies. Data should be assembled and recorded in an appropriate format and made widely available for research, analysis and response.

Consultations.

Judicial independence precludes the imposition of reforms from external sources, which means that any proposals for judicial training and accountability must be developed in consultation with judges, or even developed by the judges themselves, with whatever assistance they may require. Consultations with other key groups, such as the bar associations, prosecutors, justice ministries, legislatures and court users are recommended. Lawyers, for example, are a source of information concerning problems about which judges may be unaware. In many countries, judges are drawn from the ranks of the legal profession, as

well as in consultation with the practising bar. In some cases, bringing together different groups to discuss issues informally may prove productive. Based on the consultation process, a specific plan of action could be drafted to set out the proposed reforms in detail, establish priorities and implementation sequence, and set targets for full implementation [74].

Judicially established measures.

To protect judicial independence, self-regulation structures should be developed wherever possible. In other words, based on consultations and other sources of information, judges should be encouraged and assisted in the development and maintenance of their own accountability structures. With this in mind, the establishment of bodies such as judicial councils, in which judges themselves hear complaints, impose disciplinary measures and remedies, and develop preventive policies, will be required. Views about the extent to which training can be required without compromising judicial independence vary; it is preferable, however, for training programmes in such areas as anti-corruption to be developed by, or in consultation with, judges to the fullest extent possible. That avoids the debate about independence and is likely to increase the effectiveness of the training.

Judicial training.

The focus of the subject matter of judicial training should be to assist judges in maintaining a high degree of professional competence and integrity. Possible subject matter could include the review of codes of conduct for judges and lawyers[75], particularly if they have been revised or reinterpreted, and a review of statute and case law in key areas such as judicial bias, judicial discipline, the substantive and procedural rights of litigants and corruption-related criminal offences. Less structured options, such as informal discussions, could be used to explore difficult ethical issues among judges.

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[74] For an example of this, see Petter Langseth and Oliver Stolpe, "Strengthening Judicial Integrity Against Corruption", CIJL Yearbook, 2000

[75] In jurisdictions where judges are chosen from the practicing bar, codes of professional conduct for lawyers often continue to apply. Judges should also be aware of the standards expected of the legal counsel who appear before them.

A judicial code of conduct.[76]

Codes of conduct for judges could be developed and applied. Judicial independence does not require that such codes be developed by judges themselves, provided that specific provisions do not compromise independence. Judicial participation is, however, important both to the development of suitable provisions and the subsequent adherence of judges to them. The application of a judicial code of conduct to individual judges alleged to have breached its provisions does, however, raise independence concerns, and the power to apply such codes should be vested in the judges themselves. For that reason, key provisions of a code would stipulate that judges connected in any way with a complaint should not participate in any disciplinary or related proceedings. Once a code is established, judges should be trained in its provisions when they are appointed and, if necessary, at regular intervals thereafter. Transparency and the publication of a code are also important to ensure that those who appear before judges, plus the media and the general population, are educated about the standards of conduct they are entitled to expect from their judges. As part of the consultation process, representatives of bar associations, prosecutors, justice ministries, legislatures and civil society in general should be involved in setting standards. Those involved in court proceedings also play an important role in identifying complaints and assisting the adjudication of those complaints.

The quality of judicial appointments.[77]

The objective in selecting new judges should be to ensure a high standard of integrity, fairness and competence in the law, and processes should focus on selecting for those characteristics. Several measures can assist in ensuring that the best possible candidates are elevated to the bench. Transparency with respect to the nomination and appointment process and to the qualifications of proposed candidates will allow close scrutiny and make improper procedures difficult. Consultations with the practising bar can be used to assess competence and integrity where the candidates are lawyers. The appointment process should,

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[76] More detailed information about codes of conduct or principles for judicial conduct (the common term in civil law systems) for judges are set out in the Tool # 8 Codes of Conduct and case study #8.#9, and #10. The United Nations Convention against Corruption does not call specifically for judicial codes of conduct, but measures set out in Article 11 "…may include rules with respect to the conduct of members of the judiciary". To the extent that judges are also be made subject to codes of conduct for public officials under Article 7, bearing in mind that Article 11 requires that actions be without prejudice to judicial independence. In most systems, this would allow for the adoption of some common principles for all public officials and the further tailoring of others in their application to judges.

[77] Article 11 of The United Nations Convention against Corruption does not deal specifically with the selection and appointment of judges. To the extent that judges are considered to be public officials and subject to judicial independence, however, they could be subject to Article 7, paragraph 1, which establishes basic principles for "…recruitment, hiring, retention, promotion and retirement…" of, where appropriate, non-elected public officials. Clearly, imposing requirements on retention and retirement, as well as some requirements on promotion, have the potential to infringe judicial independence. Screening and other conditions on recruitment and hiring would not, however, as the candidates are not judges when these take place. Article 11 requires that actions taken be "without prejudice" to judicial independence.

as much as possible, be isolated from partisan politics or other extrinsic factors, such as ethnicity or religion. As a group, judges should generally represent the population at large, which means that appointments to senior or national courts may have to take into account factors such as ethnicity or geographic background. They should not, however, be allowed to interfere with the search for integrity and competence.

The assignment of cases and judges.

Experience with judicial corruption has shown that, in order to improperly influence the outcomes of court cases, offenders must ensure not only that a judge is corrupted in some way, but that the corrupt judge is assigned the case in which the outcome has been fixed. Procedures should thus be established to make it difficult for outsiders to predict or influence decisions about which judges will hear which cases. Features, such as randomness and transparency, can be incorporated into the assignment process, although transparency will inform outsiders which judge will hear which case. Such a situation will also occur in major or appeal cases, where judges may hear preliminary matters or be asked to review written evidence and arguments well in advance of hearing the case.

The establishment of local or regional courts or judicial districts and the regular rotation or reassignment of judges among those courts or districts can also be used to help prevent corrupt relationships from developing. Factors such as gender, race, tribe, religion, minority involvement and other features of the judicial office-holder may also have to be considered in such cases.

Transparency of legal proceedings.

Wherever possible, legal proceedings should be conducted in open court, a forum to which not only the interested parties but also the media and civil society, have access.

Public commentary on matters, such as the efficacy, integrity and fairness of proceedings and outcomes, is important and should not be unduly restricted by legislation, judicial orders or the application of contempt-of-court offences. The exclusion of the media or constraints on their commentary should be limited to matters where it is demonstrably justifiable, for example protecting children and other vulnerable litigants from undue public attention, and only to the extent that such an interest is served. Media may be permitted to attend proceedings and report on the facts and outcome of a case, for example, but not to identify those involved. *Ex parte* proceedings, excluding one or more of the litigants, should be permitted only where secrecy is essential, and should always be a matter of record. Neither litigants nor legal counsel should have any communication with a judge unless representatives of all parties are present.

The review of judicial decisions.

The primary forum for reviewing judicial decisions is the appellate courts. Appeal judges should have the power to comment on decisions that depart from legislation or case law so radically as to suggest bias or corruption. They should

also be able to refer such cases to judicial councils or other disciplinary bodies, where appropriate. Such bodies should have the power to review but not overturn judgments where a complaint is made or on their own initiative, for example where concerns are raised through other channels such as media reports.

Transparency and the disclosure of assets and incomes.

The potential corruption of judges, like other key officials, can be approached on the basis of unaccounted-for enrichment while in office, using requirements that relevant information must be disclosed, and investigations and disciplinary measures undertaken where impropriety is discovered.[78] Powers to audit or investigate judges affect judicial independence if they are specific to a particular judge or enquiry. Thus, while routine or random audits could be performed by other officials, provided that true randomness can be assured, any follow-up investigations should be a matter for fellow judges.

Judicial immunity.

By virtue of the nature of their office, judges generally enjoy some degree of legal immunity. Immunity should not extend to any form of immunity from criminal investigations or proceedings; nevertheless, improper criminal proceedings or even the threat of criminal charges can be used to compromise the independence of individual judges. Where criminal suspicions or allegations emerge, it may be advisable to ensure that they are reviewed not only by independent prosecutors but also by judicial councils or similar bodies. Where an investigation or criminal proceedings are under way, the judge concerned should be suspended until the matter has been resolved. A criminal acquittal, however, should not necessarily lead to reinstatement as a judge, particularly as the burden of proof is higher in criminal than in disciplinary proceedings. For example, a judge may be dismissed where there is substantial evidence of wrongdoing but not enough for a criminal conviction; or there may be discovery in a case of misconduct not amounting to crime but inconsistent with continued office as a judge, for example the failure to disclose income or conflict of interest.

[78] Regarding transparency and the disclosure of assets and income, see United Nations Convention against Corruption, Article 52, paragraph 5, which requires States Parties to consider "effective financial disclosure systems for appropriate public officials". As with other requirements, this would have to be implemented without prejudicing judicial independence (Article 11, paragraph 1), but this should be possible in most systems. A similar requirement might also be seen as falling within the more general requirement of Article 7, paragraph 4, which requires systems that promote transparency and prevent conflicts of interest. An offence of illicit enrichment is also included in the Convention (Article 20), but it is optional because in some jurisdictions placing the burden of proving that assets acquired are legitimate on the accused public official is considered an infringement on the right to be presumed innocent under ICCPR Article 12, paragraph 2 and domestic constitutional requirements.

The protection of judges.

Experience suggests that, as judges become more resistant to positive corruption incentives, such as bribe offers, they are more likely to be the targets of negative incentives such as threats, intimidation or attacks. Protection of judges and members of their families may thus be necessary, particularly in cases involving corruption by organized criminal groups, senior officials or other powerful and well resourced interests.

Dealing with judicial resistance to reforms.

Resistance to reform by judges can arise from several factors. Legitimate concerns about judicial independence can, and should, make judges resistant to reforms imposed from non-judicial sources. In such cases, there is the risk that efforts to combat judicial corruption, even if successful, may set precedents that reduce independence and erode basic rule-of-law safeguards. Resistance of that nature can best be addressed by ensuring that reforms are developed and implemented from within the judicial community, and that judges themselves are made aware of that fact and of the need to support reform efforts. Resistance may also come from judges who are corrupt, and fear the loss of income or other benefits, such as professional status, that derive from corruption or the influence it enables them to exert. Those involved in past acts of corruption may also face criminal liability if such behaviour is exposed. The benefits of reform to such judges, if any, tend to be long-term and indirect and therefore not seen as compensation for the shorter-term costs of ceasing corrupt activity and embracing reforms[79].

To redress the imbalance, it may be possible, in some cases, to ensure that early stages of judicial reform programmes incorporate elements that provide positive incentives for the judges involved. For example, reforms promoting transparency and accountability in judicial functions can be accompanied by improvements in training, professional status and compensation and tangible incentives, such as early retirement packages, promotions for judges and support staff, new buildings and expanded budgets.

Another factor that may diminish judicial resistance is a poor public perception of the judiciary and the resulting pressure on courts and judges. Where corruption is too pervasive, the basic utility of the courts tends to be eroded, leading members of the public to seek other means of resolving disputes, and the popular credibility and status of judges diminishes. Crises of that nature can graphically demonstrate the extent of corruption and the harm it causes, reduce institutional resistance and generally provide a catalyst for reforms.

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[79] Buscaglia, Edgardo and Maria Dakolias (1999) "Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account" Technical Papers. Legal and Judicial Reform Unit. Washington DC: The World Bank

The reform of courts and judicial administration

Court reforms intended to address corruption problems will often coincide with more general measures intended to promote the rule of law and general efficiency and effectiveness. Reforms include:

- ***Adequate resources and salaries.*** Ensuring that courts are adequately staffed with judges and other personnel can help reduce the potential for corruption. Officials who are adequately paid are less susceptible to bribery and other undue influences; systems that deal with such cases quickly minimize the opportunities for corrupt interference or for officials to sell preferential treatment or charge "speed money".
- ***Court management structures.*** Management structures can set standards for performance, and ensure transparency and accountability by, for example, ensuring proper records are kept and cases are tracked through the system. Where feasible, computerization or the use of other information technologies may provide cost-effective ways of implementing such reforms.
- ***Statistical analysis of cases.*** The analysis of statistical patterns with respect to how cases arise, how they are managed and assigned to judges and their outcomes can help to establish norms or averages and identify unusual patterns that may be indicative of corruption or other biases. Where misconduct is suspected, the records of specific judges could be subjected to the same analysis.
- ***Public awareness and education.*** Efforts should be made to educate the public about the proper functioning of judges and courts in order to raise awareness about the standards that should be expected. That usually generates other benefits, such as increasing the credibility and legitimacy of the courts and increasing the willingness of outsiders to participate in or cooperate with judicial proceedings.
- ***Alternative dispute resolution.*** Alternatives, such as mediation between litigants, can be used to divert cases from the courts. Such a step may allow litigants to avoid a forum suspected of corruption, although the alternative method may be just as vulnerable, if not more so. Such options do reduce court workloads and conserve resources, and are often available for impoverished litigants or for small cases where a judicial trial is out of reach.

PRECONDITIONS AND RISKS

Implementation issues

In taking action to strengthen judicial institutions, measures directed at the judges themselves should generally be implemented first, for several reasons.

- The independence of the judiciary imposes exceptional requirements that do not apply to the reform of other institutions. Some measures may have to be implemented in ways which are more costly, elaborate or time-consuming, while others may not be possible at all. For example, giving officials a free hand to impose disciplinary measures on public servants found to have engaged in corruption would create problems if applied to judges because it raises the possibility that discipline or the threat of discipline could be used to unduly influence judicial decisions. Article 11 of the United Nations Convention against Corruption requires that anti-corruption measures be applied to judges, "without prejudice to judicial independence". In addition to domestic legal and constitutional requirements, those engaged in the formulation of programmes which apply to judges should consult the relevant United Nations Standards and Norms in Crime Prevention and Criminal Justice for information on the requirements of judicial independence.[80]
- Many other anti-corruption measures require an effective rule-of-law framework that, in turn, requires competent and independent judges.
- Criminal court judges will be called upon to deal with corruption cases as a national anti-corruption programme is applied. Early cases will set important precedents in areas such as the definition of corruption or acts of corruption, and in deterring corruption.
- As corruption-related cases increase, judges themselves will become targets of corruption. If they succumb, many other elements of the strategy will fail.
- The judiciary is usually the most senior and respected element of the justice system, and the extent to which it pursues and achieves a high standard of integrity will set a precedent for other officials and institutions.
- The judiciary is also likely to be the smallest criminal justice system institution, which makes it relatively accessible by early, small-scale efforts.
- The independence of the judiciary imposes exceptional requirements that do not apply to the reform of other institutions and may take time to achieve. For example, judges will require time to develop their own codes of conduct.
- Judges exercise the widest discretion and have the most powerful positions in both civil and criminal justice systems. While reforms to other institutions, such as the legal profession, prosecution services and law enforcement agencies, are also critical, it is at the judicial level that corruption does the greatest harm and where reforms have the greatest potential to improve the situation.

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[80] See Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, "Basic Principles on the Independence of the Judiciary", GA/RES/40/32 of 29 November 1985 and 40/146 of 13 December 1985, and "Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary", ECOSOC resolution 1989/60 of 24 May 1989. These may be found in the *Compendium of UN Standards and Norms in Crime Prevention and Criminal Justice*, Part 1, Section D, available on-line at: http://www.uncjin.org/Standards/Compendium/compendium.html.

- To ensure lasting anti-corruption reforms, short-term benefits must be channelled through permanent institutional mechanisms capable of sustaining reform. The best institutional scenario is one in which public sector reforms are the by-product of a consensus involving the legislatures, the judiciary, bar associations and civil society.

RELATED MECHANISMS

Mechanisms that may be required before initiating the strengthening of judicial institutions include:

1. An independent and comprehensive assessment of the judiciary, usually at the request of the chief justice;
2. The development and establishment of a code of conduct for the judiciary;
3. Ethics training for all judges, magistrates and court staff to (i) make them aware of the code conduct and (ii) understand the consequences if caught in breaking the code;
4. Public awareness raising regarding their rights and where to complain when these rights are not honored;
5. The establishment of an independent and credible complaints mechanism for judicial matters;
6. The establishment of a judicial council or similar body with the capability to investigate complaints and enforce disciplinary action when necessary and
7. Mechanisms that may be needed in conjunction with anti-corruption agencies include:
    - An integrity and action planning meeting among all key judicial players to agree on an action plan (usually on initiative of the chief justice);
    - The agreement of measurable performance indicators for the judiciary;
    - The conduct of an independent comprehensive assessment of judicial capacity, efficiency and integrity, and of the degree of public confidence and trust in judges and judicial institutions; and,
    - The dissemination and enforcement of a code of conduct for the judiciary.

Because of the need for judicial independence, measures against judicial corruption are generally isolated from other elements of the national anti-corruption strategy. For that reason, there are no other mechanisms that are inconsistent with judicial anti-corruption measures. For reasons of confidence and credibility in both judicial institutions and anti-corruption efforts, however, some degree of coordination may be advisable, so that judicial efforts are seen as part of a broader national anti-corruption effort where possible.

IMPLEMENTATION OF TOOL #6

The typical user of Tool #6 will be the chief justice and/or the judiciary service commission. Having launched a reform programme at the national level, the chief justice would be expected to delegate the implementation of the reform to the chief judges at the state/district level.

To ensure the successful implementation of the reform of the judiciary, the necessary resources must be in place. Specific resources will vary according to the scope and duration of judicial reform programmes and cost factors associated with specific elements. Costs will usually arise from training, the support of judicial councils and specialized anti-corruption bodies, better compensation for judges, facilities and equipment, and the costs of retiring judges.

TOOL #7
CIVIL SERVICE REFORM

Reforming the civil service will be a major element of virtually every national anti-corruption strategy, and in many cases will be sufficiently large and complex a programme to warrant breaking it down both into chronological stages and into thematic elements. One of the main goals is the improvement of service-delivery by determining what should be expected of each public sector element or unit, how that output can best be delivered and then developing and implementing reforms accordingly. Other goals will often but not always overlap. These include the incorporation of effective monitoring and oversight functions, for example, which in some cases may slow – or at least not accelerate – service delivery, but will produce effects such as the improvement of accountability and reductions in losses due to corruption. Critical elements of public service reforms will generally address individual factors, collective factors and structural or systemic factors. For example, better training and remuneration are intended to change individual behaviours by reducing the incentives to engage in corrupt behaviours. Other forms of training in areas such as ethics and the raising of expectations both inside and outside of the public service operate on civil servants collectively by suppressing cultural attitudes which favour corruption and replacing them with new values which favour integrity. Systemic or structural reforms, such as the reduction of discretion and the de-layering or streamlining of overly-complex bureaucratic structures, are intended to combat corruption by improving transparency and reducing the opportunities for corruption to occur.

WHAT IS CIVIL SERVICE REFORM AND HAS IT WORKED?

Recognizing the importance of building the capacity of Governments to achieve economic and social objectives, the donor community has invested significantly in civil service reform since 1990. Few observers doubt the centrality of civil service performance to the development agenda but some question the effectiveness of past programmes to strengthen the civil services in developing countries. In most countries, the conclusion must be that when it comes to corruption, the civil service is more likely to be seen as part of the problem than part of the solution.

Numerous service delivery and/or corruption perception surveys have found civil services to be corrupt, and thus inefficient and untrustworthy in curbing corruption. A World Bank paper[81], raising the question, "...have World Bank interventions helped make Governments work better?", answers probably not. With more than 169 civil service reform projects between 1987 and 1999 in 80 countries, that is a serious setback and demands a serious rethink of the current approach to civil service reform.

[81] Barbara Nunberg (1999) Rethinking Civil Service Reform, World Bank PREM Notes, number 31

The World Bank has done a number of things in the name of civil service reform, mainly focusing on the rather narrow area of addressing fiscal concerns, that is bringing balance to government pay and employment practices. Despite that effort, most civil servants do not earn "a living wage"[82], which is one of the major causes of petty and administrative corruption[83].

Civil service reform projects also involve streamlining Government functions and organizational structures, improving human resources policies in central and local Governments, revising the legal and regulatory framework for the public administration, providing institutional support for Government decentralization and managing the process through which such changes are implemented. Internal analysis at the World Bank suggests that civil service reform operations in past years often missed even their main fiscal targets and were seldom designed to address the corruption issue. During the early 1990s, less than half the civil service reform operations of the Bank reduced wage bills or compressed salaries (a questionable objective in the first place). Moreover, the "right-sizing" of the public service was in the order of a modest 5 to 10 per cent and was often reversed soon after being brought in. Fiscal savings from such cuts were rarely sufficient to finance salary increases for higher level staff[84].

TYPICAL ISSUES IN THE CIVIL SERVICE

Assessments of civil services around the world all conclude that they are marked not only by their bloated structures but also by inefficiency and poor performance. The key symptoms observed include:

- Abuse of office, and Government property;
- Embezzlement;
- Abuse of power;
- Obsolete procedures;
- Lack of discipline;
- Lack of appropriate systems;
- Thin managerial and technical skills; and
- Poor attitudes and massive bureaucratic red tape.

In other words, public servants seem to serve themselves rather than the public. The key causes of the problem have also been identified in numerous reports as:

- Inadequate pay and benefits (remuneration);
- Insufficient focus on process with inadequate attention to such aspects as transparency, non-partisanship, inclusion of key stakeholders and impact orientation;
- Inadequate human-resource management;

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[82] Langseth,P., (1995) Civil Service Reform in Uganda; Lessons Learned in *Public Administration and Development;* Vol.15,365-390

[83] Langseth,P., (1995) Civil Service Reform in Uganda; Lessons Learned in *Public Administration and Development;* Vol.15,365-390. See also United Nations Convention against Corruption, Article 7, subparagraph 1(c), calling for adequate remuneration and pay scales, taking into account levels of economic development.

[84] Nunberg and Nellis (1995)

- Dysfunctional organization;
- Insufficient management and supervisory training;
- Inadequate facilities, assets and maintenance culture;
- Unnecessary procedural complexity;
- Abuse of procedural discretion;
- Lack of accountability;
- Inadequate performance management and measurable performance indicators;
- Project focus rather than programme focus;
- Uni-dimensional rather than multi-disciplinary approach; and
- Lack of leadership ethic and code of conduct for civil servants.

ELEMENTS OF A NEW APPROACH

There is broad agreement that a new approach is needed. Helping countries reform their civil services should also include helping build integrity to curb corruption and thereby improve service delivery. Such an approach requires a broad range of integrated, long-term and sustainable policies, legislation and measures. The Government, the private sector and the public need to work in partnership to define, maintain and promote performance standards that include decency, transparency, accountability and ethical practice, in addition to the timeliness, cost, coverage and quality of general service delivery. Education and awareness-raising that foster law-abiding conduct and reduce public tolerance for corruption are central to reducing what is, effectively, a breeding ground for corruption.

ELEMENTS OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION CALLING FOR CIVIL SERVICE REFORM

Reforming elements of the civil service to prevent and combat corruption can cover a very broad range of measures, and many elements of the Convention either call for such reforms or support them in some way. The drafters considered such reforms to be principally a matter of prevention, and most of the relevant provisions are found in Chapter II. The most important provision is probably Article 7, which calls upon States Parties to "…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." It then calls for additional measures in respect of the selection and training of individuals for positions seen as particularly vulnerable to corruption.[85] Three such areas are identified by subsequent articles: those dealing with public procurement, the management of public finances, and judges,[86] but the language leaves it open to States Parties to decide whether other areas should be accorded special attention, taking into account the variables inherent in their own domestic government structures.

[85] Article 7, subparagraph 1(b).
[86] Articles 9 and 11.

Other provisions of the Convention which should be considered in developing civil service reforms include Article 8 (codes of conduct for public officials); Article 10 (public reporting and transparency in public administration); Article 13 (participation of society in anti corruption efforts); the criminalization requirements for offences involving misconduct by civil servants (Articles 15- 20); Article 33 (protection of persons who report corruption); Article 34 (measures to address consequences of corruption); Article 38 (cooperation between national public authorities); Article 39 (cooperation between public authorities and the private sector), and Article 60 (training and technical assistance).

VISION OF FUNCTIONING CIVIL SERVICE

Following is a vision of what a properly performing civil service might be like:

1. In five years the civil service in Country X will be smaller and have better paid, honest, better trained, more motivated, and therefore more efficient and more effective, public servants. Its main focus will be to improve general security (rule of law) and quality, timeliness, cost and coverage of service delivery to the public.
2. The Civil Service of Country X will have the following characteristics:
   a. The **shared values** of the civil service will be based on the following principles:
      - Consultation;
      - Service standards;
      - Access;
      - Courtesy;
      - Access to information;
      - Openness and transparency;
      - Discipline; and
      - Value for money.

   b. Those shared values will be established, with the participation of the public servants through **a code of conduct**, made available to the public through a Citizens' Charter. The code will be monitored through a public complaints systems and enforced through disciplinary boards.

   c. A baseline focusing on quality, timeliness, cost and coverage of services and public trust in and satisfaction with the public service will already be in place. A transparent **evidence-based management system** with measurable impact indicators will be monitored against the baseline. Ministries, departments, groups and individuals will all have measurable performance indicators and targets.

   d. Since most of the direct interface between the Government and the public takes place at the local level, there will be a **decentralization of resources and tasks**, allowing implementation of a functional budgeting system of priorities and resource allocation to local government. Again, evidence-based management will assure accountability based on identified priorities with measurable performance indicators; performance

targets will be monitored against an established baseline. Value for money and public satisfaction with the services will be monitored across local governments.

e. **Rationalization and "right-sizing"** will take place based on the principle that the Government should undertake only those functions that it can effectively and efficiently perform and that cannot be privatized will be undertaken. There is a need for evidence-based establishment control and monitoring.

f. **Reduced levels of corruption** will be enforced by:

- Empowering the victims of corruption to report any irregularities;
- Increased disciplinary follow-up of complaints (enforcement of code of conduct); and
- Criminalization of corruption.

3. The civil service in Country X:

- Will be paid a minimum living wage and be given an evidence-based performance increase in pay;
- Will have clear and measurable organizational objectives and demonstrate commitment to such goals and objectives;
- Will be fully accountable and responsible for the outputs of their jobs and committed to achieving clearly defined individual objectives;
- Will be regularly monitored by an empowered civil society that know its rights, has access to information and a credible complaints mechanisms, trusts the criminal justice system and is regularly surveyed about quality, cost and timeliness of services received and the security situation.

STRATEGIC FRAMEWORK TO REFORM THE CIVIL SERVICE

The strategic framework and action plan needed to implement the foregoing vision would have at least six major components. Inherent in each would be the importance of paying a minimum living wage and of implementing evidence-based or results-oriented management. The framework would include[87]:

- Strengthening the ministry in charge of civil service reform and establishing a close relationship between it and other anti-corruption agencies (see Tool #3) and institutions representing civil society;
- Introducing an "affordable civil service" through "right-sizing" and rationalization of ministries and local government structures. Independent institutional assessments would be carried out, on the basis of which recommendations would be made as to simplification of procedures, reduction of structural discretion and introduction of evidence-based or results-oriented management.

[87] Langseth, Petter., EDI Staff Working Paper. Washington: EDI, No 95-05

- Enforced payroll monitoring and establishment control and the use of the rationalization effort combined with a job-grading exercise to "right-size" the civil service, including elimination of "ghost workers".
- Paying the civil servants in the rationalized and "right-sized" civil service a minimum living wage, without delays, on a monthly basis. Based on assessment and results-oriented management, implementation of monetization of benefits and pay.
- Reduction of corruption and improved service delivery through increased accountability via: (i) enforced codes of conduct; (ii) increased supervision; (iii) enforced results-oriented, management-based measurable performance indicators; (iv) empowering the public through citizens' charters; a credible public complaints system; access to information and whistle blower protection.
- Managing public expectations and winning public trust through a credible communication strategy.

For the new strategic framework to work, a fundamental change is needed in the handling of public affairs, that is a move towards an integrated approach while ensuring that the process is evidence-based, transparent, inclusive, broad-based, comprehensive, non-partisan and impact-oriented.

The development of an integrated, holistic strategy involves a clear commitment by political leaders to combating corruption wherever it occurs, and also submitting themselves to scrutiny. Primary attention should be given to prevention of future corruption by introducing system changes such as simplifying procedures, reducing discretion, and increasing accountability through increased transparency, in other words opening up the Government to public scrutiny[88].

Areas of Government activity most prone to corruption should be identified and relevant procedures should be reviewed as a matter of priority, and civil servants who hold high positions or positions which are especially vulnerable to corruption, or where there are high costs to society and governance if corruption occurs should be made subject to additional scrutiny using means such as financial disclosure and review requirements.[89] The salaries of civil servants and political leaders should adequately reflect the responsibility of the post and be as comparable as possible with those in the private sector, both to reduce the "need" for corruption and to ensure that the best human resources can "afford" to serve the State.[90]

Legal and administrative remedies should provide adequate deterrence, for example:

[88] See United Nations Convention against Corruption, Article 10.
[89] See United Nations Convention against Corruption, Article 7, subparagraph 1(b), Articles 9 and 11, and Article 52, paragraph 5.

[90] See United Nations Convention against Corruption, Article 7, subparagraph 1(c).

- Corruption-induced contracts should be rendered void and unenforceable[91]
- Close monitoring of Government activities that involve large financial transactions should be introduced;
- There should be random intensive audits; and/or
- Licences and permits obtained through corruption should be rendered void.

A creative partnership should be forged between the public service and civil society, including the private sector, the professions, religious organizations and relevant pressure groups[92]. One important outcome of the partnership would be to allow a systematic dialogue to develop between the public service and the public it serves. Through systematic service delivery surveys, citizens' charters that explain to the public their rights and credible complaints systems, service delivery should be monitored systematically against a pre-established baseline using measurable performance indicators. In countries with systemic corruption, such service delivery surveys often turn into "corruption surveys ", as one of the main reasons why the public is not being served is corruption: petty, administrative and grand.

ELEMENTS OF A NEW APPROACH

Pay and employment reform.

Many civil service reform operations have focused on reforming Government pay and employment policies. The objectives have been to reduce the aggregate wage bill, right-size and streamline the civil service, and rationalize remuneration structures[93]. Some would argue that such reforms have been driven by narrow fiscal determinants, have been politically difficult, and have had minimal impact both fiscally and otherwise. What was missing was an integrated approach addressing the reform in an integrated and evidence-based manner. With a more serious, systematic and holistic impact assessment, it is said, it would have been realized that the traditional approach to civil service reform did not work. Some observers argue that pay and employment reforms should be abandoned altogether. Others argue that when public servants cannot afford to stay away from corruption, pay reforms need to be deepened, broadened and lengthened.

Pay and employment reforms[94] are often needed to restore fiscal balance, a necessary but insufficient precondition for curbing corruption or for performance

[91] See United Nations Convention against Corruption, Articles 34 and 35.

[92] See United Nations Convention against Corruption, Article 13.

[93] Lindauer, David (1994), Government Pay and Employment Policies and Economic Performance, Washington, D.C.,: World Bank

[94] Langseth and Mugaju (1996), Post Conflict Uganda, Towards an Effective Civil Service, Fountain Publishers, Kampala Uganda (ISBN: 9970 02 120 6)

and capacity improvements that will lead to improved service delivery to the public. In the past, civil service reforms have generally been too narrow and too modest to achieve any of their key objectives. Most "right-sizing" programmes have sought reductions of 5 to 15 per cent while much bolder cuts are needed to render most government affordable. In Uganda in 1993-94, for example, the public service and the army were both reduced by 50 per cent so that the Government could afford to pay civil servants and soldiers a living wage. Uganda was, comparatively speaking, in an excellent fiscal position, spending less than 30 per cent of recurrent expenditure on the wage bill while other African countries were spending as much as 75 per cent. Yet, five years later, the cut had to be as deep as 50 per cent to implement a living wage with a compression rate of 1-10 five years later[95]. The expected "pain" of the redundancy of nearly 150,000 civil servants was reduced by[96]:

- A well managed and well received voluntary redundancy programme;
- The fact that more than 60,000 ghost workers were taken off the payroll between 1992-1994;
- Good support for the redundant staff who received an acceptable compensation package (31); and
- Availability of farming land, due to the civil war, making it possible for redundant staff to make a living from the land

As was proved in the case of Uganda, downsizing programmes, if well managed, need not be politically destabilizing. Focus groups conducted at the village level in Uganda in 1994, revealed that the 95 per cent of the population who did not profit directly or indirectly from working in the civil service, were totally unconcerned about what might happen to "the fat cats" in the public service. "They never served us so why should we be concerned if they lose their job?" was the typical response. Even without elaborate schemes for redundant staff as in Uganda, severance, where it existed, and "moonlighting" and/or "daylighting" have provided a transitional cushion for displaced civil servants, and the informal and agricultural sectors have been able to absorb more workers than expected.

One of the lessons learned from the "right-sizing" exercises is that where civil servants are paid less than a living wage, they are still making enough to feed their families, either the "half-honest" way where they have multiple jobs, stealing only time from the service, or through the more dishonest way where, through

[95] The policy decision by cabinet was to keep the wage bill under 45% of the recurrent expenditures

[96] Retrenched staff received a compensation package consisting of three months basic salary in lieu of notice, one month's salary in lieu of leave entitlements, transportation money from workplace to home district by the most direct route (the approved formula was in 1994 the equivalent of US$ 200 plus US$ 2 per kilometer to help the retrenched staff reach their hometown or village) and a severance package of equivalent to three months basic salary for each completed year of pensionable service up to a maximum of twenty years.. This package did not apply to people who had yet not been confirmed in their appointment. Such officers were entitled to only one month's basic salary in lieu of leave entitlement, and transport from the place of work to home district. See Langseth and Mugaju (1996), Post Conflict Uganda, Towards an Effective Civil Service, Fountain Publishers, Kampala Uganda (ISBN: 9970 02 120 6)

corruption, they are making many times their wage or salary. Thus, reforms can perhaps be pushed further on political grounds as well.

Donor-supported pay and employment reforms have continued to focus on short-term and narrow goals, such as one-shot employment cut rather than the holistic and multi-disciplinary approaches addressing:

- Affordability of the civil service by "right-sizing";
- Accountability through evidence-based monitoring of impact indicators, followed up by improved supervision and discipline;
- Capacity through the strengthening of human resources management; and
- Incentives through the implementation of codes of conduct, complaints systems, support of whistleblowers and empowerment of civil society.

Even where civil services have been "right-sized", other key reform areas have not been addressed, and it is not uncommon that successful redundancy schemes are followed by rehiring exercises. In Uganda, for example, a decentralization reform ran in parallel with the civil service reform, and many of the redundant civil servants found new jobs at the district level.

Towards an integrated approach

As the focus on pay reform and employment is too narrow to achieve the necessary institutional changes to reduce corruption and improve service delivery, the emphasis needs to be extended to include results-oriented management, human resources management and decentralization. It then needs to be extended yet further, using an even broader and highly selective approach that addresses the role of the State, with important implications for the functions, structure, organization and process of Government.

At least four more dimensions of Government reorientation need to be considered in the more integrated reform model.

The first is the by now widely recognized connection between civil service management and the framework of controls and incentives embodied in the financial management systems of Governments. Strong links between personnel and budgets functions are essential to sound Government management.

The second is the empowerment of the public to increase the accountability of civil servants. As already mentioned, there is a need to pass legislation and introduce measures that will increase public access to information and thereby open up the Government to public scrutiny. The empowerment of the public should also be increased through citizens' charters that make them aware of their rights; with improved confidence in the State, the public should, if they are not served according to their rights, be encouraged to complain through complaints systems and/or service delivery or integrity surveys.

The third dimension is the extensive administrative reform occurring throughout developing countries at the decentralized subnational level of Government. Decisions about devolution and deconcentration of staff, functions and resources must be linked to policies on central civil service

reform. It is also critical that the decentralization effort is coupled with an evidence-based approach where service delivery baselines are established and monitored by measurable performance indicators across subnational and national units. It is critical that a partnership is established between with civil society and the private sector that allows periodic and independent monitoring of the State.

The fourth dimension is the link between central Government civil service reform and institutional reforms in individual sectors. That is particularly true of the links between health and education, which are critical to the wellbeing of the public and, at the same time, the largest Government employers, and the anti-corruption bodies, including the criminal justice system. The link to the anti-corruption bodies is critical, especially for countries with systemic corruption, as corruption is often the main reason why the public are not being served in a timely and cost-effective manner. The link to the reforms in the criminal justice system is critical to re-establish rule of law and security. Although corruption within the civil service can be dealt with by reintroducing already existing disciplinary bodies and measures, the serious types of administrative and grand corruption also need to be criminalized. The coordination with independent anti-corruption agencies and the judiciary are both critical to the success of the overall reform but, at the same time, a challenge, as the executive must respect the independence of its partners.

Moving from a project to an integrated approach.

The new agenda for civil service reform requires a capacity for flexible donor responses, including the ability to intervene quickly but also to stay the course through the frequent redesign needed in integrated institutional reforms. Moreover, links among different reform initiatives under the wider umbrella of State transformation will require support mechanisms with more permeable boundaries.

The conventional project approach of donors is not well suited to the new construct of Government reconstruction and reorientation. Most projects are based on an engineering model that emphasizes tight timeframes and de-emphasizes human variables. Institutional reforms require adaptability and a commitment by participants to reform goals among national and international civil servants. Such reforms are subject to a myriad of unpredictable variables, making any blueprint at best simplistic. Since corruption is everywhere and cross-cutting, the issue of integrity of national and international "players" becomes an important new variable that needs to be addressed in a credible manner, both in the donor institutions and the Government itself. In other words, in order to help client countries implement an integrated approach, many donor organizations need to reform themselves to be credible.

The process is already ongoing; many donor agencies have begun to move away from their earlier project focus and have started applying a more integrated approach. Various high-impact, non-lending operations and a new range of operational instruments provide for a more flexible, more country-driven approach to reform. In addition, thought is being given by the organizations, such as the World Bank, to new types of programme loans that could develop the

programmatic approach more systematically. Such loans may support medium-term reforms within a broad policy framework agreed by the World Bank, each Government, the judiciary, the independent anti-corruption agencies and civil society. Establishing overall programme criteria and governance mechanisms for the reform process, conditional on the development of evidence-based and result-oriented reform packages, is key to the success of an integrated programme approach.

The integrated programme approach allows for a more tailored, realistic timeframe for Governments and other national pillars of integrity to prepare for and pursue activities following an internally, inclusive, non-partisan and broad-based schedule of reform. It is not a one-size-fits-all approach that is determined by the executive alone. The critical pillars of integrity are different in every country and, as a result, the key supporters of real reform will differ from country to country. Only some countries possess sufficient institutional capacity and integrity to pursue the more autonomous and integrated approach; others need to move away from the traditional project approach more gradually.

Learning from best practice.

Since 1990 the world has seen dramatic changes in administrative practices in industrial countries both in building integrity to curb corruption and in improving the timeliness, quality, value for money and coverage of service delivery. Governments have reshaped rigid, hierarchical, unresponsive, closed, unaccountable, bloated and corrupt bureaucracies into flexible, affordable, evidence-based, impact-oriented, accountable, citizen-responsive organization with corruption under control. Reforms have been sweeping in some countries: radical, systemic transformations based on new public management reforms that emphasize narrower Government functions and structures, demands for value for money, courtesy, transparency, consultation service standards, access, information, redress and impact orientation. Other countries have pursued more incremental improvements in civil service management while keeping basic administrative structures in place.

The range of new approaches and models available to Member States can be overwhelming. The present Toolkit may be an example of the variety and complexity involved in moving a Government towards an integrated approach that introduces improved affordability, integrity, security and service delivery.

PRECONDITIONS AND RISKS

Basic principles must be explicit in the new integrated approach. One principle is that a more integrated approach to Government reforms must guard against overloading the already burdensome requirements on Governments for reform. Another is that guidance on the design and implementation of carefully sequenced reforms cannot be provided through a universal blueprint. Reforms must be tailored to regional and country circumstances.

Moreover, most industrial country innovations are only now being tested. According to Nunberg[97], debates run high on the reforms, and the jury is still out with respect to some of the more controversial elements of the new public management, including the use of market mechanisms, such as performance-related pay or widespread contractual employment, in core civil services. For three reasons, adapting elements of competing administrative models to the context of Member States will be complex.

First, countries must be allowed to choose mechanisms that are appropriate for their own circumstances, selecting from a menu, such as the Toolkit, that neutrally demonstrates the pros and cons for each option. In the midst of powerful advocacy by true believers in one or another approach, donors can play an objective role in advising developing countries interested in sampling elements of governance reform so that blueprints are not imported wholesale from other countries.

Secondly, the neutral presentation of options must be balanced with the need to ensure that reforming Governments do not install obsolete systems that, instead of putting the State in the mainstream of 21st century modernizing trends, undermine efforts to move Governments towards the cutting edge of governance reform.

Thirdly, countries should embark on a course towards the integrated approach. More than simply reinforcing new public management slogans, the integrated approach means finding the best strategy to carry out essential tasks by leveraging scarce resources, possibly through creative technology applications or inventive management solutions that apply an evidence-based, comprehensive, inclusive, transparent and impact-oriented approach. Fresh approaches could result in a "third way" for Member States that not only bypasses traditional administrative approaches but also leapfrogs the new development and public management models to address important issues such as affordability, accountability, incentives and strategic partnership across the public and private sector.

Having said this, there are important reasons why some degree of international consistency in civil service reforms may be seen as desirable. Prominent among these are the fact that lessons may be learned and expertise transferred from country to country, and that in an increasingly interdependent environment, countries operating with similar values, standards and structures can usually collaborate more easily and effectively than those which lack significant common ground. One of the most significant effects of the United Nations Convention against Corruption, as with other global treaties, is that it represents a broad international consensus about values, standards and structures, on which individual countries can then build further taking into account national variables such as legal traditions, cultural factors and degree of economic development. The Convention encourages such an approach by making some fundamental elements mandatory for all States Parties, by making other elements variable,

[97] Nunberg, Barabara (1997) Re-thinking Civil Service Reform: an Agenda for Smart Government, Poverty and Social Policy working paper, World Bank, Washington, D.C.: World Bank.

optional or subject to the selection of options or elements of discretion, and by making clear the fundamental principle that it is intended to establish basic minimum standards which individual States Parties are both free to, and encouraged to, exceed.

IMPLEMENTING TOOL #7

The user of Tool #7 would typically be the ministry in charge of civil service reform but also departments in line ministries and/or ministries in charge of local government reforms.

Resources needed to implement reform will vary from country depending on the type of reform being implemented. Staff redundancy measures, for example, require large resources.

TOOL #8
CODES AND STANDARDS OF CONDUCT

The setting of concrete standards of conduct serves several basic purposes:

- It clearly establishes what is expected of a specific employee or group of employees, thus helping to instill fundamental values that curb corruption.
- It forms the basis for employee training, discussion of standards and, where necessary, modification of standards.
- It forms the basis of disciplinary action, including dismissal, in cases where an employee breaches or fails to meet a prescribed standard. In many cases, codes include descriptions of conduct that is expected or prohibited as well as procedural rules and penalties for dealing with breaches of the code.
- Codification, in which all of the applicable standards are assembled into a comprehensive code for a specified group of employees, makes it difficult to abuse the disciplinary process for corrupt or other improper purposes. Employees are entitled to know in advance what the standards are, making it impossible to fabricate disciplinary action as a way of improperly intimidating or removing employees.

Codes of conduct may be used to set any standard relevant to the duties and functions of the employees to which they apply. That will often include anti-corruption elements, but also common are basic performance standards governing areas such as fairness, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, responsible use of organizational resources and, where appropriate, standards of conduct towards the public. Countries developing codes of conduct exclusively for anti-corruption purposes should consider the possibility of integrating them within more general public service reforms, and vice versa.

Codes that support disciplinary structures may also set out procedures and sanctions for non-compliance. Codes may be developed for the entire public service, specific sectors of the public service or, in the private sector, specific companies or professional bodies such as doctors, lawyers or public accountants. Several models have been developed to assist those developing such codes[98]

DESCRIPTION

One of the many challenges of setting standards or establishing codes of conduct is to ensure the that legal, behavioural, administrative and managerial aspects of such instruments are consistent with basic principles of justice, impartiality, independence, integrity, loyalty towards the organization, diligence,

[98] See Case Study #8 Codes of Conducts for different organizations

propriety of personal conduct, transparency, accountability, and responsible use of organizational resources.

Means of setting standards or establishing codes of conduct

Standards of conduct for officials and other employees are governed by several sources.

- ***Legislation*****,** usually criminal and/or administrative law, is used to set general standards that apply to everyone or to large categories of people. The criminal offence of bribery, for example, applies to anyone who commits the offence, and usually covers all bribery or bribery involving the public interest or a public official. In some countries, more specific legislation is used to set additional standards applicable to all public officials or, in some cases, even private sector workers.
- ***Delegated legislation or regulations***, in which the legislature delegates the power to create specific technical rules, may also be used for setting standards for specific categories of officials, such as prosecutors, members of the legislature or officials responsible for financial accounting or contracting matters.
- ***Contract law*** is another major source of standards. Using contracts governing employment or the delivery of goods or services, standards may be set for a specific employee or contractor as part of his or her individual contract. Alternatively, an agency or department may set general standards to which all employees or contractors are required to agree as a condition of employment.

Higher standards can usually be set for smaller, more specific groups based on what can be reasonably expected of that group. Private citizens are subject only to basic criminal offences such as bribery, whereas judges can reasonably be prohibited from accepting gifts or having financial or property interests that might conflict with their impartiality.

The source of a particular standard has procedural implications. Breaches of criminal law standards result in prosecution and punishment, and require a high standard of proof and a narrow range of prohibited conduct. Breaches of an employment contract, on the other hand, usually lead to disciplinary measures or dismissal subject to a lower standard of proof. Employees can be dismissed for failing to declare conflict of interest or accepting gifts, even if bribery cannot be proved.

More than one standard or code of conduct will often apply to a particular official or employee. A prosecutor, for example, may be required to meet:

- Specific standards for prosecutors;
- Professional standards set by the bar association or professional governing body for lawyers;
- General standards applicable to all public servants; and
- Standards set by the criminal law.

A key issue that must often be addressed in setting specific standards is to ensure that the standards are not inconsistent with more general standards that

already apply, unless an exception is actually intended. The concept of "double jeopardy" does not usually apply to disciplinary proceedings. For example, a prosecutor convicted of accepting a bribe would usually be subject to separate proceedings leading to a criminal penalty, professional disbarment and dismissal for breach of contractual standards.

ELEMENTS OF CODES OF CONDUCT

General content and format

Codes of conduct usually establish general standards of behaviour consistent with basic ethical principles of justice, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, and responsible use of organizational resources. They may also contain more specific standards applicable to specific (and clearly defined) groups of employees, as well as procedures and sanctions to be applied in cases of non-compliance. Compliance mechanisms should also include less drastic options to reduce the use of disciplinary measures. One common way of administering ethical standards is to establish a consultant individual or body, so that individuals can enquire whether a particular activity would be in breach of the rules before engaging in it. For example, judicial councils or committees could be consulted by a judge who is uncertain as to whether he or she should hear a particular case; and public servants could enquire whether a proposed gift can be accepted or refused. Such an approach reduces the costs and harm caused by disciplinary actions and, as no liability is involved, allows the application of standards that might otherwise be too general to enforce.

Specific standards may include positive obligations, such as the requirement to disclose assets or potentially conflicting private interests, and prohibition, such as the ban on accepting gifts. Usually, standards applicable to the public sector not only prohibit conduct seen as inconsistent with the office involved but also conduct that might give outsiders the perception of impropriety or damage the credibility or legitimacy of that office. Clarity is advisable to ensure that the rules will be understood and to support enforcement. Rules set by employment contracts do not come within the purview of the criminal law. Codes or, in some cases, the parent legislation or regulations, may also contain self-implementing elements, such as requirements that employees be trained or that they should read and understand codes before they are hired.

Codes of conduct may be used in both the public and private sectors but there are several key distinctions.

- Public sector codes can be established either by legislative or contractual means, or a combination of the two. In most cases, private sector codes do not raise sufficient public interest to warrant legislation and are implemented exclusively by contract.
- Public sector codes pursue only the public interest and generally involve provisions that balance the public interest against the rights of the officials to whom they apply. For example, disclosure requirements must balance the public interest in transparency with individual privacy rights. Private sector codes, on the other hand, often protect the private interests of the

employer, which may or may not coincide with the public interest. For example, confidentiality may take precedence over transparency. Private sector organizations will sometimes find it necessary or desirable to include in their codes elements that address the public interest. For instance, codes for medical practitioners and lawyers are intended to protect patients and clients, which is seen as essential to the delivery of the specific services and to the credibility of the profession. In many cases, private sector organizations will try to protect the public interest to preserve self-regulation instead of being regulated by the State.

ELEMENTS OF CODES OF CONDUCT FOR PUBLIC OFFICIALS[99]

General elements

Anti-corruption elements can and should be supported by more general standards of ethics and conduct to promote high standards of public service, good relations between public officials and those they serve, as well as productivity, motivation and morale. Such standards can promote a culture of professionalism within the public service while, at the same time, fostering the expectation of high standards among the general population.

Specific elements could include the following:

- Rules setting standards for the treatment of members of the public that promote respect and courtesy;
- Rules setting standards of competence for public servants, such as knowledge of relevant laws, procedures and related areas to which members of the public may have to be referred;
- Rules establishing performance criteria and assessment procedures that take into consideration productivity and the quality of service rendered; and
- Rules requiring managers to promote and implement service-oriented values and practices and requiring that their success in doing so be taken into account when assessing their performance.

Impartiality and conflicts of interest[100]

Impartiality is essential to the correct and consistent discharge of public duties and to ensuring public confidence in them. The requirement for impartiality will generally apply to any public official who makes decisions. Higher or more specific standards will be applicable to more powerful or influential decision-makers, such as senior public servants, judges and holders of legislative or executive office. Essentially, impartiality requires decisions to be taken on the facts alone, without resort to extraneous considerations that could influence the outcome in any way. Such considerations may arise from the individual ethnic

[99] See case study #10; UN Code of Conduct for Public Servants
[100] See, for example, Royal Canadian Mounted Police External Review Committee, Conflict of Interest, http://www.erc-cee.gc.ca/Discussion/english/eDP10.htm

customs or religious beliefs of officials, or come into play where their private interest conflicts with their public duty. Codes of conduct should seek to deal with both those eventualities. Specific requirements could include:

- A general requirement that decisions be made on the facts alone. In some circumstances, there could also be rules prohibiting, for example, discrimination based on characteristics such as race, ethnicity, gender, religion or political affiliation.
- Requirement that senior officials responsible for establishing the criteria for decision making should limit them to those relevant to the decision at hand; further, that all criteria be set out in writing and made available to those who will be affected by the decision.
- Requirement that written reasons be given for decisions, to permit subsequent review.
- Requirement that specified officials avoid activities that might give rise to conflicts of interest. That may, for example, preclude senior public servants from playing an active role in party politics. Those responsible for decisions affecting financial markets are often precluded from investing personally or are required to place investments in "blind trusts" thus preventing officials from making a decision that might affect their personal interests.
- Requirement that officials avoid conflicts by altering their duties. For example, a judge who represented a particular individual prior to his appointment should not hear a case involving the former client. The conflict should be disclosed and the case assigned to another judge. Officials on public boards or commissions are often precluded from debating or voting on agenda items that could affect their personal interests.
- Requirements that officials declare interests that may raise conflicts. Frequently, there are provisions for general disclosure at the time of employment and at regular intervals thereafter, as well as disclosure of a potential conflict of interest as soon as it becomes apparent. Such requirements ensures basic transparency by alerting those involved that action may have to be taken to eliminate a conflict.
- Requirements that officials should not accept gifts, favours or other benefits. Where a direct link between a benefit and a decision can be proved, offences related to bribery may apply but, in many cases, the link, if any, is more general. To prevent such a situation and ensure there is no perception of bias, there can be a "blanket" prohibition of the acceptance of gifts or the prohibition can be selectively applied to those affected by, or likely to be affected by, any past or future decision of the official involved. Depending on custom or the nature of the office, exceptions may be made for very small gifts. Where officials are allowed to accept gifts under certain circumstances, the rules can also require disclosure of information about the nature and value of the gift and the identity of the donor so that there can be an independent assessment of whether the gift is appropriate or not.

Rules for the administration of public resources.

Officials responsible for administering public resources may be subject to specific rules intended to maximize the public benefit from expenditures, minimize waste and inefficiency, and combat corruption. Such officials represent a relatively high risk of corruption because they usually have the power to confer financial or economic benefits and to subvert mechanisms intended to prevent or detect improper dealings in public funds or assets. Generally, they will be officials who make decisions governing expenditure, contracting for goods or services, deal in property or other assets, as well as those responsible for the auditing or oversight of such officials. Specific rules could include the following:

- Rules requiring all decisions to be made in the public interest, such interest being expressed in terms of maximizing the benefits of any expenditure while minimizing costs, waste or inefficiency.
- Rules requiring the avoidance, where possible, or the disclosure of actual or potential conflicts of interest, similar to conflict of interest rules for public officials. (See above). In practice, for example, such rules might require an official awarding a Government contract to make full disclosure and step aside if one of the applicants proved to be a friend, relative or former associate;
- Rules requiring that proper accounting procedures be followed at all times and appropriate records be kept to permit subsequent review of decisions;
- Rules requiring officials to disclose information about decisions. For example, winning bidders may be required to submit the details of their bid for review by the losers.
- Rules requiring officials to disclose assets and income to permit scrutiny of sums of money not derived from public employment.

Confidentiality rules

Public officials frequently have access to a wide range of sensitive information and are usually subjet to rules prohibiting and/or regulating disclosure. The rules may range from criminalizing espionage and the disclosure of official secrets to lesser sanctions for the disclosure of information such as trade secrets or personal information about citizens.

Such rules commonly combine positive obligations to maintain secrecy or take precautions to avoid the loss or disclosure of information, and impose sanctions for intentional disclosure and, in some cases, negligence. Secrecy requirements can be used to shield official wrongdoing from disclosure; modern legislative and administrative codes have thus begun to include provisions to protect "whistleblowers" acting in the public interest. Specific rules could include the following.

- Secrecy oaths requiring that confidential information be kept confidential unless official duty requires otherwise.
- Classification systems to assist officials in determining what information should be kept confidential or secret and what degree of secrecy or

protection is appropriate for each category of information. For example, information that could endanger lives, public safety, national security or the normal functioning of major public agencies to function is usually subject to a relatively high classification.

- Rules prohibiting officials from profiting from the disclosure of confidential information. In some countries, there is civil liability for appearance fees or book publication royalties if generated in part by inside information.
- Rules prohibiting the use of confidential information to gain financial or other benefits. Insiders with advance access to Government budgets are usually prohibited from making investment deals that would constitute "insider trading" in the private sector. The rules should be broad enough to preclude direct use or disclosure of the information, or the provision of advice based on the information to others who may then profit.
- Rules prohibiting the disclosure or use of confidential information for an appropriate period after leaving the public service. The period will generally depend on the sensitivity of the information and how quickly it becomes obsolete. Obligations regarding inside knowledge of pending policy statements or legislation usually expire when they are made public, whereas obligations relating to certain national security interests may be permanent. Officials with broad inside knowledge may be prohibited from taking any employment in which that information could be used, although such a prohibition may possibly be accompanied by some provision for compensation. In drafting requirements for post-employment cases, care should be taken to distinguish between the use of skills and expertise gained in the public service that may be used freely, and confidential information, that may not.

Additional rules for police and law enforcement officials[101]

Many law enforcement agencies, because of the nature of their duties and the powers and discretion they exercise, have developed specific codes of conduct to supplement those that apply to public officials.

Law enforcement personnel are particularly likely to be exposed to corrupt influences when dealing with crimes that generate large proceeds, such as drug trafficking, organized crime, which often has the motivation and resources to corrupt investigators, and major corruption cases, where persons are suspected of having engaged in corruption. For such reasons, specific anti-corruption rules and internal enforcement mechanisms are sometimes directed at law enforcement personnel who commonly work in such areas.

Specific rules may include the following.

- Prohibition on acting or claiming to act as an official when not on duty or in areas of geographic or subject-matter jurisdiction beyond the mandate of the official concerned;

[101] For a general code of conduct, see "Code of Conduct for Law Enforcement Officials", GA/RES/34/169 of 17 December 1979 and ECOSOC Res.1989/61, "Guidelines for the effective implementation of the Code of Conduct for Law Enforcement Officials.

- General prohibition on abuse of power;
- Requirement that some sensitive duties, such as interrogating suspects, be carried out only with witnesses present or, where feasible, where audio or video recording are being made; and
- Requirement that records be kept by an agency and its individual officers regarding general enforcement policies and priorities, and that individual officers exercise discretion, so that conduct at variance with the standards will become apparent.

Additional rules for members of legislative bodies and other elected officials

For several reasons, rules governing elected officials tend to vary from those for other public servants. Where many countries maintain a professional and politically neutral public service institutions and may restrict political activity on the part of their officials, partisan activity is a central part of seeking and holding elective office. Those who hold such office, moreover, are held politically accountable for their actions, which may lead to rules emphasizing transparency over legal or administrative sanctions. Elected officials also have inherent conflicts of interest. Where the duty of a neutral public servant to the public interest is usually unequivocal and paramount, the elected politician must often face the difficult task of reconciling that with conflicting obligations to constituents, political party or policy platform.

Rules that may apply in such cases include:

- Rules governing legislative or parliamentary immunity. Legislators are given a measure of legal immunity to ensure that they cannot be prevented from attending sittings and that threats of civil or criminal action cannot be used to influence their participation or voting. The scope of the immunity should be narrow to ensure that immunity cannot be used to shield the subject from ordinary criminal liability;
- To ensure that elected officials cannot conceal corruption proceeds, rules requiring the disclosure of assets and financial dealings will be required. Essentially, rules may be the same as for other senior public officials;
- Rules requiring elected officials to disclose the sources and amounts of political donations and to account for election expenditure. Such rules may be imposed as a means of ensuring election fairness and combating corruption;
- Rules prohibiting the use of legislative privileges or facilities for private gain or other non-legislative purposes. Such restrictions often prohibit the use of legislative facilities for partisan political purposes to ensure that incumbents do not gain any unfair political advantage; and
- Rules prohibiting the payment of legislative members for work done in the course of their duties, apart from prescribed salaries or allowances.

Rules for cabinet ministers or other senior political officials

Many ministers and many senior officials hold partisan political offices, either appointed through affiliation or selected from among the elected members of the

legislature. Whether the senior officials are elected or not, many of the foregoing rules still apply. Ministers, however, occupy positions of sufficient power, influence and seniority that additional rules may also apply, for example:

- More extensive rules on the disclosure of assets and incomes and for avoiding conflicts of interest, plus closer surveillance to ensure that any conflicts are avoided or dealt with.
- Accountability to the legislature. The relationship between the executive and legislative varies from one country to another. In the interests of transparency and political accountability, the ministers who formulate and implement Government policy are usually required to appear before legislative bodies to provide information and account for the actions of their departments. Sanctions for failing to appear or for misleading legislatures may apply;
- Post-employment constraints. Constraints are similar to those that may be applied to public servants but are more stringent and, in some cases, last longer. Such constraints exist partly because of the extent and sensitivity of the information ministers hold, and partly because post-ministerial advantages could be linked to undue influence on decision-making by the minister while in office. For example, if a minister takes a job with a company affected by his or her previous duties, suspicions of clandestine employment offers to the minister while in office would undoubtedly be raised. Such employment may also cause concern that the former minister could have inside information, or that he or she may have undue influence with colleagues still in office. In some circumstances, a ministerial office may have involved such broad-ranging powers and interests that a prohibition on post-ministerial employment for some time after leaving office may be necessary. Pensions, severance packages or other compensation may have to take that into consideration.
- Confidential information. Rules governing the disclosure of confidential information are similar to those applicable to other present or former public servants. Closer monitoring may be warranted, however, because of the sensitivity of the information to which ministers generally have access.
- Transitional requirements. Unlike ordinary members of elected legislatures, political ministers and elected heads of State have both political and executive responsibilities that may come into conflict during transitional periods, such as election campaigns and the period between the decision of the electorate and the handing over of office. Broadly speaking, political ministers should be prohibited from using executive powers in ways that confer partisan political advantage, although their accountability in such circumstances may be political rather than legal. Some rules that may be applied include prohibition on the awarding of contracts, hiring people or conferring benefits that are unnecessary for the maintenance of Government; prohibition on the use of public servants for partisan purposes, accompanied by measures prohibiting public servants from engaging in such conduct and protecting those who refuse to do so; rules limiting the destruction of documents (in hard copy or digital format) to records of a political nature; and rules prohibiting public servants from disclosing official records of a political nature to members of subsequently elected Governments.

Rules for judicial officers[102]

As noted in the segment dealing with building judicial institutions, judges should be subject to many of the same rules as other public servants, with two significant differences. Compliance with basic standards of conduct is more important for judges because of the high degree of authority and discretion their work entails. Thus, the formulation and application of codes of conduct for judges must take into consideration the importance of basic judicial independence[103]. The senior and critical function of judicial officers will often make them the focus, at an early stage, of anti-corruption strategies. Thus, the measures developed for judges and the reaction of judges to those measures will serve as a significant precedent for the success or failure of elements applied to other officials.

Possible rules include:

- Rules intended to ensure neutrality and the appearance of neutrality, for example restrictions on participation in some activities, such as partisan politics, that are taken for granted by other segments of the population, and some restrictions on the public expression of views or opinions. Such restrictions may depend on the level of judicial office held and the subject matter that may reasonably be expected to come before a particular judge. In general, the restrictions must be balanced against the basic rights of free expression and free association, and any limitations imposed on judges must be reasonable and justified by the nature of their employment[104]. Judges may also be restricted in their ability to deal in assets or property, particularly if their jurisdiction frequently raises the possibility of conflict of interest. Where such conflicts are less likely, a more practicable approach may be that of disclosure and avoidance.
- Rules intended to set standards for general propriety of conduct. Judges are generally expected to adopt high moral and ethical standards; conduct failing to meet such standards, even if not criminal or a clear breach of a legal standard, may call the fitness of a judge into question. Conduct seen as inappropriate may vary with cultural or national characteristics, and it is important that reasonably clear guidelines, standards or examples are set out. Usually judges will do this themselves. Examples of inappropriate conduct may include serious addiction or substance-abuse problems, public behaviour displaying a lack of judgment or appreciation of the role of judges, indications of bias or prejudice based on race, religion, gender, culture or other characteristics, and patterns of association with inappropriate individuals, such as members of organized criminal groups or persons engaged in corrupt activities.

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[102] See Case study #9 Bangalore Principles of Judicial Conduct for Judges

[103]. See Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, "Basic Principles on the Independence of the Judiciary", GA/RES/40/32 of 29 November 1985 and 40/146 of 13 December 1985, and "Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary", ECOSOC resolution 1989/60 of 24 May 1989.

[104] See International Covenant on Civil and Political Rights of 16 December 1966, Articles 19 and 22.

- Rules prohibiting association with interested parties. The integrity of legal proceedings depends on the basic principle that all elements of a case be laid out in open court to ensure basic transparency, and that all interested parties have an opportunity to understand all the elements of a case and respond accordingly. The appearance of integrity is also critical. Usually, judges are prohibited from having contact with any interested party under any circumstances; any exceptions to this are set out in detail in procedural rules. Judges should also be prohibited from discussing matters that come before them and should be required to ensure that others do not discuss them in their presence. Rules governing other public servants, and especially those in high professional or political offices, should also prevent them from contacting judges or discussing matters that are before the courts.
- Rules governing public appearances or statements. Judges are often called upon to make public comment on the court system or contemporary legal or policy issues. The integrity of proceedings and any resulting case law depends on the inclusion of all judicial interpretation and reasoning in a judgment; rules should therefore prohibit a judge from commenting publicly on any matter which has come before him or her in the past or is likely to do so in the future. Rules may also require judges to consult or seek the approval of judicial colleagues or a judicial council prior to making any comment, particularly if they hold senior judicial office and likely to hear a wide range of cases.
- Rules limiting or prohibiting other employment. Codes of judicial conduct often either prohibit alternative employment entirely, limit the nature and scope of such employment, or require disclosure and consultations with chief judges or judicial councils before other employment is taken up. Both the nature of the employment and the remuneration paid can give rise to conflicts of interest, and such limitations/prohibitions usually extend to unpaid (pro bono) work.
- Rules requiring disclosure and disqualification. Rules intended to prevent conflicts of interest are often supplemented by rules requiring judges to identify and disclose potential conflicts, and to refrain from hearing cases in which such conflicts may arise. Rules should also provide a mechanism whereby a judge can alert colleagues to an unforeseen conflict that arises while a case is ongoing. The rules may require disclosure and consultation with the parties, and in extreme cases, self-disqualification and termination of the proceedings and their recommencement before another judge. Mechanisms should also be in place for parties, witnesses, other participants or any other member of the public to identify possible conflicts of interest in judicial matters, and for the discipline of any judge who fails to disclose a known conflict.

More generally, rules should require judges to disqualify themselves in proceedings in which their impartiality might reasonably be questioned. Examples include:

- A personal bias or prejudice concerning a party or issue in contention;
- Personal knowledge of any facts in contention or likely to be in contention;

- Involvement of personal friends, associates, former associates or former clients[105]; and
- The existence of a significant material financial or other personal interest on the part of the judge, or on the part of a close friend or relative that could be substantially affected by the outcome.

Codes of conduct for the private sector

The extent to which private sector codes feature in national anti-corruption programmes will depend, to some degree, on political and policy assessments of the extent to which any given private sector activity affects the public interest. Areas in which significant public interests are triggered include organizations that deal frequently with the Government, for example providing goods or services, or those whose basic functions affect the public interest or public policy, such as the media.

Governments often choose to go beyond such areas, regulating private sector activities whose collective or long-term effects raise significant public interests. Those involved in such activities could also be required or encouraged to adopt and enforce codes of conduct as part of a larger regulatory strategy. One such example is trading in stocks or securities where individual trades are private but rules ensuring transparency and public confidence in the market are established as a prerequisite for economic prosperity and stability in the country.

The underlying values of private sector codes of conduct are much the same as for the public sector, particularly in respect of provisions intended to combat corruption, but specific provisions will vary according to the nature of the organization and the functions of its employees. A major distinction is that while public servants are expected to act exclusively in the public interest, those in the private sector are generally obliged to act in the interests of their employer, and may be faced with ambiguities or conflicts in cases where those interests and the public interest do not coincide. For example, journalists may discover information whose publication may be in the interest of their employer but not of the public. An added complexity in such cases is the considerable difficulty of deciding where the public interest lies, based on the actual information and circumstances in question.

In general, private sector rules may include rules setting out the basic interests of the employer, the relevant public interests and the circumstances in which each should be given priority. Rules requiring employees to keep employer information confidential, for example, may have express exceptions for situations where the employer is a supplier to the Government. If an employer does not create such exceptions, they may be created by the State in the form of legislation. Similarly, rules for dealing with cases of "whistleblowers" who disclose information in the public interest but to the detriment of the employer may be created by legislation or court decisions.

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[105] Where judges are recruited from the ranks of the practising Bar, full application of this principle may not be practicable, especially in regions or communities where there are relatively few lawyers.

Regarding private codes, they could also address a number of anti-corruption questions. Here, however, "corruption" will generally mean conflicts of interest where individual interest is placed ahead of the interest of the employer rather than the public.

Some possible rules follow but they are by no means exhaustive.[106]

- Rules could require disclosure, create limits or complete prohibition with respect to gifts, gratuities, fees or other benefits that might be offered to the employee. As disclosure is intended to identify potentially conflicting interests, it could be limited to sources that are linked in some way to the business or to the obligation of the employee to the employer.
- Rules could require the disclosure of other personal financial or related information, particularly for employees with significant responsibility for accounting and financial matters.
- Rules could govern the behaviour of employees engaged in particularly sensitive aspects of the business, such as the handling of sensitive information or the preparation or receipt of competitive bids for contracts.
- Rules could require the compliance of employees with the legislative and regulatory requirements that apply to the company, for example for financial disclosure or environmental standards. That ensures that, while the employer may be held legally liable for malfeasance by employees, such malfeasance will also constitute breach of contract by the employee, invoking powers of discharge and discipline.

Rules for journalists.

As noted, members of the media, in providing information that allows the public to make informed choices about governance and other important matters, have a greater overlap in private interest and public interest functions than most. Political accountability, for example, depends on an independent media to inform the electorate about what their elected officials have or have not done while in office and what they propose to do if elected or re-elected. More generally, the media ensure transparency in public affairs, an important function in ensuring good governance in general and the control of corruption in particular. Rules for journalists could include the following.

- Rules setting standards for the quality of research and the accuracy of reporting. Generally, negligence or wilful blindness with respect to the accuracy of information gathered or the reporting of information that has not been properly verified or is known to be false or inaccurate, serves the interests of neither the public nor the employer;
- Rules governing the conduct of employees in cases where private and public interests may conflict. One possibility in such cases may be

[106] IFWEA Journal, "Company Codes of Conduct: Raising Awareness", http://www.ifwea.org/journal/1099/company_codes_of_conduct_html
Human Rights for Workers - A Hong Kong Critique of Corporate Codes, http://www.senser.com/8-9.htm.

consultations with other experienced journalists or editors during which the relevant private and public interests could be identified and assessed. While the views of the government or particular officials, if known, may be relevant to discussions, they will not necessarily determine their outcome.

- Rules governing attempts to corrupt members of the media will generally be similar to those for other private-sector employees. They may include requirements not to accept gifts or other benefits and to disclose any possible conflicts of interest, including offers of gifts or benefits, other employment, or memberships or other affiliations. The major difference between the media and other areas of private employment is the breadth of their field of activity. Reporters or editors can be called on to deal with news in almost any area, thus there is much more potential for conflicts of interest to be raised. Where such conflicts are seen as inevitable, rules may even prohibit some forms of activity completely. For example, those who report on or analyse stock markets and have the power to influence trading may be prohibited from trading themselves and should disclose in advance any commentary that could, when published, affect trading.

PRECONDITIONS AND RISKS

The implementation of codes of conduct

Examples of cases in which excellent codes of conduct have been drafted, and then implemented ineffectively or not at all, abound. Codes must be formulated with a view to effective implementation, which means an effective implementation plan and a strong commitment to ensure that the plan is carried out. Implementation strategies should include a balance of "soft" measures that ensure awareness of the code, and encourage and monitor compliance, and "hard" measures, clear procedures and sanctions to be applied when the code is breached[107].

Effective implementation may require the following elements.

- Drafting and formulation of the code so that it is easily understood both by the "insiders" who are expected to comply with it and the "outsiders" whom they serve.
- Wide dissemination and promotion of the code, both within the public service or sector affected and among the general population or segment of the population being served.
- Employees should receive regular training on issues of integrity and on the steps each employee can take to ensure compliance by colleagues. Peer pressure and peer reviews could be encouraged.

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[107] Mike Nelson, The Challenge of Implementing Codes of Conduct in Local Government Authorities, paper presented at the 9th International Anti-Corruption Conference, http://www.transparency.de/iacc/9…apers/day4/ws3/d4ws3_mnelson.html; Meredith Burgmann, Constructing Legislative Codes of Conduct, http://www.aph.gov.au/senate/pubs/pops/pop35/chapter5.htm.

- Managers should be trained and encouraged to provide leadership, as well as advice on elements of the code and in the administration of compliance (monitoring and enforcement) mechanisms.
- The establishment of monitoring and enforcement mechanisms can range from criminal law enforcement to occupational performance assessment and research techniques.
- The establishment and use of transparent disciplinary procedures and outcomes. Transparency is important to ensure fairness to the employees involved and to assure insiders and the general public that the code is being applied effectively and fairly.
- The effective use of a full range of incentives and accountability structures. Using deterrence measures such as extensive monitoring and threats of disciplinary action are an effective means of ensuring compliance with the code; they are not, however, always the most efficient option. Those who are subject to the code should also be provided with as many positive incentives as possible to comply with it. Those could include education and information programmes to instill professional pride and self esteem; compensation to reflect the higher degree of professionalism expected, and the inclusion of elements of the code in employee assessment mechanisms. Front-line employees should be assessed on their compliance and managers on the way they promote and apply the code in dealing with subordinates.
- The establishment of mechanisms to permit feedback from employees and outsiders, anonymously if necessary, on the administration of the code, to indicate possible areas for expansion or amendment.
- The establishment of mechanisms to permit reports of non-compliance, anonymously if necessary.
- The establishment of mechanisms to enable employees who are uncertain about the application of the code to elements of their duties, to consult prior to making decisions. For example, those facing conflicting obligations to keep information confidential while ensuring transparency in decision-making may consult regarding what information should be disclosed, to whom and in what circumstances.

RELATED TOOLS

Tools that may be required before codes of conduct can be successfully implemented include:

- Publicity campaigns and the development and promotion of such documents as citizens charters that raise awareness of the code and those it regulates. Such mechanisms establish expectations on the part of the population, particularly those directly affected by corruption.
- Establishment of an independent and credible complaints mechanism to deal with complaints that the standards prescribed have not been met; and

- Establishment of appropriate disciplinary procedures, including tribunals and other bodies, to investigate complaints, adjudicate cases and impose and enforce appropriate remedies.

Tools that may be needed in conjunction with codes of conduct include:

- Tools involving the training and awareness-raising of officials subject to each code of conduct to ensure adherence to the code and identify problems with the code itself;
- The conducting of regular, independent and comprehensive assessments of institutions and, where necessary, of individuals, to measure performance against the prescribed standards;
- The enforcement of the code of conduct by investigating and dealing with complaints, as well as more proactive measures, such as "integrity testing"; and,
- The linking of procedures to enforce the code of conduct to other measures to identify corruption, such as more general assessments of performance and the comparison of disclosed assets with known incomes

Codes of conduct can be used with most other tools, but areas of overlap and possible inconsistency may be a concern and should be taken into account when formulating specific provisions. That is particularly true of other rules that may apply to those bound by a particular code. For example, codes should not be at variance with criminal offences; in some systems it may be advisable to reconcile other legal requirements by simply requiring those bound by the code to obey the law, effectively incorporating all applicable legislative requirements and automatically reflecting any future statutory or regulatory amendments as they occur. Care should also be taken to ensure that codes are consistent with other applicable codes of conduct, or that if an inconsistency or variance is intended, it is clearly specified.

TOOL #9

NATIONAL ANTI-CORRUPTION COMMISSIONS AND SIMILAR BODIES

National anti-corruption commissions, committees and similar bodies may be established to fulfill a wide range of purposes. They may be composed of politicians, public servants and/or members of civil society. The nature and composition of a particular body will depend mainly on what it is expected to accomplish.

Such bodies differ from anti-corruption agencies. An anti-corruption agency is a standing public service body established to implement and administer prevention and enforcement elements of a national strategy. Anti-corruption committees or commissions, on the other hand, can be standing or ad hoc bodies. They are intended, inter alia, to develop the anti-corruption strategy and its major elements, including the establishment of an independent anti-corruption agency and other necessary entities; to develop legislation; to develop appropriate action plan(s); to take measures to keep the public informed; and to foster broad-based support of the national strategy.

Other functions, including public monitoring both of the implementation of the national strategy and of the work of officials or bodies forming elements of that strategy, can be assigned as needed. Any ongoing roles will depend on how successful the national strategy is and whether ongoing responsibilities have been safely passed on to other bodies, such as anti-corruption agencies. For example, once basic anti-corruption legislation is developed and enacted, it may be sufficient to leave development of future amendments to the usual legislative process, possibly advised by the anti-corruption agency or outside sources of expertise.

DESCRIPTION

Mandate

The basic mandate of a committee is usually to formulate the national strategy, making adjustments, as needed, during its implementation. That would include, for example, setting basic priorities, sequencing strategic elements, monitoring progress in specific areas and adjusting planning and timelines to progress or delay actions as implementation proceeds. In the interests of transparency and the coordination of the activities assigned to it, the committee should report to the legislature and key officials. More generally, it should report to the public, encouraging support and participation, and managing expectations.

Constitution, establishment and legal basis.

As with anti-corruption agencies, some degree of independence, entrenchment of mandate and security of tenure is needed to ensure that the work of the committee will not be subject to undue influences or curtailment by those

uninterested in controlling corruption. Entrenchment could be accomplished by an executive order, entrusted to the legislature or, if necessary, by a more stringent mechanism. One possibility is establishment for a fixed period, with some form of renewal or extension if the mandate has not been effectively discharged.

Membership

Members of the committee should be selected with a view to ensuring expertise in a range of areas. Membership should be sufficiently diverse as to reflect the country as a whole. Generally, committees will consist of members recruited from the executive, judiciary, legislature, electoral governing body, civil servants in key departments such as customs, procurement, revenue collection and law enforcement, and from regional and local government bodies. Members from outside Government may include representatives of religious groups, relevant non-governmental organizations, business leaders, the media and the academic community.

Committees must enjoy public confidence and credibility, and that is enhanced by the appointment of individuals widely known and respected for their integrity, commitment and competence. Membership should represent areas of the public and private sectors identified as critical for the success of the national strategy. Often, those areas will themselves be early targets of any reforms needed, and members will be able to assist in the reform process and keep the committee aware of progress as it proceeds.

Drafting legislation establishing a national anti-corruption commission.

Legislation establishing such a national anti-corruption commission should deal with the following issues.

- If an existing body is to be mandated, the name and description of the body; if it is not to be mandated, the name by which the new body is to be designated;
- The basic composition of the body and the process whereby members should be appointed and removed. Once established, the body itself could be delegated the responsibility of appointing and removing members. Legislation could specify appropriate levels of representation from key areas such as the judiciary, civil society and public service, if necessary;
- The process whereby the chairperson is appointed and removed;
- Powers of the committee to engage, retain, compensate and dismiss staff, including regular staff, and the ad hoc engagement of individuals with specialized expertise;
- Provisions requiring members to disclose and, where necessary, discontinue other activities that may raise conflicts of interest. Similar provisions should be established for the staff of the committee, either through the legislation itself, with the committee using powers delegated by the legislation, or through contractual provisions developed by the committee;
- Provisions governing the budget of the committee, ensuring basic independence and the adequacy of resources. The committee can also

be required to submit to external audits or report on its activities and expenditures on a periodic basis; and

- Provisions setting out the basic mandate and powers of the committee. The provisions will usually include the development of a national strategy, the monitoring and adjustment of the strategy where necessary, and the roles to be played by the committee in the implementation of the strategy.

Roles might include:

- The development and furnishing to other entities of advice on the strategy and the programmes to implement it;
- The conducting of information campaigns to educate and develop support for the strategy among the general public and key population groups;
- The establishment and implementation of training programmes, or the delegation of that responsibility to specific departments or agencies. For example, the national committee may design general anti-corruption training programmes, and then call upon specific entities, such as the judiciary or law enforcement agencies, to adapt and supplement the general materials to take account of the issues most likely to arise for each entity;
- The establishment of monitoring and reporting mechanisms to gather information about progress in implementing the strategy, the compilation and analysis of that information and the production of regular public reports on the status of implementation;
- The role, if any, to be played by the committee in monitoring activities in specific areas, such as the operation of political organizations or election mechanisms. Such roles will depend to a large degree on whether other organizations already perform them; and
- Provisions establishing the tenure of the committee, including provisions governing automatic renewal or expiry of its mandate, the intervals at which that should occur, and any criteria for review and determination of whether the mandate should continue or not. Once specific goals are set for the national strategy, the committee should usually continue in existence until the goals have been demonstrably met or until such time as its work has been transferred to other established entities, such as an anti-corruption agency.

Establishment of a national integrity unit to support committees and commissions

The purpose of a national integrity unit is to coordinate anti-corruption activities and the precise functions of the various institutions engaged in active efforts against corruption. The specific mandate will depend on whether other entities such as anti-corruption agencies, commissions or committees have been established and, if so, what their mandates are.

In circumstances where steering committees or commissions develop, launch, implement and monitor national strategies and where agencies actually implement and administer prevention and enforcement elements of a national

strategy, a national integrity unit would be called upon to consult with a national committee on elements of the national strategy, coordinating the formulation of specific mandates to ensure effectiveness and minimize redundancy. As the strategy is implemented, it would consult with departments, agencies and other entities about ongoing operations, ensuring mandates were respected and minimizing gaps and redundancies.

Functions that can be performed by a national integrity unit,

Secretariat to a national integrity commission or steering committee.

In some countries a national integrity unit has functioned as a secretariat to the national integrity steering committee or similar body. It may perform the same functions for other entities such as ad hoc working groups, for example those working for reforms of public administration, deregulation, privatization, budget, taxation, and banking.

Clearing-house for citizen participation.

In addition to coordinating institutional participation, the units can also coordinate between institutions, individually or collectively and the general population. They can act as a clearinghouse for citizen participation in the integrity process, accepting and transmitting proposals or criticisms, and ensuring that questions are answered. They can initiate activities such as the signing of "integrity pledges" by officials and other high-profile events aimed at building public confidence in reform and developing momentum for change. They can also facilitate longer-term institutional reforms by engaging civil society in implementing and evaluating reform programmes.

Special tasks.

Apart from such general tasks, units could also be assigned special activities and responsibilities. Working with officials and agencies outside the anti-corruption programme, it can help in incorporating integrity issues or elements into other ongoing policies or operations, such as national development strategies or economic reform agendas. Providing a source of central coordination for expertise on integrity-related issues can ensure that quick and reliable information is available when and where it is needed. Units can also forge direct links between Government and institutions of civil society for research, information, and public awareness-raising. Finally, the unit could conduct surveys on such issues as the delivery of public services, organize public education and awareness-raising activities, and conduct integrity workshops.

PRECONDITIONS AND RISKS

Four major areas of concern can be identified:

Selection of members.

The public credibility of a committee or commission will depend largely on the perception that its members have integrity, are competent, and that all relevant interests in society are represented on it. The link between the credibility of the membership and the committee as a whole is especially important in the early stages of the strategy, before the committee can be judged on its accomplishments. Later, if the committee is seen as successful, the credibility of individual members may be less critical.

The setting of reasonable goals and the management of public expectations.
In sub-units as in other anti-corruption bodies and programmes, credibility is often damaged if the extent of corruption and the difficulty of the task at hand are underestimated. There can be unreasonable expectations and the perception that the committee is a failure if expectations are not met. Expectations as to the goals of the committee, the timeframe for the achievement of various objectives and the indicators used to assess ongoing progress must, therefore, be reasonable.

Isolation of the committee and its work from civil society.
If the committee does not regularly communicate with civil society regarding its goals, activities and progress, popular support is unlikely to be generated. Without such support, technical reforms are much more difficult to achieve, and even if they can be accomplished, may have little impact.

Lack of involvement of all stakeholders.
If key individuals or entities are not closely involved, credibility may be damaged. More seriously, uninvolved stakeholders may refuse to cooperate with or may impede the reform effort. For example, while strict corruption offences may be enacted, they will have little impact if they are not properly enforced or if the judiciary does not cooperate. It is also just as important to involve corrupt stakeholders, or those perceived as being so, as well as stakeholders who play a critical role in anti-corruption efforts, such as judges and watchdog agencies. A common mistake has been to establish national integrity units that report to the executive instead of to an independent entity such as a national anti-corruption commission or committee. Reporting to the executive erodes credibility, particularly if corruption involves the executive or is perceived as doing so; it also impairs the functioning of the unit in coordinating anti-corruption efforts on a daily basis. If an independent entity has not been established specifically for the anti-corruption strategy, reporting to other independent entities, such as judicial bodies or multipartisan legislative committees, could be considered.As with other entities, units must have the necessary financial and human resources, as well as freedom from interference.

RELATED TOOLS

For the sake of efficiency, national anti-corruption commissions, committees and similar bodies would need to be supported by:

- Evidence about types, levels, cost and causes of corruption established through independent comprehensive assessments;
- Credible public complaints mechanisms;
- Tools that raise awareness of members of the public about their role in fighting corruption;
- Legislation empowering and protecting the public in their efforts against corruption, including access to information/whistleblower protection legislation.
- Codes of conduct and citizens charters outlining performance standards; and
- National and municipal (local) broad-based integrity and anti-corruption action-planning meetings.

TOOL #10

NATIONAL INTEGRITY AND ACTION-PLANNING MEETINGS

As anti-corruption strategies are developed, implemented and evaluated, it will frequently be necessary to bring stakeholders together to ensure that they are well informed and to assess, and if necessary mobilize, their support for the process.

National integrity meetings can be held to deal with any substantive or procedural aspect of the strategy; they may be of a very general nature or focus on a specific area or issue of concern. Action-planning meetings generally deal with more specific matters, for example assessing the effects of past or ongoing activities and developing or adjusting specific action plans, where appropriate.

While specific objectives may vary, the goals of such meetings will usually include most or all of the following:

- Raising awareness about the negative impact of corruption;
- Assessing the state of progress made to curb corruption;
- Helping to build consensus for a national integrity strategy and tailoring action plans or elements of the strategy to apply to participants;
- Helping participants understand the national strategy and how their own efforts are linked to it;
- The development, planning, coordination and assessment of specific elements of the strategy; and
- Creating partnerships, fostering participation and directing group energy towards productive ends.

DESCRIPTION

National integrity meetings or "workshops" should bring together a broad-based group of stakeholders to develop a consensual understanding of the types, levels, locations and causes of corruption, and its potential remedies. At the early stages of the process, such workshops will usually be multipurpose:

- Assessment of the nature and scope of the problem;
- Development of a preliminary assessment of priority areas for attention; and
- Education and, in some cases, reassurance of participants to secure their support and cooperation

Later in the process, the focus will usually shift to:

- Assessment of past efforts;
- Planning of future efforts; and, where necessary;
- Readjustment of priorities to take account of ongoing efforts and developments.

Meetings can be organized at the national or subnational level or for a particular sector in which common issues are likely to arise. Meetings could also be used to bring specific sectors together to facilitate cooperation or help share expertise or experiences. The process component of meetings should maximize learning and communication; the content component should produce new knowledge and stimulate debate leading to new policies. The discussions held at meetings and their outcome should be documented where possible so that they can be used as the basis for assessing future progress and for future meetings.

The evolution of meetings as the national strategy proceeds

Within specific sectors of Government, several meetings may be held in sequence as the strategy is developed, implemented and assessed. For example, municipal or subnational integrity workshops have been held in the following distinct stages or phases.

- ***Phase I*** seeks to build a coalition to support reform, focusing on discussions with local stakeholders to raise awareness of corruption and assess their perceptions of the problem. Their views regarding priorities and modalities are considered and, where possible, reflected in the applicable action plan. That ensures future cooperation and support for the national strategy, and especially those elements of it that directly affect the sector or region involved.
- ***Phase II*** focuses on a more objective assessment of the problem in the region or sector concerned, using Service Delivery Surveys (SDS) or similar methods. Information is systematically gathered, recorded and analysed during Phase II.
- In ***Phase III,*** the results of the SDS are considered, and participants are asked to help develop and consider options for dealing with the problems identified. Priorities may also be set or adjusted at this stage, taking into account not only the seriousness of specific problems but also sequencing issues, in which reforms in one area may be needed at an early stage to support later reforms planned for other areas. An action plan, setting out specific activities and the order in which they should be undertaken, is developed.
- ***Phase IV*** usually involves implementation of the various elements of an action plan according to an agreed timetable.
- ***Phase V*** involves the assessment of progress and, where necessary, the adjustment of substantive actions or priorities in accordance with that assessment. Meetings for such purposes could be held regularly or as necessary.

Information for the holding of national integrity or action-planning meetings

All meetings should be designed with specific objectives in mind. Every aspect of the design should increase the chance that objectives will be met. The most important objectives are to:

- Ensure that content is focused and that the scope of the content is clearly defined; and
- Ensure that the process enhances the sharing of information and transfer of knowledge.

Other important process components include:

- Creation of a learning environment;
- Enabling networking and cooperation between participants;
- Generating enthusiasm and motivating participants to take follow-up actions; and
- Encouraging participants to focus on the development of solutions rather than merely dwelling on the problems themselves.

Meetings should be carefully planned, and there should be a sound framework in place well before actual start-up. Participants who will play leading roles, such as facilitators, chairpersons, panellists, speakers and support staff, should be well briefed in advance about their respective roles and tasks. Participants should also be informed in advance about what is expected of them, and should attend the workshop well prepared to meet both the content and process objectives. Flexibility on the part of organizers and participants is also important. The process should be evaluated as the meeting proceeds, and adjusted as necessary.

Based on previous experience, meetings could employ the following general pattern:

- A series of preparatory activities is conducted to build organizational capacity, foster broad-based consultation, collect credible data, select key workshop personnel and publicize the meeting and its objectives. Some of those requirements may be met using standardized materials or personnel, while others will be specific to each meeting and to the entity or entities in which it is to be held.
- Most meetings held thus far have been two-day events, which provides sufficient time to explore the issues involved and does not overtax leaders or participants.
- A first plenary session is held to raise general awareness, launch the meeting and build pressure on participants to deliver on the objectives of the meeting. Such sessions usually begin with a keynote address and a review of workshop objectives and methodology. Foreign experts, survey analysts and local analysts may be called upon to offer brief presentations.
- The opening plenary should set the tone for the meeting, with presentations covering the full range of topics within the chosen theme. Content should cover problems and possible solutions. Speakers may include some experts from outside the host country, region or participant group, but domination by "outsiders" should be avoided if possible.
- A series of working group sessions follows the opening session, using small (fewer than 15) groups and trained chairpersons to analyse substantive areas and build consensus on facts and issues. For example, a group may be called upon to examine the causes and results of corruption and/or lack of integrity, and to identify actions to address those problems. A range of separate topics can be developed to allow participants to select those they wish to address. If appropriate, separate groups can be asked to consider similar, related or

overlapping topics to permit later comparison or stimulate discussion between groups when the plenary reconvenes.

- Where separate groups are used, each group should designate a member to report to the plenary on its deliberations to ensure clarity and facilitate documentation.
- A final plenary session should be held to synthesize the results of the working groups. That session is also a forum for publicly presenting the findings of the workshops and other outcomes of the meeting, such as action plans or recommendations. It helps to ensure that the outcome of the meeting is documented and disseminated.

Procedural objectives of meetings.

In organizing meetings, basic procedural goals should be set and communicated to those organizing and running each meeting. Goals can be adjusted in accordance with the substantive goals of the meeting (see below). In cases where a series of meetings is held, the objectives and the extent to which they have been achieved can also be taken into account in planning future meetings. Process objectives should be clearly communicated to leaders and participants well in advance of the meeting and reaffirmed, as necessary, at the start of and during the meeting. Process objectives will normally be as follow:

- To initiate a sharing and learning process appropriate for the participants involved;
- To establish an atmosphere in which participants can contribute effectively and are encouraged to do so; and
- To create partnerships or linkages between participants from different stakeholder groups.

PARTICIPATION.

There should be no more than 15 people per group and facilitators should ensure that all group members have an opportunity to speak. Organizers should ensure that participants do not listen passively to speakers but have the opportunity to ask questions, express their views and actively participate in discussions addressing the workshop objectives. Such participation ensures better understanding, ownership of information and heightened awareness.

Facilitators should also prevent individual participants from dominating discussions. While deliberations may aim at consensus, organizers and participants should recognize that it is not always realistic. An equally valid goal in most cases is the identification, clarification and understanding of differing positions or viewpoints and the reasons they are held. This benefits the participants directly and assists others in adjusting the strategy to take account of and resolve the differences in other ways.

CREATING PARTNERSHIPS.

Many meetings are used to bring together individuals who do not normally associate. In such cases, a key function is the development of contacts and relationships that benefit the anti-corruption strategy and would not otherwise exist. For example, contacts may be established between those responsible for

anti-corruption measures in relevant public sector departments or agencies or between representatives of the Government, media, religious groups, private sector groups, and non-governmental organizations or other elements of civil society. In processes funded or supported by outside agencies or donors, partnerships can also be created between donors, recipients and other interested parties. In such cases, however, it is important to ensure that the major focus of the meeting is on domestic issues and that foreign donors or international agencies or experts do not unduly impose their views on country participants.

In order to achieve partnership, several options may be considered for the workshop process, for example, asking some participants act as observers only. Such "observers" would not participate in the small-group discussions; they would only listen and offer comments on group feedback during plenary sessions. Another option is to ask participants to discuss identical topics during separate small-group sessions and then to compare findings during plenary sessions.

MANAGING GROUP DYNAMICS.

Every group has its own dynamics, which can be either detrimental or conducive to achieving group objectives. Facilitators should monitor the proceedings and be prepared to intervene if necessary. To present content effectively, organizers may ask presenters or other participants to do any of the following:

- Present a general introduction to the workshop theme;
- Present key issues and formulate questions to stimulate discussion among participants;
- Share research information;
- Present (theoretical) models;
- Present examples of practical successes and failures; and
- Generally facilitate and stimulate discussion.

CONTENT OBJECTIVES OF THE MEETING.

From a substantive standpoint, the content of a meeting will depend on several factors, such as who the participants are and what stage they or the entities they represent have reached in implementing their elements of the national strategy. Organizers should begin by ensuring that the content to be covered meets the needs of the participants. Presenters and panellists should be briefed beforehand on what is expected of them and asked to prepare accordingly.

WORKSHOP TOPICS, KEY ISSUES AND ELEMENTS.

To ensure that the content is relevant to the theme of the meeting, organizers should designate a list of topics or themes, from which specific areas to be covered can be designated by the participants or in consultation with them. Those responsible for chairing or facilitating actual discussions should formulate basic questions or issues for each topic area and these can be used to stimulate discussion or refocus participants on the issues at hand.

General themes or topics that might be discussed include:

- The need to build a workable national integrity system, the development of specific recommendations for action and the assignment of responsibility for improving the system;
- How society as a whole might participate in a continuing debate on such issues and work with like-minded political players in a creative and constructive fashion;
- Issues of leadership, including the sort of leadership required, whether the right kind of leadership is available and, if not, what can be done to fill leadership vacuums, and whether available leaders are appropriately trained;
- Identification of the results to be achieved and best-practice guidelines that could be followed to achieve them;
- The need to foster partnership, action, learning and participation. The focus should be on partnerships between the types of organizations represented: how such partnerships can be established and what is needed from individuals and organizations to achieve that; and
- The creation of political will and commitment: whether a commitment for change exists and how to develop or reinforce it.

Some possible areas for specific discussions could include the following.

- Role of the Government in promoting or establishing key elements of the national strategy, such as transparency and accountability structures;
- Role of the political process, including the legislature, the bodies that conduct and validate elections, and the democratic political process in general;
- Role of civil society, such as non-governmental organizations, the media, religious groups and professional organizations;
- Role of the private sector; and
- Role of specific officials or institutions, such as Auditors General, the judiciary, law enforcement agencies and other constitutional office holders.

PREPARATION OF MATERIALS

Careful consideration should be given to the written and oral materials prepared in advance. They help to orient and sensitize participants beforehand, serve as guidelines during discussions, and provide reference information afterwards. It is important that drafters consider carefully the participants for each meeting, framing materials in a style and format that is appropriate to their educational and knowledge level, linguistic, cultural and other relevant characteristics. Content should seek to build upon existing knowledge and complement it by introducing areas that may be new to participants. For example, meetings of groups such as law enforcement officers, prosecutors or judges could be based on the assumption that participants will have some level of legal knowledge but less understanding of social or economic issues. Content could then seek to develop

specialized legal knowledge relevant to corruption, while also raising more general awareness of its social, political and economic effects.

Materials could include the following.

- Background papers and other relevant documents distributed in advance or handed out on the first day;
- Short oral remarks by the authors of the papers;
- General comments from a number of speakers on the first morning of the workshop; and
- "Trigger" questions formulated by the facilitators for each small group discussion to help identify key issues and stimulate the interest of participants.

MATERIALS PRODUCED BY MEETINGS

The basic purpose of documentation is to inform those responsible for the overall strategy about the status of efforts in each area, to keep those who may be dealing with similar issues in other areas up to date, and to inform those who plan future meetings or other activities about the history and development of each issue discussed.

Documentation also forms an important source of historical information and, in the case of projects funded or supported by donors, demonstrates the results achieved as a result of the support and provides guidance regarding future support. Generally, organizers should attempt to document as much as possible of the proceedings, keeping in mind the costs of producing and disseminating documents and the fact that texts that are too long or too detailed are less likely to be read.

The format of reports may be determined by the authority convening the meeting, by the meeting itself or by the organizers. Whatever the format, the relevant information should be set out clearly and logically to assist participants in referring back to former proceedings, and to inform those who did not attend. Organization into clear and well titled categories or segments greatly assists the process. To some extent, standardization of format assists anyone charged with obtaining information from many reports. If a series of meetings is planned, organizers may wish to create a template for reports. Strict adherence to a template should not, however, take priority over clarity or the effective organization and labelling of information for ease of access. If possible, reports should be prepared as the meeting proceeds, and reviewed, corrected and adopted by the meeting before it concludes.

Where feasible, documentation should include the following:

- A list of all participants, including their basic "contact information" to enable those involved to meet or discuss after the meeting;
- If the meeting is convened by a specific authority, based on a specific mandate, or as part of a series of meetings, basic historical and reference information about these should be included;
- A statement of the basic purpose of the meeting, the issue or issues taken up and the basic organizational framework or process used;

- The results of discussions, and enough information about the tenor and substance of discussions to indicate how results were reached, or if they were not reached, the reason(s) why;
- Texts of papers or speeches presented during the meeting (full texts, extracts or summaries), edited for uniformity and consistency;
- Observations, reports or other notes provided by presenters or other participants; and,
- Any suggested follow-up actions, conclusions and recommendations[108].

Role of organizers and other personnel

Meetings should be organized and conducted by a team that assesses the needs of the country or region, develops specific themes and topics, prepares materials, organizes and conducts the meeting itself, and prepares reports and other substantive outputs. Team members should be properly briefed in writing ahead of time. If possible, they should meet two days before the meeting to share ideas, clarify and coordinate individual roles, agree on content and process objectives and clarify the content of topics and key issues. They should also agree on the format of small-group and plenary findings that are to be included in the proceedings.

Some typical roles are described below.

Workshop Management.

A group of organizers can be assigned the task of selecting topics or options for workshops or discussion groups, organizing each group, ensuring that chairpersons, resource persons (e.g. subject-matter experts) and other facilitators are present, and making sure that the proceedings are documented. The group can also meet to coordinate subgroup activities as discussions proceed. Additional facilitators may be recruited to provide further assistance if needed. Some specific assignments for managers include:

- The selection and briefing and training of chairpersons, facilitators, rapporteurs and other personnel, as needed;
- Visiting small groups during discussions and supporting or assisting group facilitators where necessary;
- Management of time;
- Passing information between groups; and
- Providing feedback to organizers as the meeting proceeds.

Chairpersons.

Chairpersons are needed for plenary sessions and for each subgroup conducted. Individuals are usually selected for their ability to interact with large audiences and for their conceptual ability in guiding and summarizing discussions. It is advisable to have one or more vice-chairpersons appointed

[108]The format of conclusions and recommendations may depend on the organization of the meeting. Meetings convened and mandated by a specific authority generally report back to that authority, often in a format established specifically for the purpose. Other meetings may simply publish recommendations in a more general form.

and briefed to ensure that proceedings are not disrupted if a chairperson becomes indisposed or unavailable. Specific responsibilities include:

- Chairing sessions;
- Encouraging, identifying and calling upon speakers in discussions;
- Ensuring that discussions are balanced and that everyone is encouraged and permitted to speak;
- Ensuring that discussions remain focused;
- Guiding discussions where necessary but also maintaining basic fairness and neutrality should there be controversy between participants;
- Managing time;
- Summarizing discussions at the end of each issue;
- Posing questions to be addressed by subgroups;
- In the case of subgroup chairpersons, reporting the results of discussions back to the plenary; and
- Approving the official record of the meeting or ensuring that the plenary itself does so.

Substantive support for assisting chairpersons.

Depending on the size and complexity of the meeting and the personal ability of designated chairpersons, additional personnel may be designated to help run the meeting or manage discussions. In ongoing national strategies, facilitators trained in advance can provide valuable assistance to chairpersons who are selected by the plenary and have less time to prepare. In some cases, such facilitators may provide the basis for ensuring meaningful input and "ownership" from multiple sources. Meetings of entities, such as the professional associations of judges, lawyers or local government, can ensure some degree of control and ownership of the proceedings by appointing knowledgeable insiders as chairpersons; the national anti-corruption programme can also supply input into the substance and management of meetings either by providing facilitators or training them to support and assist chairpersons. In such cases, the functions of facilitators commonly include preparation of discussion agendas and briefing materials for chairpersons, provision of advice and assistance in identifying issues and summing up discussions, and either drafting reports or assisting chairpersons or others to do so.

Secretariat support.

Professional staff to provide organizational support, generate and manage correspondence, arrange transport, accreditation and other matters for participants, maintain financial records, produce documents and allied functions are also important, particularly for large or important meetings where smooth proceedings and accurate documentation are of the essence.

Media liaison.

Ensuring that a meeting is well publicized is important both for transparency and to raise awareness of the anti-corruption programme. The media liaison should

be reasonably familiar with the local or other media who are likely to attend, as well as with the theme and topics for the meeting. He or she should be able to prepare press releases or communiqués as needed and assist the media by, for example, obtaining information and arranging interviews. Kits of materials may be prepared, and in-session documents and post-meeting reports may be made available, if appropriate. One means of assisting the media is to set up a "press board" where newspaper clippings and other materials can be displayed on a daily basis.

PRECONDITIONS AND RISKS

A number of challenges may arise with the organization and conduct of meetings and workshops.

- It may be difficult to identify a full range of stakeholders, given the needs of the country or region involved and the specific themes and topics to be covered. It may also be difficult to ensure the maximum possible breadth of representation.
- It is usually difficult to strike a balance between process and substance. Too much emphasis on process results in a well run meeting without substance. Too much emphasis on substance can lead to detailed discussions that produce no clear outcomes.
- Sizes of working groups may be too large or too small. Experience has shown that a maximum of 15 participants works well. Larger groups make it difficult for everyone to contribute, and smaller groups may not have enough participants to represent a good range of knowledge and views.
- It may be difficult to produce output materials, such as action plans, that are reasonable and credible, or to mobilize support for those outputs. The true purpose of meetings and workshops is to consider issues and develop appropriate responses that lead to action. Where the outputs are unreasonable or lack credibility, further action is unlikely.
- Where meetings involve specific groups, a balance of "inside" and "outside" participation is important. Meetings sponsored by foreign donors, for example, could include foreign participation but should reflect the perceptions and priorities of the participants and not the donors. Foreign experts can be used to support discussions, if needed, but should not dominate them. The same principle applies where participants are drawn from smaller communities, such as law enforcement personnel or judges. Outsiders can support the efforts of such groups to identify problems and develop solutions but should avoid the perception of imposing solutions from outside.

RELATED TOOLS

Tools that may be required before an integrity or action planning meeting can be successfully implemented include:

- A credible agency or body with a formal mandate and necessary resources to organize the meeting;
- Where an action plan or similar instrument is produced, the organization and capacity actually to implement or supervise implementation of the plan. Plans

that are not implemented erode the credibility of the overall anti-corruption effort;

- Tools that raise awareness of the meeting itself and the role of the different stakeholders at the meeting, and that establish appropriate expectations on the part of populations;
- Where a meeting is likely to identify specific complaints or problems, the institutions and mechanisms needed to deal with such complaints should be in place;

Tools that may be needed in conjunction with integrity and action-planning meetings include:

- The institution or entity that convened and mandated the meeting should be prepared to receive and follow up on any report or recommendations the meeting produces;
- Where multiple meetings are held, the convening entity should retain and compile reports. A parent agency, such as a national commission or committee, may also be charged with making collective periodic reports synthesizing the information from many meetings to the national legislature or executive; and
- Basic transparency is important to ensure that results are credible and that they are widely disseminated for use by others. An independent media to report on the outcome of the meeting and to monitor the implementation of action plans or recommendations is important. Reports can also be made to public bodies such as legislative assemblies or committees.

TOOL #11
ANTI-CORRUPTION ACTION PLANS

Comprehensive and coherent plans of action set clear goals, timelines and the sequences in which specific goals should be accomplished. Within an overall anti-corruption strategy, that serves several purposes:

- Setting out clear goals and timelines puts pressure on those expected to contribute to the achievement of goals. Participants do not want to be seen as responsible for failing to meet the goals; and in some cases, may even face legal or political accountability for malfeasance or inaction if they do fail;
- Clear plans of action can and should be made public, ensuring overall transparency and helping to mobilize popular support and pressure to achieve the expected goals;
- Clarifying what actions must be taken, at what time and by whom assists in planning future actions and evaluating past or ongoing actions;
- The exercise of developing and drafting action plans assists in planning, by forcing planners to consider issues such as how to implement each element, the timing and sequencing of various elements and a realistic assessment of what can be achieved within the specified timeframe;
- The development of a national plan of action serves as a framework against which more specific and detailed action plans for specific regions or agencies of Government can be developed; and
- The development of a realistic general and specific action plans forces a degree of vertical integration, in which national planners must consult their local counterparts, and vice versa, to determine what is feasible.

DESCRIPTION

The exact description of an action plan will depend on whose actions are being planned. A national plan is likely to be an extensive document setting out goals in fairly general terms for all segments of Government and society. Its primary functions will be to articulate national goals, set political priorities and serve as the basis of more specific action plans in which the objectives, actions and timeframes for specific agencies or regions are set out with much greater precision.

Plans should always be realistic. Setting unachievable goals will seriously damage the credibility of anti-corruption efforts. To avoid that problem, the development of plans of action will usually require consultations with those expected to take the necessary actions, those who will be affected by them and those who will be asked to monitor and assess successes or failures and to plan future actions.

The views of those who will take the actions are needed to plan realistic actions, identify potential obstacles at the planning stage, and mobilize understanding and support for the proposed course of action.

Consultations with those affected may serve much the same purpose, and help establish expectations of what will be done and when, thus bringing pressure on the actors to deliver accordingly.

Consultations with future evaluators will ensure that, if goals are not achieved, it can be determined whether failure resulted from poor planning, inadequate execution, or both.

The most commonly used means of consultation are the national integrity and action-planning meetings described in Tool #10. Less formal settings can also be used, however, particularly in developing plans that are very narrow in scope or directed at specific agencies or departments. It is important that the views of all three key groups of stakeholders are voiced and considered in the formulation of the plan of action. Setting goals that are too high results in failure and loss of credibility, while setting goals that are too low fails to maximize the potential of the individuals and organizations involved.

National action plans

National action plans should take the following factors into consideration:

- National action plans often involve input and support from outsiders, including donor or other foreign Governments, foreign experts, non-governmental organizations and international institutions such as United Nations agencies, World Bank or International Monetary Fund. Their input can be invaluable, allowing a country to profit from the experience of others before starting its own anti-corruption efforts. Outside input should not, however, be allowed to dominate when an action plan is being formulated or an assessment made of what is feasible for the country concerned. Domestic "ownership" of the process is vital. The most realistic assessment of what must be done and how to avoid obstacles or deal effectively with them is often a combination of the high expectations, demands and pressures of outsiders and the profound knowledge of insiders.
- Within each country, diversity of input and consultation is also important. As noted above, those who are expected to take actions, those affected by the actions and those who will monitor and assess actions should all be consulted. In the case of a national action plan, much wider consultations and much greater transparency are needed to ensure the plan is reasonable and to mobilize popular support and political pressure to achieve the goals. Thus the involvement of the political or legislative and executive elements of Government, as well as most elements of civil society[109], are all required.
- Substantively, action plans can include elements in five important areas: awareness raising, institution building, prevention, anti-corruption legislation, enforcement and monitoring.

[109] The judicial branch of government would not usually be involved, since elements of national action plans may well take the form of offences or other legislative changes on which judges would be expected to rule. Judges may be kept informed in a neutral manner, however, and would of course be the primary focus of development for specific action plans directed at the judicial branch itself.

- A high level of coordination will be needed in developing and implementing the action plan. National plans will require coordination with the subordinate plans of specific regions or Government entities and, within each plan, the various actions and actors must be coordinated with one another. The implementation of a national action plan will typically involve actors such as a supreme audit or similar institution, national and regional ombudsmen, prosecutorial and law enforcement agencies, civil-service management structures, "central" agencies or departments responsible for Government planning and budgetary controls, other Government departments, public-procurement agencies, and public-service unions or associations.
- Those expected to take action under the national plan should be held accountable for achieving results.

The major substantive measures in national action plans can be broken down into the following major actions and actors[110]:

- Public sector or executive measures;
- Legislative measures;
- Law enforcement measures;
- Private sector measures;
- Civil society measures; and,
- International measures.

Some action plan objectives for executive and other public sector actors

- Make Government programmes and activities more open and transparent by inviting civil society to oversee aid and other Government programmes; establish and disseminate service standards; establish a credible and open complaints mechanism;
- Generate transparency and clarity with respect to the delivery of public services by a clear statement of what services are to be delivered, by whom, to whom, to what standard and within what timeframe, thus creating standards for those who deliver services and expectations from service users. As a priority, establish legislative requirements and administrative procedures to ensure appropriate public access to Government information;
- Develop and implement civil service reforms to increase levels of professionalism; increase the focus on integrity and service standards; replace patronage and other irregular structures with clear, codified consumer rights; establish the principle of meritocracy in staffing, promotion, discipline and other areas;

[110] Petter Langseth, Prevention: An Effective Tool to reduce Corruption. "Best Practices", presentation at the 9th ISPAC Conference in Milan, November 1999.

- For prevention and to mobilize popular support for the national action plan itself, launch projects that educate society about the true nature, extent and harmful effects of corruption and instill a moral commitment to maintaining integrity in dealings with business and Government officials;
- Establish Government agencies, such as specialized anti-corruption agencies, if needed; strengthen all State institutions by simplifying procedures, improving internal control, monitoring, enforcement and efficiency; establish meaningful incentives and remuneration;
- Strengthen the independence and competence of investigative, legislative, judicial and media organizations; and
- Develop legislative and administrative measures that permit and encourage the use of civil remedies and allow those affected by corruption to take direct action against it.

Some action plan objectives for law enforcement

- Clarify the roles and functions of law-enforcement officers, prosecutors and judges, including judicial and prosecutorial independence and, where applicable, the role of prosecutors in advising law enforcement and reviewing criminal charges.
- Establish basic standards for integrity and professional competence in law-enforcement functions; develop codes of conduct or similar to provide specific guidance to law- enforcement officers and specific target groups, including senior officers and training officers or instructors[111].
- Establish basic principles and standards for recruitment, training, active service and disciplinary matters, or adjust existing principles and standards to incorporate integrity or anti-corruption elements.
- Establish independent oversight functions within agencies to monitor integrity and competence.

Some action plan objectives for prosecutors

- Clarify the basic roles and functions of law enforcement, prosecutors and judges, including judicial and prosecutorial independence, and, where applicable, the role of prosecutors in advising law enforcement and reviewing criminal charges.
- Establish basic standards for integrity and professional competence in prosecutorial functions; develop codes of conduct or similar to provide

[111] See, for example United Nations Code of Conduct for Law Enforcement Officers, GA/RES/43/169 and guidelines for their implementation, ECOSOC Resolution 1989/61. On the use of force and firearms, see Report of the Eight United Nations Congress on the Prevention of Crime and Treatment of Offenders (Havana, Cuba, 1990), A/CONF.144/28/Rev.1, Sales No. E.91.IV.2, Part I.B, Resolution 2 and annex. Both are reproduced in the Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (1992), E.92.IV.1. See also Case Study #8 Bangalore Principles of Judicial Conduct for Judges

specific guidance to prosecutors[112]. In many countries the new codes will supplement codes of professional conduct for the legal profession.

- Establish independent oversight and monitoring functions within agencies to monitor integrity and competence.

Some action plan objectives for legislators and legislative bodies

- Address issues such as transparency and integrity on an internal basis and, where a legislature has the necessary competence, adopt or enact legislative elements of the national anti-corruption strategy.
- Clarify the role and functions of the legislature and its relationship with other key elements of Government and political structures, particularly those which influence law- and policy-making functions, such as political parties, the professional/neutral public service and judicial elements.
- Establish or clarify the standards of conduct expected of elected members of the legislature and their partisan political supporters, bearing in mind both legal and political accountability.
- Establish internal bodies and procedures for dealing with staff who do not perform in accordance with applicable standards.
- Establish or clarify requirements for disclosing of incomes and assets and for disclosing and dealing with conflicts of interest.
- Enact or adopt the anti-corruption laws called for by the national strategy covering areas such as the establishment and independence of anti-corruption agencies, audit authorities, anti-corruption commissions or other bodies; the regulation of political and campaign financing; freedom of information, media and other transparency measures; conflict of interest legislation; whistleblower and witness protection provisions; public service reforms such as limits on discretion, reducing complexity or merit-based compensation; amnesty provisions, where needed, and law enforcement powers needed to investigate corruption, test integrity, and provide international cooperation; and trace, freeze, seize and confiscate the proceeds of corruption.

Some action plan objectives for civil society and the private sector

Legislatures will usually need action plans to establish clarity and credibility for the overall anti-corruption strategy, while also setting out goals for various elements. Given the broad range of individuals and organizations involved, action plans at the national level will usually set out general areas or objectives within which more specific plans can later be formulated for each institution or sector. Some elements include:

- Establishment of general principles for integrity and ethical conduct suitable for adaptation to specific circumstances, for example, principles

[112] See, for example, International Association of Prosecutors, "Standards of professional responsibility and statement of the essential duties and rights of prosecutors", April 1999, available on-line at: http://www.iap.nl.com.

underpinning ethical practices for Government contractors and other businesses, the media, academic and other institutions, and those who work in them.

- Plans for private-sector institutions could include elements dealing with fiduciary or trust relationships; conflicts of interest; auditing practices and other safeguards; transparency in business dealings, particularly on public exchanges or stock markets; the regulation of anti-competitive practices; and general awareness-raising with respect to topical issues such as corporate criminal liability for corruption offences and the relationship between private-sector corruption and the public interest.
- Plans for civil society institutions could include academic research on corruption and related topics; measures to ensure professional competence; diversity and independence in the media and academic institutions; the consultation, awareness-raising and empowerment of the population groups served by civil society; and the development of the expertise and infrastructure needed to support genuine transparency and open monitoring of public institutions and their functions.

The incorporation of international measures into action plans

A significant amount of corruption involves transnational elements such as organized criminal groups or multinational business concerns. Some predominantly domestic corruption also presents transnational aspects, particularly in activities such as development aid projects and some international commercial activities. To address those issues, national action plans, as well as many plans directed at specific segments of Government and even civil society, should incorporate some of the following elements.

- The stricture that all forms of corruption, whether domestic or transnational in nature should be dealt with appropriately;
- A national commitment to developing, ratifying and fully implementing international instruments against corruption;
- Action plans for legislatures and national Government agencies should encourage and support effective international cooperation in corruption cases through adequate policies, legislation and administrative infrastructure. Major forms of cooperation would include education and other forms of prevention; mutual legal assistance and other investigative cooperation; willingness to prosecute multinational cases, where appropriate; extradition of offenders to other jurisdictions undertaking such prosecutions; and assistance in recovering the proceeds of corruption[113].
- Plans for public sector, private sector and civil society elements should all provide for exchange of information about the nature and extent of

[113] The various forms of international cooperation are dealt with in detail in the Revised Draft United Nations Convention on Corruption, which is expected to be finalized in late 2003.For the latest documents, see: http://www.odccp.org/crime_cicp_convention_corruption_docs.html. See also the terms of reference for the negotiation of the Convention, GA/RES/56/261, paragraph 3, and the Report of the Open-Ended Intergovernmental Expert Group which prepared the terms of reference, A/56/402 - E2001/105.

corruption, the harm it causes, and various "best practices" or other means of dealing with it.

- Plans of action for the private sector should promote the development and implementation of international rules and standards for investment, banking and other financial practices to deter corruption and prevent and combat the illicit transfer and concealment of its proceeds.

PRIORITIZING MEASURES WITHIN AN ACTIONPLAN

To help stakeholders arrive at consensus regarding the sequencing and prioritization among different measures of the action plan, a selection matrix needs to be developed. Important variables in this selection matrix are the:

- Expected impact of the measure
- complexity of the measure
- cost
- how long it will take to implement
- extent of control over the implementation

PRECONDITIONS AND RISKS

If clear and transparent goals are established in action plans, the overall credibility of anti-corruption efforts risks being damaged if such public goals are not achieved. As noted, plans that are too ambitious or unrealistic are unlikely to succeed. Plans that are too conservative fail to make the maximum use of existing anti-corruption potential and may be seen as cosmetic or token efforts, which again adversely affects credibility.

Most of the other risks are associated with individual or institutional resistance. For example, elements of action plans aiming to restructure or reform established bureaucratic practices are likely to be confronted with institutional inertia and resistance from persons who feel their interests are being threatened. With time and effort being needed to train officials in the new practices, the risks must be identified and dealt with as they arise. As a general principle, however, the harmful effects of delays and other problems can be minimized by ensuring that plans of action are sufficiently flexible so that delay or failure of one element does not derail the entire plan.

RELATED TOOLS

Tools that may be required before an action plan can be developed include:

- Consultations and other information-gathering efforts to determine which sectors or subject matter areas require action plans and what can be expected from plans under consideration;
- The development of specific actions that will form part of the plans under consideration, such as codes of conduct, and accountability and transparency structures;
- The development of a broad national plan is needed as a foundation and framework before action plans that are more specific in subject matter or application are developed.

Tools that may be needed in conjunction with action plans include those that form elements of the plan or plans in question. Further meetings or other ongoing consultations will also usually be needed to assess the status of implementation and develop further actions based on that assessment.

TOOL #12
STRENGTHENING LOCAL GOVERNMENTS

Anti-corruption strategies must involve all levels of Government, and efforts at each level must be coordinated. Many elements of anti-corruption strategies, though conceived and planned at the national level, must be taken seriously and implemented willingly at the local level to be effective. Other elements must be planned and implemented entirely at the local level. The purposes of such tools include:

- Assisting planners and policy-makers in adapting tools formulated for general circumstances to meet the needs of action planning and implementation at the local level;
- Facilitating integration of tools used in local communities vertically with national or central programmes and horizontally with programmes of other local communities; and,
- Encouraging and facilitating public participation at the local level.

The implementation of international treaties at the regional, provincial or municipal levels often poses additional challenges, especially in federal systems, where some elements of ratification may fall within the competence of semi-sovereign sub-national governments and not the State itself, which has agreed to and is bound by the treaty.[114] As is generally the case with international treaties, the United Nations Convention against Corruption is a legal agreement between sovereign States Parties, leaving matters of implementation within federal countries and at the local or municipal levels to the individual contracting States Parties. However, it was also clear to the drafters of the Convention that many of its provisions, and especially those dealing with the public sector, public officials and public offices, would not be effective unless applied more or less equally to all levels of government within each State Party. This would follow in many countries as a matter of straightforward interpretation and application of many of the provisions. The definition of "public official", for example, includes any person holding an office so defined in domestic law or performing a public function or providing a public service as defined by domestic law,[115] which would

[114] A federal system is one in which regions, provinces and other sub-national entities enjoy some degree of sovereignty, usually in the form of exclusive or primary legislative competence over specific subject-matter, within the national constitution. Views about whether sub-national entities have personality or capacity in international law vary to some degree according to the exact structures and relationships established by the domestic constitution involved, but in most cases only treaties ratified or acceded to by the central or federal state entity create international law obligations. Under Article 29 of the Vienna Convention on the Law of Treaties a treaty, once ratified, is binding on the entire territory of a federal State, unless the contrary is specified, usually either in the treaty or a reservation. The principal problem faced by federal States involves persuading the regional or provincial governments to enact and implement legislation giving effect to the treaty within areas of their exclusive legislative competences. See Aust, A., *Modern Treaty Law and Practice* Cambridge University Press, 2000, at pp.48-52, 160-61, and 169-72, and Shaw, M., *International Law*, 4th ed., Cambridge University Press, 1997, pp.155-59.

[114] Convention Article 2, subparagraph (a).

automatically extend most of the provisions in cases where the relevant domestic definitions applied to all levels of government. In some countries the inclusion of regional or local officials and offices is less clear-cut, however, and to ensure that these were also included, the agreed notes for the *travaux préparatoires* specify that, in the definition of "public official", the term "office", and hence the scope of the definition itself:[116]

…is understood to encompass offices at all levels and subdivisions of government from national to local. In States where subnational governmental units (for example, provincial, municipal and local) of a self-governing nature exist, including States where such bodies are not deemed to form part of the State, "office" may be understood by the States concerned to encompass those levels also.

It is therefore clear that, while measures taken in respect of regional or municipal levels of government and their officials or employees may require adaptations or variations to make them effective at these levels and to ensure consistency and coordination with national policies and programmes, such measures as are required at the national-level are equally required at the various sub-national levels. In practical terms, it is likely that in many countries, actions taken at the sub-national level will form a substantial portion of the overall anti-corruption effort, and of the measures taken to implement the Convention. This means that the collection of reports and assessments of sub-national actions will also be important as the basis of information transmitted to the Convention Conference of States Parties under Article 63, paragraph 6.

DESCRIPTION

In some respects, anti-corruption programmes at the municipal or local level can be seen as a miniature version of similar efforts at the national level. Thus, some of the following content does not constitute fully developed "tools" but rather information needed to adapt tools described in other segments to fit the circumstances of locally based efforts. In other aspects, however, corruption represents an exclusively local problem that must be dealt with on that basis or the corruption is of a more widespread nature that requires purely local countermeasures. Some of the following content therefore describes tools or elements of tools specifically developed or tailored to support actions at the local level.

In developing countries, decentralization has increased citizen participation in local decision making. Elected local governments face increasing responsibility for the construction and maintenance of basic infrastructure, delivery of basic services and social services, with all the concomitant financial, managerial and logistical challenges. That local responsibility has advantages and disadvantages for the control of corruption. Decentralization and greater local autonomy can isolate local activities from centralized monitoring and accountability structures that deter and control corruption. If well managed, however, and provided that

[116] A/58/422/Add.1, paragraph 3.

they can be mobilized to identify and eliminate corruption, they can also place local activities under closer and more effective scrutiny from local people.

The following specific actions can either be adapted as "tools" and incorporated into local anti-corruption programmes or used as a guide to modify elements of programmes being adapted for use at the local level. One way of initiating the local process is through the use of meetings similar to action-planning meetings at the national level. Following preliminary research to identify possible agenda elements and participants, a meeting would be held to inform local stakeholders about the national strategy, to discuss local corruption problems, and identify issues and possible courses of action to be taken. In most cases, a series of meetings would be held to gradually refine the issues, set priorities, establish a plan of action and identify the responsibilities of individuals or organizations to implement the plan. The tools dealing with the organization of meetings and the preparation of action plans will generally be valid for activities undertaken at the local level.

Action planning meetings and the resulting local anti-corruption programmes will generally deal with the following issues:

Identifying the political will and capacity to execute local reforms.

It is important to identify local leaders with the will and ability to press for better governance in general and anti-corruption measures in particular. Often, local in civil society sources, such as the media, can assist in this effort.

The assessment of local corruption, the institutional framework for actions and other factors

As most corruption has some local component, those active at the national or international levels must bear in mind that local planning will usually have to be flexible enough for local circumstances for effective implementation to take place. Much assessment, particularly of local institutions and political conditions, can be carried out using action-planning meetings. Other information, such as assessments of the local nature and extent of corruption and general public concern about it, may have to be obtained using more detailed and specific measures, such as public surveys. While assessment should precede the development and implementation of action plans, it should also takes place during and upon completion of the process to assess progress and adjust actions as necessary (see "evaluation and monitoring", below). Generally, information must be obtained and considered about the following matters:

Assessment of local administrative structures.

Included will be a general assessment of the basic organization of local government, the identification of sectors affected by corruption, and the identification of institutional capacity that can be used for anti-corruption efforts. Assessments should employ internal sources (those who work in the institutions) and external sources (those who use or are affected by the services or operations involved).

Assessment of the nature and extent of local corruption problems and of local priorities for action.

The basis of any local action plan must be a subjective and objective assessment of corruption to provide some indication of the actual nature and extent of problems, for example which elements of Government are most affected and what the overall impact is. A subjective assessment of how local people perceive the problem will provide further insight and will often form the basis for setting priorities for action. Conflicts between national and local priorities may be encountered and need to be addressed.

Assessment of good governance factors.

General information should be sought regarding the effectiveness, efficiency, transparency, integrity, and accessibility of service delivery. It should be compared with an objective assessment of the same factors, and both sides of the comparison should provide a basis for assessing the impact of future reforms.

Assessment of the quantity and quality of citizen-government interaction.

The assessment should identify major deficiencies in interaction between the population and the local government, structures that facilitate or impede public information and participation, and levels of public awareness as to how local government works in theory and in practice.

Assessment of service-delivery.

The assessment should seek to identify major deficiencies in the levels and types of services delivered by the municipality. That would include analysis of how public resources are allocated to each department and the impact, if any, on service delivery. As noted above, information should be sought about actual delivery levels and capacity and about public perceptions as to whether they are good, adequate or inadequate.

Assessment of other governance indicators.

Internal governance factors should be assessed, including procedural complexity; the degree of discretion in decision making; the use of accountable and merit-based compensation mechanisms; promotion; hiring; degree of formality in the handling of budget resources; transparency in the flow of organizational information; whether codes of conduct exist and are enforced and how they are related to service delivery.

Obtaining local participation and “ownership” of local programmes

It is important to involve the local population in the ownership process. In adjusting measures developed for other levels of Government or for municipal governments nationwide, local input is needed. That will ensure that reforms are tailored to local circumstances, ensure that local priorities are reflected and that plans optimize local resources and capacity without setting goals or timeframes that are unrealistic or unachievable.

Local participation is also crucial to informing people about the programmes, mobilizing local support for them and providing a sense of credibility and "ownership" at the local level. Action-planning meetings should thus include the right local participants for the subject matter to be considered. That will include

local politicians, officials of local departments and agencies, representatives of civil society and representatives of the public affected by the areas under discussion. "Outsiders", such as representatives of national Governments or anti-corruption programmes, donor countries or institutions and technical experts may be needed to assist in organizing and running the as "tools" and incorporated into local anti-corruption programmes or used as a guide to modify elements of programmes being adapted for use at the local level.

One way of initiating the local process is through the use of meetings similar to action-planning meetings at the national level. Following preliminary research to identify possible agenda elements and participants, a meeting would be held to inform local stakeholders about the national strategy, to discuss local corruption problems, and identify issues and possible courses of action to be taken. In most cases, a series of meetings would be held to gradually refine the issues, set priorities, establish a plan of action and identify the responsibilities of individuals or organizations to implement the plan. The tools dealing with the organization of meetings and the preparation of action plans will generally be valid for activities undertaken at the local level.

ISSUES RAISED AT BY LOCAL ANTI CORRUPTIOIN ACTION PLANS

Action planning meetings and the resulting local anti-corruption programmes will generally deal with the following issues:

Identifying the political will and capacity to execute local reforms.

It is important to identify local leaders with the will and ability to press for better governance in general and anti-corruption measures in particular. Often, local civil society sources, such as the media, can assist in this effort.

The assessment of local corruption, the institutional framework for actions and other factors

As most corruption has some local component, those active at the national or international levels must bear in mind that local planning will usually have to be flexible enough for local circumstances for effective implementation to take place. Much assessment, particularly of local institutions and political conditions, can be carried out using action-planning meetings. Other information, such as assessments of the local nature and extent of corruption and general public concern about it, may have to be obtained using more detailed and specific measures, such as public surveys. While assessment should precede the development and implementation of action plans, it should also takes place during and upon completion of the process to assess progress and adjust actions as necessary (see "evaluation and monitoring", below).

INFORMATION NEEDED

Generally, information must be obtained and considered about the following matters:

Assessment of local administrative structures.

Included will be a general assessment of the basic organization of local government, the identification of sectors affected by corruption, and the identification of institutional capacity that can be used for anti-corruption efforts. Assessments should employ internal sources (those who work in the institutions) and external sources (those who use or are affected by the services or operations involved).

Assessment of the nature and extent of local corruption problems and of local priorities for action.

The basis of any local action plan must be a subjective and objective assessment of corruption to provide some indication of the actual nature and extent of problems, for example which elements of Government are most affected and what the overall impact is. A subjective assessment of how local people perceive the problem will provide further insight and will often form the basis for setting priorities for action. Conflicts between national and local priorities may be encountered and need to be addressed.

Assessment of good governance factors.

General information should be sought regarding the effectiveness, efficiency, transparency, integrity, and accessibility of service delivery. It should be compared with an objective assessment of the same factors, and both sides of the comparison should provide a basis for assessing the impact of future reforms.

Assessment of the quantity and quality of citizen-Government interaction.

The assessment should identify major deficiencies in interaction between the population and the local government, structures that facilitate or impede public information and participation, and levels of public awareness as to how local government works in theory and in practice.

Assessment of service-delivery.

The assessment should seek to identify major deficiencies in the levels and types of services delivered by the municipality. That would include analysis of how public resources are allocated to each department and the impact, if any, on service delivery. As noted above, information should be sought about actual delivery levels and capacity and about public perceptions as to whether they are good, adequate or inadequate.

Assessment of other governance indicators.

Internal governance factors should be assessed, including procedural complexity; the degree of discretion in decision making; the use of accountable and merit-based compensation mechanisms; promotion; hiring; degree of formality in the handling of budget resources; transparency in the flow of organizational information; whether codes of conduct exist and are enforced and how they are related to service delivery.

OBTAINING LOCAL PARTICIPATION AND "OWNERSHIP" OF LOCAL PROGRAMMES

It is important to involve the local population in the ownership process. In adjusting measures developed for other levels of government or for municipal governments nationwide, local input is needed. That will ensure that reforms are tailored to local circumstances, ensure that local priorities are reflected and that plans optimize local resources and capacity without setting goals or timeframes that are unrealistic or unachievable.

Local participation is also crucial to informing people about the programmes, mobilizing local support for them and providing a sense of credibility and "ownership" at the local level. Action-planning meetings should thus include the right local participants for the subject matter to be considered. That will include local politicians, officials of local departments and agencies, representatives of civil society and representatives of the public affected by the areas under discussion. "Outsiders", such as representatives of national Governments or anti-corruption programmes, donor countries or institutions and technical experts may be needed to assist in organizing and running the meetings but they should not dominate the proceedings.

IMPLEMENTATION OF THE REFORMS

Based on the consensus of the workshops and the analysis of qualitative and quantitative information, specific reforms can be developed and implemented in ways that address, and are seen to address, factors that may be hampering integrity and service delivery at the local level.

Experience suggests that in an environment of scarce human and financial resources, international institutions may play an important role in supporting municipal implementation through technical assistance. It is also important to develop an appropriate sequence for reforms taking into consideration factors such as direct and indirect economic costs, political costs and benefits, and the need to obtain short-term results to generate longer-term credibility.

The objective is to incorporate "best practices" into municipal public anti-corruption policies through civil society operational committees. If appropriately applied, best practices should produce lower levels of corruption and improved service delivery, combined with the accountability generated by effective social controls. They demonstrates the advantages of combining political will, technical capacity to execute reforms, and a partnership with civil society.

EVALUATION AND MONITORING

Efficiency, effectiveness, levels of corruption, accessibility, transparency, procedural complexity and other relevant factors must be reassessed from time to time to determine whether local government services have shown an improvement and whether adjustments to anti-corruption programmes are needed. As with the initial assessment, objective indicators of performance and subjective indicators of the perceptions of the public and key service-users should be considered. In analysing the indicators, some consideration should be given, not only to the individual factors, but how these are related and what the relationship says about overall impact. Regarding procedural complexity, for

example, it is important to consider whether complexity in a particular area has increased or decreased, and also whether overall performance has improved or deteriorated and whether the two are linked. Where complexity is reduced but performance does not improve, further enquiry may be needed to determine whether other factors are impeding progress.

THE USE OF LOCAL ANTI-CORRUPTION COMMISSIONS OR COMMITTEES

The establishment of commissions or committees to develop, implement and monitor anti-corruption efforts is the subject of Tool #9. The elements discussed there can be adapted for use at the local level, where appropriate. Specific mandates for local committees could include the following elements:

- Development of a municipal strategy or action plan combining elements of the national programme with those generated or modified by local needs;
- Translation of national and municipal anti-corruption policies into specific plans of action for the local level;
- Preparation of municipal legislation, where needed;
- Dissemination of information, generation of local support and momentum;
- Monitoring of the implementation of the local programme; and,
- Providing local information and feedback to national, regional, and local anti-corruption entities.

RELATED TOOLS

Most public services are delivered at the municipal or local level; thus, that level is where most petty and administrative corruption is likely to occur. For municipal anti-corruption initiatives to succeed, additional initiatives also need to be launched. Specific tools that may form elements of local programmes or be used in conjunction with such programmes include:

- Tools that increase public awareness, such as media campaigns, that increase awareness of and resistance to corruption while fostering awareness and support of anti-corruption efforts;
- Tools supporting consultations and the development of strategies, and action plans that reflect local problems and priorities, such as the holding of action-planning or similar meetings;
- Tools involving assessment of the nature and extent of corruption as well as local perceptions and reactions to the problem and efforts to combat it. Tools in this category assist in developing "baseline" information against which later progress can be assessed, ongoing assessments as to whether goals have been achieved and modifications or adjustments to ongoing strategies or actions;
- Tools that develop and establish standards, such as codes of conduct, are often used to provide the basis for efforts at the local level and to generate appropriate expectations from service-users;
- Tools supporting transparency;

- Tools supporting institutional reform, such as the creation of performance-linked incentives for officials, the reduction of official discretion, and the streamlining or simplification of procedures; and
- Tools supporting accountability, such as inspection or audit requirements, disclosure requirements, complaints mechanisms, conflict of interest measures, disciplinary rules and discretion.

TOOL #13

LEGISLATURES AND THEIR EFFORTS AGAINST CORRUPTION

The purpose of this tool is to assist legislatures in strengthening the roles they play in areas critical to the fight against corruption. They include general areas, such as transparency and accountability in Government, and specific areas, such as the formulation and adoption of anti-corruption laws and the independent, multipartisan oversight of anti-corruption bodies. While the focus is on anti-corruption efforts, it must be noted that such efforts are often closely linked to the broader concerns of legislatures in areas such as human rights and the rule of law[117].

DESCRIPTION

Anti-corruption efforts in legislative bodies may be directed at the institutions themselves, or at the individuals who serve as elected members. Many elements are simultaneously directed at both. While committee structures, for example, are institutional structures, one of their major functions is to ensure that substantive responsibilities are efficiently allocated among individual members.

Accountability structures.

Generally, these include standards and rules governing conduct, and bodies or tribunals dealing with breaches of such standards. It should be borne in mind that elected officials are politically as well as legally accountable. Legislative or administrative codes of conduct may set general standards for the conduct of election campaigns, the management of offices and the general conduct of the business of an elected representative. Some elements, such as the obligation to attend sittings and participate in various legislative functions, may also be governed by procedural rules of the legislature. They are often strongly influenced by political factors, such as the need for a political Government to ensure that it has sufficient support when the legislature votes on its initiatives. Others, such as rules for disclosing, avoiding and otherwise dealing with conflicts of interest, may have to be developed and established specifically.

Holding elected members politically accountable requires that there be transparency with respect to the business of the legislature and the conduct of its individual members. Structures that would hold them legally accountable, as noted in the previous chapter, must take into account the need for some degree of legal immunity and the independence of the legislature itself. As with independent judges, that generally involves bodies or tribunals constituted from within the legislature itself, to ensure that disciplinary proceedings[118] are not

[117] On the role of parliaments in the fight against corruption, see also the Committee on Economic Affairs and Development of the Council of Europe http://stars.coe.fr/doc00/edoc8652.htm

[118] See, for example the Code of Conduct and the Guide to the Rules Relating to the Conduct of Members, approved by the UK House of Commons 24 July 1996, House of Commons Paper 688 of session 1995/96, at http://www.parliament.uk/commons/selcom/s&phome.htm. In Uganda, a leadership code requires leaders,

misused by outsiders seeking to improperly influence the conduct of legislative business. Westminster-style parliaments commonly do this by establishing a committee of members to maintain codes of conduct and, where necessary, conduct disciplinary proceedings. Committees are usually established with the same political profile as the legislature. That ensures that while committees are multipartisan, the majority political faction also holds a majority on each.

Other oversight structures.

The committee system itself provides additional oversight by distributing subject matter among many committees, some of which will have overlapping mandates. For example, matters requiring the support of one committee for the substantive policy being proposed must often also have the approval of committees responsible for the approval of the budgetary allocation it requires. Apart from those assigned to monitor the conduct of individual members, committees may also be called upon to monitor areas such as legislative publications, the finances of the legislature itself, freedom of information and media access to legislative matters, and the multipartisan oversight of key executive functions[119] The efficacy of legislative oversight depends to a large degree on how well informed members are about the subject matter they are called upon to oversee. Government agencies and other bodies may be required to report to legislative oversight committees regularly or on an ad hoc basis, and may be given research capabilities to assist in their work.

Transparency structures.

As noted, transparency is critical to holding elected officials politically accountable, and this can be supported by, inter alia, open access to information requirements, media access to the legislature, the publication of accounts and proceedings, modern technological aids, such as the establishment of websites for the legislature and individual members, and ensuring that members of the public have as much access to sittings as possible, whether in person or through the broadcast media. Given the partisan political nature of political activities and political accountability, diversity of sources is important; in their desire to seek re-election, members can be expected to put their achievements in the most favourable light, while political adversaries may attempt to discredit them. It is important for voters to have a diversity of views so they can make their own judgments.

Sittings and proceedings of the legislature.

Important political issues must be raised in legislative bodies, and both substantive and procedural rules are usually tailored to produce such an effect.

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including Members of Parliament, to declare incomes, assets and liabilities annually and prohibits leaders from putting themselves into conflict of interest positions.

[119] On the role of parliaments in the fight against corruption, see also the Committee on Economic Affairs and Development of the Council of Europe http://stars.coe.fr/doc00/edoc8652.htm

Procedurally, it is important for individual members to have the freedom to express any views or concerns, and that they be provided ample opportunity to do so. The first requirement is generally met by ensuring freedom of speech for members and affording them legal immunity for statements they make in the legislature. The second is met by procedural rules that allocate time among members to ensure that everyone has the opportunity to speak. Proceedings usually allocate some time for subject-specific discussion on matters such as proposed legislation and some time in which members can raise any issue. A tradition of the Westminster parliament, adopted by many other legislatures, is the holding of a regular "Question Time" in which members of the parliament can question Government ministers, who in parliamentary systems are usually also members and must attend the sittings to respond. In systems where ministers are appointed from outside the legislative branch, such as the United States, other means, such as requiring ministers to appear before standing committees, perform a similar function. In both systems, failing to appear or giving false or misleading answers to questions is considered a serious transgression and subject to either legal or political sanctions.

Watchdog institutions.

The same watchdog institutions that have oversight over non-political Government or public service functions may also have some powers of oversight over legislatures, bearing in mind the need for legislative independence and political accountability. As noted in the previous chapter, the legal immunities of members should be limited to what is strictly necessary to ensure full and free legislative debate and to prevent undue influence being exerted on legislative matters. Immunity need not shield members from review by bodies such as Auditors General and basic human rights bodies and standards, and it should not shield them from legislative or other rules governing, for example, accountability for political funds, the conduct of election campaigns, misappropriation and mismanagement of public funds, improper expenditures or procurement malpractice.

PRECONDITIONS AND RISKS

Election campaigns and transition periods. All political office-holders may be subjected to additional corrupt influences during election periods. Funds must be raised and spent quickly, making accounting difficult, and donors may take advantage of political pressures to seek promises of favourable consideration should the candidate be elected. Politicians leaving office suddenly find themselves free of many of the political sanctions used to enforce standards of conduct, and those coming into office are usually under pressure to engage in patronage appointments to reward supporters. These can all set precedents for corrupt behaviour and erode the credibility of those involved, making them less effective against corruption.

RELATED TOOLS

For the legislature to be credible in its fight against corruption, a parliament must be perceived as having sufficient integrity itself to address the corruption issue. To increase the integrity of parliament, the following additional anti-corruption **TOOL** should be implemented:

- Establish, disseminate, discuss and enforce a code of conduct for parliamentarians;
- Establish a disciplinary mechanism (disciplinary committee or publics accounts committee) with the capability to investigate complaints and enforce disciplinary action when necessary;
- Require all parliamentarians to declare their assets and their campaign financing;
- Conduct an independent comprehensive assessment of the Governments levels, cost, coverage and quality of service delivery, including the perceived trust level between the public service and the public;
- Simplify complaints procedures;
- Raise public awareness as to where and how to complain (for example, by campaigns giving the public the relevant telephone numbers to call); and
- Introduce a computerized complaints system allowing institutions to record and analyse all complaints and monitor actions taken to deal with them.

CASE STUDY #1

THE INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC) OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (SAR) [120]

Hong Kong once a corruption-stricken environment, is now a world city with impressive anti-corruption records[121]. Unimaginable as it now seems, corruption was widespread there during the 1960s and early 1970s, when the public regarded bribery as a "necessary evil", a "way to get things done". Corruption syndicates in the police force were particularly prevalent and bribe-taking was institutionalized.

The last straw was the escape of Peter Godber, a police chief superintendent, in 1973 while under investigation by the police Anti-Corruption Office. Public protests followed. The Independent Commission against Corruption (ICAC) was born in 1974 out of a pressing need to respond to the public call for action against corrupt individuals.

At first, winning the confidence of the public in the commitment of the Government and ICAC to tackle the problem head-on was not easy. Hence, ICAC was made directly accountable to the Governor of Hong Kong (after 1997, the Chief Executive of the Hong Kong Special Administrative Region of China) and was thus separated from the rest of the civil service, a move to help stave off the public crisis of confidence in the anti-corruption efforts.

The Government also realized that such an elusive form of crime could not be effectively checked without tackling the problem at source. As a result, ICAC was given the task of carrying out an integrated three-pronged attack on corruption, involving investigation, prevention and community education. To equip it for the daunting challenges ahead, the Government also entrusted it with the necessary legal powers and supported it with sufficient resources.

Tough and high-profile law enforcement action quickly convinced a sceptical public that the government and ICAC meant business as ICAC made every effort to plug corruption loopholes in both the public sector and the private sector. To foster a culture of integrity, it also launched community education campaigns to impress upon the people that corruption was evil and to enlist their support in reporting on corrupt individuals.

The change in public attitude from accepting bribery as a necessary way of life to actively helping to rout corrupt individuals was achieved through extensive media campaigns and face-to-face contact with various members of the community.

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[120] Based on a paper presented by Dennis Osborne at a UN expert meeting n the elaboration of an anti-corruption tool-kit, Vienna, 13-14 April 2001

[121] Alan Lai, Commissioner, Independent Commission against Corruption, Hong Kong Special Administrative Region of China.

The three-pronged approach has proved successful over the years as the Hong Kong Special Administrative Region has witnessed growing public identification with the anti-corruption cause. One of the strongest indicators of public faith is that some 70 per cent (2001 figures) of those who have reported corruption to ICAC are willing to identify themselves and provide contacts.

Through the persistence and dedication of its staff members, ICAC has survived many difficult times. Nevertheless, it is very aware that it could not have accomplished what it has if it were not backed by the rule of law, an independent judiciary and a credible system of checks and balances. It is conscious of the need to maintain its professionalism and uncompromising approach in tackling corruption.

Corruption used to be endemic in Hong Kong. As mentioned, in 1973, a police superintendent under investigation for corruption fled the colony. The public outrage led the Governor to set up a Commission of Enquiry that found "syndicated corruption" in many organizations, especially the police. ICAC was directed mainly at alleged corruption among the police. According to the Annual Report for 1974, over 3,000 corruption complaints were received during the first 10 months of operation and 108 persons prosecuted, of whom 56 were Government officers. All the major corruption syndicates were thought to have been broken by July 1977.

In the months following its creation, however, ICAC experienced serious tensions with the police. In 1977, following the arrest of scores of police officers and the smashing of several large corruption syndicates, 2,000 policemen marched to ICAC headquarters and caused a near riot. The Governor announced an amnesty.

Between 1974 and 1993, 9,000 people were prosecuted for corruption and it is claimed that 84 per cent of them were convicted. The ICAC Annual Report shows that over 2,500 corruption reports were received in 1998, and that 382 persons were prosecuted for corruption and related offences. Of those, 243 were convicted, 18 acquitted and 98 still had their cases pending at the end of the year. Of the 382 persons prosecuted, 268 were from the private sector. A further 226 persons, mostly from the private sector, were prosecuted for offences under a Prevention of Bribery Ordinance, mainly for deception, false accounting or theft.

ICAC has (1999) a staff of 1,300, of which 800 work in an Operations Department that investigates suspected corruption. From time to time, its staff engage in undercover activities. A Corruption Prevention Department seeks changes in working practice. A Community Relations Department educates the public and fosters support for ICAC.

Committees monitor the work of each department, by receiving reports and complaints. They also ensure that ICAC itself does not abuse its powers or become corrupted.

Operations include investigations into the law-enforcement services, the public service, banking, the private sector and elections. Fraud is a police responsibility, but the receiving of illegal commissions is handled by ICAC. In that respect, ICAC may issue search warrants, investigate bank accounts and arrest and

detain persons in its own centre for up to 48 hours. Evidence is referred to the Department of Justice which brings charges. Operations are conducted in cooperation with agencies elsewhere in the People's Republic of China, and in other countries. Cautions for minor cases for which the offender makes a full admission have been found highly cost-effective. Officers know they will be watched closely after being cautioned and few offend again.

Trials for minor offences are expensive. Publicized court cases and convictions raise awareness, however, and encourage the public to report suspected corrupt practice, thus helping ICAC in further operations. The percentage of anonymous reports is continuing to drop, showing increasing public confidence in ICAC.

Prevention includes making recommendations on good business practice to minimize temptation and risks. Recommendations are mandatory for the public sector and advisory for private businesses. Focus is given to changing systems rather than people. Prevention is claimed to be more cost-effective than prosecution.

The Community Relations Department conducts an intensive education programme in the community. Every year, staff of the Department meet managers of the business sector, head teachers, teaching staff and students of schools and tertiary institutes, Government servants and representatives of organizations elsewhere in China, to educate them on the costs of corruption, anti-bribery legislation, especially relevant past cases, penalties and consequences of corruption. Community relations and education are concerned with helping people to develop attitudes against corruption. Their success depends in part on successful court cases and publicity that provide a credible threat of prosecution. Workshops, seminars, training programmes and various formats are adapted to reach the targets and "prevention packages" are handed out.

The media is used for deterrence and educational purposes. A series of announcements in the public interest" are produced for television and radio, and explain the efforts of ICAC. The TV commercials have three main themes: appeals to the public to report corruption; warnings that corrupt practices are likely to be discovered and that dire consequences will follow; and pleas for honest dealings for the benefit of society. Education packages provide schools with ideas for role play and contain high quality supporting materials. Some teachers say the material from ICAC is the best made available to them, and that it facilitates lessons that are in contrast to the usual "chalk and talk". Training programmes reach over 20,000 public servants a year and courses are available for the private sector.

In 1994, the Community Relations Department launched a Campaign on Business Ethics with the aim of enhancing the image of Hong Kong as a business centre. About half of all corruption reports are against private-sector organizations and the public perceives corruption to be more common in business than in Government.

ICAC staff members attribute success to:

- Political will;
- The independence of ICAC;
- The authority of the Commissioner to appoint and manage, and to dismiss staff without explanation;
- The existence of proper, and properly enforced, legislation against corruption;
- Publicity for prosecutions of corruption; and
- A law that obliges public servants to declare their assets and the sources of their funds, when asked.

In December 1994, a review of the powers and accountability of ICAC was completed within the context of political changes and the Hong Kong Bill of Rights Ordinance 1993. The aim was to ensure that ICAC remained effective against corruption without itself being corrupted. The changes introduced as a result of the review included more control of some investigating powers; search warrants, for example, are now issued by the courts and not by ICAC. The power of the Commissioner to dismiss staff without giving reason has been upheld; it was recognized that investigations into corrupt practice may make it necessary for officers to be removed quickly if there is suspicion or complaint.

According to a former Commissioner, the changes include the need for:

- A strong political will; a strong framework of laws; a coherent strategy covering investigation, prevention and education, active community involvement; and adequate funding;
- Videotape recording of all interviews with suspects, with suspects under caution. Three copies are made of the video, of which one is given to the suspect, one is sealed for the court, and one is kept by ICAC. The subsequent admission of the recordings as evidence in court has persuaded many persons to enter guilty pleas, with huge savings in court costs;
- A requirement that all reports of alleged corruption must be investigated;
- Making it an offence for ICAC staff to disclose the names of persons being investigated until a search warrant is given or the persons are charged or arrested; and
- Requiring an "Operations Committee", an oversight body of citizens, to examine any investigation that has not been completed within 12 months.

OUTSTANDING RESULTS

As mentioned above, the groundwork for a forceful assault on corruption was laid on three fronts: investigation, prevention and community education. After decades of hard work, ICAC has been widely recognized as a model of success in bringing the problem to an end. It proved that the battle against corruption can be effective, given sufficient resources, persistent determination and adequate power to pursue criminal prosecutions.

Corruption is a form of crime characterized by "satisfied customers"; there are often no apparent victims. An anti-corruption agency has to rely on members of the public to come forward and report on acts of corruption. Their willingness to report and, better still, to testify in a court of law, hinges on their trust and confidence in the anti-corruption agency. It is therefore essential for ICAC always to be aware of the public mood.

As well as annual opinion surveys that have been continuously refined over the years, smaller-scale quarterly polls are also conducted to keep ICAC informed of any sudden shifts in public sentiment and, thus, any need to adjust its strategic priorities.

In the Hong Kong SAR, the revolutionary change in the public attitude towards corruption has been remarkable. There is evidence of public scorn for corruption, coupled with a readiness to act against it. Some of the findings of surveys commissioned by ICAC are surprising:

- Over 98 per cent of respondents have expressed support for the work of ICAC since the question was first asked in 1994.
- The level of intolerance towards corruption in the public and the private sectors has remained high in recent years. In 1998, about 80 per cent of respondents held such a view and a high of 83.7 per cent was recorded in 2000.
- An important barometer of trust is the percentage of non-anonymous reports of corruption, reports filed by persons willing to provide their identities. That figure increased gradually from a low of 35 per cent in 1974 to 56 per cent in 1980 and 70 per cent in 2000.
- The proportion of respondents agreeing that ICAC was impartial in its investigation rose to an all-time high of 74.6 per cent in 2000, up from 56.4 per cent in 1994. In the 2000 survey, only 8.3 per cent of respondents disagreed with that view.

THE NEED FOR PUBLIC SUPPORT

Public attitudes can never be taken for granted. In the Hong Kong SAR, the transformation of the public attitude from resigned tolerance to extreme intolerance of corruption has been a slow and painstaking process, punctuated with successes and setbacks. Such a massive social campaign is demanding, yet the lessons drawn from it are invaluable. In the context of the Hong Kong SAR, the shaping of a new social order called for:

- ***Public identification with the cause*****.** Sustained community education campaigns are needed to raise public awareness of corruption. People should be made aware that corruption may have dire consequences if left unchecked. They must be convinced that ordinary citizens are in a position to do something about it, for their own interest and the common good. They should be shown in concrete terms that corruption only fuels other crimes to the detriment of the prosperity and economic wellbeing of the people.
- ***Reporting in confidence*****.** Fear of retaliation discourages people from reporting. ICAC spares no effort in ensuring that nobody is victimized for

reporting corruption. From the start, ICAC has enforced a rule of silence on all reports of corruption. For highly sensitive cases, a comprehensive witness protection programme is in place that, in extreme cases, enables witnesses to change their identities and relocate.

- ***Making corruption a high-risk crime***. Justice must be seen to prevail against corruption. Nothing could send a stronger message both to law-abiding citizens and criminals than the ability to bring to justice persons who have committed acts of corruption - regardless of their background and positions.
- ***Credible checks and balances.*** Because of the confidential nature of the work of ICAC and the extensive investigative powers that it enjoys, there is some potential for abuse. Since the inception of ICAC, therefore, an elaborate system of checks and balances has been in place to assure the public that if any abuse were to occur, it would be promptly rectified. The system safeguards the interest of the public by placing prosecution decisions solely in the hands of the Department of Justice. All aspects of ICAC: investigation, prevention, community education and overall management, are supervised by advisory committees comprising respectable citizens appointed by the Chief Executive of the Hong Kong SAR. The committees can discuss with the Chief Executive matters of concern and they publish annual reports on their work. Moreover, all non-criminal complaints against officers of ICAC are vetted by an independent complaints committee that publishes its findings annually.

WINNING PUBLIC TRUST

ICAC was established at a time when the determination and capability of the government to fight graft was in doubt. It thus had to win back public trust.

The public believes in results, not empty slogans. The first Commissioner of ICAC decided that it was only through quick and forceful action that public confidence could be gained. The civil service as a whole, and the police in particular, were identified as the primary targets. The successful extradition from London of fugitive police officer, Peter Godber, and his subsequent conviction within a year, gave the Commission a promising start.

High-profile arrests and prosecutions continued to make headlines, gradually convincing the public that the government and ICAC meant business. Reports on corruption began to flood in; in the first year, 86 per cent of the reports were against Government departments and the police. Corruption syndicates in the police, high on the list of priority problems, were vigorously pursued by ICAC. In one major operation mounted during that period, 140 police officers from three police districts were rounded up at the same time. More than 200 policemen were detained for alleged corruption in one operation. In all, 260 police officers were prosecuted between 1974 and 1977, four times the total number prosecuted in the four years preceding the establishment of ICAC.

In parallel, corruption prevention specialists were dispatched to various government departments to examine their procedures and practices with a view to removing all loopholes for corruption. Assistance was also rendered when necessary to help departments produce codes and guidelines on staff conduct. The Corruption Prevention Department was also involved in the early stages of

policy formulation and in the preparation of new legislation to close down opportunities for corruption.

At the same time, the community relations department of ICAC has brought about a revolution in the public attitude to corruption. Various publicity and outreach programmes have been organized by the Department to educate the public and strategies have been refined and adjusted to suit the changing social and economic environment.

A DOUBLE-BARRELLED APPROACH IN EDUCATION

The public education endeavours of ICAC have been in two forms: extensive use of the media and in-depth, face-to-face contact. Over the past 25 years, the approach has proved to be effective in instilling a culture of probity.

Media

The Hong Kong SAR is reputed for its free press. In 2000, there were about 60 printed dailies and more than 700 periodicals. There are also two free-to-air commercial television stations, one cable network plus other satellite-based television services beaming news and other programmes from more than 40 domestic and non-domestic channels.

ICAC has realized from the beginning that the media is a powerful and indispensable partner in disseminating anti-corruption messages. A news story about a person convicted of corruption has a significant impact on the community. A press information office was one of the first units established by ICAC. Acting as a bridge between ICAC and the press, the office regularly issues press releases on operations, arranges interviews and briefings by ICAC officers to hammer home the message that corruption is evil. Media reports on crime involving corruption demonstrably have a deterrent effect.

Advertising campaign

ICAC also produces its own announcement of public interest to proactively communicate a culture of probity through advertising campaigns. The messages are tailored to suit the prevailing public sentiment and social climate. The messages of the past 27 years can be put into four different categories:

- ***The era of awakening.*** During its early years, ICAC had to deal with a population that was deeply suspicious of governmental commitment to fighting corruption. People in the lower income bracket, who were more vulnerable to abuse, held a particularly accepting view of such crime. Media campaigns were launched to reach that segment of society and highlight their suffering. Backed with tough law enforcement action, the Commission urged the public to be a partner in fighting corruption by reporting such crime.
- ***Level playing field.*** As syndicated corruption in the police and the civil service had diminished by the late 1970s, ICAC was able to channel more of its energy into dealing with the problem of corruption in the private sector. In the midst of an economic upturn, the Commission emphasized that the fight against corruption was important to continued economic growth. Elements of deterrence and persuasion formed part of those campaigns. The slogan used by ICAC was, "Whichever way you look at it, corruption doesn't pay". The message reverberated loud and clear in the community. Tough action against

some private corporations and their senior mangers during the period reinforced the warning by ICAC that it was not making empty threats.

- ***The 1997 jitters.*** During the 1997 jitters, after years of transition leading to the reunification of Hong Kong with Mainland China, some people in Hong Kong worried about the uncertainty ahead. After all, the concept of "one country, two systems" was without precedent anywhere. It was suspected that certain individuals would try to take advantage of the situation and get rich quick, despite the large number of cases involving corruption being reported. There were some doubts in the community as to the ability and the effectiveness of ICAC to keep the Hong Kong SAR one of the least corrupt places in the world after reunification. To counter those concerns, ICAC set out to assure the general public, through media campaigns, that the corruption of the 1960s and 1970s would not return as long as the public continued to cooperate in tackling the problem.
- ***The mission continues*****.** After a long period of economic prosperity, coupled with the gradual reduction of reports of corruption, the social ill that once plagued the city has gradually faded. The prevailing social environment is such that there is some danger that the level of alertness may drop, particularly among members of the younger generation who have never experienced corruption. They may take it for granted that corruption is no longer a threat and may have trouble comprehending that parents and grandparents fought a fierce battle to make the Hong Kong SAR corruption-free. To ICAC, it is important that the next generation should be made aware of the need to continue anti-corruption efforts. A large share of educational resources has, in recent years, gone towards fostering integrity and honesty among youth. That will continue to be the case in the years to come.

Television drama series

ICAC came at a time when television was the most powerful media for reaching the masses. Among many innovative publicity efforts made by ICAC was the production of a television drama series based on real corruption cases. It was an astounding success and, to date, remains one of the most popular television programmes, its ratings comparable to those of commercial productions. In the series, the dire consequences of corruption are vividly portrayed and the professionalism and efficiency of the officers of ICAC are effectively conveyed. To ensure the work of ICAC is accurately reflected, the actors portraying officers are asked to dress, talk and carry out their investigations in a manner that is as close to real life as possible.

The internet

The cyber revolution has given ICAC another potent medium for interactive communication with the community. Internet surfers can gain access to it in the virtual world. There are "best practice" packages for specific trades and industries, as well as practical guides on dealing with ethical dilemmas and difficult situations in individual branches of industry. Also on the ICAC web site is information on corruption cases that it has dealt with over the years.

As Internet browsing has become one of the most popular hobbies among members of the younger generation, ICAC has also launched a web site for

teenagers that uses interactive games and information to impart positive values to young people.

Face-to-face contact

Despite the immense influence of the media in reaching the masses, ICAC believes that it is no substitute for face-to-face contact with the people it serves to explain its goals and mission and obtain feedback on its work. ICAC uses strategic network regional district offices to maintain direct contact with members of various segments of the community.

The offices have two primary functions:

1. They serve as focal points of contact with local community leaders and organizations with whom the ICAC regional officers organize various activities to disseminate anti-corruption messages. The regional offices hold regular meet-the-public sessions to gauge public views on various corruption issues. Tailor-made briefings and training sessions are offered to civil servants and those practising specific trades in the private sector to raise their awareness of the anti-corruption law and the problems associated with corruption. Educational programmes are arranged to develop an anti-corruption culture among young people and newly arrived immigrants.
2. The offices, manned by people trained to deliver ICAC messages to different sectors of the community, also serve as report centres that members of the public can walk into and lodge a complaint about corruption. Experience shows that people feel more at ease providing such information in these less formal settings .

Community relations officers reach between 200,000 and 300,000 people on average per year through 800 talks, activities and special projects. The 200 staff members meet with members of the community through meet-the-public sessions, training workshops at workplaces, school talks and seminars designed for businesses and professionals.

CURRENT SITUATION REGARDING CORRUPTION

Corruption in the Hong Kong SAR is under control. While no government can expect to eradicate corruption, improvements in the area of integrity are encouraging. The efficiency and honesty of the civil service have been acknowledged by the world community. Syndicated corruption belongs to the past.

The various types of complaints reveal changes in the social culture and public attitudes. Complaints involving corruption in the civil service accounted for 86 per cent of the total in 1974. That figure dropped to 60 per cent in 1980 and to less than 40 per cent in 2000. Reports on alleged police corruption plunged from 45 per cent of the total in 1974 to 30 per cent in 1984 and to less than 14 per cent in 2000.

Complaints involving corruption in the private sector accounted for 13 per cent of the total in 1974, 37 per cent in 1984 and 54 per cent in 2000. That increase was attributed largely to the growing public intolerance towards corruption in the

private sector and, to an even greater extent, to the realization within the business community that corruption was bad for business.

Despite strong resistance to ICAC in the 1970s, entrepreneurs have gradually come to understand that bribery has had an adverse effect on business. Consequently, their resistance has changed to acceptance and even active support of ICAC. In 1995, six major chambers of commerce together with ICAC, helped found the Hong Kong Ethics Development Centre to promote ethics and corporate governance. Nowadays, nearly one in ten reports of corruption in the private sector is made by senior business managers.

CONCLUSION

Fighting corruption is an ongoing battle. The public needs to be constantly assured that ICAC is capable of carrying out its tasks effectively, without fear or favour. The Commission is keenly aware of the need to maintain its level of professionalism in the face of the growing sophistication of criminal groups, aided in part by the globalization of trade and the digital revolution. The extremely low incidence of corruption in the Hong Kong SAR could not have been achieved solely with the establishment of ICAC. Many other factors are involved.

- ***A holistic approach to the problem.*** The three-pronged strategy of investigation, prevention and community education has enabled ICAC to tackle the problem at source.
- ***A supportive public.*** A supportive public makes it possible for the battle against corruption to be fought on all fronts, in every corner of the community. Without a supportive public, regardless of the human and financial resources involved, it would not have been possible to reduce corruption so quickly.
- ***The rule of law*****.** The people of the Hong Kong SAR have treasured, respected and guarded the rule of law, an important factor in convincing the public that justice will be done.
- **Government commitment.** The commitment of the government has translated into sufficient resources and adequate legal powers to hunt down the criminals involved in corruption. The Hong Kong SAR has demonstrated that corruption can be contained. ICAC has been given the task of keeping it under tight control.

CAN THE ICAC EXPERIENCE BE USED ELSEWHERE?

The earlier status of Hong Kong, the accountability of its Governor to the British parliament, and its small size and great wealth have provided a unique environment. Nevertheless, several organizations, and nations, wish to copy the change of Hong Kong from a society entrenched in syndicated corruption to one in which the public does not expect officials to be corrupt, and in which there is determined action against corruption in the private sector.

Some of the lessons learned by ICAC staff could be useful elsewhere.
They include:

- The need to win public cooperation in reporting corruption;
- The importance of securing convictions for corruption and publicizing them;
- The cost-effectiveness of cautions and of prevention;
- The value of developing corporate codes of conduct for parts of the private sector; and
- The use of video recordings for interviews with suspects, and their admissibility as evidence in court.

CASE STUDY #2

THE ANTI-CORRUPTION AGENCY (ACA) OF MALAYSIA[122]

The Anti-Corruption Agency (ACA) of Malaysia was founded in 1967 by merging three earlier bodies. The main functions of ACA are to:

- Investigate and prosecute offences of corruption;
- Prevent and curb corruption in the public service; and
- Investigate the conduct of civil servants.

Corruption is defined in the Prevention of Corruption Act 1961 and Ordinance 22, 1971, as including bribery, false claims and the use of public position or office for pecuniary or other advantage. Claims for false expenses are dealt with by ACA, but the police deal with other fraudulent claims.

ACA prosecutes offenders and seeks to prevent corruption. In its early years, it carried out many investigations against members of the public for bribing civil servants. Subsequently, as it instituted preventive programmes to encourage the public to report such corrupt practices, an increasing number of civil servants were arrested. Although much of its present work is concerned with public servants, ACA has also investigated ministers, charged a football player with rigging a match result, and had bank managers convicted for taking a personal percentage in exchange for agreeing to grant bank loans. As at August 1994 there were 150 court hearings a month. A promotional video is used to seek cooperation from the public and to deter those who are tempted by corrupt acts. The ACA also provides advice on management methods to reduce opportunities for corruption.

ACTIVITIES OF THE ANTI CORRUPTION AGENCY (ACA)

The activities of ACA include:

- Procuring intelligence and investigating corruption cases;
- Anti-corruption campaigns, education, television programmes and other publicity;
- Prosecuting offenders;
- Studying weaknesses in government administration; and
- Conducting such activities as surprise corruption checks.

ACA investigates conflicts of interest, extortion, false claims and corrupt business transactions. Prevention and deterrence techniques include punishment, management and education, and enlisting public support to fight corruption. One ACA officer has described corruption as a "consensual crime" with its own natural defence mechanisms, and has complained that conviction sentences

[122] Based on a paper presented by Dennis Osborne at a UN expert meeting on the elaboration of an anti-corruption tool-kit, Vienna 13-14 April 2000.

were often "too light". Between 1985 and 1990, half of those convicted received a one-day imprisonment sentence only, and 85 per cent received sentences of less than six months.

Increasing responsibilities have been given to the ACA. They include the adoption of revised regulations for conduct and discipline of public officers in 1993, a code of ethics for judges in 1994, and increased cooperation with religious organizations. A new division of the ACA was formed in 1996 to provide an early warning system for corruption in large Government corporations. In April 1997, the Government endorsed a three-pronged strategy for the ACA to strengthen its resources and management, further develop its preventive and promotional work, and improve enforcement, including redrafting of laws on corruption. In 1999-2000, the ACA took responsibility for attacking corruption in the private sector, and sought extra staff for that purpose.

The ACA has given special attention to the "top ten" corruption prone agencies in Malaysia, to the setting up of Ethics, Quality and Productivity Committees at State and departmental levels; and to the interests and safety of witnesses and informers. Meanwhile, the civil service has developed a set of values known as "The Twelve Pillars" to which civil servants subscribe:

1 The value of time
2 The success of perseverance
3 The pleasure of working
4 The dignity of simplicity
5 The worth of character
6 The power of kindness
7 The influence of example
8 The obligation of duty
9 The wisdom of economy
10 The virtue of patience
11 The improvement of talent
12 The joy of originating

MANDATE OF THE ANTI-CORRUPTION AGENCY

The ACA has the power to investigate, interrogate, arrest and prosecute. Staff members were appointed initially by transfers from the police but are now recruited into a separate administration. They receive public-sector pay plus an incentive allowance. There are six divisions: Prosecutions; Investigations; Information; Prevention; Training; and Administration. Legislation, regulation, operation and motivation are closely linked. Thus, customs officers at the checkpoints and police on the street are allowed to carry only a small amount of cash on their person. Random checks and searches provide evidence of corrupt cash payments and discourage acceptance of bribes.

INCREASED EMPHASIS ON PREVENTION

The ACA acts on information received: it receives 8,000 reports a year. Only a small number of those reports are found to be mischievous. ACA uses paid informers in ways that are described as being "similar to the FBI". Initially, information is received in confidence but subsequent enquiries are made openly. The three stages are discreet enquiry, preliminary enquiry and open enquiry. Publicity for enquiries may encourage others to come forward with evidence. The aims of investigation are to prosecute, uncover breaches in civil-service discipline, propose improvements to systems to reduce opportunities for corruption, assist other agencies, for example the Inland Revenue, and cultivate future information sources. Informants may be anonymous. Publicity for enquiries as well as for charges, trials and convictions, discourages corrupt practice.

Greater emphasis is now given to preventing corruption than in the past, with a three-pronged strategy of Information, Education and Communication (I, E, C). Efforts to educate the public and discourage people from conducting corrupt practices are based primarily on ethics and religion. The thrust of ACA work on prevention was presented in a promotional video made available in 1994. The video includes quotes from the sayings of the Prophet, "Allah curses the giver of bribes and the receiver of bribes and the person who paves the way for both parties". The underlying causes of corruption are described as living beyond one's income and running heavy debts, with corruption breeding off administrative weaknesses. Efforts are made to appeal to people to avoid corruption and are based on morality ("Corruption is evil"), social pressure ("Would you support your family with money derived from corruption?"), self-respect ("We have an image to keep as Government servants") and loyalty. Corruption is said to be dangerous because it is infectious. The video makes an appeal to the public to cooperate in fighting corruption ("Have you reported an act of corruption to the authorities?"). The video warns that corruption does not pay, and presents a scene of a clanging door bell in a prison, which represents a threat of punishment, and the scene of an arrest in front of a family, which attempts to bring a sense of shame. ACA also uses television dramas.

There is concern about the slow progress of cases through the courts and the lack of severity in sentencing. Other problems listed by the ACA include the transaction of corrupt money in foreign countries, the fact that the public does "not want to get involved", difficulty in getting cooperation from foreign citizens and organizations, fear of vengeance for supporting the authority, difficulties in retaining witnesses and people accepting corruption "as a way of problem solving ... and convenience". Another problem is the allegation that ACA is a tool of the Government, and that it arrests small fish but lets the "whales" get off free. ACA has responded to this allegation by claiming that two State ministers have been prosecuted and a senior cabinet minister investigated and, although the latter was cleared of any criminal offence, he was asked to declare all his assets (ACA Annual Report 1993). It is, however, recognized that the "businessman-politician" is hard to catch.

ACA staff believes that reducing the levels of corruption depends on:

- The political will;
- A Malaysian requirement that public servants may not run their own businesses;
- A requirement that public servants should declare their assets;
- A check to ensure that public servants do not have a lifestyle that is beyond their means; and
- A rule that those that are too heavily in debt may not be promoted.

ACA staff is recruited at levels equivalent to police sergeants, inspectors and assistant superintendents. Initial on-the-job training is provided, followed by specialist courses on prosecution, intelligence gathering, prevention and management. Some staff go overseas to obtain academic qualifications in such fields as criminology. Training opportunities are sought in the United Kingdom and the United States. The ACA manpower and budget come under the Department of the Prime Minister. The Director General is appointed by the King on the advice of the Prime Minister and reports to Parliament. The ACA cooperates closely with similar organizations in many countries.

The ACA is vigilant about the possibility of its own staff being corrupted and checks are made.. The police retain the power to charge people with corruption, including ACA staff. The public may complain about ACA staff to the Public Complaints Bureau.

CASE STUDY #3

BOTSWANA, CORRUPTION AND ECONOMIC CRIME ACT 1994

The Corruption and Economic Crime Act 1994 of Botswana provides for the establishment of a Directorate on Corruption and Economic Crime (DCEC) with an extensive mandate including the investigation of alleged or suspected offences, the alleged or suspected contravention of fiscal and revenue laws; the conduct of any person that may be connected with or conducive to corruption; the examination of the practices and procedures of public bodies with a view to eliminating those that may be conducive to corrupt practices; the education of the public about the evils of corruption; and the fostering of public support against corruption. The Act also creates several offences, including the possession of unexplained property.

The DCEC was set up in the Office of the President and became operational in September 1994 when Botswana was becoming an increasingly important financial centre, with the second highest GDP per capita in Africa and major earnings from foreign investments, diamonds, tourism and beef, as well as a customs union with South Africa.

The early division of responsibilities into Investigation (operations), Prevention (mainly management advice) and Education (including public relations) followed a pattern adopted successfully elsewhere. An Intelligence Group was established to supplement information gained from complaints from the public. A Report Centre for receiving messages from the public became fully operational in March 1995.

By 1998, there were five branches, each headed by an Assistant Director. These are:

- Prosecutions and Training;
- Investigations;
- Intelligence and Technical Support;
- Administration, Development and Financial Investigations; and
- Corruption Prevention and Public Education.

DCEC Annual Reports from 1995 to 1998 show a growth in results, activities and staffing. It has been estimated that one benefit of DCEC was to increase Government income from the recovery of unpaid taxes and associated fines and seizures to an amount that exceeded the DCEC budget. In addition, several individuals were investigated under Section 34 of the Act for the possession of assets or maintaining a standard of living they could not satisfactorily explain. In 1997, 87 arrests and 66 prosecutions began of which 31 were completed and 21 resulted in convictions. In 1998, 79 arrests were made and 39 prosecutions began, of which 29 were completed and 14 produced guilty verdicts. That left 66 cases pending that arose from DCEC work, some of which dated back to 1994. Press releases regarding the charges and trials raised public awareness.

Although DCEC is part of the civil service, it is autonomous. By December 1998, 109 posts had been created.

INFORMATION FROM THE 1995 AND 1996 ANNUAL REPORTS

It may be instructive to note the difficulties reported during the first years in existence of DCEC. In the 1995 and 1996 Reports, the Director raised a number of concerns, challenging critics of DCEC, and claiming in one report that, "Contrary to the ill informed comments aired in the media and elsewhere, DCEC has had some significant operational successes."

That was linked with a discussion of "operational targeting": whether or not to choose specific target groups for investigation. It was argued that it is not only necessary and right but the actual statutory duty of DCEC to investigate every pursuable report (4). In the 1996 report, the Director claimed that targeting "big fish" alone is morally indefensible and that the whole problem should be targeted.

There has been frustration in the working environment and concern about bureaucratic delays because DCEC is part of the normal Government service.

When it was found necessary for DCEC staff to help conduct prosecutions on behalf of the Attorney General (AG), the Director sought the strengthening of the AG, arguing that a qualified lawyer, rather than an investigator, who may be prone to accusations of bias, can best undertake the role of prosecutor.

A constitutional right to bail had led to suspect expatriates absconding from the country with, among other things, assets that might have been seized.

The Director sought better accountability for DCEC through the creation of a Directorate Review Committee.

The importance of training was stressed, including the value of an officer visiting Hong Kong SAR and another attending a workshop at RIPA International in London. The Director also argued, however, that much more training is still needed.

According to the Director, there is a need to help the law to catch up with technology, including the introduction of video-recording interviews with suspects and the admissibility in court of such evidence.

Although later reports are less defensive, there are significant references to continuing delays in processing cases through the office of the Attorney General, and concern is expressed about difficulties in obtaining information from banks.

The Directorate has, however, secured several significant convictions, as listed in its annual reports, raised awareness of corruption issues, drafted codes and guidelines to reduce corrupt behaviour, and shown the difficulties of operation within the Government bureaucracy and the constraints and delays in having cases processed by the courts.

CASE STUDY #4

THE ANTI-CORRUPTION OFFICE (OAC) OF ARGENTINA [123]

The Anti-Corruption Office (OAC)[124] of Argentina is an agency created by law within the Ministry of Justice and Human Rights. Its purpose is to elaborate and coordinate policies to prevent and fight corruption. According to Decree No. 102/99, the OAC is in charge of preventing, investigating and promoting the prosecution of those actions described as illegal by the Inter-American Convention Against Corruption, ratified by Law No. 24.759. (6). The Ministry of Justice and Human Rights, through the OAC, has the primary responsibility for implementing such policies in the national public sector, and to act as petitioner or claimant before the judiciary in the cases it has investigated.

The Public Administration Prosecutor (Fiscal De Control Administrativo) heads the OAC, and has the rank of Secretary of State. The OAC has two main departments, the Department of Transparency Policies (Dirección de Planificación de Políticas de Transparencia) and the Department of Investigations (Dirección de Investigaciones), each headed by an Under Secretary of State.

Specialists in economics, sociology, law, public accounting, international relations and political science form the staff at the Department of Transparency Policies. The Department of Investigations comprises mainly lawyers. Staff of both departments are selected on the basis of background, experience and qualifications. The administration of financial disclosure forms of public officials, a function previously carried out by the former Oficina Nacional de Etica Publica, is now the responsibility of a professional cadre of specially trained career public officials.

PUBLIC ADMINISTRATION PROSECUTOR

The Public Administration Prosecutor is in charge of the Anti-Corruption Office. The main functions of this position are to:

- Elaborate and submit the anti-corruption programme to the Ministry of Justice and Human Rights for approval;
- Decide whether or not to open and close an investigation;
- Coordinate the actions of the OAC with other Government agencies; and
- Oversee the implementation of the financial disclosure statements of public officials.

[123] Based on a Paper Presented by Roberto de Michele, Department of Transparency Policies, Anti-corruption Office, Ministry of Justice and Human Rights, Argentina. Paper presented at Workshop on Combating Corruption, X United Nations Congress on the Prevention of Crime and Treatment of Offenders, Vienna, 10-11 April 2000

[124] For full access to the regulations of the OAC, see www.jus.gov.ar.

THE DEPARTMENT OF INVESTIGATIONS

The main duty of the Department of Investigations is to carry out administrative enquiries into the behaviour of public officials, in accordance with the Inter-American Convention Against Corruption. The duties include:

- Receiving claims from private parties and public officials;
- Investigating allegations of wrongdoings in the public administration;
- Promoting administrative, civil and criminal actions; and
- Assuming the position of claimant before the criminal courts.

Laws have extended powers to conduct enquiries to the Department of Investigations. For example, the Department can request assistance from any public agency and, in particular, from the police force, the revenue agency and other control agencies. Assistance includes obtaining public records and other sources of information that may help proceedings. The Department can also subpoena public and private parties to give testimony.

In the course of a given investigation or at the request of an interested party, the Department can protect the identity of the parties that declare or provide information.

The Department of Investigations, under the direction of the Public Administration Prosecutor, has the power to select cases for investigation, according to their economic, institutional and social impact. At the end of an investigation, the Director proposes to the Public Administration Prosecutor a course of action: administrative enquiries, sanctions or bringing criminal suit. If the Prosecutor approves, the results of an investigation can be made public. The Department of Investigations is compiling an index to evaluate the caseload of the area.

Cases Received per Day between 27 December and 23 March.

December	January	February	March		
1.0	4.5	5.7	5.8	5.1	Average
0.0	6.7	18.2	8.4	11.5	Variance
3	100	120	99	322	Total

As the variation is not great, it is fair to say that the office has been receiving, on average, five cases per day.

The cases are classified, according to their status, as:

- **Dismissed or archived**. Those that lack any economic, institutional or social significance but placed on hold in case new evidence is produced.
- **Under preliminary enquiry.** Cases with prima facie some economic, institutional or social significance but requiring additional evidence to determine the feasibility of further action.

- **Criminal action promoted with follow-up.** Cases that come before the courts without charges being laid, but with follow-up.
- **Criminal action promoted without follow-up.** Cases that come before the courts without charges being laid and without follow-up.
- **Administrative action with follow-up**. Cases presented before the highest-ranking authority of the agency in which the public official under investigation is employed, with a view to imposing administrative sanctions. OAC in charge of follow-up.
- **Administrative action without follow-up.** Same as above, but without follow-up.
- **Under preliminary investigation.** The available evidence and other elements are verified in advance of a full investigation.
- **Under full investigation.** Cases in which investigators are collecting evidence with a view to criminal prosecution.
- **Criminal charges**. The OAC presents a case before the criminal courts and tries to acquire the position of co-claimant along with the district prosecutor.
- **Cases transferred.** Cases outside the jurisdiction of the OAC, another agency having accepted the case.
- **Cases concluded.** Cases falling within OAC jurisdiction and terminated after investigations or substantive proceedings, such as referring claims to the criminal courts.
- **Improper jurisdiction.** The case presented is not within OAC jurisdiction.

The low percentage of cases either transferred or not falling within OAC jurisdiction shows that the public is relatively aware of the mission and function of the OAC. The figures also show that most cases either have a criminal ingredient or no substance at all. The number of cases that might have been transformed into administrative enquiries is insignificant.

Status of cases received at 23 March

	Quantity	Percentage
Dismissed or archived	76	24
Under preliminary enquiry	13	4
Criminal action promoted with follow-up	1	0
Criminal action promoted without follow-up	3	1
Administrative action with follow-up	0	0
Administrative action without follow-up	1	0
Under preliminary investigation	136	42
Under full investigation	55	17
Criminal charges	3	1
Cases transferred	9	3
Cases concluded	9	3
Improper jurisdiction	17	5
Total	323	100

The number of dismissed cases points to the decision of the OAC not to remain involved in unpromising investigations. At the same time, a large percentage of the cases are under either preliminary or full investigation (59 per cent). In cases under full investigation, the OAC will not necessarily present itself as co-claimant.

The three cases brought to court so far have been partly challenged by the presiding judges. In one case, they did not readily accept the jurisdiction of the OAC. In the other two, the request of the OAC was questioned in terms of substantive criminal law. Definitions are pending the response of the appeal courts.

In the meantime, the OAC is committed to designing new software to classify case data and statistics. The primary objective of the software is to provide strategic information on case files, from opening to resolution one way or another.

It should be noted that cases are received through many different channels, such as telephone and fax, and especially Internet and e-mail. Many cases are set in motion by someone reading the newspaper. On other occasions, public officials and members of opposition parties have brought their claims to the OAC.

One of the advantages foreseen of this software is that it will help categorize cases, for example in terms of economic impact and areas of the State involved. The OAC will also discover which corrupt practices are most widespread, which strategies have been most effective and which strategies have not produced the expected results. Fundamentally, it will provide the Department of Transparency Policies with the information required to achieve its ultimate goal: identification of where preventive measures are most needed.

THE DEPARTMENT OF TRANSPARENCY POLICIES

The Department of Transparency Policies is responsible for elaborating public policies to prevent corruption. Its main functions are to:

- Elaborate and suggest indicators of corruption that are of institutional, social and economic significance;
- Analyse cases under investigation to determine their structural causes and create prevention policies and actions;
- Recommend and assist national agencies in the implementation of preventive policies or programmes;
- Propose and assist in the implementation of the legal and administrative reforms necessary to improve transparency in public administration; and
- Manage the system of financial disclosure statements of public officials and determine the potential interest conflicts in their actions.

The Department of Transparency Policies is charged with designing and helping to implement preventive strategies within the public administration. Most of the strategies are related to improving access to information and developing techniques to ensure transparency in policy-making procedures.

At the same time, the Department of Transparency Policies is carrying out the first study on transparency and governmental performance from within the public administration. The study takes into account three basic operations of the public sector: human resources administration, budget administration, including procurement, and legal administration.

The aim of the study is not to identify the number of bribes but rather the factors that encourage corruption, whether they be institutional, legal or economic. To acquire such a large body of information, a detailed sector-by-sector analysis is now under way. Eventually, the survey will allow:

- Identification of the practices that promote corruption;
- Recognition of the way in which the actors involved perceive and conceive corruption; and
- Development of an instrument to identify critical areas within the public administration.

The Department of Transparency Policies also actively provides assistance to public agencies to improve performance and accountability. An example of that strategy is the technical assistance agreement between the OAC and the Programmea de Asistencia Médica Integral (PAMI), the largest provider of health services in Argentina, with an annual budget of over 20 billion dollars. In the past, PAMI has been identified with systemic corruption and looting. In fact, the former President and most of the members of the Board of Directors have been already criminally accused by the Department of Investigations for racketeering, violations of fiduciary duties and other abuses.

Under the terms of the agreement with PAMI, the OAC is carrying out a series of actions to increase transparency in its procurement operations and to enhance access to information both for beneficiaries and the private sector alike.

Some of those actions include:

- Opening a website for PAMI, (www.pami.org.ar) where access to critical information is available and where claims can be filed by those wishing to protect their identity.
- Creating a Citizens' Charter for beneficiaries;
- Creating a system of rule-making, notice and comment for bidding documents;
- Publishing, via the Internet, over 140 bidding documents for contracting every major service provided by the agency; and
- Establishing a monitoring procedure for the performance of the services provided to customers, using Internet, 1-800 lines and other methods of information gathering.

The immediate result of such actions has been to create direct access to the information that the Agency previously handed out on a discretionary basis, particularly procurement documents related to health services. While enhancing transparency, the measures also allow for a better perception of the structural deficiencies of the agency. An internal team of experts is now designing the organizational changes required to avoid a repeat of past practices.

The Department of Transparency Policies is also responsible for the administration of the system of financial disclosure forms for public officials. The system allows for tracking of assets of public officials as well as cases of conflict of interest.

Recently, the office has ruled in some significant conflict of interest cases. For example, a Government minister who declared that he held a position on the board of a private corporation and acted as a consultant for a firm, was asked to resign from those positions and refrain from involving himself in any administrative proceedings involving his previous clients. Similar decisions were handed out in the case of three Secretaries of State.

The system of financial disclosure forms is under reform. The current system, based on paper support, is expensive and provides limited use of the data. There are over 30,000 documents "in the system" and it is estimated that one document costs US$70 simply to produce, receive and classify; that does not include investigation of its contents. The system is currently being fully computerized, with cost per magnetic form at US$ 6. Along with cost advantages, use of computers will allow information to be analysed and cross checked with other databases.

CASE STUDY #5

JUDICIAL INTEGRITY AND CAPACITY (7)

In the firm belief that a process to develop the concept of judicial accountability should be led by the judges themselves and not by politicians or public officials, the United Nations Centre for International Crime Prevention (CICP), in collaboration with Transparency International (TI), invited a group of chief justices and high-level judges to a preparatory meeting at Vienna in April 2000 to consider formulating a programme to strengthen judicial integrity.

Recent attempts by some development organizations to reform judiciaries in Latin America and Eastern Europe had not been particularly successful, mainly because they failed to recognize the existence of different legal traditions in the world. It was decided, therefore, to focus on the common law system at the pilot stage.

The group was formed exclusively of common law chief justices or senior judges of seven Asian and African countries: Bangladesh, the Indian state of Karnataka, Nepal, Nigeria, South Africa, Tanzania and Uganda.

OBJECTIVE OF THE PROGRAMME

The objective of the programme was to launch at the international level an "action-learning" process, the approach generally used by CICP and TI, for chief justices. The process would assist chief justices in identifying possible anti-corruption policies and measures for adoption in their own jurisdictions and test the measures at their own national level. In subsequent international meetings to refine the approach, they would share their experiences and subsequently trigger the adoption of measures by their colleagues at home.

Under the action-learning process, CICP and TI do not claim to "know all the answers"; nor do they come to countries seeking to impose off-the-shelf solutions or approach a project with preconceived notions. Instead, they work with relevant institutions and stakeholders in each country to develop and implement appropriate methodologies, submitting any conclusions, on a continuing basis, to scrutiny by specialist groups. The entire project is based on partnership and shared learning.

The objectives of the first meeting were to:

- Raise awareness regarding:
- The negative impact of corruption,
- The level of corruption in the judiciary,
- The effectiveness and sustainability of an anti-corruption strategy consistent with the principles of the rule of law, and;
- The role of the judiciary against corruption.
- Formulate the concept of judicial accountability and devise methodology to introduce that concept without compromising the principle of judicial independence; and

- Design approaches that will be of practical effect, have the potential to impact positively on the standard of judicial conduct and raise the level of public confidence in the rule of law.

The following issues were discussed by the group:

- Public perception of the judicial system.
- Indicators of corruption in the judicial system;
- Causes of corruption in the judicial system;
- Developing a concept of judicial accountability;
- Remedial action; and
- Designing a process to develop plans of action at the national level.

THE NEED TO INTRODUCE AN EVIDENCE-BASED APPROACH

Chief Justices concluded that judicial corruption or the perception of judicial corruption is fuelled in two ways:

- By first-hand experience of judges or court staff asking for bribes; and
- By a lack of professional skills and coherent organization, and a way of administering justice that can be interpreted as being caused by corrupt behaviour.

Indicators of the latter include delays in executing court orders; the unjustified issuing of summons and granting of bail; prisoners not being brought to court; lack of public access to records of court proceedings; files disappearing; unusual variations in sentencing; delays in delivering and giving reasons for judgment; high acquittal rates; apparent conflicts of interest; prejudices for/against a party, witness, or lawyer, whether individually or as a member of an ethnic, religious, social, gender or sexual group; immediate family members of a judge regularly appearing in court; prolonged service in a particular judicial station; high rates of decisions in favour of the executive; appointments perceived as resulting from political patronage; preferential/hostile treatment by the executive or legislature; frequent socializing with particular members of the legal profession, the executive or the legislature, with litigants or potential litigants; and, post-retirement placements.

Chief justices agreed, however, that current knowledge of judicial corruption was inadequate and could not be used as a basis for remedial action. All agreed on the need for more evidence about types, causes, levels and impact of corruption. Even in those countries where surveys had been conducted, the results were not sufficiently specific. Generic questions about the levels of corruption in the courts, for example, do not reveal the precise location of the corruption and will therefore be quickly rejected by the judiciary as a basis for formulating adequate counter measures and policies.

Chief Justices agreed on the strong need to elaborate a detailed survey instrument to allow identification not only of the levels of corruption but also its types, causes and locations. They were convinced that the perception of judicial corruption was, to a large extent, caused by malpractice within other sectors of the legal establishment. For example, experiences from some countries show

that court staff or lawyers, in order to enrich themselves, pretend that the judge has asked for a bribe. Surveys in the past did not sufficiently differentiate between the various branches and levels of the court system. The approach inevitably led to a highly distorted picture of judicial corruption as most contact with the judiciary was restricted to the lower courts. Moreover, the survey instruments used to date probably did not take into account that the perception of corruption may be strongly influenced by the outcome of a court case. Generally speaking, the losing party is far more likely to blame its defeat on the other party "bribing the judge", particularly when its lawyer tries to cover up his own shortcomings.

Furthermore, service delivery surveys usually rely exclusively on the perceptions or experiences of court users rather than using insider information, which could easily be obtained by interviewing prosecutors, investigative judges and police officers. Existing instruments also seldom seek to further refine the survey information by referring it for discussion by focus groups and/ or by conducting case studies on institutions that seem particularly susceptible to corruption.

SET OF PRECONDITIONS NECESSARY TO CURB CORRUPTION IN THE JUDICIARY

The judicial group agreed that a set of preconditions must be put into place before the concrete measures to fight judicial corruption can be instituted. Most preconditions are directly related to the respect or esteem in which the judicial profession is held.

Fair remuneration and conditions

The low salaries paid in many countries to judicial officers and court staff must be improved. Without fair remuneration there is not much hope of combating corruption. Fair remuneration would also allow practices, such as the traditional system of paying "tips" to court staff on the filing of documents, to be abolished. Adequate salaries will not, however, guarantee a corruption-free judiciary. Countless examples of public services all over the world prove that, regardless of adequate remuneration, corruption remains a problem. An adequate salary is a necessity but is not, in itself, a guarantee of official probity .

An excessive workload will also hinder the ability of judges to ensure the quality of their work. Eventually, it will make the job less rewarding and make some more susceptible to corruption.

While improving service conditions may improve living standards, examples from some developing countries suggest that the State often tends to provide a large part of the remuneration to judges in the form of extras, such as housing, car and staff, thus advocating a standard of living that exceeds what judges would be to afford on their salary. It perhaps also contributes to the temptation of some to adopt corrupt practices, if only to accumulate sufficient resources to maintain their social status and lifestyle during retirement.

To formulate a realistic, focused, and effective plan of action to prevent and contain judicial corruption, the judicial group recommended the development of a coherent survey instrument to assess the types, levels, locations and remedies of judicial corruption. The group also recommended establishment of a mechanism

to assemble and record the data and, in an appropriate format, to make them widely available for research, analysis and response.

Transparent procedures for judicial appointments

Transparent procedures for judicial appointments were considered necessary by the judicial group to combat the actuality or perception of corruption in that area, including nepotism or politicization. Moreover, candidates for appointment should submit, in an appropriate way, to an examination regarding any possible allegations or suspicions of past involvement in corruption.

Furthermore, the group concluded that a transparent and publicly known, and possibly random, procedure for the assignment of cases to particular judicial officers was needed to combat the actuality or perception of litigant control over the decision-maker. Internal procedures should be adopted within court systems to ensure that assignment of judges to different districts is changed on a regular basis with due regard to the gender, race, tribe, religion, minority involvement and other features of the judicial office-holder. Such rotation should be adopted to avoid the appearance of partiality.

Adoption and monitoring of judicial code of conduct

To ensure correct behaviour on the part of judicial officers, the judicial group urged adoption of judicial codes of conduct. Judges must be instructed in the provisions established by such codes and the public must be informed about their existence, their content and how to complain in case of violation. Newly appointed judicial officers must formally subscribe to a judicial code of conduct and agree, if a breach is proved, to resign from judicial or related office. Representatives from the national judicial association, bar association, prosecutor's office, Ministry of Justice, Parliament and civil society should be involved in the setting of standards for judicial integrity, helping rule on best practices and reporting on the handling of complaints against allegedly errant judicial officers and court staff.

Declaration of assets

Rigorous obligations should be adopted to require all judicial officers publicly to declare their assets and those of their parents, spouse, children and other close family members. Such declarations should be publicly available and regularly updated. They should be inspected after appointment and monitored from time to time by an independent and respected official.

As another pressing field of intervention, the group identified widespread delays causing opportunities for corrupt practices and the perception of corruption. Standards for timely delivery that are practically possible must therefore be developed and made known publicly. It should be noted, however, that reducing court delays has proved extremely difficult even in countries where the mobilization of human and financial resources are far less problematic than in the developing world. For example, the delay-reduction programme of the United States, even though generally seen as a success, did not manage to significantly reduce court delays. It did, however, increase the number of cases concluded by a court decision, with more litigants being willing to sit through lengthy court proceedings if they saw a "light at the end of the tunnel". .

Computerization of court files

According to the judicial group, practical measures such as computerization of court files, should be adopted. Experiences from the state of Karnataka in India suggest that this is of immense help in reducing the work load of the single judge and speeds up the administration of justice. It also helps avoid the reality or appearance that court files are "lost" or require "fees" for their retrieval or substitution.

Establishment and monitoring of sentencing guidelines

The group also supported the notion that sentencing guidelines could significantly help in identifying clearly criminal sentences and other decisions that are so exceptional as to give rise to reasonable suspicions of partiality.

Use of alternative dispute resolution

It was felt that making available systems for alternative dispute resolution would give the litigants the possibility to avoid, where they exist, actual or suspected corruption in the judicial branch. A study carried out for the World Bank on the development of corruption in two South American judiciaries, in Chile and in Ecuador, seems to confirm this assumption .

Importance of peer pressure and a public complaints mechanism

The group also noted the importance of proper peer pressure on judicial officers. Such pressure should be enhanced to help maintain high standards of probity within the judiciary.

The establishment of an independent, credible and responsive complaint mechanism was seen as an essential step in efforts against judicial corruption. The responsible entity should be staffed with serving and past judges and be given the mandate to receive, investigate and determine any complaints of corruption involving judicial officers and court staff. The entity, where appropriate, should be included in a body with a more general responsibility for judicial appointments, judicial education and action or recommendation for removal from office.

In the event of proof of the involvement in corruption in the line of duty of a member of the legal profession, whether a judicial officer or court staff, appropriate investigative means should be in place and, if the allegation is proved, a mechanism for disbarment/dismissal of the person concerned.

Procedures that are put in place for the investigation of allegations of judicial corruption should be designed after due consideration of the viewpoint of judicial officers, court staff, the legal profession, users of the legal system and the public. Appropriate provisions for due process in the case of a judicial officer under investigation should be established, bearing in mind the their vulnerability to false and malicious allegations of corruption by disappointed litigants and others.

No immunity from obedience to general law

It should be acknowledged that judges, like other citizens, are subject to the criminal law. They have, and should have, no immunity from obedience to the general law. Where reasonable cause exists to warrant investigation by police

and other public bodies of suspected criminal offences on the part of judicial officers and court staff, such investigations should take their ordinary course, according to law.

Need for an independent inspectorate

An inspectorate or equivalent independent guardian should be established to visit all judicial districts regularly in order to inspect, and report upon, any systems or procedures that are observed that may endanger the actuality or appearance of probity and report upon complaints of corruption or the perception of corruption in the judiciary.

Important role to be played by the bar association and law society

The role and functions of bar associations and law societies in anti-corruption efforts in the judiciary should be acknowledged. Such bodies have an obligation to report to the appropriate authorities reasonable instances of suspected corruption. They also have the obligation to explain to clients and the public the principles and procedures for handling complaints against judicial officers. Such bodies also have a duty to institute effective means to discipline members of the legal profession who are alleged to have been engaged in corruption.

Need to give litigants timely information regarding status of the case

To assure the transparency of court proceedings and judicial decisions, systems of direct access should be implemented to permit litigants to receive advice directly from court officials concerning the status of their cases awaiting hearing.

Need to conduct workshops addressing integrity and ethics

Workshops and seminars for the judiciary should be conducted to consider ethical issues and heighten vigilance by the judiciary against all forms of corruption. A handbook for judges, if not already in existence, should be instituted. The book should contain practical information on all topics relevant to enhancing the integrity of the judiciary.

Judicial officers, in their initial education and thereafter, should be regularly assisted with instruction in the area of judicial bias (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality. To achieve accountability civil society and the judiciary need to recognize that the judiciary operates within the society it serves. Thus, every available means of strengthening civil society as a means of reinforcing the integrity of the judiciary should be undertaken. Moreover, society must be vigilant to ensure such integrity is maintained. To assure the monitoring of judicial performance, the work of the judiciary and the need for maintaining high standards of integrity should be explained to the public. The adoption of initiatives such as a National Law Day or Law Week should be considered.

The important role of the media

It was agreed that the role of the independent media as a vigilant and informed guardian against corruptibility in the judiciary should be recognized, enhanced and strengthened by the support of the judiciary itself. Courts should be afforded the means to appoint media liaison officers to explain the importance of integrity in judicial institutions, the procedures available for complaint and investigation of

corruption, and the outcome of any such investigations. Such officers should help to remove the causes of misunderstanding of the judicial function.

CASE STUDY #6

SINGAPORE: THE TEN COMMANDMENTS APPROACH

During the last decades, Singapore has made huge efforts to eradicate corruption in all the branches of its public administration. Today, according to various sources (TI Corruption Perception Index, Asian Executives Poll), it is ranked as the least corrupt country within the entire Asian-Pacific Region.

With respect to the judiciary, Singapore has adopted a "Ten Commandment Approach" which is reproduced here:

Commandment One:

Transparency in the selection of judges

Commandment Two:

Adequate remuneration for judges and court staff

Commandment Three:

An independent yet accountable judiciary

Commandment Four:

A coherent system of case management

Commandment Five:

Performance indicators for the judiciary and the judges

Commandment Six:

Consistent and objective criteria in the administration of justice

Commandment Seven:

Clear ethical markers and guidelines for the judges

Commandment Eight:

A common vision for the judiciary and leading by example

Commandment Nine:

Full transparency in the justice process at all times

Commandment Ten:

Learn from lessons of forward-looking institutions.

CASE STUDY #7

NIGERIA: DEVELOPMENT OF A CODE OF CONDUCT

In the case study below, Jeremy Pope of Transparency International describes how he, with the direct support of the newly elected President of Nigeria, Olusegun Obasanjo, involved all the key stakeholders in developing, from scratch, a code of conduct for Government ministers.

BACKGROUND

As he assumed office, the newly elected President of Nigeria, Olusegun Obasanjo, faced a daunting task. For a generation, his country had been plundered by a series of military administrations. During that time, the civil service had become demoralized and dysfunctional. There were few permanent secretaries who had ever written a cabinet memorandum as the Cabinet had not met as such in their professional careers. Moreover, few even knew how a law was enacted as the military had “governed” by decree. While there were some outstanding individuals of probity and dedication to public service, there had really been no democratic "government" at all in the accepted sense of the word: no unity of purpose, no teamwork, no sense of cohesion and certainly little evidence of any commitment to promoting the public interest. There had simply been a succession of appointees who had seen high political office as nothing more and nothing less, than a highway to self-enrichment and the bestowing of favour on friends and relations.

It was in such an unpromising environment that the newly elected President vowed to return his country to democratic rule.

Because of the tradition of self-enrichment, it was widely believed that many of those who had sought election to the national assembly and aspired to serve as ministers were captives of the old ethos; while they might be willing to articulate the new ethos they might not have much belief in it. Furthermore, it was understood that many had borrowed heavily to finance their various campaigns and were effectively in hock to vested interests who were expecting a handsome return on their "investments". Others were the beneficiaries of corrupt practices under previous regimes and were seeking political power in order to protect what they had acquired illicitly.

CHALLENGES

It was essential to overcome distorted political values, and make the new Cabinet internalize the "Obasanjo ethic". The challenge was to start a process that, if successful, would completely revolutionize the understanding, deeply entrenched in the political life of the nation, that ministerial office was a "licence" to dispense favours to family and friends without regard to the public interest or the ability of the nation to bear the costs involved. Clearly, whatever else might be involved, the start had to be made at the top.

PROCESS

For that reason, as soon as the senate was selected and confirmed, and before portfolios had been allocated and the new ministers were formally sworn in, the newly elected President convened a "values retreat" for his incoming team. The objective was to create an atmosphere in which the new ministers could reflect on the tasks that lay before them and how they might achieve sustainable and meaningful change to the culture of corruption that gripped most, if not all, of their departments and agencies. Just what this would entail was unknown. The retreat would last for two days, and the President was venturing into uncharted waters.

As the outcomes desired included a code of conduct for ministers and senior advisers, it was decided to draft a code of conduct for the retreat before it was held. As it was vital for the document to be a product of the ministers themselves, and not simply imposed by the President, the "draft" was transformed into a "questionnaire" that asked ministers and advisers how strongly they felt about each proposition contained in the draft. The questionnaire was distributed as the retreat began and it was completed straight away.

As expected, the ministers, in their answers to the questions, almost universally endorsed as the propositions contained in the "draft code", and as a result, when the "draft code", amended somewhat in the light of the responses, was placed before them, it was already a familiar document and chimed well with the opinions they had already expressed.

Before the "draft" was reprocessed in this way, however, the ministerial team and their advisers had to address the "values" issue, and it was uncertain how this could be done. In the event, the options of a rousing "anti-corruption" address from the President and/or an address by someone else, whether Nigerian or an external resource person, were both rejected as simply stating the obvious: that ministers should not act corruptly but discharge public duties in a manner consistent with public trust.

Instead, the strategy was to divide the team into small groups and invite them to answer a series of short but challenging questions in the expectation that they would in effect lecture themselves even more effectively than any platform speaker could. The questions were:

- What particular action by a particular minister in the past did they strongly approve of?
- Why did they strongly approve of it?
- What particular action by a particular minister in the past did they strongly disapprove of?
- Why did they strongly disapprove of it?
- How in a sentence would each of them like to be remembered for their period in office as a minister/senior adviser?

Each group had a highly animated discussion, and it emerged from the conclusions that the most admired ministers were those who were:

- Modest, honest and saw themselves as servants of the people of Nigeria;
- Committed to their portfolios, minimized waste and made a positive difference to the lives of the people that their ministries served;
- Punctual in their own timekeeping and did not waste the time of others by keeping them waiting;
- Respectful of the law and, in particular, did not flout their official positions by, for example, ignoring traffic lights; and
- Respectful of other people in public places and did not, for example, jump the queue at the airport.

RESULTS

Against the background of such conclusions, the groups reassembled to consider the draft code of conduct. It was examined in a plenary session, and the parameters of each paragraph were explored, discussed and revised until universal agreement was reached on the text.

At that point, President Obasanjo, who had deliberately remained absent from the discussions so as not to inhibit the freedom of discussion, rejoined the meeting. He welcomed the adoption of the code and suggested that all of them, including him, should personally sign it. That was done, and they then signed a second copy, that was handed to the President to retain.

Finally, the President indicated his satisfaction with the outcome of the retreat and elicited from the collective meeting the response that those who failed to uphold the spirit and the letter of the code would have let the whole ministerial team down and would thus be required to resign. To facilitate that process, should it prove necessary, the ministers would, prior to being sworn in, sign an undated letter of resignation that the President would hold in safe custody.

The full text of the new code was then released to the media, and it was carried prominently throughout the country, with the more serious newspapers reproducing the text in its entirety.

That was the beginning of the process. The code had been discussed, internalized and adopted by the ministers as their own document. Their individual commitment to its provisions had been personally expressed in writing. The code had been widely published and, by implication, the media and the wider general public had been invited to measure the performance of each and every minister against its provisions.

To enable ministers and senior advisers to seek guidance on any particular dilemmas that they, individually, might face from time to time, the code included provision for the appointment by the President of an independent source of advice, namely a person of high public standing and reputation. Those who sought his/her advice were open in disclosing all relevant facts and, by acting on the advice they received, would have a complete answer to any subsequent allegation of misconduct.

That was the beginning of what was planned to be a sustained and systematic assault on a culture of political and administrative corruption. Starting at the top, the plan was to drive the values down through the management systems, with the leaders secure in the possession of the necessary moral authority that would enable them both to provide leadership and to take disciplinary decisions where these were called for.

The exercise did not end there. Plans have now been advanced for workshops along similar lines, including case studies, to be conducted throughout the highest echelons of the public service. Thereafter, the ethical approach will be institutionalized downwards and throughout the public service.

On a general note, the biggest risk of any code of conduct is that:

- It is not accepted or even known by the stakeholders who are supposed to be governed by it; or
- It might be known to the stakeholders but is not monitored in an adequate manner.
- There are no risks, costs and/or uncertainties associated with breaking the code of conduct.

The approach described in the Nigeria case study tries to address the concerns by:

- Involving the key players in the development of the code of conduct;
- Disseminating the code of conduct to the public to create awareness about what they can expect, and thereby provide some checks and balances; and involving a strong President in the process to make the code of conduct more serious, almost as if it were a social contract.

CASE STUDY #8

CODES OF CONDUCT USED BY DIFFERENT TYPES OF INSTITUTION

The key areas described apply to international and intergovernmental organizations:

- The professions and NGOs;
- The private sector;
- Public officials, including ministers and parliamentarians; and
- Judicial officers.

A. CODES OF CONDUCT: INTERNATIONAL AND INTERGOVERNMENTAL ORGANIZATIONS

A1. European Bank for Reconstruction and Development, (EBRD) Code of Conduct 1991

The Code was adopted by the Board of Governors of the EBRD on 15 April 1991, and is applicable to all officials and staff members of the Bank as well as to experts and consultants where it is incorporated into their contracts. The Code addresses issues such as confidentiality, business affiliations, gifts and honours, political activities, financial interests, investments, trading activities, and disclosure statements.

A2. European Union, code of conduct for the Commissioners

The treaty article on the European Commission makes special reference to the complete independence enjoyed by the members of the Commission, who are required to discharge their duties in the general interest of the Community. In the performance of their duties, they must neither seek nor take instructions from any Government or other body. The general interest also requires that, in their official and private lives, Commissioners should behave in a manner that is in keeping with the dignity of their office. The object of the code is to set limits to the outside activities and interests of Commissioners that could jeopardize their independence. It also responds to the need to codify certain provisions relating to the performance of their duties. The issues dealt with in the Code include the outside activities of the Commissioners; their financial interests and assets; activities of spouses; collective responsibility and confidentiality; rules for missions; rules governing receptions and professional representations; acceptance of gifts and decorations; and the composition of their offices

B. CODES OF CONDUCT: PRIVATE SECTOR

Corporate codes of conduct can differ according to the organization they cover. The following sections summarize codes of conduct developed by Governments, industrial groups and non-governmental organizations.

B1. Codes of conduct for electoral staff

Such a code applies to all connected with an election, ranging from couriers, voter educators, mail sorters, material despatchers to senior electoral managers. Election staff enjoy a position of trust, and are expected to adhere to all relevant rules and regulations to ensure the integrity of the election process.

http://www.aceproject.org/main/english/po/poe03/default.htm

B2. Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles

The Code identifies desirable transparency practices for central banks in conducting monetary policy and for central banks and other financial agencies in conducting financial policies.

http://www.imf.org/external/np/mae/mft/code/

B3. European Bank for Reconstruction and Development, Business Standards and Sound Business Practices: A Set of Guidelines

The European Bank for Reconstruction and Development has formulated a set of guidelines that bona fide lenders and investors expect companies to follow. The decision to set guidelines was taken in recognition that the success of an organization depends not only on sound strategy, competent management, good assets and a promising market, but also on maintaining a sound relationship with customers, shareholders, lenders, employees, suppliers, the community in which it operates, and Government authorities.

B4. FMC Corporation, Code of Ethics and Business Conduct Guidelines

Global chemical company, FMC Corporation, has established a Code of Ethics outlining the principles that should guide all FMC employees in their daily work. The Business Conduct Guidelines reflect the policy of FMC Corporation, nationally and internationally, with respect to political contributions, payments to Government personnel, commission payments, proper accounting procedures and commercial bribery.

B5. International Chamber of Commerce, Rules of Conduct to Combat Extortion and Bribery, 1996

The International Chamber of Commerce (ICC) is a global business organization with 63 national committees and over 7,000 member companies and associations in more than 130 countries. It seeks to promote international trade and investments, as well as rules of conduct for cross-border business. The ICC Rules of Conduct are intended as a method of self-regulation by international business. They are of a general nature and, although they have no direct legal force, constitute what is considered to be sound commercial practice in the matters to which they relate. The Standing Committee on Extortion and Bribery, however, established by the ICC seeks, inter alia, to ensure that enterprises and business organizations endorse the Rules of Conduct.

B6. Lobbyists' Code of Conduct/ Canadian Government, 2 June 1997

The purpose of this Lobbyists' Code of Conduct is to reassure the Canadian public that lobbying is being carried out ethically and to the highest standards in

order to conserve and enhance public trust in the integrity, objectivity and impartiality of Government decision making.

http://www.lobbyistdirectory.com/2Ethxnws/general.htm

B7. The Defense Industry Initiative (DII), a Code of Conduct for Employees in Private Companies

DII is a consortium of U.S. defence industry contractors that subscribes to a set of principles for achieving high standards of business ethics and conduct. It includes a summary of major applicable laws and regulations, as well as a statement of more general corporate aspired objectives. After identifying the fundamental principles, the Code addresses specific subjects such as business courtesies, kickbacks, conflicts of interest, confidential information, use of company resources, and the importance of keeping complete and accurate books.

http://www.dii.org

B8. OECD Updated Guidelines on Conduct for Multinationals

In June 2000, the Organization for Economic Cooperation and Development (OECD) agreed on a revised set of guidelines on responsible business conduct for multinational enterprises. The guidelines, which were adopted by the Governments of 33 countries, cover a variety of areas, including employment and industrial relations.

http://www.eiro.eurofound.ie/2000/09/features/eu0009270f.html

C. CODES OF CONDUCT: PROFESSIONS AND NGOS

C1. United Nations, Principles of Medical Ethics

The Principles are relevant to the role of health personnel, particularly physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982. The 6 Principles were adopted by the UN General Assembly by resolution 37/194 of 18 December 1982.

C2. United Nations, Basic Principles on the Role of Lawyers, 1990

The Principles were adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, and "welcomed" by the UN General Assembly in its resolution 45/121 of 14 December 1990. The United Nations invited Governments to be guided by the Principles in the formulation of appropriate legislation and policy directives, and to make efforts to implement them in accordance with the economic, social, legal, cultural and political circumstances of each country. In its resolution 45/166 of 18 December 1990, the UN General Assembly invited Governments "to respect them and to take them into account within the framework of their national legislation and practice".

C3. Charter for a Free Press, adopted by the Voices of Freedom Conference, London, 1987

The statement of 10 principles was approved by journalists from 34 countries at the Voices of Freedom World Conference on Censorship Problems held in

London in January 1987. The Conference was held under the auspices of the World Press Freedom Publishers, International Press Institute, Inter-American Press Association, North American Broadcasters Association, and the International Federation of the Periodical Press.

C4. International Bar Association, Standards for the Independence of the Legal Profession, 1990

The statement of standards was adopted by the International Bar Association in 1990 and is designed to assist in promoting and ensuring the proper role of lawyers. It seeks to complement the UN Basic Principles on the Role of Lawyers and to provide more detail. While the UN principles are addressed to Governments, the IBA Standards seeks to address the question of independence of the profession from the viewpoint of lawyers.

C5. Code of Professional Conduct of the Uganda Journalists' Association

The Uganda Journalists' Association promulgated its Code of Conduct as a basis for adjudication of disputes between the press and the public in Uganda, and for disciplinary action when the conduct of a journalist falls bellow the required minimum standards enshrined in the Code.

http://transparency.de/documents/source-book/c/cvK/k1.html

C6. Transparency International (TI): Code of Conduct

TI promulgated a Code of Conduct containing principles of administration, provisions about gifts and conflict of interests, and the establishment of an Ethics Committee.

D. CODES OF CONDUCT: PUBLIC OFFICIALS, INCLUDING MINISTERS AND PARLIAMENTARIANS

D1. UN Crime Prevention and Control Division at Vienna: International Code of Conduct for Public Officials.

The Code provides for the loyalty, efficiency, effectiveness, impartiality and fairness of public officials. It also contains provisions about conflicts of interest and disqualification, disclosure of assets, acceptance of gifts, confidential information, political activity, reporting, disciplinary actions and implementation.

http://www.uncjin.org:80/Documents/Corruption.pdf

D2. Law Reform Commission of Australia: Code of Conduct for all Office Holders

The Code refers to principles, such as impartiality and honesty, and to conflicts of interest and misuse of power. It also includes provisions relating to members of parliament and their staffs, ministers and ministerial staff, public servants, members of the defence force, staff of the parliamentary departments, consultants, statutory office holders, members of tribunals, and the media.

D3. Council of Europe: Recommendation No R (2000) 10 of the Committee of Ministers to Member States on Codes of Conduct for Public Officials

The Committee, convinced that raising public awareness and promoting ethical values are valuable as means of preventing corruption, recommends the adoption of national codes of conduct for public officials based on the model code of conduct. This model Code contains, inter alia, general principles and provisions about reporting, conflict of interest, declaration of interests, gifts, misuse of official position, observance of the code and sanctions.

http://cm.coe.int/reports/cmdocs/2000/2000cm60.htm

http://www.greco.coe.int/docs/rec10(2000)e.htm

D4. Modern Local Government in Touch with the People: New Codes of Conduct for Councillors in England

A new Model Code of Conduct for Councillors is being promoted under a new ethical framework, where a council embraces the new culture of openness and ready accountability. Elected councillors of local authorities in England are expected to behave according to the highest standards of personal conduct in the performance of their duties.

http://www.local-regions.detr.gov.uk/lgwp/8.htm

D5. Practical Measures to Promote Integrity in Customs Administrations: A Code of Conduct

By clearly articulating expectations, customs administrations can hold employees accountable for performance and take appropriate action when those standards are not met. The Code refers to maintenance of integrity, confidentiality of information, conflict of interest, appearance and conduct.

http://www.transparency.de/iacc/8th_iacc/papers/crotty.html

D6. TI, German Chapter: Code of Conduct for Legislators, Ministers and Public Officials

Three different codes of conduct relating to the duties of legislators, ministers and public officials are included. The Codes contain provisions about the use of influence, Government property and confidential information, acceptance of gifts, hospitality and sponsored travel.

http://www.transparency.de/

D7. Africa Leadership Forum, Draft Code of Conduct for African Parliaments, 1998

The draft Code of Conduct was adopted at the African Leadership Conference on Democratization of African Parliaments and Political Parties, held in Gaborone, Botswana in July 1998, and attended by representatives from parliaments across the African continent. It was offered to African parliaments to assist the process of developing national codes of conduct to guide the various democratic institutions in the years ahead.

D8. Australia, Parliamentary and Electorate Travel: Recommendations for reform, Independent Commission Against Corruption (ICAC), New South Wales, 1999

The second report of ICAC on the subject of parliamentary entitlements analyses the use by members of parliament of their entitlements and allowances and of the administrative systems operating within the New South Wales Parliament, and makes recommendations for change. The first report, released in April 1998, examined the conduct of seven members of parliament regarding the use of travel entitlements.

D9. Organisation for Economic Cooperation and Development (OECD), Principles for Managing Ethics in the Public Service, 1998

On 23 April 1998, the Council of the OECD adopted the Principles and recommended action by Member Countries to ensure well functioning institutions and systems to promote ethical conduct in the public service.

D10. South Africa: Register of Member' Interests, Parliament of the Republic of South Africa, 1999

The elected leaders of South Africa are required to disclose shares and financial interests, paid employment outside parliament, directorships and partnerships, consultancies and retainerships, sponsorships, gifts and hospitality, benefits, travel of certain categories, land and property, and pensions.

D11. South Africa, Code of Conduct for Persons in Positions of Responsibility, Moral Summit, 1998

The Code of Conduct was adopted and signed by all the participants at a "moral summit" convened by President Nelson Mandela in October 1998 to discuss the "moral crisis" of South African political and social life. The participants included representatives of all major political parties and religious leaders.

D12. South African Police Service Code of Conduct

The introduction of the Code of Conduct is probably the best known example of an attempt to improve professional conduct in the police service. Every employee of the service is requested to endorse this Code of Conduct, sign it and strive to live by it. It focuses particularly on abuse of power and State assets, corruption and discrimination.

http://www.saps.co.za/17_policy/priority/code.htm

D13. United Kingdom, The Civil Service Code, 1996

The Civil Service Code sets out the constitutional framework within which all civil servants work and the values they are expected to uphold. It is modelled on a draft originally put forward by the House of Commons Treasury and Civil Service Select Committee. It came into force on 1 January 1996 and forms part of the terms and conditions of employment of every civil servant.

D14. United Nations, International Code of conduct for Public Officials, 96

The Code, contained in Resolution 51/59: Action against Corruption, was adopted by the UN General Assembly on 12 December 1996, and was recommended to Member States as a tool to guide their efforts against corruption. The Code enunciates three general principles, then focuses on

conflict of interest, disclosure of assets, acceptance of gifts or other favours, confidential information, and political activity.

E. CODES OF CONDUCT: JUDICIAL OFFICERS

E1. Amendments to the Rules of Court: Canons of Judicial Conduct for the Commonwealth of Virginia

The Canons are designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through the Judicial Enquiry and Review Commission.

http://www.courts.state.va.us/jirc/canons_112398.html#canon1

E2. Model Code of Judicial Conduct

The Model Code of Conduct was adopted by the House of Delegates of the American Bar Association on 7 August 1990.

http://www.abanet.org/cpr/le-rules.html

E3. Chief Justices from Africa and Asia Meeting to develop Judicial Code of conduct, India, February 2001 (see Case Study 13)

According to the Chief Justices, a judicial code of conduct was necessary for all officers, including those newly appointed. It was felt that self-restraint and avoiding unnecessary social contact would preserve judicial independence and that a code of conduct would be useful in avoiding opportunities for corruption.

http://www.undcp.org/adhoc/crime/corruption_judicprocd.pdf

E4. Canadian Judicial Council, Ethical Principles for Judges, 1998

A working committee including four Chief Justices and an academic prepared the Statement of Ethical Principles for Judges for the Canadian Judicial Council. It was designed to represent a concise yet comprehensive set of principles addressing the many difficult ethical issues that confront judges as they work and live in their communities. It was also intended as a sound basis to promote a more complete understanding of the role of judges in society and the ethical dilemmas they often encounter.

CASE STUDY #9

THE BANGALORE DRAFT: INTERNATIONAL PRINCIPLES FOR JUDICIAL CONDUCT (1)

PREAMBLE

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to

supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:
INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:
IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:
INTEGRITY

Principle:

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:
PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:
EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

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Value 6:
COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"*Court staff*" includes the personal staff of the judge including law clerks.

"*Judge*" means any person exercising judicial power, however designated.

"*Judge's family*" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"*Judge's spouse*" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

EXPLANATORY NOTE

First meeting held in Vienna in April 2000

1. At its first meeting held in Vienna in April 2000 on the invitation of the United Nations Centre for International Crime Prevention, and in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Judicial Group on Strengthening Judicial Integrity (comprising Chief Justice Latifur Rahman of Bangladesh, Chief Justice Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal, Chief Justice Uwais of Nigeria, Deputy Vice-President Langa of the Constitutional Court of South Africa, Chief Justice Nyalali of Tanzania, and Justice Odoki of Uganda, meeting under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as rapporteur, and with the participation of Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers) recognized the need for a code against which the conduct of judicial officers may be measured. Accordingly, the Judicial Group requested that codes of judicial conduct which had been adopted in some jurisdictions be analyzed, and a report be prepared by the Co-ordinator of the Judicial Integrity Programme, Dr Nihal Jayawickrama, concerning: (a) the core considerations which recur in such codes; and (b) the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

2. In preparing a draft code of judicial conduct in accordance with the directions set out above, reference was made to several existing codes and international instruments including, in particular, the following:

(a) The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association, August 1972.
(b) Declaration of Principles of Judicial Independence issued by the Chief Justices of the Australian States and Territories, April 1997.
(c) Code of Conduct for the Judges of the Supreme Court of Bangladesh, prescribed by the Supreme Judicial Council in the exercise of power under Article 96(4)(a) of the Constitution of the People's Republic of Bangladesh, May 2000.
(d) Ethical Principles for Judges, drafted with the cooperation of the Canadian Judges Conference and endorsed by the Canadian Judicial Council, 1998.
(e) The European Charter on the Statute for Judges, Council of Europe, July 1998.
(f) The Idaho Code of Judicial Conduct 1976.
(g) Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999.
(h) The Iowa Code of Judicial Conduct.
(i) Code of Conduct for Judicial Officers of Kenya, July 1999.
(j) The Judges' Code of Ethics of Malaysia, prescribed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, in the exercise of powers conferred by Article 125(3A) of the Federal Constitution of Malaysia, 1994.
(k) The Code of Conduct for Magistrates in Namibia.
(l) Rules Governing Judicial Conduct, New York State, USA.
(m) Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.

(n) Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan.
(o) The Code of Judicial Conduct of the Philippines, September 1989.
(p) The Canons of Judicial Ethics of the Philippines, proposed by the Philippines Bar Association, approved by the Judges of First Instance of Manila, and adopted for the guidance of and observance by the judges under the administrative supervision of the Supreme Court, including municipal judges and city judges.
(q) Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands, November 2000.
(r) Guidelines for Judges of South Africa, issued by the Chief Justice, the President of the Constitutional Court, and the Presidents of High Courts, the Labour Appeal Court, and the Land Claims Court, March 2000.
(s) Code of Conduct for Judicial Officers of Tanzania, adopted by the Judges and Magistrates Conference, 1984.
(t) The Texas Code of Judicial Conduct
(u) Code of Conduct for Judges, Magistrates and Other Judicial Officers of Uganda, adopted by the Judges of the Supreme Court and the High Court, July 1989.
(v) The Code of Conduct of the Judicial Conference of the United States.
(w) The Canons of Judicial Conduct for the Commonwealth of Virginia, adopted and promulgated by the Supreme Court of Virginia, 1998.
(x) The Code of Judicial Conduct adopted by the Supreme Court of the State of Washington, USA, October 1995.
(y) The Judicial (Code of Conduct) Act, enacted by the Parliament of Zambia, December 1999.
(z) Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1981.
(aa) Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982.
(bb) United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly, 1985.
(cc) Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") prepared by Mr L.V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, 1989.
(dd) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997.
(ee) The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.
(ff) The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of Judges and Lawyers, February 2000.

Second meeting held in Bangalore in February 2001

At its second meeting held in Bangalore in February 2001, the Judicial Group (comprising Chief Justice Mainur Reza Chowdhury of Bangladesh, Justice Claire L'Heureux Dube of Canada, Chief Justice Reddi of Karnataka State in India, Chief Justice Upadhyay of Nepal, Chief Justice Uwais of Nigeria, Deputy Chief Justice Langa of South Africa, Chief Justice Silva of Sri Lanka, Chief Justice Samatta of Tanzania, and Chief Justice Odoki of Uganda, meeting under the chairmanship of Judge Weeramantry,

with Justice Kirby as rapporteur, and with the participation of the UN Special Rapporteur and Justice Bhagwati, Chairman of the UN Human Rights Committee, representing the UN High Commissioner for Human Rights) proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct. The Judicial Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

The Bangalore Draft was widely disseminated among judges of both common law and civil law systems and discussed at several judicial conferences. In June 2002, it was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT), comprising Vice-President Reissner of the Austrian Association of Judges, Judge Fremr of the High Court in the Czech Republic, President Lacabarats of the Cour d'Appel de Paris in France, Judge Mallmann of the Federal Administrative Court of Germany, Magistrate Sabato of Italy, Judge Virgilijus of the Lithuanian Court of Appeal, Premier Conseiller Wiwinius of the Cour d'Appel of Luxembourg, Juge Conseiller Afonso of the Court of Appeal of Portugal, Justice Ogrizek of the Supreme Court of Slovenia, President Hirschfeldt of the Svea Court of Appeal in Sweden, and Lord Justice Mance of the United Kingdom. On the initiative of the American Bar Association, the Bangalore Draft was translated into the national languages, and reviewed by judges, of the Central and Eastern European countries; in particular, of Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Romania, Serbia and Slovakia.

The Bangalore Draft was revised in the light of the comments received from CCJE-GT and others referred to above; Opinion no.1 (2001) of CCJE on standards concerning the independence of the judiciary; the draft Opinion of CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality; and by reference to more recent codes of judicial conduct including the Guide to Judicial Conduct published by the Council of Chief Justices of Australia in June 2002, the Model Rules of Conduct for Judges of the Baltic States, the Code of Judicial Ethics for Judges of the People's Republic of China, and the Code of Judicial Ethics of the Macedonian Judges Association.

Round-Table Meeting of Chief Justices from the civil law system

The revised Bangalore Draft was placed before a Round-Table Meeting of Chief Justices (or their representatives) from the civil law system, held in the Peace Palace in The Hague, Netherlands, in November 2002, with Judge Weeramantry presiding. Those participating were Judge Vladimir de Freitas of the Federal Court of Appeal of Brazil, Chief Justice Iva Brozova of the Supreme Court of the Czech Republic, Chief Justice Mohammad Fathy Naguib of the Supreme Constitutional Court of Egypt, Conseillere Christine Chanet of the Cour de Cassation of France, President Genaro David Gongora Pimentel of the Suprema Corte de Justicia de la Nacion of Mexico, President Mario Mangaze of the Supreme Court of Mozambique, President Pim Haak of the Hoge Raad der Nederlanden, Justice Trond Dolva of the Supreme Court of Norway, and Chief Justice Hilario Davide of the Supreme Court of the Philippines. Also participating in one session were the following Judges of the International Court of Justice: Judge Ranjeva (Madagascar), Judge Herczegh (Hungary), Judge Fleischhauer (Germany), Judge Koroma (Sierra Leone), Judge Higgins (United Kingdom), Judge Rezek (Brazil), Judge Elaraby (Egypt), and Ad-Hoc Judge Frank (USA).

CASE STUDY #10

UN CODE OF CONDUCT FOR PUBLIC SERVANTS

BACKGROUND

The Committee of Ministers of the Council of Europe adopted on 11 May 2000 a recommendation on codes of conduct for public officials, which includes, in the appendix, a Model Code of Conduct for Public Officials. The Model Code of Conduct gives suggestions on how to deal with real situations frequently confronting public officials, such as gifts, use of public resources, dealing with former public officials, etc. The Code stresses the importance of the integrity of public officials and the accountability of hierarchical superiors. It comprises three objectives: to specify the standards of integrity and conduct to be observed by public officials, to help them meet those standards and to inform the public of the conduct it is entitled to expect of public officials. Furthermore, it contains a series of general principles addressing, for example, the conflict of interests, incompatible outside activities, how to react when confronted with problems such as offers of undue advantages, especially gifts, susceptibility to the influence of others, misuse of official position, use of official information and public resources for private purposes and the rules to follow when leaving the public service, especially in relations with former public officials.

ARTICLES

Article 1

1. This Code applies to all public officials.
2. For the purpose of this Code "public official" means a person employed by a public authority.
3. The provisions of this Code may also be applied to persons employed by private organisations performing public services.

The provisions of this Code do not apply to publicly elected representatives, members of the government and holders of judicial office.

Article 2

1. On the coming into effect of this Code, the public administration has a duty to inform public officials about its provisions.
2. This Code shall form part of the provisions governing the employment of public officials from the moment they certify that they have been informed about it.

Every public official has the duty to take all necessary action to comply with the provisions of this Code.

Article 3
Object of the Code

The purpose of this Code is to specify the standards of integrity and conduct to be observed by public officials, to help them meet those standards and to inform the public of the conduct it is entitled to expect of public officials.

Article 4
General principles

1. The public official should carry out his or her duties in accordance with the law, and with those lawful instructions and ethical standards which relate to his or her functions.
2. The public official should act in a politically neutral manner and should not attempt to frustrate the lawful policies, decisions or actions of the public authorities.

Article 5

1. The public official has the duty to serve loyally the lawfully constituted national, local or regional authority.
2. The public official is expected to be honest, impartial and efficient and to perform his or her duties to the best of his or her ability with skill, fairness and understanding, having regard only for the public interest and the relevant circumstances of the case.
3. The public official should be courteous both in his or her relations with the citizens he or she serves, as well as in his or her relations with his or her superiors, colleagues and subordinate staff.

Article 6

In the performance of his or her duties, the public official should not act arbitrarily to the detriment of any person, group or body and should have due regard for the rights, duties and proper interests of all others.

Article 7

In decision making the public official should act lawfully and exercise his or her discretionary powers impartially, taking into account only relevant matters.

Article 8

1. The public official should not allow his or her private interest to conflict with his or her public position. It is his or her responsibility to avoid such conflicts of interest, whether real, potential or apparent.
2. The public official should never take undue advantage of his or her position for his or her private interest.

Article 9

The public official has a duty always to conduct himself or herself in a way that the public's confidence and trust in the integrity, impartiality and effectiveness of the public service are preserved and enhanced.

Article 10

The public official is accountable to his or her immediate hierarchical superior unless otherwise prescribed by law.

Article 11

Having due regard for the right of access to official information, the public official has a duty to treat appropriately, with all necessary confidentiality**,** all information and documents acquired by him or her in the course of, or as a result of, his or her employment.

Article 12
Reporting

1. The public official who believes he or she is being required to act in a way, which is unlawful, improper or unethical, which involves maladministration, or which is otherwise inconsistent with this Code, should report the matter in accordance with the law.
2. The public official should, in accordance with the law, report to the competent authorities if he or she becomes aware of breaches of this Code by other public officials.
3. The public official who has reported any of the above in accordance with the law and believes that the response does not meet his or her concern may report the matter in writing to the relevant head of the public service.
4. Where a matter cannot be resolved by the procedures and appeals set out in the legislation on the public service on a basis acceptable to the public official concerned, the public official should carry out the lawful instructions he or she has been given.
5. The public official should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment. The investigation of the reported facts shall be carried out by the competent authorities.
6. The public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith.

Article 13
Conflict of interest

1. Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.
2. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.
3. Since the public official is usually the only person who knows whether he or she is in that situation, the public official has a personal responsibility to:

- be alert to any actual or potential conflict of interest;
- take steps to avoid such conflict;
- disclose to his or her supervisor any such conflict as soon as he or she becomes aware of it;
- comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.

4. Whenever required to do so, the public official should declare whether or not he or she has a conflict of interest.
5. Any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

Article 14

Declaration of interests

The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests.

Article 15

Incompatible outside interests

1. The public official should not engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his or her duties as a public official. Where it is not clear whether an activity is compatible, he or she should seek advice from his or her superior.
2. Subject to the provisions of the law, the public official should be required to notify and seek the approval of his or her public service employer to carry out certain activities, whether paid or unpaid, or to accept certain positions or functions outside his or her public service employment.
3. The public official should comply with any lawful requirement to declare membership of, or association with, organisations that could detract from his or her position or proper performance of his or her duties as a public official.

Article 16

Political or public activity

1. Subject to respect for fundamental and constitutional rights, the public official should take care that none of his or her political activities or involvement on political or public debates impairs the confidence of the public and his or her employers in his or her ability to perform his or her duties impartially and loyally.
2. In the exercise of his or her duties, the public official should not allow himself or herself to be used for partisan political purposes.
3. The public official should comply with any restrictions on political activity lawfully imposed on certain categories of public officials by reason of their position or the nature of their duties.

Article 17

Protection of the public official’s privacy

All necessary steps should be taken to ensure that the public official's privacy is appropriately respected; accordingly, declarations provided for in this Code are to be kept confidential unless otherwise provided for by law.

Article 18

Gifts

1. The public official should not demand or accept gifts, favours, hospitality or any other benefit for himself or his or her family, close relatives and friends, or persons or organisations with whom he or she has or has had business or political relations which may influence or appear to influence the impartiality with which he or she carries out his or her duties or may be or appear to be a reward relating to his or her duties. This does not include conventional hospitality or minor gifts.
2. Where the public official is in doubt whether he or she can accept a gift or hospitality, he or she should seek the advice of his or her superior.

Article 19

Reaction to improper offers

If the public official is offered an undue advantage he or she should take the following steps to protect himself or herself:

- Refuse the undue advantage; there is no need to accept it for use as evidence;
- Try to identify the person who made the offer;
- Avoid lengthy contacts, but knowing the reason for the offer could be useful in evidence;
- If the gift cannot be refused or returned to the sender, it should be preserved, but handled as little as possible;
- Obtain witnesses if possible, such as colleagues working nearby;
- Prepare as soon as possible a written record of the attempt, preferably in an official notebook;
- Report the attempt as soon as possible to his or her supervisor or directly to the appropriate law enforcement authority;
- Continue to work normally, particularly on the matter in relation to which the undue advantage was offered.

Article 20

Susceptibility to influence by others

The public official should not allow himself or herself to be put, or appear to be put, in a position of obligation to return a favour to any person or body. Nor should his or her conduct in his or her official capacity or in his or her private life make him or her susceptible to the improper influence of others.

Article 21

Misuse of official position

1. The public official should not offer or give any advantage in any way connected with his or her position as a public official, unless lawfully authorised to do so.
2. The public official should not seek to influence for private purposes any person or body, including other public officials, by using his or her official position or by offering them personal advantages.

Article 22

Information held by public authorities

1. Having regard to the framework provided by domestic law for access to information held by public authorities, a public official should only disclose information in accordance with the rules and requirements applying to the authority by which he or she is employed.
2. The public official should take appropriate steps to protect the security and confidentiality of information for which he or she is responsible or of which he or she becomes aware.
3. The public official should not seek access to information which it is inappropriate for him or her to have. The public official should not make improper use of information which he or she may acquire in the course of, or arising from, his or her employment.

4. Equally the public official has a duty not to withhold official information that should properly be released and a duty not to provide information which he or she knows or has reasonable ground to believe is false or misleading.

Article 23

Public and official resources

In the exercise of his or her discretionary powers, the public official should ensure that on the one hand the staff, and on the other hand the public property, facilities, services and financial resources with which he or she is entrusted are managed and used effectively, efficiently and economically. They should not be used for private purposes except when permission is lawfully given.

Article 24

Integrity checking

1. The public official who has responsibilities for recruitment, promotion or posting should ensure that appropriate checks on the integrity of the candidate are carried out as lawfully required.
2. If the result of any such check makes him or her uncertain as to how to proceed, he or she should seek appropriate advice.

Article 25

Supervisory accountability

1. The public official who supervises or manages other public officials should do so in accordance with the policies and purposes of the public authority for which he or she works. He or she should be answerable for acts or omissions by his or her staff which are not consistent with those policies and purposes if he or she has not taken those reasonable steps required from a person in his or her position to prevent such acts or omissions.
2. The public official who supervises or manages other public officials should take reasonable steps to prevent corruption by his or her staff in relation to his or her office. These steps may include emphasising and enforcing rules and regulations, providing appropriate education or training, being alert to signs of financial or other difficulties of his or her staff, and providing by his or her personal conduct an example of propriety and integrity.

Article 26

Leaving the public service

1. The public official should not take improper advantage of his or her public office to obtain the opportunity of employment outside the public service.
2. The public official should not allow the prospect of other employment to create for him or her an actual, potential or apparent conflict of interest. He or she should immediately disclose to his or her supervisor any concrete offer of employment that could create a conflict of interest. He or she should also disclose to his or her superior his or her acceptance of any offer of employment.
3. In accordance with the law, for an appropriate period of time, the former public official should not act for any person or body in respect of any matter on which he or she acted for, or advised, the public service and which would result in a particular benefit to that person or body.

4. The former public official should not use or disclose confidential information acquired by him or her as a public official unless lawfully authorised to do so.
5. The public official should comply with any lawful rules that apply to him or her regarding the acceptance of appointments on leaving the public service.

Article 27

Dealing with former public officials

The public official should not give preferential treatment or privileged access to the public service to former public officials.

Article 28

Observance of this Code and sanctions

1. This Code is issued under the authority of the minister or of the head of the public service. The public official has a duty to conduct himself or herself in accordance with this Code and therefore to keep himself or herself informed of its provisions and any amendments. He or she should seek advice from an appropriate source when he or she is unsure of how to proceed.
2. Subject to Article 2, paragraph 2, the provisions of this Code form part of the terms of employment of the public official. Breach of them may result in disciplinary action.
3. The public official who negotiates terms of employment should include in them a provision to the effect that this Code is to be observed and forms part of such terms.
4. The public official who supervises or manages other public officials has the responsibility to see that they observe this Code and to take or propose appropriate disciplinary action for breaches of it.
5. The public administration will regularly review the provisions of this Code.

CASE STUDY #11

NATIONAL INTEGRITY WORKSHOP IN TANZANIA

The workshop on the National Integrity System in Tanzania was designed to achieve a balance between process and content[125]. On the one hand, it began a process that maximized learning and communication through the exchange of experiences and the assignments given to working groups. On the other, it presented enough material content to produce new knowledge and form the basis for debate.

While, initially, the workshop proceeded according to plan, it responded to the needs and desires of the participants as the days went by. The ability to adapt in such a way took preparation, with human, physical and technological resources prepared and at the ready to deal with new situations as they emerged. Such flexibility was possible only if all the participants, officials and resource people were clear about their responsibilities and the workshop objectives right from the beginning.

In the past, there had been a striking upsurge in public concern about levels of corruption in Tanzania. Although there are varying levels of illegal behaviour in any free society, there were increasing complaints that corruption in the country had reached intolerable and unsustainable levels.

Upcoming elections presented an opportunity for all Tanzanians, of every political persuasion, to get together to produce a transparent and accountable system with less corruption and enhancements in the decision-making process and in Government administration. An opportunity to put the whole system of governance under scrutiny and to launch major initiatives for constitutional reform from clear platforms occurs very infrequently in the life of a nation.

The workshop was convened not to cast aspersions or attribute blame, nor to debate specific causes célèbres. Rather, it aimed to develop the outline of a National Integrity System that would help curb corruption in the future, by drawing on all spheres of society and establishing a platform for a continuing dialogue between civil society and Government.

WORKSHOP OBJECTIVES

The main objectives of the workshop were to develop a general outline of a national integrity system geared to help curb corruption and establish a strategy through which the various components of civil society could work to complement the efforts of Government against corruption.

[125] Participants at the workshop on the national integrity system in Tanzania requested that the workshop design be documented in order for them to use it as a guideline in planning and designing their own workshops. This case study contains a description of the workshop design. It also points to those areas where the design could be improved, and provides reasons for this. Participants were informed that the design of the national integrity system workshop was an example of only one of the various ways in which a workshop could be designed as well as facilitated. Those interested in other types of designs were instructed to contact the Workshop Management Group.

The workshop addressed the issue of integrity and ethics and their relation to corruption control. As part of the dialogue, Transparency International (TI) summarized its experience of working with societies addressing comparable problems, notably in Latin America. TI also summarized current moves at the international level, especially within the OECD, to constrain transnational corruption and its impact on countries in the south. Specifically, the participants were invited to:

- Discuss the needs of post-election Tanzania in the context of building a workable national integrity system and in the light of the experience of contemporary corruption in the country;
- Prepare an outline document, drawing on best practice, which could serve as a focus for informed public discussion and political debate in the run-up to the elections;
- Determine how Tanzanian society as a whole might participate in continuing debate on the issue of integrity and work with like-minded political players in a creative and constructive fashion; and
- Establish ownership of, and commitment to, the conclusions and action plan on the part of the participants.

Discussions were based on the "Chatham House Rules" (whereby statements cannot be attributed to individuals outside the meeting room), and the final document was adopted by consensus.

WORKSHOP ORGANIZATION

The expectations of the organizers were as follows:

- That Tanzanians are generally concerned for the future of their country and see the containment of corruption as a priority for the incoming administration;
- That their concern about the menace of corruption transcends all divides, including those of party politics; and
- That leaders within Tanzanian society, both in civil society and official positions, will wish to work together in cooperative ways to develop effective approaches.

The workshop was organized by Transparency International (TI), TI-Tanzania and the Prevention of Corruption Bureau.

PARTICIPATION

In an endeavour to gather together a cross-section of informed interests across Tanzanian society, invitations were sent to the following categories of participants:

- Prevention of Corruption Bureau;
- Religious bodies (e.g. CCT, TEC, BAKWATA);
- National Electoral Commission;
- Newspaper reporters (including TAMWA);
- Office of the Auditor-General;
- The judiciary;

- The police force;
- Tanganyika Law Society;
- University of Dar Es Salaam;
- Members of Parliament
- Chamber of the Attorney General, Director of Public Prosecutions;
- The business community (The Chambers TCIA, CTI and Dar Merchants);
- Members of civil society interested in forming anti-corruption Pressure groups;
- Political parties;
- Chairman, Public Accounts Committee; and
- Chairman, Permanent Commission of Enquiry.

WORKSHOP DURATION AND SESSIONS

The meeting spanned two days with three sessions per day. Each session comprised a short plenary (20 minutes) followed by working groups (75 minutes), followed by a plenary session reporting back (45 minutes), totalling two and a one half hours for each session.

PLENARY AND WORKING GROUPS

A minimum amount of time was spent in the plenary sessions, so as to maximize intensive working group debate rather than making presentations. A short opening plenary to each session provided concise scene-setting before the working groups began. The plenary heard the reporting back and a rapporteur drew together an analysis of the conclusions of the groups.

The working groups made most of the contributions. Each selected its own rapporteur. The working groups had facilitators, rather than chairs, who consolidated the discussions. The reporting back was based on those consolidations. Members of working groups were selected randomly to achieve a good cross-section of interests in each group.

The working sessions summarized and consolidated, and a drafting group, drawn from the participants, structured the collective findings of the groups into a draft document. The document covered areas for action and identified who should take the action. Where appropriate, indications of priorities were included.

Drafting group

A small drafting group drawn from the participants was responsible for preparing a short document which captured the points made in the discussions and encapsulated them in the framework document which was to result from the meeting. The document was drafted throughout the meeting, at the end of each session. A member of the drafting group acted as a plenary rapporteur at the close of each session.

Papers

Short, sharply focused papers, designed to assist and provoke discussion, were provided for each agenda item,

Report and follow-up

A report of the meeting was prepared and circulated to the interested parties after the meeting, together with the conclusions and recommendations. Subject to the wishes of the meeting, the document was made available to the press. Follow-up action was monitored and fostered by TI-Tanzania and others who wished to be involved.

Workshop ground rules and responsibilities

Four working groups met to discuss six different topics during the workshop. Each working group had 60 minutes to discuss the assigned topics and five minutes to present the findings and recommended action of each group in plenary. Each group had the following office bearers:

1. Chairperson, responsible for:
- Managing the process in the group discussion;
- Organizing the substantive discussion of the group by presenting the issues described in the Draft Agenda;
- Facilitating the election of the plenary presenter;
- Ensuring balanced participation in the group deliberations;
- Facilitating a short process to identify all the issues members wished to raise, and allocating time to each issue;
- Starting the first group session by asking group members to briefly introduce themselves, to make everybody feel at ease;
- Assisting with the formulation of issues, without influencing the content;
- Assisting both the group facilitator and the presenter to capture the essence of the points made on flip-charts; and
- Providing feedback on each day's proceedings to the Workshop Management Group.

2. Facilitator/consolidator, responsible for:
- Helping the chairperson to keep a check on the time allocated for discussion of the relevant issues;
- Capturing the deliberations and the issues raised on flip charts and bringing conceptual clarity, without imposing personal views;
- Assisting the group plenary presenters in preparing the group feedback to the plenary sessions; and
- Assisting the group chairperson and the workshop management team as necessary.

3. Presenter, responsible for:
- Presenting the group's response in a logical and clear way during the plenary session within the five minutes allocated; and
- Fielding and posing questions during plenary sessions.

CASE STUDY #12

QUEENSLAND, AUSTRALIA: THE ROLE OF THE LEGISLATURE IN EFFORTS AGAINST CORRUPTION

PARLIAMENTARY COMMITTEES

In an October 1992 report on the Review of Parliamentary Committees, the Queensland Electoral and Administrative Review Commission on Public Administration Committees in Parliament, recommends the establishment of five Standing Committees with power to enquire into and report on any aspect of public administration in Queensland. The five committees are in respect of: finance and administration, legal and constitutional affairs, community services and social development, resources and infrastructure, and business and industry. The report details the specific functions of each committee and can be viewed at:

http://www.transparency.de/documents/source-book/contents.html

THE OPPOSITION

In 1998, the Commonwealth Secretariat issued a report entitled, The Role of the Opposition. The report is the result of a workshop on the rights and responsibilities of the opposition organized by the Commonwealth Secretariat and held in London in June 1998. The issues addressed included:

- Holding the executive to account;
- The opposition as the "alternative Government";
- The legislative function;
- The opposition, consensus and the national interest;
- The opposition, the people and civil society; and
- The opposition in decentralized democracies.

The report can be viewed at:

http://www.transparency.de/documents/source-book/contents.html

CHAPTER IV
SITUATIONAL PREVENTION

CORRUPTION PREVENTION IN THE PUBLIC SECTOR

BACKGROUND

For the purposes of the Toolkit, prevention measures have been classified as either "situational" or "social". In "situational" prevention, outlined in the current section, anti-corruption measures are directed at the specific situations in which corruption problems occur. In "social" prevention, anti-corruption measures are directed at more general social or economic factors with the aim of creating conditions that are less likely to produce or support corrupt practices.

Most social prevention measures are concerned with raising awareness of corruption and mobilizing the population: (a) to refrain from corrupt practices themselves; and (b) to expect integrity on the part of those who provide services, particularly in the public sector. Thus, many of the social elements of anti-corruption programmes can also be considered as "empowerment" measures, in the sense that they provide the power and the incentives for the public to take appropriate action. Such measures are very general in nature and thus difficult to classify and describe in detail; yet, arguably, they are highly potent instruments because of the impact they can achieve.

The Tools dealing with “situational prevention” , as presented here, focus on the prevention of corruption in situations that tend to involve public institutions, public functions or other significant public interests. Many Tools can, however, be applied to the private sector with relatively minor adaptations or modifications.

BALANCING INDEPENDENCE AND ACCOUNTABILITY

Good governance and the rule of law require a careful balance to be struck between efficiency and accountability. A balanced system will allow Government officials sufficient discretion to function effectively, while ensuring that discretion is regulated and structured to avoid arbitrary and unaccountable decision-making. Accountability structures must operate effectively on an everyday basis if corruption is to be controlled.

Effective, practical accountability may be eroded by various problems. Legal accountability, for example, requires the effective operation of the rule of law through appropriate legislation and competent, motivated and independent courts, judges and lawyers. Political accountability depends on adequate electoral systems being in place, supported by transparency, public information and other associated civil society functions. Even where adequate procedures and structures are in place, however, they may be negated by factors such as excessive complexity, a lack of adequate resources or cultural resistance from officials.

As accountability for decision-making is reduced, so the scope of administrative discretion increases, and various forms of corruption become easier to commit, more widespread and more prevalent[126]. Conversely, corruption can be deterred or prevented by the establishment of clear, stable and coherent criteria for the interpretation and enforcement of legal rules within a public service culture that supports the transparent, objective and accountable application of such rules. Such factors reduce the opportunities for improper actions on the part of officials and increase the probability that any officials involved in corrupt practices will be held legally or politically accountable. In any case, in a well regulated system, an official with the discretion to award Government contracts is unlikely to have unfettered discretion. He/she will normally have only the discretion to determine which bidder offers the terms most advantageous to the public interest and, in most cases, will possess objective criteria against which to assess competing bids. Moreover, the official is less likely to abuse his/her discretion if the terms offered will later be the subject of comparison and comment in the media, or if unsuccessful bidders are permitted to make their own comparisons and to mount a challenge, through judicial or administrative appeal, if they see an abuse of discretion.

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 specialized 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

Article 7 of the United Nations Convention against Corruption

[126] Edgardo Buscaglia. 2001. "An Economic and Jurimetric Analysis of Corrupt Practices in Developing Countries: A Governance-Based Approach" International Review of Law and Economics, June

KEY AREAS FOR INSTITUTIONAL REFORM

Regulating official discretion

The development of rules, practices and cultural values that regulate the use of official discretion should be based on a wide range of criteria, some general and some that may be specific to the country or particular public function involved. Factors such as cost-effectiveness, for example, are important, particularly in developing countries. The aim, in regulating official discretion, is to reduce conditions in which corruption may flourish without imposing elaborate or unwieldy controls that impede the transaction of public affairs. One reason why openness and transparency are popular strategic elements is the relative inexpensiveness of making information available through pre-existing media with pre-existing structures and working to pre-existing rules.

Objective criteria for assessing whether conditions exist that may foster abuse of discretion and, if so, what measures should be applied to reduce them, can be developed by sampling and reviewing case files and other relevant materials.

Reducing Procedural Complexity

One factor that can erode the effectiveness of accountability structures is excessive complexity in the decision-making process. Overly complex procedures increase the potential for corruption; they impede the functioning of internal discretion-structuring; of control factors, such as audits; and of external structures, such as transparency. Bureaucracies with too many layers, too complex rules or unclear lines for reporting, responsibility and accountability create environments in which the demarcation between appropriate and corrupt conduct may be unclear. Such a situation contributes to cultures that are permissive of corrupt practices and may even condone them. Such environments also shield corruption from official and public scrutiny and, in cases where the presence of corruption itself is apparent, they erode the effectiveness of disciplinary and criminal justice controls by making individual responsibility difficult to apportion. The problem of complexity is often aggravated by other factors, such as the lack of training and resources that often plague the bureaucracies of developing countries. In such cases, complexity make it more expensive and time-consuming to hold officials accountable. The lack of adequate financial and human resources on the part of accountability structures, such as public auditors, law enforcement agencies and the civil and criminal courts, only increases the difficulty still further.

Such problems may be addressed by assessing and reducing complexity to levels consistent with the basic bureaucratic functions involved. De-layering and other restructuring procedures, especially in "service-delivery" areas involving extensive contact with private individuals, companies and other elements of civil society, not only reduce the potential for corruption but increase the cost-effectiveness of the bureaucracies themselves. That is a particularly significant advantage in developing countries. Such reforms could be adapted from “best practices” that have been found to work in other countries or in other areas of the national Government in question; or they could be formulated as part of the process of overall strategy development for good governance reforms or the

control of corruption. The use of mechanisms, such as workshops or focused discussion groups incorporating bureaucrats and members of civil society who use a given service, is important to ensure the development of viable reforms and the "ownership" of the reforms by those most concerned with them.

The reform and streamlining of public administrations are often undertaken for reasons other than combating corruption, and many examples of useful programmes can be found in the work of the development agencies of Governments, intergovernmental and non-governmental organizations. Reforms undertaken for other purposes will usually be consistent with the additional goal of reducing the opportunities for corruption and, in many cases, will have anti-corruption elements specifically incorporated. Thus, in developing anti-corruption strategies, the more general goals of public-sector reform should be considered, and vice versa.

Increasing Transparency in the allocation of public resources

Another factor strongly associated with legal and political accountability is transparency. Transparency in the structures and procedures for spending public funds and granting benefits helps prevent corruption by reducing the opportunities for corrupt officials and transactions to remain undetected. Where public scrutiny does disclose corruption, various deterrence and control factors, such as criminal, civil and disciplinary liability and loss of political support, come into play.

Transparency may also prevent corruption in less direct ways. Public scrutiny may, for example, generate political pressure to reform overly complex and inefficient bureaucracies, leading to changes that reduce the opportunities for corruption. More generally, the establishment of transparency as an ongoing, general principle of public administration serves to educate the population, developing popular expectations of high standards and triggering a negative response when those expectations are not met or when transparency is withdrawn in an attempt to cover up malfeasance.

Transparency structures in the public sector may be internal, as in internal audit systems, or external, as, for instance, where public accounts or public resources are subject to open debate in legislative bodies or to review by the media. Transparency not only requires the relevant information to be disclosed and accessible, it also requires information to be gathered and produced in an authoritative and easily understood format. Internally, that requires the establishment of effective budgeting and auditing systems with access to Government information that is accurate and sufficiently independent or autonomous. The systems must be capable of analysing information, both in the detailed context of specific Government functions or agencies, and in the more general approach of integrating Government-wide data. Externally, transparency requires the existence of motivated, competent, adequately resourced and independent elements of civil society to scrutinize the public administration and make observations and conclusions available in a form accessible to the public. That includes not only popular print and broadcast media, but also more specialized commentaries from academic institutions, trade unions and

professional associations that report on specific subject areas to defined groupings.

The political oversight of legislative bodies is also important at the stage of setting budgets and spending priorities, and in ensuring that they are adhered to. Political oversight ensures popular input, and hence public ownership of major policy decisions; it also makes the overall process subject to political accountability. That is also true for cases where a Government finds it necessary to depart from established spending priorities. Such departures will occur from time to time, but political oversight and accountability create counter-pressures, ensuring that departures occur only when legitimate and necessary, and that there is increased public scrutiny of the new priorities and how resources are allocated to them. Transparency of that type is required at all levels of Government, including central, municipal and, in federal systems, regional governments, as well as internally within each level. As an audit requirement, there should also be a substantial degree of vertical integration, to ensure that increased scrutiny in one level does not simply displace corruption from there to other levels.

Consistency and clarity in the principles governing the allocation of resources is also an important element of transparency. Establishing basic principles for accountability through, for example, a requirement to keep records and for independent auditing or review of those records, develops a public expectation that such controls will be applied, and an official expectation that the public will be looking for them to be applied. Media and other commentators become knowledgeable about the functioning of such controls, ensuring that any abuses identified, or any attempt to depart from basic principles, whether by an individual official or the Government itself, will be reported. It is important for such principles to become established at all levels of Government as administrative practices and cultural values. In many cases, countries that have vigorous scrutiny of public administration only at the central or federal Government level are plagued by corruption.

Employee culture and motivation, and the creation of positive incentives

The culture and motivation of officials is a critical factor at several stages of a corruption-prevention programme. Where corrupt values and practices have been adopted and institutionalized as cultural norms, officials tend to persist in such practices themselves and to be resistant to structural or cultural reforms to reduce corruption or strengthen transparency and accountability. Bureaucratic cultures are influenced by factors such as status, wages, working conditions, job security, career advancement and the nature of the duties themselves. Once established, entrenched cultural values tend to be very difficult to uproot, particularly in relatively closed, rigid bureaucracies such as those commonly associated with the police or military personnel.

For several reasons, low status, salaries and living standards contribute to cultural values sympathetic to corruption. At a practical level, officials with low living standards are more likely to be tempted by bribes or other benefits that would improve those standards. On the other hand, officials who enjoy high status and high living standards have more to lose if they are disciplined or

prosecuted for corrupt practices; they are therefore more susceptible to deterrence measures. Low salaries and living standards are also commonly associated with low morale and low self-esteem, both of which can create moral justification or rationalization for corrupt behaviour. The behaviour of the officials in such cases will be determined by a combination of factors, both subjective and objective. Employees who consider themselves unfairly treated may engage in corrupt practices to obtain what they see as fair compensation, or as a form of revenge against employers or society.

Ultimately, corruption tends be associated with how the corrupt officials perceive their situation, which itself depends, to some degree, on the actual conditions in which they find themselves. Often an official will compare his/her own situation with the conditions enjoyed by others, for example private-sector workers with apparently equivalent duties, or those employed in positions commonly encountered by the officials in the course of their duties. If a wide gap is perceived, officials are tempted to migrate to the higher-paying careers, thus leaving the public service, or to engage in corrupt practices to raise their own standard of living and status to "more acceptable" levels. Examples of that phenomenon abound in the area of narcotics enforcement, where even relatively well paid officials are sometimes tempted by the affluence and ostentatious lifestyles of the major offenders they encounter.

To reduce such tendencies, adequate salaries, status and working conditions for officials are important preventive measures. Similarly, career advancements, such as promotion and salary increases, should be based on merit rather than corrupt criteria. While reforms such as salary increases can be costly, public officials must be assured of an adequate standard of living in comparison with their private-sector counterparts, and their status and salary levels should be commensurate with the workloads, duties and levels of responsibility involved.

It is unlikely that any affordable salary increase will match the potential incomes from corrupt practices, particularly in developing countries where resources are in short supply. In such cases, educating officials about the importance of the work they do can also help to increase professional status, support non-financial incentives for ethical public service and encourage realistic assessments of disparities between themselves and "equivalent" employees in the private sector. Education can also be directed at more fundamental issues. Corruption offers the possibility of great individual enrichment, but only at the cost of erosions in the overall social conditions in which the officials involved and their families must still live. Officials tempted to compromise on safety standards, for example, can be reminded that such compromises may endanger themselves, friends and family members. It is also absolutely essential that any notions that public sector salaries are low and can be supplemented by corrupt income should be dispelled.

In attempting to instill bureaucratic values, it is important that measures be realistic, practical and enforceable. Ethical principles should be straightforward and clearly enunciated in a format easily understood by those to whom they are directed. Complex structures or principles afford opportunities for creative interpretations that can foster corruption. It is also important that the same messages should be delivered by everyone and to everyone. The same

principles that apply to junior officials should also apply to their superiors; and senior officials should reinforce basic ethical principles both in their statements to subordinates and in the example of their own conduct and practices. More generally, the same principles should be known to and supported by civil society. Officials should clearly know what is expected of them, and that public-service values must be consistent with those of society as a whole.

Results- and facts-based management

The internal accountability of officials can also be strengthened by the use of management styles in which merit and, hence promotion, is assessed on the basis of measurable results. To provide a coherent accountability framework, many Governments and organizations, have adopted results-based management, also known as facts-based management and performance management. Such systems are also used to ensure appropriate accountability in decentralized structures. Decentralization, in which greater autonomy is given to officials closer to the decision-making process, offers the possibility of greater efficiency and more responsive decision-making. On the other hand, it can also make relatively junior officials less accountable and increase the potential for corruption unless accountability is instituted in other ways.

Internal reporting procedures

Most of the preventive measures set out in the previous sections have elements that operate through internal Government processes and through external relationships between officials and the private sector or population. Once the basic measures are in place, their effects can often be greatly amplified by the adoption of additional elements on a purely internal basis. Such elements are effective because, being specific to the organization involved, they can be specifically tailored to the types of people working in the organization, the functions that the organization performs and how it is organized, formally and informally. For example, functions such as the keeping of formal records, audits, and the instruction and discipline of officials, are common to most if not all bureaucracies, but would operate quite differently in a paramilitary police force than in an organization administering public health-care or transportation infrastructures.

Each organization should be encouraged to adopt standards and practices that are appropriate to its own individual characteristics and consistent with more fundamental principles established for the Government as a whole. Requirements for record-keeping should ensure that appropriate records are kept, protected from tampering and made available for audits or similar reviews but the exact form and content of such records may vary. Individual decision-makers must be afforded sufficient information and discretion to perform their functions, but will still be subject to review so that their performance can be monitored and inappropriate or incorrect decisions reversed. The exact means of review will also vary. A challenge to the decision of a police officer to arrest a suspect will, for example, be heard in the criminal courts; other decisions may be the subject of administrative review, or in the form of a complaint made directly to another official, or to another agency established for the purpose, such as an ombudsman. In some cases, decisions seen as inappropriate will be brought to

the attention of the media in an attempt to generate popular political pressure for redress. In all cases, the review process has two related functions: the correction of unfair or incorrect decisions and the identification and correction of problems within the decision-making process itself.

Of particular concern are internal structures intended to identify and address corruption or other improper practices on the part of officials. Such structures should be equipped and willing to entertain reports or complaints both from users of the bureaucracy and those who work within it. They should be competently staffed and adequately resourced, and possess some degree of independence or autonomy from those whose functions they review. They require sufficient authority to gather information or evidence, to develop remedial measures and to ensure that such measures are implemented. In many cases, remedial measures may include the discipline, discharge or criminal prosecution of those found to have engaged in illegal or inappropriate conduct. Such structures may be charged with other areas of official malfeasance than corruption. The degree of formality may vary depending on the seriousness of cases and the nature of the bureaucracy within which offences occur, ranging from relatively informal official enquiries to full-blown criminal law-enforcement and prosecution. The seriousness of a bribery case will vary according to which official was bribed, what outcome was sought, and whether it was achieved. For example, most systems would treat attempts to bribe a minor official to issue a business licence prematurely less seriously than the successful bribery of the judge in a major criminal case.

Elimination of conflicts of interest

While it is desirable for public officials to be completely independent of the decisions they must make, it is not always possible. Officials must live in society. Their children attend schools, they invest their wages, buy and sell personal property, use health-care systems and many other services that can create a conflict of interest with their duty to carry out independent decision-making. Having a personal interest that conflicts is not corrupt or improper per se; the impropriety lies in not disclosing a conflict of interest or where the private interest is allowed to unduly influence the exercise of the public interest. To address such problems, many Governments have adopted systems requiring officials to identify personal interests that may conflict and thus ensure that action be taken to eliminate the conflict. The official can be required either to dispose of the interest or divest himself or herself of it when a conflict arises or, more proactively, eliminate the private interest as a condition of employment. Alternatively, removing such an official from any position of influence could protect the public interest.

Divestment or mechanisms such as "blind trusts", in which decisions are made by a trustee so that the public official has no knowledge of what assets he or she owns, are often used in cases where the nature of the public office involved is likely to raise conflicts too frequently to be dealt with on a case-by-case basis. For example, finance ministers and other senior public officials responsible for setting fiscal or monetary policies, or who make policy or enforcement decisions with respect to stock trading, might be completely prohibited from owning or trading in stocks as a condition of employment. Similarly, employees whose

duties routinely involve handling "inside knowledge" of the financial status and affairs of a company might be prohibited from any trading in the stock of the company as a precaution against "insider trading". Excluding the official involved from any position of conflict, on the other hand, is often used for more routine conflicts of interest, or in cases where requiring divestment or non-ownership is impracticable or unfair to the official. For example, officials cannot be prohibited from owning houses or other real property, but an official may be required to abstain from participating in or voting on municipal decisions that could increase or decrease the value of specific property the individual owns.

If conflicts of interest are to be managed in that way, appropriate organizational structures will be required. Such structures must be sufficiently decentralized to ensure that, should some officials be excluded, enough independent officials will remain to make the necessary decisions in a manner consistent with the public interest and visibly free of corruption.

Monitoring and other precautions are also needed to ensure that:

- Corrupt officials are not able to conceal their true interests;
- The ultimate decision-maker is kept independent of any colleagues who may have conflicts; and
- Inside information is not simply transferred to a third party for corrupt use to the indirect benefit of the official. Indeed, many codes of conduct or employment contracts specify that information should not be disclosed, and extend other anti-conflict measures to third parties close to the official, such as former employers, business associates or close family members [127]

Proactive measures against conflicts of interest clearly prevent corruption by routinely removing the temptation or opportunity to engage in it. They also protect officials by removing any basis for suspicion, and instill trust and confidence in the integrity of public administration. Such measures also increase deterrence and the effectiveness of criminal justice measures by creating records that make it easier to prosecute or discipline corrupt officials. In some cases, corrupt officials can be identified and dismissed based only on their failure to comply with disclosure requirements. That avoids the need for more costly and complex criminal proceedings, and removes the official before any significant harm can be caused by actual corruption.

Disclosure of Assets

Requiring officials, particularly those in senior positions, to disclose their assets, either publicly or to internal government anti-corruption agencies, prevents corruption in two major ways.

The disclosure of assets and interests assists both the official concerned and the Government in determining whether conflicting interests exist that may require

[127] In most legal systems, a contract between an employer and employee cannot bind others, such as associates or relatives, who are not a party to the contract. It can, however, impose conditions on the employee, which are contingent on actions or conduct of third parties.

either divestment of the private interest or the reassignment of the public interest to another official, not in a conflict position.

More generally, requiring officials to fully disclose their wealth and specific assets at various stages of their careers provides a baseline and means for comparison to identify assets that may have been acquired through corruption. An official who has acquired significant wealth while in office might reasonably be required to explain where the wealth came from.

To support the first function, public officials may be required to list their major interests and assets on assuming office and to ensure that the list is kept up to date while in office. That permits others to consider whether a conflict of interest exists and, if so, to call for appropriate action. Some systems go further, placing the onus on the official involved to formally indicate that a conflict of interest may exist whenever this appears to be the case.

To support the second function, the listing of assets must, at an absolute minimum, take place when the official assumes and leaves office. Most systems, however, require more regular assessments. While such systems may be based on self-reporting, corrupt officials will not incriminate themselves. Formal and independent reviews and record-keeping functions will be required, accompanied by sanctions for officials who fail to report or misrepresent information. Such sanctions could be of a criminal, monetary or disciplinary nature, but should be serious enough to provide an adequate deterrent. As with the disqualification of officials, the vigorous application of such sanctions can be a powerful instrument against corruption, as officials can be removed simply for failing to meet reporting obligations, even if actual corruption cannot be proven[128].

Disclosure of political contributions

The principle of disclosure can also be effectively applied to the making of political contributions. Disclosure ensures that such contributions are legitimate attempts to support a particular political faction and not attempts to bribe or buy influence with politicians who are already in government or may later assume power. In such cases, disclosure requirements can be used to assist in the enforcement of legal requirements, such as bans on large single donations or the anonymity of donors, particularly if both the donor and recipient are required to make the necessary disclosures. Since the public function involved is, by definition, political in nature, the transparency created by disclosure requirements also supports basic political accountability. Officials who are publicly known to have received large donations from identified individuals, companies or other interests will find it politically difficult improperly to favour those interests once in office.

It would be difficult in a court of law to distinguish between cases where the donor simply supports the political faction that he or she expects to follow a particular policy or course of action in the future and cases where the donation is intended to actually influence or bring about a certain course of action. Public disclosure requirements, however, address the problem by effectively transferring the issue to the court of public opinion. Where disclosure

[128] If the employee has a separate written contract of employment, that document should either set out the disclosure obligations or incorporate by reference any other document used such as an integrity pledge.

requirements are imposed, it is usually important that timely disclosure be required. Unless information about contributions, which may affect the outcome of an election, is made public before the election, any real political accountability is deferred until the next election.

TOOL #14

DISCLOSURE OF ASSETS AND LIABILITIES BY PUBLIC OFFICIALS

The purpose of Tool #14 is to increase transparency with respect to the incomes and assets of public servants. The assets of public servants must be declared, and any increases accounted for. Such a process deters illicit enrichment from sources, such as bribery, or investments made with inside knowledge. It also ensures that unlawful behaviour is quickly identified and dealt with. The disclosure of information concerning the incomes and assets of public servants also raises privacy concerns, thus "transparency" in such cases does not necessarily entail full public disclosure. Where possible, disclosure is made to specially established bodies, such as inspectors or auditors general, that are trusted to take any necessary actions. Where this is done, full public disclosure need only be made in cases where improper conduct is discovered.

DESCRIPTION

he obligation to disclose can be established either by legislative means, such as statutes or regulations, or as a contractual condition of employment. To clarify the exact nature, scope and reasons for disclosure, new employees may be required to sign documents such as "integrity pledges" setting out their disclosure obligations (53). Usually, it is neither necessary nor practicable to subject every member of the public service to a disclosure process; normally, such a process applies only to officials at or above a fixed level of seniority or those in certain positions. In both cases, the purpose is to target public servants whose positions place them in a position with sufficient potential for illicit enrichment. Examples commonly include:

- Those who are responsible for Government expenditures, the allocation of contracts or other benefits;
- Those who have discretion in dealing with public funds or assets;
- Those whose positions entail access to valuable confidential information or information that can be used to gain wealth or advantage outside Government;
- Those whose decisions carry economic impact on others; and
- Those responsible for audit and watchdog functions in such areas.

Initial disclosure should be required either upon entry into the public service or on employment in (or promotion into) a position for which disclosure is required. Thus, basic information is generated, against which later disclosure can be compared to assess whether there has been enrichment that must be accounted for. Disclosure itself would contain elements similar to that required by many income-tax systems, including basic income from all sources and any large expenditures. For public-service disclosure, however, requirements would go beyond that, requiring information about assets, including investments, bank accounts, pensions and other intangibles, as well as real property and major items of personal property. It should require the disclosure of holdings and

transactions both domestically and in other countries and currencies. Also required would be disclosure of locations and dates of payment, who made the payment, and other basic information to permit verification of any element of the disclosure. The official should also be required to consent to further disclosure by others holding information on his or her behalf, such as banks or financial institutions. Officials can also be compelled to provide further assistance, up to the point where criminal malfeasance is suspected, at which juncture rights against self-incrimination will usually apply.

Penalties for failing to disclose as required, or for making false or misleading disclosure, must be severe enough to act as a significant deterrent. Usually at least the same penalties as apply for the types of misconduct the disclosure is intended to discover will be required, otherwise corrupt officials will simply refuse the disclosure as the lesser penalty. Disclosure requirements are intended to deter corruption and to identify and exclude corrupt officials, which requires that two distinct types of penalty should apply. Discharge and other disciplinary sanctions flow from breach of contractual requirements either to disclose (non-disclosure) or to refrain from corrupt behaviour (malfeasance), and from breaches of criminal or other offence provisions. The first category results in action to remove the official from the public service or from a position open to abuse, and the second leads to criminal punishment intended to deter others. Since only one category is of a criminal law nature, double-jeopardy rules do not, and should not apply.

PRECONDITIONS AND RISKS

The major difficulties with disclosure requirements arise from the fact that they must strike a balance between controlling illicit enrichment and invading the privacy of those required to make disclosure. Legitimate employees may feel that they are being treated as offenders, or untrustworthy employees, and private harm may occur if personal information is made public without good cause.

The interests of controlling corruption and illicit enrichment generally favour some disclosure with respect to associates and relatives of officials, but this is more problematic. They are not parties to any employment contract and therefore cannot be contractually obliged to make any disclosure. The employee can be obliged to disclose information about transactions that he or she has with a relative, but cannot compel the relative to disclose information the employee does not have. Legislative requirements can be imposed, but that will usually require political justification and, in some cases, constitutional justification, for invading the privacy of non-employees. Difficulties would also be encountered in defining the class of individuals who would be subject to the obligation in respect of each official.

When the obligation to disclose extends beyond immediate family, a greater need emerges to verify the disclosures. For example, when evaluating the lifestyle of the disclosure subject, it is important to take into account that, in some cultures, it is not unusual for extended family members to provide significant financial support either in money or housing. An initial judgment that an individual is living beyond his or her means can easily be explained by financial assistance from family members. At the same time, however, enquiries should be made

regarding the means of the family donors. It would not be unusual for a corrupt official to use the extended family as a conduit to receive ill-gotten gains. Any verification method should aim to produce an accurate initial lifestyle evaluation. The method should be clear and to avoid criticism.

RELATED TOOLS

Tools that may be used in conjunction with disclosures of assets and liabilities by public officials include:

- Codes of conduct and/or legislation outlining the requirement for the declaration of assets and the consequences if somebody is either not complying with the rules by not reporting their assets or not reporting them accurately.
- Tools giving the public access to the declared assets
- Tools establishing an asset declaration monitoring body. Successful enforcement requires an entity with a clear mandate, capacity and resources to build a system that keeps records and monitors the timeliness and validity of the assets declared. The asset declaration monitoring body needs to be mandated as part of the legislation introducing monitoring of assets; sufficient resources have to be budgeted to ensure proper records management, investigation and enforcement through a disciplinary body.
- Tools that establish and raise public awareness and expectations, such as citizens' charters and public-relations campaigns.
- Tools that establish and support mechanisms to enforce compliance, disseminate, monitor and investigate cases. In most cases, enforcement of political standards consists of simple transparency, leaving voters to interpret the appropriate standards and the conduct of political officials, and to decide for themselves whether standards have been met.

There are no tools that should be specifically avoided if a body is established to develop and administer declaration of assets. Questions of overlap with other applicable standards, especially legal standards, will arise, however. If legal compliance mechanisms are applied, the standards must become more clear and certain in order to be enforceable, effectively making such standards indistinguishable from employment codes of conduct or legislative standards (see Tool #5).

To increase transparency with respect to the incomes and assets of public servants, it is important that the declaration of assets is enforced and monitored.

TOOL #15
AUTHORITY TO MONITOR PUBLIC SECTOR CONTRACTS

The purpose of Tool #15 is to create a specialized authority to monitor key contracts and transactions in areas where corruption is widespread. Such an authority or mechanism could be established from within a country but, in many cases, an international authority may be needed to ensure that it is beyond the reach of corruption. The basic functions of such an authority would include the review and validation of non-corrupt transactions, the identification of corrupt transactions and the provision of advice or recommendations for anti-corruption reforms.

Tool #15 seeks to:

- Increase uncertainty about exposure and punishment for corrupt national and multinational practices connected with public sector contracts;
- Increase the transparency and accountability of the business community in international contracting, and thereby improve the efficiency and effectiveness of projects, for example, natural disaster relief efforts;
- Remove national immunity for international corrupt practices in countries where offenders cannot be extradited to complaining countries, thereby ensuring that guilty parties are tried at the very least in their country of residence; and
- Initiate a complaints mechanism that is easily accessible to civil society and civic organizations as a means of addressing maladministration and corrupt practices within international aid efforts (see Tool #4).

BACKGROUND

In recent years, international organizations have been focusing increasing attention on the impact of corrupt activities on economic, social and political development. Several have adopted anti-corruption instruments that codify measures to address such practices in international commercial transactions including, but not limited to:

- The Inter-American Convention against Corruption (OAS, 1996);
- The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD, 1997); and
- The Criminal Law Convention on Corruption (Council of Europe, 1998).

At the same time, a number of development projects are failing and services are not being delivered because of dubious practices within international agencies and non-governmental organizations. Thus, the use of aid allocated for a given project is not being maximized and its impact is being reduced. The most poor and vulnerable people in the world are paying the consequences for such practices, and have no effective channels of complaint.

AN INTERNATIONAL ANTI-CORRUPTION FORUM (IACF)

The need to establish an authority or mechanism, with the working title, "International Anti-Corruption Forum (IACF)", was first discussed between the World Bank and the UN Centre for International Crime Prevention (CICP) on 8 December 1998.

An IACF would assist in the implementation and application of current and future anti-bribery conventions adopted by multilateral institutions as a means of increasing transparency in international commercial transactions and raising awareness among the international business community of:

- The unacceptability and, indeed, the illegality of participating in corrupt practices abroad; and
- The consequences of participating in such practices (including extradition and imprisonment, financial sanctions, international press exposure, tarnished business reputation and blacklisting)

Domestic authorities would be established by legislation or executive appointment. In such cases, the basic credibility of the authority would depend on the credibility of individual members.

On the request of a Member State, CICP would select three internationally renowned experts in the corruption-prevention field to staff an international authority for the requesting State.

THE ROLE AND THE MANDATE OF THE IACF

Review of public sector contracts.

When established, the IACF would assist local authorities by producing a document setting out the types of public-sector contracts that should be submitted to it for review. Criteria for review would be, for example, the type of contract or the value of the goods or services involved.

Review would usually include not only the terms of the contract itself but also the process by which it was prepared and a successful contractor selected. That would include the drafting of contract requirements that were fair and did not favour specific applicants and the management of processes for soliciting and assessing competitive bids.

International commercial transactions.

The IACF could also monitor international commercial transactions undertaken within the country. To provide transparency and the assurance that a given transaction was not corrupt, the IACF would, in response to a request from a Government or one of the parties to the transaction, review areas such as negotiations, contract terms and the fulfillment of the contract or completion of the transaction. It could also offer advice to those planning or arranging transactions. It should be empowered to report any improprieties to the appropriate judicial, law enforcement or anti-corruption authorities.

Transparency and annual report.

The work of the IACF should be as transparent as possible while recognizing that aspects of contracts and transactions must, in some cases, be kept confidential for commercial or competitive reasons. The authority should make public reports on its work from time to time. They could take the form of reports on specific transactions, contracts or other activities the authority was requested to review, or periodic reports summarizing the general work of the authority. Reports should be made annually if the volume of work carried out warrants it. The media should be encouraged to publish materials from such reports.

Organization of the IACF

Three mechanisms for monitoring public-sector contracts and international commercial transactions have been envisaged:

- An international mechanism for transparency in public contracts;
- An international accountability/arbitration mechanism; and
- The establishment of a UN ombudsman.

The first could have a direct effect on public sector contracts. The second, which might encompass both public sector contracts and international commercial transactions, could provide the contractors with an international arbitration mechanism allowing for decisions on the commercial effects of corruption and bribery. The third would organize an international complaints system, through the establishment of an ombudsman, to address the concerns of civil society and civic organizations relating to maladministration and/or corruption in international development activities.

Mechanism for transparency in public contracts

The mechanism would seek to guarantee the honesty and transparency of public-sector contracts. The public-sector contracts falling under the jurisdiction of the mechanism must first be identified. Specific criteria could be defined, such as the amount of the contract and the nature of the goods/services. Such contracts could include international elements.

Mechanism for international accountability/arbitration

The mechanism would seek to ensure the international accountability of national authorities/bodies and international companies involved in public-sector contracts and in international commercial transactions. It should be underlined that the jurisdiction of the arbitrators would be applicable only to the commercial consequences of the contract. The criminal offence would remain within the jurisdiction of the national criminal justice system. The advantages of such arbitration mechanisms include: objectivity, speed, reduced bureaucracy and prompt implementation of the decision. States signing such agreements would assure the international community and the private sector of their strong commitment to respecting transparency and accountability.

Mechanism for UN system ombudsman (see also Tool #4)

The establishment of an ombudsman for the UN system is proposed to increase transparency and accountability, and to provide an avenue for civil society (at the national and the international level) to initiate remedial action where required. Such an ombudsman would not have jurisdiction over complaints about the UN

coming from within the UN system, as those are presently covered by other arrangements. The focus of jurisdiction for the office would be on maladministration in the delivery by UN agencies of specific projects and services to civil society within recipient countries.

The office could have the following additional functions:

- Focus on improved administration and accountability, and establishment of a cooperative relationship with relevant UN agencies. It might also cover the World Bank and the regional development banks;
- Establishment of a system through which complaints could be addressed both from civil society and from "whistleblowers" within the UN system itself. It should be noted that, currently, it would be contrary to UN procedures for any form of retribution to take place on the basis of complaints from a "whistleblower" within the UN system;
- Right of access to all relevant documents and to interview staff within relevant agencies; and
- Regular reporting requirements to the General Assembly, for instance annually and in special reports, as dictated by the circumstances at hand.

SELECTION OF EXPERTS:

A pool of high-level experts, recognized at the international level for their expertise and competence in the area of anti-corruption strategies and economic, financial and legal affairs, would be selected. The pool should include, among others, prosecutors, judges, academics and representatives of the private sector, selected on a broad geographical basis. The experts would assist UNODC in assessing the needs of the requesting countries, in elaborating recommendations of best practice to tackle corruption, and in implementing the measures recommended by the Global Programme against Corruption.

Possible functions:

- Independent and non-partisan assessment of the cost of structural building (for example, a bridge, school, house or hospital) to guide the disaster relief and rebuilding effort;
- Neutral assessment of large tenders/bids on big contracts. People from the international assessment facility could be called in to review the final bid process. In particular, upon the request of the national authority in charge of issuing the contract, UNODC would offer advisory services covering all the phases leading to the conclusion of the contract and, in particular, the establishment of criteria for the selection or designation of candidates. The immediate effects would be a significant improvement in the transparency of such contracts, real competition among the candidates and real competitiveness in the field of international transactions;
- Strengthening the rule of law. For example, there would be an examination of the modalities of the recent international cases of violation of the Geneva Convention with regard to war crimes and crimes against humanity to learn lessons from such incidents and facilitate future

efforts by the international community to take on corrupt officials when they are travelling outside their protected area;

- Testing the "implementability" of the OECD Convention and the OAS Convention as countries pass and promulgate implementing legislation; and
- Implementation of an arbitration mechanism within the framework of the "National Anti-Corruption Programme Agreement."

- Provisions for such a mechanism could deal with cases of corruption and bribery, defining the contracts to which the mechanism will be applied. The mechanism could also be included in subregional or regional treaties or conventions against economic crimes, either as part of treaties or as a protocol. The State or other partners would submit the cases to a college of arbitrators. The principles and procedures of arbitration would refer to the principles established by the United Nations Commission on International Trade Law. For each international commercial transaction or public-sector contract falling into such a mechanism, a letter of agreement would have to be signed by the parties and the State in order to give jurisdiction to the international arbitration mechanism.
- Representatives of Member States and of companies involved in an international commercial transaction falling within the jurisdiction of the international arbitrators would obtain the right to bring the case to arbitration. The arbitrators would transmit their decisions to the parties. Because of the penal implications of corruption and bribery, the arbitrators should also send a copy of their decision to the competent national criminal justice authority.
- The IAF could assist the oversight committee, especially in dealing with corrupt initiatives from the North, but also, possibly, where an instance of involvement of political parties in "grand corruption" is discovered.
- The carrying out of ombudsman function for UN agencies. Agencies would seek to raise awareness in the countries of the South of the complaint system through which they could make their voices heard.

EXPECTED IMPACT

At the national level**,** the implementation of the proposed project would result in more effective international transactions by increasing the efficiency and transparency of financial and contractual procedures. That could, in turn, liberate national funds for other socio-economic programmes and corporate funds for commercial investment.

I*nternationally,* the project would improve the transparency and accountability surrounding international commerce; it would raise the uncertainty of businesses about benefiting from corrupt practices. It would also emphasize the consequences of being incriminated (including extradition and imprisonment, financial sanctions, international press exposure, tarnished business reputation and blacklisting), thereby providing a disincentive to engage in such practices.

Increased accountability in the international NGO community would result from the establishment of a complaints mechanism designed to address concerns from civil society relating to aid projects being conducted within a client country.

PARTNER INSTITUTIONS:

- The United Nations Office on Drugs and Crime (UNODC);
- Transparency International (TI);
- OECD;
- IMF; and
- The World Bank.

PRECONDITIONS AND RISKS

Key challenges establishing such a facility:

- Location of such a facility;
- Addressing issues of national sovereignty;
- Identifying key people for involvement; and
- Piloting and identifying the scope of activities

RELATED TOOLS

For the IACF to succeed it is critical that the following programmes are implemented in parallel:

- A clear international mandate, including the necessary resources, needs to be established by a relevant international legal instrument and/or convention
- Businesses need to be educated, assisted and empowered to refrain from participating in illicit behaviour, either as the victim or perpetrator of corrupt transactions;
- Ethical standards in business should be promoted through the development of codes of conduct, education, training and seminars;
- High standards should be developed for accounting and auditing, and transparency in business transactions promoted;
- Rules and regulations that draw a clear line between legal and illicit activities should be developed;
- Normative solutions to the problem of criminal responsibility of legal persons need to be developed; and
- Sufficient internal control mechanisms, personnel training and sanctions for violations should be established.

TOOL #16

CURBING CORRUPTION IN THE PROCUREMENT PROCESS

Public Procurement is where the public and private sectors do business. Mention the subject of corruption in Government and most people will immediately think of bribes paid or received in the awarding of contracts for goods or services or, to use the technical term, procurement.

Few activities create greater temptations or offer more opportunities for corruption than public sector procurement. Every level of Government and every kind of Government organization purchases goods and services, often in large quantities and involving much money. Procurement, in many countries, is seen as one of the most common forms of public corruption, partly because it is widespread and much publicized.

PUBLIC PROCUREMENT VERSUS PRIVATE PROFIT.

To the non-specialist, procurement procedures appear complicated, even mystifying. They are often manipulated in a variety of ways, and without great risk of detection. Some would-be corrupters, on both sides of a transaction, often find ready and willing collaborators. Special care is needed, as the people doing the buying (either those carrying out the procurement process or those approving the decisions) are not concerned about protecting their own money, but are spending "Government money".

FOUND EVERYWHERE.

Corruption in procurement is sometimes thought to be a phenomenon found only in developing countries with weak Governments and poorly paid staffs. The "most developed" countries, too, have amply demonstrated in recent years that, for them, corrupt procurement practices can become an integral part of doing business. Nor is procurement corruption the exclusive domain of the buyer who controls the purse strings. It can just as easily be initiated by the supplier or contractor who makes an unsolicited offer. The real issue, of course, is what can be done about it?

PRINCIPLES OF FAIR AND EFFICIENT PROCUREMENT

Procurement should be economical and based on the principle of "value for money". It should result in the best quality of goods and services for the price paid, or the lowest price for the acceptable quality of goods and services; not necessarily the lowest-priced goods available; and, not necessarily the absolutely best quality available, but the best combination to meet the particular needs. "Price" is usually "evaluated price", meaning that additional factors, such as operating costs, availability of spares and servicing facilities, are taken into account.

Contract award decisions should be fair and impartial. Public funds should not be used to provide favours; standards and specifications must be non-discriminatory; suppliers and contractors should be selected on the basis of their

qualifications and the merit of their offers; there should be equal treatment of all in terms of deadlines, confidentiality, and so on.

The process should be transparent.

Procurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors, and preferably announced as part of the invitation to bid. The opening of bids should be public, and all decisions should be fully recorded in writing.

The procurement process should be efficient.

Procurement rules should reflect the value and complexity of the items to be procured. Procedures for small-value purchases should be simple and fast, but as purchase values and complexity increase, more time and more complex rules are required to ensure that principles are observed. "Decision-making" for larger contracts may require committee and review processes. Bureaucratic interventions, however, should be kept to a minimum.

Accountability is essential.

Procedures should be systematic and dependable, and records explaining and justifying all decisions and actions should be kept and maintained.

Competence and integrity in procurement.

Competence and integrity encourage suppliers and contractors to make their best offers and that, in turn, leads to even better procurement performance. Purchasers who fail to meet high standards of accountability and fairness are quickly identified as poor business partners. Clearly, bribery and corruption need not be a necessary part of doing business. Experience shows that much can be done to curb corrupt procurement practices if there is a desire and a will to do so. In order to understand how best to deal with corruption in procurement, it helps to know first how it is practiced.

HOW CORRUPTION INFLUENCES PROCUREMENT DECISIONS

Contracts involve a purchaser and a seller. Each has many ways of corrupting the procurement process at any stage. Suppliers can:

- Collude to fix bid prices;
- Promote discriminatory technical standards;
- Interfere improperly in the work of evaluators; and
- Offer bribes.

Before contracts are awarded, the purchaser can:

- Tailor specifications to favour particular suppliers;
- Restrict information about contracting opportunities;
- Claim urgency as an excuse to award to a single contractor without competition;
- Breach the confidentiality of supplier offers;
- Disqualify potential suppliers through improper prequalification; and
- Take bribes.

The most direct approach is to contrive to have the contract awarded to the desired party through direct negotiations without any competition. Even in procurement systems that are based on competitive procedures, there are usually exceptions where direct negotiations are permitted, for example:

- In cases of extreme urgency because of disasters;
- In cases where national security is at risk;
- Where additional needs arise and there is already an existing contract; or
- Where there is only a single supplier in a position to meet a particular need.

MANIPULATION BY THE PURCHASER: HOW TO MAKE A FAVOURED PARTY WIN

Even if there is competition, it is still possible to tilt the outcome in the direction of a favoured supplier. If only a few know of the bidding opportunity, competition is reduced and the odds improve for the favoured party to win.

Improper prequalification requirements.

Bidder competition can be further restricted by establishing improper or unnecessary prequalification requirements, and then allowing only selected firms to bid. Again, prequalification, if carried out correctly, is a perfectly appropriate procedure for ensuring that bidders have the right experience and capabilities to carry out the requirements of a contract. If the standards and criteria for qualification are arbitrary or incorrect, however, they can become a mechanism for excluding competent but unwanted bidders.

Tailored specifications.

Persistent but unwanted parties who manage to bypass the hurdles mentioned can still be effectively eliminated by tailoring specifications to fit a particular supplier. Using the brand name and model number of the equipment from the preferred supplier is a little too obvious, but the same results can be achieved by including specific dimensions, capacities and trivial design features that only the favoured supplier can meet. The inability and failure of competitors to be able to meet these features, which usually have no bearing on critical performance needs, are used as a ploy to reject their bids as being "non-responsive."

Breach of confidentiality.

Competitive bidding for contracts can work only if the bids are kept confidential until the prescribed time for determining the results. A simple way to predetermine the outcome is for the purchaser to breach the confidentiality of the bids, and give the prices to the preferred supplier who can then submit a lower figure. The mechanics are not difficult, especially if the bidders are not permitted to be present when the bids are opened.

Invention of new criteria.

The final opportunity to distort the outcome of competitive bidding is at the bid evaluation and comparison stage. Performed responsibly, it is an objective analysis of how each bid responds to the requirements of the bidding documents and a determination of which is the best offer. If the intention is to steer the

award to a favoured bidder, the evaluation process offers almost unlimited opportunities: if necessary, and unless prevented from doing so, evaluators can invent entirely new criteria for deciding what is "best", and then apply them subjectively to get the "right" results. They are often aided in the process by issuing bidding documents that are deliberately vague and obscure about what requirements must be met and how selection decisions will be made.

Such techniques are only a brief outline of some of the ways in which a purchaser is able to corrupt the procurement process.

It would be a mistake to think that the buyers are always the guilty parties: just as often, they are the ones being corrupted by the sellers, although perhaps without undue resistance.

The most serious and costly forms of corruption may take place after the contract has been awarded, during the performance phase. It is then that the purchaser of the goods or services may:

- Fail to enforce quality standards, quantities or other performance standards of the contract;
- Divert delivered goods for resale or for private use; and
- Demand other private benefits (trips, school tuition fees for children, gifts).

For his or her part, the unscrupulous contractor or supplier may:

- Falsify Quality or Standards certificates;
- Over-invoice or under-invoice; and
- Pay bribes to contract supervisors.

If the sellers have paid bribes or have offered unrealistically low bid prices in order to win the contract, their opportunities to recover the costs arise during contract performance. Once again, the initiative may come from either side but, in order for it to succeed, corruption requires either active cooperation and complicity or negligence in the performance of duties by the other party.

WHAT CAN BE DONE TO COMBAT CORRUPTION IN PROCUREMENT?KEY PRINCIPLES TO BE FOLLOWED

Public exposure.

The most powerful tool is public exposure. The media can play a critical role in creating public awareness of the problem and generating support for corrective actions. If the public is provided with the unpleasant and illegal details of corruption: who was involved, how much was paid, how much it cost them, and if it continues to hear about more and more cases, it is hard to imagine that the people will not come to demand reform.

Once support is developed for the reform of procurement practices, the problem can be attacked from all sides. Usually the starting point will be the strengthening of the legal framework, beginning with an anti-corruption law that has real authority and effective sanctions.

Criminalize bribery.

Only the United States has had a Foreign Corrupt Practices Act, since 1977, that specifically makes it a crime under its domestic laws to bribe foreign officials to gain or maintain business, even when those events take place abroad. The OECD Convention, directed at outlawing international business corruption involving public officials, aims, in essence, to internationalize the US approach.

The next legal requirement is a sound and consistent framework establishing the basic principles and practices to be observed in public procurement.

Unified procurement code.

The code can take many forms, but there is increasing awareness of the advantages of having a unified procurement code, setting out the basic principles clearly, and supplementing them with more detailed rules and regulations within the implementing agencies. A number of countries are consolidating existing laws that, over many years, have developed haphazardly into such a code.

Transparency procedures.

Beyond the legal framework, the next defence against corruption is a set of open, transparent procedures and practices for conducting the procurement process itself. No one has yet found a better answer than supplier or contractor selection procedures based on real competition.

- The complexity or simplicity of the procedures will depend on the value and nature of the goods or services being procured, but the elements are similar for all cases:
- Describe clearly and fairly what is to be purchased;
- Publicize the opportunity to make offers to supply;
- Establish fair criteria for selection decision-making;
- Receive offers (bids) from responsible suppliers;
- Compare them and determine which is best, according to the predetermined rules for selection; and,
- Award the contract to the selected bidder without requiring price reductions or changes to the winning offer.

For small contracts, suppliers can be selected with very simple procedures that follow these principles. However, major contracts should be awarded following a formal competitive bidding process involving carefully prepared specifications, instructions to bidders and proposed contracting conditions, all incorporated in the sets of bidding documents that are usually sold to interested parties.

Such documents may take months to prepare. Procurement planning must be sure to take these time requirements into account, and start early enough to ensure that the goods and services will be ready when needed. Any pressures for "emergency" decisions should be avoided.

ON-LINE PROCUREMENT ADVANCES

Opening of bids.

One key to transparency and fairness is for the purchaser to open the bids at a designated time and place in the presence of all bidders or their representatives who wish to attend. A practice of public bid openings, where everyone hears who has submitted bids and what their prices are, reduces the risk that confidential bids will be leaked to others, overlooked, changed or manipulated. Some authorities resist such public bid opening, arguing that the same results can be achieved by having bids opened by an official committee of the purchaser without bidders being present. Clearly that does not have the same advantages of perceived openness and fairness, especially since it is widely believed, and often the case, that a purchaser is a participant in corrupt practices.

Bid evaluation.

Bid evaluation is one of the most difficult steps in the procurement process to carry out correctly and fairly. At the same time it is one of the easiest steps to manipulate if someone wants to tilt an award in the direction of a favoured supplier.

Delegations of authority.

The principle of independent checks and audits is widely accepted as a way of detecting and correcting errors or deliberate manipulation, and it has an important place in public procurement. Unfortunately, it has also been used by some to create more opportunities for corruption. In particular, the delegation of authority for contract approvals is an area that warrants some discussion.

At face value, the rationale for delegation is convincing: low-level authorities can make decisions about very small purchases but higher levels should review and approve the decisions for larger contracts. The larger the contract value, the higher should be the approving authority. A desk purchase can be approved by the purchasing agent; a computer must be approved by a director; a road must be approved by a Minister; and a dam may need to be approved by the President.

Establishing such a group requires a long-term effort, one that is never completely finished. It requires regular training and retraining programmes; security in the knowledge that one will not be out of a job if the winning contractor is not the one favoured by the Minister; and at least a level of pay that does not make it tempting to accept bribes to meet the bare necessities of a family. If a competent procurement cadre is developed, and there are a number of places where this has been achieved, the chain of approving authorities, with its accompanying delays, and other hazards can be reduced to a minimum.

Independent checks and audits.

It is not being suggested that all independent checks and audits should be eliminated; they have an important role. There are, however, some countries where so many review and approval stages have been built into the process that

the system is virtually paralyzed. In some, it is impossible to award a major contract in less than two years from the time the bids are received.

ADDITIONAL REFORMS

The list of actions suggested here is lengthy, but looks at the subject broadly, rather than examining such technical details as the standardization of bidding documents and the establishment of simplified purchasing procedures for special kinds of procurement.

PUBLIC INFORMATION PROGRAMMES

Programmes about procurement must address all parties: the officials who have responsibilities for procurement, the suppliers and contractors who are interested in competing for contracts, and the public at large. The messages could be that:

- The particular jurisdiction, whether a nation or one of its organizations, possesses clearly stated rules of good procurement practice that it intends to enforce rigorously;
- Violators of the rules will be prosecuted under the law;
- Officials who indulge in corrupt practices will be dismissed; and
- Bidders who break the rules will be fined, possibly jailed, and excluded from consideration for any future contracts, by being "blacklisted".

Whatever statements are made must then be backed up by appropriate actions.

SUCCESS FEES AND "GRAND CORRUPTION"

"Commissions" as a cover for corruption.

As George Moody-Stuart has made clear, the greatest single cover for corruption in international procurement is the "commission" paid to a local agent. It is the task of the agent to land the contract. He or she is given sufficient funds to do so without the company in the exporting developed country knowing more than it absolutely has to about the details. Thus, a comfortable wall of distance is created between the company and the act of corruption, enabling expressions of surprise, dismay and denial to be feigned should the unsavoury acts come to the surface. The process also enables local agents to keep for themselves whatever is left of the handsome commissions after the bribes have been paid. Much of it may have been originally intended for bribing decision-makers but none of it, of course, is accounted for. Such practices give rise to kick-backs all along the line, with company sales staff effectively helping themselves to the money of their employer.

Obviously, if commissions can be rendered transparent it would have a major impact on that source of corruption.

Under the gradualist approach, the bidders for specific projects are being brought together and encouraged to enter into an "Anti-Bribery Pact" with the Government, and with each other. Each bidder agrees not to pay bribes and to disclose the commissions paid and, for its part, the Government pledges to make special efforts to ensure that the exercise is not tainted by corruption. Thus, the rules change for everyone at the same time; and the players are, themselves, a part of that process of change. Once the selected contracts have been offered,

the bidders continue to meet to monitor developments and build confidence for future exercises of a similar nature.

A drawback has been opposition from some international lending institutions to any ad hoc arrangement for a specific project, the view being that the law must be changed across the board. That can present obstacles where a Government has difficulty in persuading its legislature to back serious anti-corruption efforts, and also where it may be beyond the capacity of Government machinery to adequately police new arrangements, at least initially.

Such problems, however, have been largely overcome by making the Anti-Bribery Pact a voluntary one, and it has won encouraging levels of support from the private sector firms involved. Indeed, the voluntary approach may be the better approach. Initial monitoring suggests that the innovation is working and that it is serving to significantly reduce corruption levels in the selected major contracts.

THE INFLUENCE OF TRANSPARENCY INTERNATIONAL (TI)

Transparency International[129] has developed a concept called "islands of integrity" to prevent corruption. The concept is based on two common concerns:

1 The fear that many of the pressures to engage in corruption arise from concerns that competitors will do so; and,
2 The understanding that, where corruption is pervasive, it may not be feasible to attack it everywhere at once.

It is argued that, if an "island of integrity" can be created by ensuring that a particular agency, department, segment of Government or transaction is not corrupt, competitors can be secure in the knowledge that refraining from corrupt practices themselves will not put them at a competitive disadvantage.

TI has based its anti-corruption approach on the following three basic principles:

- It aims to build broad coalitions against corruption by bringing together groups that are expressly non-partisan and non-confrontational. Consultations draw in other relevant segments of civil society, typically business leaders, journalists, religious figures, academics, NGOs with shared aims, members of chambers of commerce and other professional bodies to test the interests and feasibility of forming a national chapter. In some instances, well established NGOs of high public standing have amended their constitutions to adopt the TI approaches and have then become a national chapter of TI in their country.
- The role of the national chapters. Not only are TI chapters the "owners" of the TI movement, but they are free to define their own mandates and work programmes. They must, however, follow three important rules of conduct:

- They will not investigate and expose individual cases of corruption as such activity would undermine efforts to build coalitions promoting

[129] Transparency International see TI web page and/or TI Sourcebook

professional and technical improvements of anti-corruption systems; and

- They must avoid party politics as partisan activity, which would damage the credibility of TI.
- They will involve civil society in an evolutionary manner. Rather than arguing for dramatic, sweeping programmes that attempt to "cleanse the stables" in a single onslaught, TI argues for achievable and highly specific plans of action in a step-by-step process towards problem solving.

WHY IS THERE A NEED FOR AN "ISLANDS OF INTEGRITY" CONCEPT?

The prevalence of corruption can dishearten individual firms or even nations from taking the first step to end the practice. When everyone pays bribes, no one wants to be the first to stop and end up empty-handed. TI developed the "islands of integrity" approach to counter such situations. Using the approach, all parties to a specific project will enter into an Integrity Pact (or Anti-Bribery Pact).

The "islands of integrity" approach is also being developed in areas of Government activity that are particularly susceptible to corruption (e.g. revenue collection). In such cases, it can be feasible to hive off the department concerned, ring-fence it from other elements in the public service, pay the staff properly, and have officials raise their standards.

LESSONS LEARNED

The field of public procurement has been a battleground for corruption fighters. It is in public procurement that most of the "grand corruption" occurs with much of the damage visibly inflicted upon the development process in poorer countries and countries in transition. Although, initially, there were sceptics who fought against the "islands of integrity" approach, successes are increasingly being recognized in such areas.

The use being made of the Internet for public procurement by the city of Seoul and in Mexico is also promising.

Commissions paid by bidders to agents should be declared.

Some thought that legislation requiring disclosure of commissions would undermine international competitive bidding and that some corporations would not wish to abide by such a rule. Where such a requirement has been introduced, however, there has been little evidence of it having such a negative effect. The honest have nothing to hide, and if the corrupt fold their tents and leave, the field is better without their presence. The experience in New York City has been an inspiration to corruption fighters, and is being followed in Nigeria.

Corrupt bidders should be blacklisted.

Blacklisting firms that are caught bribing can be a potent weapon. Of course, due process must be observed, and penalties should be proportionate. There can be no doubt, however, that the international corporations blacklisted by Singapore in the 1990s received a considerable shock and that, in the future, others will think twice before attempting to bribe Singaporean officials. The World Bank subsequently went down the same path, posting the names of blacklisted firms

and individuals on its website. The remedy works best in countries where the rule of law is functioning properly and adequate appeal mechanisms are in place.

PRECONDITIONS AND RISKS

Related tools

Likely related tools to strengthen social control mechanisms are:

- Establish, disseminate, discuss and enforce a code of conduct for public servants;
- Establish and disseminate, discuss and enforce a citizens' charter;
- Establish an independent and credible complaints mechanism where the public and other parts of the criminal justice system can file complaints;
- Establish a disciplinary mechanism capable of investigating complaints and enforcing disciplinary action when necessary;
- Conduct an independent comprehensive assessment of the levels, cost, coverage and quality of service delivery of the Government, including the perceived trust level between the public service and the public;
- Simplify complaints procedures;
- Raise public awareness where and how to complain (for example, by campaigns telling the public what telephone number to call); and
- Introduce a computerized complaints system allowing the institutions to record and analyse all complaints and monitor actions taken to deal with them.

TOOL #17
INTEGRITY PACTS

Integrity pacts perform a similar function to islands of integrity but focus on specific contracts or transactions rather than ongoing institutional arrangements. Those involved in a specific process, such as bidding for a Government contract, are asked to enter into an integrity pact in which everyone involved agrees to observe specified standards of behaviour and/or not to engage in corrupt practices. Such pacts can be of a contractual nature, and could be linked to the principal contract, permitting litigation if one of the parties to it is found to be in breach.

Where effective, integrity pacts result in bids and contract terms negotiated on the assumption that there is true competition between the bidders. That results in lower public costs, and the transparency of the process reassures participants and the public that neither the process nor the outcome has been tainted by corruption. Transparency also establishes a precedent for use of integrity pacts in the future.

DESCRIPTION

An integrity pact consists of a contract in which the responsible Government office and bidders or other interested parties agree to refrain from corrupt practices.

A description of specific practices to be prohibited is advisable but will depend to some degree on the nature of the activity to which the pact would apply. Competitive bidders would be asked to agree to refrain from offering or paying bribes, providing any other inducements, or seeking, gaining or using unfair advantages such as inside information.

All parties should be required to set out in writing their procedures and safeguards to assure compliance with the pact during the competitive and contract-creation process. The successful parties could be required to do the same with respect to the administration of the contract once it has been agreed. As the integrity pact is a contract, disputes or questions of interpretation arising out of it will normally be resolved using the courts and laws of the country in which it was made, unless specified otherwise. Such cases may include multi-national contracts, that usually specify whose national laws and courts will be used, and cases where a dispute-settlement mechanism not using the regular courts, such as arbitration, is desired.

Sanctions and remedies.

Contractual remedies should be based on the principle that the pact is a contract among all of the participants, on which any one of them could seek a judicial remedy. Thus, the agreement should include clear sanctions and remedies for Government officials and bidders or service providers. Sanctions could include referral of improprieties to law-enforcement authorities, prohibition from future contracts and contractual remedies for those prejudiced by the improper actions. If public servants are involved, they should also include disciplinary measures to

ensure that unsuccessful bidders, who would not be a party to the principal contract, could still sue, if necessary, under the pact. The pact could also fix specific remedies, including financial damages and the possibility of voiding the principal contract and restaging the bidding process.

Transparency.

Integrity pacts should also provide for transparency for example, through disclosure of all payments by the Government to contractors and by contractors to their sub-contractors.

Middlemen and agents.

Middlemen and agents are often used by businesses to disguise acts of bribery. In order to be effective, the island of integrity agreement or integrity pact should include clear rules either prohibiting the use of intermediaries or regulating the activities of agents, facilitators or other middlemen, both to ensure transparency and preclude corrupt activities. The corrupt activities of intermediaries should trigger the same sanctions and remedies as malfeasance by the principal participants.

Monitoring/civil society.

To ensure effective contract monitoring, transparency of the entire bidding and contract-execution process is important. Corruption can occur at any stage, and it is important to ensure effective transparency from beginning to completion of the contract. An atmosphere should be created in which transparency is presumed and expected, and in which confidentiality must be justified. Much of the most effective monitoring is done by competitors and civil society organizations, and all relevant documentation and information should be made public if possible. The documents should be made available or, where feasible, posted on the Internet. Documentation should include all decisions regarding the bidding process, including the evaluation criteria utilized, the reasons for the decision, the identities of bidders and a list of unsuccessful bids. Similar standards should apply to the execution of the contract, with particular attention to any changes in performance criteria or remuneration provisions.

PRECONDITIONS AND RISKS

The viability of integrity pacts depends on all of the participants agreeing to be bound by them, and that should be made a requirement of participation. If not, the competition will be inherently unfair, unsuccessful parties may not be able to obtain remedies or sanctions against corrupt competitors, and the general impression that corrupt practices have a competitive advantage over non-corrupt ones will be reinforced.

The contract remedy provisions must be carefully considered. The successful bidder and the Government will be parties to the principal contract, under which either could take action on the basis that there was corrupt practice by the other. Unsuccessful applicants are not parties to the contract, however, and can pursue remedies (as opposed to sanctions, which are legislative) only under the integrity pact. The pact should be drafted to ensure that such action is possible and feasible (for example, by ensuring access to low-cost arbitration). At the same time, remedies should be reasonable and fair. Where it is not practicable to

allow the principal contract to be declared void, for example, certain remedies may be feasible, such as financial damages and holding a successful but corrupt competitor liable for a full accounting of the profits.

RELATED TOOLS

Related tools to strengthen social control mechanisms could be:

- Establish, disseminate, discuss and enforce a code of conduct for public servants;
- Establish and disseminate, discuss and enforce a citizens' charter;
- Establish an independent and credible complaints mechanism where the public and other parts of the criminal justice system can file complaints;
- Establish a disciplinary mechanism capable of investigating complaints and enforcing disciplinary action when necessary;
- Conduct an independent comprehensive assessment of the levels, cost, coverage and quality of service delivery of the Government, including the perceived trust level between the public service and the public;
- Simplify complaint procedures;
- Raise public awareness as to where and how to complain (for example by campaigns informing the public of "hotlines"); and
- Introduce a computerized complaints system allowing the institutions to record and analyse all complaints and monitor actions taken to deal with them.

TOOL #18

REDUCING PROCEDURAL COMPLEXITY

Excessive complexity is associated with corruption for two major reasons. To the extent that acts of corruption commonly occur in the course of procedural administration and decision-making, more complex structures tend to involve more individual officials who may be tempted to engage in corruption and more opportunities for them to do so. For example, a license application which must be reviewed by four separate officials, any of whom might delay or reject it, creates four separate opportunities for corruption to occur. Excessive complexity also tends to make decision-making processes less transparent, and those who carry out the processes less accountable. Outsiders, unable to understand how a system should function or how it actually does function, are unlikely to be aware of the presence of corruption or its deleterious effects on the system, and insiders are therefore less likely to be deterred. The United Nations Convention against Corruption seeks to address both problems, although the primary provision (subparagraph 10(b)) has been placed in an Article dealing with transparency.[130]

Opportunities for corruption can be reduced or even eliminated by restructuring administration to reduce complexity, streamline organization, and clarify roles, relationships and the use of authority. Reducing complexity can also bring benefits in transparency, general integrity, reduced costs and better service delivery.

DESCRIPTION

Excessive complexity will often be made apparent by symptoms such as low levels of cost-effectiveness, non-compliance and corruption. Some people, faced by overly complex requirements to obtain building permits, for example, will simply build without a permit (non-compliance). Other people will attempt to streamline the application process by engaging in corruption. Research, such as surveys of service-users, and analyses comparing the service or functions in question with similar services in other sectors or jurisdictions, will identify specific problem areas. If a building permit takes longer to obtain than a driving licence, for example, is that because of complexity or a substantive difference between the two procedures? Do building permits take as long to obtain in another city or country where similar circumstances exist?

Once a basic problem has been identified, the bureaucracy in question should be studied in detail. Substantively speaking, that will entail identifying the criteria

[130] This simply includes "simplifying administrative procedures" on a list of measures that may be undertaken to enhance transparency. The elements of this Tool offer a practical range of means which can be used to implement the requirement. Other guidance may be found in Article 7 (preventive anti-corruption policies and practices), Article 9 (establishment of appropriate systems for public procurement and management of public finances), and Article 13 (participation of society), and in particular subparagraph 1(a) (transparency and public participation in decision-making processes).

currently being used to process cases and make decisions, and determining what criteria are actually necessary. Unnecessary criteria can then be eliminated. Procedurally, each stage of the process should be examined, and as many stages consolidated or eliminated as possible. Diagrams such as algorithmic "flow-charts" and similar analytical tools can be useful in such a process. In the case of a building permit, for example, the process would entail identifying the criteria on which permits should be issued or refused, creating an application form that ensures applicants have provided information on all the criteria, decision-making on all the criteria at one pass, and the collection of fees as an integral part of the process, either when an application is filed or when a permit is issued.

Diagnostic studies of administrative reforms have just been completed in Chile, Bolivia, Venezuela, Singapore and Uruguay. They show that it is possible to base sound policies for reducing excessive administrative complexities in public-service delivery on an assessment of perceptions and case files in a sample of municipal and national public-service users.

Surveys measured perceptions of efficiency, efficacy, public access and coverage, the quality of the information supplied by the local authorities for public use. It is interesting to note that in each country, public perceptions of corruption all related to the provision of key services. The studies concluded that the main factors affecting corrupt practices lay within two main areas:

- Lack of efficiency, excessive complexity and unpredictability of the administrative procedures used to grant permits; and
- Lack of channels for the supply of public information related to what public services to demand from local government administrations and how to demand them.

To solve the problems, mechanisms were required to make municipal and national administration work more effectively when granting the most common and important permits, for instance, construction permits in Venezuela and debt-free permits in Uruguay.

Greater efficiency in that context required that the following conditions should be met:

- The identification of ways of achieving a greater effectiveness in the administrative procedures followed by citizens applying for permits and any other administrative service at both the municipal and national levels;
- The identification of the administrative reforms needed to attain greater efficiency in the processing of permits and documents issued by municipal authorities;
- The identification of the administrative sequence of procedures that would enhance the level of the public access to municipal services and decrease the likelihood of corrupt activities in the supply of services.

The methodology used to achieve the conditions outlined above must be based on the use of quality-control techniques as defined by efficiency-enhanced flow charts and the use of interviews with each administrative employee working for

the departments involved in granting the selected administrative services and/or permits. Flow charts for each of the procedures involved should be drawn up to establish what the old administrative procedures were and to show the proposed new simplified procedures. The flowcharts would allow for the measurement of several impact-performance indicators that would include the following areas:

- The definition of each administrative procedural step and number of steps;
- How long it takes to issue the various permits and documents in the sample;
- How long each procedural step takes;
- How long each employee takes on any given procedure;
- How many and what type of resources are used in each procedural step for each permit;
- Are users satisfied with the efficiency of the service provided by the public agency?
- Do users trust the agency providing the public service? and
- How much does a user have to pay to use the public service in question?

After sampling of user case files and conducting extensive interviews with public officials, a final report would be written to perform the following tasks:

- Identify procedural bottlenecks and excesses of time taken within each procedural step. That would allow authorities (and in some cases, specialized civil society NGOs) to propose different ways to streamline the procedural structure for granting of permits at the municipal levels as well as other administrative services at the national levels;
- Develop new administrative flowcharts based on best practices followed under similar resource and budgetary conditions that would simplify procedures while reducing the degree of discretion involved in the granting of permits; and
- Develop procedural and functional manuals for each of the selected permits and administrative services that would also define the functions of each public official involved.

PRECONDITIONS AND RISKS

In many cases, elements of complexity are generated by employee initiatives that accumulate over time as new elements are passed from employee to employee. Imposing strict conditions and merging elements of the process can be seen as a threat, as more efficient operations may result in the loss of jobs, status or other considerations. Streamlining reforms are therefore often met with internal reluctance or resistance.

Moreover, the cultural changes required in an organization are usually slow-motion and subject to vested interests opposed to reforms. Therefore, the right balance must be struck to provide reformers and flexible employees tangible short-term benefits and shifting some of the costs of reforms to the longer term.

RELATED TOOLS

Tool #18 could be combined and sequenced with the following tools:

- Reducing and structuring procedural discretion;

- Increased accountability through results and facts-based management;
- Public complaints mechanisms;
- Citizens charters; and
- Committee on Standard of Public Life.

TOOL #19

REDUCING AND STRUCTURING DISCRETION

In the provision of public services, excessive substantive and procedural discretion tends to reduce accountability and transparency, thereby creating conditions in which external and institutional corruption can flourish. Discretionary powers should be limited to what is necessary to the function in question and be properly structured, for example, by applying rules and criteria for decision-making, by ensuring transparency and through effective review mechanisms. Imposing such limits helps to ensure that decisions are made exclusively on the prescribed criteria which, in turn, reduces the potential influence of corrupt criteria. There are two distinct – and often complementary – means of reducing overall discretion: the discretion of individual decision-makers can be reduced to the minimum necessary, structured by rules and made subject to appeals and oversight; and the number of individuals or points within a system at which discretion is exercised in the making of decisions can be reduced. The latter approach can also be seen as a form of reducing complexity, and is dealt with in Tool #18, above. Both are covered by the same provision of the United Nations Convention against Corruption.[131]

DESCRIPTION

Discretionary powers are essential to effective decision-making. The structuring of discretion usually involves an assessment of the decision to be made, the criteria on which the decision should be based and the range of acceptable outcomes. The following elements may be involved:[132]

- Criteria for making a decision should be clearly established, set out in writing, and made available to the decision-maker and to those affected by his or her decisions.
- A process should be established to ensure that all the relevant criteria are made clear, and that the process is sufficiently transparent to ensure that improper or irrelevant criteria cannot be put forward. The process may, for example, in some cases, involve letting interested parties review the criteria

[131] The principal provision is Article 10, subparagraph (b), which simply includes "simplifying administrative procedures" on a list of measures that may be undertaken to enhance transparency. Other, more general provisions include Article 7 (preventive anti-corruption policies and practices), Article 9 (establishment of appropriate systems for public procurement and management of public finances), and Article 13 (participation of society), and in particular subparagraph 1(a) (transparency and public participation in decision-making processes).

[132] See generally United Nations Convention Article 9, paragraph 1, which sets out similar criteria for use in corruption-resistant systems of public procurement. While the Convention treats procurement, public finances and the judiciary as particularly critical areas, the basic principles set out in Article 9 can be applied with minor variations to reduce opportunities for corruption in any decision-making process. Note that the Convention is intended to establish minimum standards, and that States Parties are free to adopt measures which go beyond any of the requirements (Article 65, paragraph 2).

through a public hearing or, in less elaborate frameworks, granting public disclosure of application forms.

- When a decision is made, it should generally be disclosed with sufficient explanatory information so that a challenge or appeal can be mounted if inappropriate criteria are thought to have been used.
- There should be an opportunity for unsuccessful applicants or other interested parties to have a decision reviewed by an authority that is independent of the decision-maker, such as a more senior officer, an administrative review body or a court of law.

For any reform in this area to be successful, the following steps need to followed:

- Empirical statistical techniques must be applied. There should be a survey of public opinion and public employees to identify the social, economic and organizational factors that explain public perceptions of public services: their efficiency, their effectiveness, the quality of Government information and how easy access to those services is;
- Case files need to be examined to detect inconsistencies or incoherence in the application of decision-making criteria by public officials;
- A list of courses of policy action should be drawn up with objective indicators showing abuse of procedural and/or substantive discretion. [Note: the term, abuse of discretion, for the purposes of the case at hand, represents the application of incoherent/inconsistent procedural or substantive criteria in the decision-making process within public-service provision.]

The objectives of the survey of public opinion will be to:

- Reveal the perceptions of users (individuals and firms) as to the effectiveness, efficiency and corruption related to the provision of selected public services;
- Quantify the subjective perceptions of abuse of procedural/substantive discretion by selected public officials in the provision of public services;
- Identify the main areas affected by abuse of discretion within the relevant Government jurisdiction; and
- Determine how the possible relative lack of perceived efficiency and effectiveness, and abuse of discretion, affect public perceptions as to how successfully their preferences are being translated into actions.

An initial diagnostic report must then be drafted as a basis of any future policy proposal. The report must aim at capturing and explaining public perceptions regarding the efficiency, effectiveness, abuse of discretion, corruption and quality of the information issued by a Government agency. The nature, scale and scope of public access to the public services in question must also form part of the report.

Taken into account time and resource constraints, a survey must be designed to achieve the above objectives. The objective of the survey will be to gather information from users (citizens and firms) at the point of service provided by Government agencies in two jurisdictions.

The survey of perceptions must then focus on the impact of the efficiency or effectiveness perceived by the citizen or firm. A stratified random sampling technique can be used as a way of quantifying perceptions within the aforementioned areas through the use of simple and accessible questionnaires. The survey must cover all relevant representative strata including gender, age group, income/wealth levels, and education levels and focus on users of the public services in question. The assessment-diagnostic survey would need to be repeated after policy initiatives go through the implementation stage and community-based monitoring of the reforms, for example the implementation of information campaigns and participatory budgeting, would also need to be instituted.

From a substantive standpoint, the survey can be divided into the following four parts:

- A survey of perceptions of efficiency/effectiveness and abuse of procedural/substantive discretion related to specific public service areas;
- A survey of perceptions of how well the preferences of the interviewees are translated into Government action;
- A survey of how effective public access is to the public services;
- Collection of qualitative data; in addition to quantitative data, qualitative data must be collected from the same sites, using focus group discussion and meetings with each of the employees working in the areas under scrutiny.

Finally, samples of real case files must be drawn to expose inconsistencies/incoherencies in decision-making processes applied by a specific public official to other similar case types that he or she handles.

The perceptions of the public and of the firms that were gathered in the survey must be monitored by social control boards (see Tools 12 and 25) and explained over time through the use of public-service performance indicators, for example, coverage, unit cost, variable cost and production of services; by using input indicators, such as the administrative structure of the procedures used to supply a specific public service; by allocating public funds to each service within the budget of an agency; and through economic variables, such as wages, cost of capital and other budget-related variables. Within that context, input variables (to be monitored over time) will in part determine the impact indicators, as will public perceptions, also to be monitored over time once reforms are implemented.

- A report focusing on explaining and describing perceptions of the efficiency/effectiveness and abuse of substantive/procedural discretion related to the provision of the specific public services would include:
- Revealing the change in user (individuals and firms) perceptions of the effectiveness, efficiency and abuse of procedural/substantive discretion before and after reforms are implemented;
- Examination of case files aimed at detecting the abuse of procedural/substantive discretion before and after reforms are implemented;
- Additionally, the report will focus on the implementation of policy solutions to the problems found that negatively affect public perceptions. Regarding the granting of permits, for example, the report may require the implementation of

mechanisms to make procedures work better and be more effective. Improved public service delivery (i.e. less abuse of discretion) may require the following conditions to be met:

Pinpointing how to streamline administrative procedures for citizens applying for services from public bodies;

- Identifying what administrative reforms are needed to achieve greater administrative efficiency in the public services;
- Identifying a sequence of administrative procedures that would enhance the level of public access to the public services while decreasing the likelihood of abuse of discretion in the supply of such services.
- The methodology used to achieve the conditions above must be based on the use of quality control techniques in the form of efficiency-enhanced flow charts and the use of interviews with each of the employees working for the departments involved, for example in granting selected documents and permits.

Flowcharts for each of the procedures involved must be built in order to establish the old and the newly proposed procedures. By way of example: in issuing selected documents and permits, the flowcharts would measure several indicators, as follows:

- How many administrative steps there are in a given procedure and a definition of each step;
- The proportion of cases where abuse of discretion is detected;
- The time it takes for a given sample of permits and documents to be issued;
- Procedural time taken per procedural step;
- Procedural time taken per employee; and
- Amount and type of resources used in each procedural step per permit.

As result of the random sampling of case files per user and extensive interviews with public officials, a diagnostic assessment report and, later, an impact assessment report would include:

- Identification of procedural bottlenecks within each procedural step that would allow ways to be proposed of neutralizing areas within which abuse of discretion takes place;
- Development of new administrative flowcharts based on best practices followed under similar resource and budgetary conditions that would simplify procedures while reducing the degree of discretion involved in the supply of given public services.
- Development of procedural manuals covering the supply of specific public services that would also define the functions of each public official involved.

PRECONDITIONS AND RISKS

In many cases, patterns of abuse of discretion are generated by employee initiatives and organizational inertia that accumulate over time as the behavioural patterns in question are passed from employee to employee. Imposing strict conditions and merging elements of the process can be seen as a threat, as

more efficient operations may result in the loss of jobs, status or other considerations. Streamlining reforms are therefore often met with internal reluctance or resistance.

Moreover, the cultural changes required within an organization to eradicate systemic abuses of procedural/substantive discretion are usually slow and subject to vested interests that are opposed to reforms. Therefore, the right balance must be struck to provide reformers and flexible employees tangible benefits in the short term while shifting some of the costs of the reforms to the long term.

RELATED TOOLS

Tool #19 could be combined and sequenced with the following tools:

- Reducing procedural discretion.
- Increased accountability through results and facts-based
- Public complaints mechanisms
- Citizens' charter
- Committee on standards in public life

TOOL #20

RESULTS- OR FACT-BASED MANAGEMENT

The term "results-based management" (RBM) is used to describe management structures that set clear goals for achievement, as well as criteria and processes for assessing whether they have, in fact, been achieved. The effect of RBM is to increase overall accountability. Corruption becomes more difficult to conceal because performance is continually monitored and reviewed. It is also clear when stated goals are not met. RBM and similar assessment and accountability structures are not dealt with specifically in the United Nations Convention against Corruption, but do fall within the scope of measures which could be used to implement a number of provisions, notably those requiring such things as pre-determined, clear and objective criteria for decision-making.[133]

DESCRIPTION

The exact description of results-based management systems will vary considerably according to the nature of the organization in which they are applied and other situational factors. Generally, however, they have the following elements:

- The setting of clear goals and objectives for the overall process or the bureaucracy as a whole, as well as for specific elements of either;
- A performance measurement system that focuses on results;
- A learning culture grounded in evaluation and feedback;
- Stakeholder participation at all stages of programme design and implementation;
- Where the organization is decentralized, clear lines of authority and accountability among the various units; and
- Concrete links between results, planning and resource allocation.

RBM functions both as a management system and a performance reporting system. The requirement to establish clear goals at the outset, as well as a system for assessing performance effectively, operates as a management tool, clarifying lines of authority and responsibility and quantifying expected and actual performance. Establishing the measurement and reporting of results as an institutional norm makes it difficult to conceal substandard results. The standardization of goals and assessment methods throughout the system also facilitates comparisons, which tends to make it apparent when one element is not functioning at the same level as the others. That, in turn, alerts management to the possible presence of corruption or inefficiencies.

Typical RBM structures are characterized by the following results chain:

[133] See Article 5, paragraph 2 (general practices aimed at the prevention of corruption), Article 9, paragraph 1 (public procurement) and in particular subparagraph 1(c) (objective and predetermined criteria for public procurements), Article 10 (transparency and public reporting on decision-making), and Article 12, subparagraph 2(f) (audit controls in the private sector).

PRECONDITIONS AND RISKS

INPUT → PROCESS → OUTPUT → OUTCOME → IMPACT

Terminology and concepts must be understood and accepted.

Even though the basic concept is easy to understand, many Government organizations experience confusion and misunderstanding related to certain terms. The implementation process must begin with the clarification and definition of important terms. A process to create ownership and commitment is also necessary.

Information must be clear and easy to assess.

Many organizations publish a broad array of handbooks on the topic, reports and guidelines, both in hard copy and electronically through the Internet and Intranets. Systematic training and dissemination of "best practices" are also commonly offered.

RBM may be too complicated and comprehensive for some applications.

Implementing comprehensive management reforms is a major task that may not always be practicable or cost-effective, given the nature of the problem encountered.

RBM is difficult to apply to occupations or structures in which performance is hard to quantify.

The nature of the function or service performed by a particular structure should be carefully considered against any criteria that will be used to assess performance. Criteria, such as how many files are processed or how many clients are seen, are at best meaningless and at worst counterproductive without some realistic assessment of the quality of the service provided. Encouraging those who license drivers to process more applicants, for example, may simply result in the exclusion of fewer sub-standard drivers and higher accident levels. Genuinely effective qualitative criteria may be virtually impossible to produce or monitor for some public sector activities.

RELATED TOOLS

Institutional reforms intended to prevent and combat corruption in public-sector institutions will often be integrated within much more broadly-based public sector reforms. While the immediate focus may in some cases be on corruption, larger reform efforts should incorporate anti-corruption elements wherever possible. Tool #21, therefore, could be used in any programme intended to bring about changes in public-sector institutions. Moreover, the reduction of corruption should be an ongoing effort in which no opportunity should be wasted. Failure to incorporate anti-corruption measures and expertise into more general public-service reform programmes may result in unintended consequences in which other reforms create new opportunities or incentives for corruption or roll back previously achieved efforts.

Specific tools that may be used together or combined into general public-service reform programmes include:

- Tools for reducing and structuring discretion;
- Tools establishing and monitoring public service standards, such as codes of conduct, public complaints mechanisms and service delivery surveys; and,
- Tools providing positive and negative incentives for reforms, including improvements in compensation, professional status and working conditions, as well as disciplinary and other deterrence measures.

TOOL #21

USING POSITIVE INCENTIVES TO IMPROVE EMPLOYEE CULTURE AND MOTIVATION

Many elements of anti-corruption strategies can be described as "negative" incentives in that they seek to deter or punish corrupt conduct by increasing the associated risks of undesirable consequences for those involved, such as professional discipline or even criminal prosecution.

Establishing positive incentives, such as increased remuneration, remuneration more closely linked to positive performance, increased or enhanced professional status and improved job security and working conditions, is also an important anti-corruption measure. Generally, these incentives are provided for in Article 7, paragraph 1 of the United Nations Convention against Corruption, which deals both with the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected officials, and with factors which operate while they are employed, such as training, remuneration and pay-scales.[134]

Generally, positive incentives can prevent or combat corruption in the following specific ways:

- Adequate wages may result in employees not having to seek an additional income in order to achieve a satisfactory standard of living. This is particularly important where requirements for disclosure and the `avoidance of conflict of interest may encourage public servants to conceal supplementary income if they cannot afford to discontinue it.
- Additional compensation can be linked to improvements in performance, both generally and in relation to specific anti-corruption measures. Such incentives can take the form of pay increases or bonuses linked to performance assessments. Adequate salaries and benefits can be represented as compensation for complying with the requirement not to engage in outside employment or seek to earn additional income.
- Increases in job security, professional status and compensation increase the effectiveness of "control" factors, under which employees are less likely to engage in prohibited conduct because they have more to lose if discharged, disciplined or criminally prosecuted. The effect can be enhanced by ensuring that, in employment contracts, disciplinary rules or codes of conduct, corrupt or criminal conduct is a cause for discipline, including dismissal.
- Improvements in professional or job status can be linked to or used to reinforce integrity standards. Employees with high morale and professional self-esteem are less likely to engage in corrupt practices and more likely to take positive action against corrupt practices they encounter if they are encouraged to believe that corruption demeans their status.

[134] Under Article 7, paragraph 1, the criteria set out for “recruitment, hiring, retention, promotion and retirement” include the individual criteria merit, equity and aptitude (subparagraph (a)), adequate remuneration and equitable pay scales (subparagraph (c)) and education and training programmes (subparagraph(d)).

- Positive incentives will often be used as elements of broader public-service reform programmes, thereby supporting a higher quality of public service and indirectly contributing to other anti-corruption elements embedded in such programmes.

DESCRIPTION

Types of positive incentive

Positive incentives usually include any reward, compensation or benefit that may induce an employee or institution to improve standards of integrity, efficiency or effectiveness, and that lies within the economic, political and legal means of the employer to confer. In some cases, the existence or effectiveness of a benefit depends on how it is perceived by the proposed recipient; in other words, the basic applicability or effectiveness of incentives may vary according to the individuals or groups to which they are directed. Low-level employees, whose incomes are often marginal, may be more strongly influenced by pay increases or financial performance bonuses, whereas those at higher levels may be more motivated by changes to working conditions or professional status. Positive incentives will usually include the following:

- Increases in basic pay or increases in the range of pay-rates applicable to a particular job classification;
- Bonuses or other payments linked to specific achievements or performance;
- Improvements of quality-of-life benefits such as accommodation or health-care provision;
- Improvements in pension or retirement benefits, especially in cases where early retirements or reductions in the numbers of public servants are among the desired outcomes;
- Improvements in prospects for promotion or career advancement linked to the desired performance outcomes;
- Enhancement of professional esteem or status, either for public servants in general or for specific professional groups within the public service;
- General reforms that increase fairness in the way job assignments are allocated and compensation is assessed, addressing, for example, inequities resulting from discrimination based on race, region, culture, ethnicity or gender for example; and,
- Other improvements in working conditions.

Linkage between incentives and other reforms

Positive incentives can be an effective anti-corruption tool but they will almost never be used in isolation. Indeed, failure to establish a proper context and ensure that compensation is, in fact, closely linked to desired outcomes may result in a waste of resources and, in some cases, the create incentives that reward, or are seen as rewarding, corrupt behaviour.

A major factor in establishing linkages is the economic costs of positive incentives. Simply increasing the compensation of large numbers of public servants is beyond the financial means of developing countries and, for that reason, positive incentives are often embedded in reform packages that increase

the pay and status of public servants. Such measures, however, also involve reducing the numbers of employees as well as training and institutional reforms that will allow smaller numbers of employees to perform the work successfully. To justify higher compensation, it is usually necessary to achieve economies in operation, or to improve the overall delivery of services in a way that justifies the additional costs involved [135],[136]

For incentives to work, close links must be established between the conferring of a benefit and the outcome(s) for which that benefit is intended to provide an incentive. Employees must be made aware of the desired outcome, what is expected of them and how they are intended to accomplish it, and the fact that the benefit is contingent on actual performance. That entails the establishment of specific goals for individuals and organizations, a fair but accurate means of assessing performance, and a fair and neutral means of increasing and reducing the benefit in accordance with assessed performance. In the case of corruption, it may involve directly assessing whether an employee is corrupt by means such as integrity testing, monitoring of interactions with members of the public and encouraging those affected by corruption to complain about it. Additionally or alternatively, it may involve the setting of individual or institutional performance standards that cannot be met using corrupt practices, or, if achieved, are at least suggestive of a high degree of individual and/or institutional integrity.

PRECONDITIONS AND RISKS

As noted, a major problem is that broad-based positive incentives will be too costly for the Governments most in need of them. In extreme cases, the inability of State resources to support an effective professional public service sector indirectly leads to the subsidization of public services by the corrupt incomes of public servants. Substituting the priorities and dynamics of a corrupt economic and social fabric for the rule of law and fair, efficient and effective public policies is too a high price to pay. Reforms and positive incentives may, in some cases, be supported by aid donors, who can provide not only the resources to confer benefits but elements of the training and the increases in competence, efficiency and integrity to which those benefits are linked.

The other major risk is that benefits will be conferred without clearly linking them to the desired improvements, and that improvements will not be achieved as a result.

RELATED TOOLS

Institutional reforms intended to prevent and combat corruption in public-sector institutions will often be integrated within much more broadly based public sector reforms. It is important that larger reform efforts incorporate anti-corruption elements wherever possible. Tool #21 should be combined with a range of tools intended to bring about changes in public-sector institutions. avoid unsuccessful

[135] See, for example, Lindauer, David (1994), Government Pay and Employment Policies and Economic Performance, Washington, D.C.,: World Bank.

[136] Note that Article 7, subparagraph 1(c) of the United Nations Convention against Corruption calls for adequate remuneration and equitable pay scales, "…taking into account the level of economic development of the State Party."

outcomes. It should not generally be applied in isolation. The reduction of corruption should be an ongoing effort in which no opportunity should be wasted. Moreover, the failure to incorporate anti-corruption measures and expertise into more general public-service reform programmes may result in unintended consequences in which other reforms create new opportunities or incentives for corruption or roll back previously achieved efforts.

Specific tools that may be used together or combined into general public-service reform programmes include:

- Tools for reducing and structuring discretion; and
- Tools that establish and monitor public service standards, such as codes of conduct, public complaints mechanisms and service delivery surveys, and results-based management.

CASE STUDY #13

UGANDA LEADERSHIP CODE 1992

UGANDA LEADERSHIP CODE, 1992 (EXCERPTS)

Part III Statement of Income, Assets and Liabilities

Article 5

A leader [137]shall:

- within three months after the commencement of this Code; or
- within three months after becoming a leader; and
- thereafter, annually during the month of December in each year,

submit to the Committee a statement of income, assets and liabilities of himself and his nominees in the form specified in the Third Schedule of this Code:

Provided that nothing in this subsection compels a leader to submit a statement within 90 days from the commencement of this Code if he resigns his office within that period.

Every leader shall ensure that all the information contained in the statement submitted by him is true and correct to the best of his knowledge.

Article 6

The Committee may, by notice in writing, require a leader to account for any matter in connection with a statement submitted by him including:

- the omission of anything which in the opinion of the Committee should have been included in the statement;
- any discrepancies appearing in the statement or occurring between the statement and any other statement or information available to the Committee;
- and the leader shall comply with that requirement.

Article 7

The contents of a statement shall be treated as secret and no person other than a person described in subsection 20 of this section is entitled to inspect the statement.

The persons referred to in subsection (1) of this section as entitled to inspect a statement are:

- the Committee and its officers;
- the Inspector-General of Government in connection with his functions;
- the Auditor-General in connection with his functions;
- the Inspector-General of Police or a police officer not below the rank of Senior Superintendent authorised in writing by the Inspector-General of Police, for the purpose of investigating an offence;
- a person authorised by order of a judge of the High Court in relation to any proceeding in a court.

[137] The term "leader" includes all high-level public servants with significant decision-making powers. They are listed in the appendix of the Leadership Code.

Article 8

If any leader:

- fails without reasonable cause to submit a statement ; or
- fails without reasonable cause to comply with any requirement under section 6 of this Code; or
- knowingly or recklessly submits a statement or gives account of any matter which is false, misleading, or insufficient in any material particular,

the leader shall be deemed to be in breach of this Code and the Committee shall report the breach to the authorised person under section 20 of this Code.

He/she shall be deemed to be in breach of this Code and the Committee shall report the breach to the authorised person under section 20 of this Code[138]

[138]The code is currently being reviewed since sanctions for false, misleading or incomplete declarations have proven insufficient.

CASE STUDY #14

INTERNATIONAL MONITORING AUTHORITY FOR THE TRANSPARENCY OF PUBLIC CONTRACTS AND INTERNATIONAL COMMERCIAL TRANSACTIONS. EXAMPLES.

PAPUA NEW GUINEA, STATEMENT TO OMBUDSMAN COMMISSION OF INCOMES, ALL ASSETS, BUSINESS DEALINGS, GIFTS, 1976

The form used for making a statement to the Ombudsman Commission on income, assets, business dealings, gifts, as required by the Constitution and the Organic Law on the Duties and Responsibilities of Leadership, can be found at:

http://www.transparency.de/documents/source-book/contents.html

THAILAND, DECLARATION OF ASSETS AND LIABILITIES, CHAPTER 10, PART 1 OF THE 1998 CONSTITUTION

Article 291 of the Constitution requires designated holders of political office (including the prime minister, cabinet ministers, members of parliament and of local councils) to declare the assets and liabilities of themselves, their spouses and children in their minority to the National Counter Corruption Commission (NCCC) when they take office and when they leave office. The declarations made by the Prime Minister and cabinet ministers are made public within 30 days of their submission. The NCCC is empowered to verify these declarations. Please see:

http://www.transparency.de/documents/source-book/contents.html

ASIAN DEVELOPMENT BANK: GUIDELINES FOR PROCUREMENT UNDER ADB LOANS

The purpose of the Guidelines is to inform borrowers of the Asian Development Bank and prospective suppliers and contractors about the general principles and procedures to be observed when procuring goods and work for ADB-financed projects. The Guidelines apply to procurement under loans from both the ordinary capital of the Bank and Special Funds resources. Please see:

http://www.transparency.de/documents/source-book/contents.html

HONG KONG SAR, CHECK LIST ON PURCHASING AND TENDER PROCEDURES, ICAC

The document, issued by the Hong Kong SAR ICAC, suggests certain essential control procedures to be implemented in a purchasing and tendering system. They are designed to prevent corruption, and the document therefore covers only those areas that are more susceptible to malpractice. Please see:

http://www.transparency.de/documents/source-book/contents.html

SOUTH AFRICA, TRANSPARENCY IN FAIR AND COMPETITIVE PUBLIC PROCUREMENT, ARTICLE 187 OF THE 1994 CONSTITUTION

The above-mentioned provision in the Constitution of South Africa requires that the procurement of goods and services for any level of Government be regulated by an Act of Parliament. The Act makes provision for the appointment of independent and impartial tender boards; for the tendering system to be fair, public and competitive; for tender boards to record their decisions, and to provide reasons for their decisions to interested parties. It also prohibits improper interference with the decisions and operations of tender boards. Please see:

http://www.transparency.de/documents/source-book/contents.html

TRANSPARENCY INTERNATIONAL, MODEL LEGISLATION FOR PUBLIC CONTRACTS TO IMPLEMENT THE ANTI-BRIBERY PACT APPROACH, 1995

The Public Contracts (Special Provisions) Act is a model law designed to implement the Anti-Bribery Pact. It prohibits certain practices and provides for the incorporation of implied terms in public contracts, as found at:

http://www.transparency.de/documents/source-book/contents.html

WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS, 1996

The procurement guidelines require borrowers and bidders under World Bank-financed contracts to observe the highest standard of ethics during the procurement and execution of such contracts, and that such stipulations be specified in the contract.

http://www.transparency.de/documents/source-book/contents.html

CASE STUDY #15

MODEL "ISLAND OF INTEGRITY" IN AN EAST AFRICAN NATION

The Comprehensive Development Framework of the World Bank seeks an effective and disciplined approach to poverty reduction through partnership, capacity building and knowledge management. It does so through by drawing upon the collective experience and learning of the development community.

The same principles are embodied in the main objective of a proposed road construction project in an east African nation. Additionally, the Bank sought to create a sustainable capacity within local governments and civil society to implement a "clean" process of construction contracting for current and future projects using the "islands of integrity" approach.

The approach aims to identify reliable markets or projects, as well as all competitors in those markets, and to introduce a system that actively commits all stakeholders to refrain from offering or accepting any illicit inducements in order to gain an unfair advantage. As no bidder need fear that his or her competitors will offer bribes to win the business, the bidding process will be free from corrupt influence.

Although it is a relatively new approach, there have been several projects (for example, in Hong Kong SAR, Ecuador and Uganda) that have incorporated the same guiding principles and may provide the groundwork for the completion of the project in question.

PROJECT DESCRIPTION

Purpose

The purpose of the project was to complete construction of a road with minimal environmental impact within a specified timeframe with a budget having a life span of at least 20 years.

Completion

Completion of the work was envisaged for 2001.

Estimated Cost

The estimated cost is $20 million for project completion, 5% for the implementation of the “island of integrity” component and 5% for future road maintenance.

Process

Following preliminary discussions between the World Bank and a donor Government, a meeting was organized with key players from the East African country and other representatives to discuss the existing environment and the project objectives and process. The project was expected to comprise several elements including:

- Training and capacity building of local personnel;

- Consensus building and public participation of all stakeholders; and
- Road construction and maintenance.

A meeting of the local broad-based stakeholders was held in the east African country to address each of the elements and to finalize the project design before launching the project. Specific areas for capacity building involved training modules in financial management and procurement issues.

Issues

The following issues were discussed:

- Promoting incentives for continued stakeholder involvement in order to optimize broad-based participation and build consensus among the Government, civil society, NGOs and the private sector. By serving as a "best practice," the project may be of value to the Office of the President, the Ministry of Transport and the Anti-Corruption Bureau. By expediting transport, it may expand the need for new market places and increase the need for new suppliers, thus supporting the growth of small and medium-sized enterprises (SMEs);
- Establishing and enforcing a new set of ground rules, checks and balances, and consequences relating to transparency in:
- The tender process;
- The disclosure of information; and
- The inspection/monitoring of construction and maintenance.
- Creating synergy among and integrating related projects as a means of increasing project ownership beyond national and local government to local citizens and civic and commercial groups. Related projects could include, inter alia, the promotion of SMEs, new market places and tourism;
- Encouraging interaction among central and local Government institutions and other stakeholder groups to share knowledge in substantive areas (tendering, financial management, information disclosure) and to decentralize authority/responsibility of oversight;
- Building the capacity of local authorities to promote a clean process including tendering and financial management.

EXPECTED IMPACT OF THE PROJECT

The project is expected to produce the following impacts:

- The building and maintenance of a sound road will expedite public and commercial transport over the next 20 or more years and may result in the replication of the "island of integrity" approach in related infrastructure projects such as bridge/tunnel construction and drainage/sewage.
- Capacity and institution building will result in the transfer of technical knowledge, standards and processes to local authorities thereby increasing their ability to serve the public by improving their:
- Infrastructure (buildings, computers, tools);
- Skills;
- Access to information; and
- Incentives;

- Public education and awareness raising will raise the expectations of the civil society to expect efficient and effective products in Government projects and will increase its participation in monitoring and overseeing the process;
- The establishment of new ground rules will support anti-corruption prevention and enforcement measures, particularly in the areas of financial management and tendering;
- New transparency policies will allow for the collection and dissemination of comparative data on road building and maintenance;
- There will be favourable international attention for the Government of the east African country through the use of the project as a "best practice" of the approach for similar projects elsewhere;
- There will be favourable domestic attention for the Government of the east African country and the local Government authorities will be seen as having reconfirmed their commitment to the anti-corruption programme; and
- There will be favourable domestic attention for participating commercial entities that will be known to adhere to the rule of law and established guidelines, providing the Government and general public with a high-quality product to facilitate their transport needs.

CASE STUDY #16

PRIVATE SECTOR ANTI-CORRUPTION COOPERATION IN THE PROCUREMENT PROCESS

In the United Kingdom, oil companies Esso, Mobil, Shell, Statoil and British Petroleum (BP), realized that individuals were targeting procurement operations in oil, gas and petrochemical projects and operations, and that they were prepared to use unethical or illegal means for personal gain They thus created a joint venture, ICG, in an effort to eliminate such practices. Within ICG, each participating company has an assignee with full access to all the ICG facilities and is available to assist other companies on matters relating to prevention. The main forms of assistance include:

- Advising participants on the threats of illegal information brokering and other procurement irregularities;
- Developing awareness materials and preventative measures to minimize exposure, including case studies; and
- Providing access to an intelligence database.

To safeguard integrity in the procurement process of the oil, gas and petrochemical industry, the ICG devised a series of questions for each stage of the process: strategy, market review, tender, evaluation, and award and management. Questions included considerations regarding both policy decision-making (procurement, business conduct, information technology and security, and HSE, etc.) and behavioural attitudes to decision-making (acting legally, ethically, responsibly and fairly).

QUESTIONS REGARDING STRATEGY

- Is there an appropriate level of challenge to the strategy?
- Are the requirements fit for purpose?
- Are the planning and time scales realistic?
- Have any changes been justified and approved?
- Are the terms and conditions appropriate?

QUESTIONS REGARDING MARKET REVIEW

- Has an unbiased review of suppliers been conducted?
- Has an approved list of bidders been used?
- Have unqualified bidders been included or qualified bidders excluded?
- Has the importance of criteria been manipulated, e.g. HSE, technical competence, etc.?
- Has the ICG database been checked?

QUESTIONS REGARDING TENDER

- Is there a clearly documented tender procedure?
- Is there a good audit trail?

- Are all tenders being treated equally?
- Is there a formal, witnessed bid opening?
- Is there good information and or information technology and physical security at all times?

QUESTIONS REGARDING EVALUATION

- What were the preset approved criteria?
- Was there involvement on a "need to know" basis?
- Were there any late scope or specification changes?
- Was there consistent treatment of bidders?
- Was there a proper evaluation of technical and commercial aspects?

QUESTIONS REGARDING AWARD AND MANAGEMENT

- Was there any undue pressure to award to a particular supplier?
- Was the award justified and documented?
- Were unsuccessful bidders debriefed and/or interviewed?
- Were there any unjustified contract amendments?
- Were there any changes in orders and budget or schedule overruns?
- Has the reporting been closed out?
- Has there been continued contact with ICG focal point?

CASE STUDY #17

RESULTS-BASED MANAGEMENT

UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP)

The key building block in the RBM system is the UNDP Multi-Year Funding Framework 2000-2003 (MYFF). The MYFF document sets the four-year frame for the intended work of the organization. Based on the empirical realities of the programme choices being made at the country, regional and global levels, it is intended as a key instrument for the strategic management of UNDP.

The MYFF consists of two basic documents; a strategic results framework (SRF) and an integrated resources framework. The approach is a combination of "top-down" (framework of goals/subgoals decided at the central level) and "bottom-up" (specific outcomes at the country level decided through a process whereby every country office and other UNDP operating units have participated in formulating 150 SRFs). The results framework and the resources framework are not yet in line and there is still a discrepancy of approximately 50 per cent between the formulated resources needs and the actual resources allocated. There are two principal reporting instruments in the system:

- The results-oriented annual report (ROAR) which reports on the progress achieved in contributing to the outcomes identified in the SRF; and
- The multi-year funding framework report (MYFFR) which should provide a more in-depth assessment of results achieved at the end of the four-year cycle.

THE WORLD BANK (WB)

RBM in the Bank is part of several different systems and many different participants. Evaluation in the Bank has two major dimensions:

- Self-evaluation by the units responsible for particular programmes and activities; and
- Independent evaluation by the Operations Evaluation Department (OED). A board committee (the Committee of Development Effectiveness) oversees the operations evaluation system.

The Quality Assurance Group (QAG), created in 1996, provides line managers and staff with independent assessments of the quality of ongoing work and identifies and helps them to address critical problem areas in the current portfolio. QAG reviews operational products on a sample basis, including reviews of supervision, checks on the quality of proposed new products, and troubleshooting for problem projects, and assesses the quality of advisory services and of country portfolio performance reviews.

In addition, the Bank has an Internal Audit Office and an Inspection Panel. At the project level, in the Bank there is a good system of supervision, follow-up, implementation and implementation-completion reports (ICR) done by the operation department in charge of the project. At the country level, the key

document is a Country Assistance Strategy (CAS), revised every year or every second/third year, depending on size, importance and need. Performance indicators are included in several CASs. The OED evaluates the work of the Bank at the country level in Country Assistance Reviews (CAR), to feed the evaluation information into the strategy process.

A similar system with Sector Strategy papers and Sector Strategy reviews are under development on the 15 sectors in the Bank.

US GOVERNMENT

The 1993 Government Performance and Results Act (GPRA) requires agencies to set strategic goals, linked to long-term strategic plans and annual goals, to measure performance against those goals, and to report publicly on how well they are doing.

Such requirements imply:

- The development of strategic plans;
- The possibility of submitting performance plans annually; and
- Reporting the progress and results through an annual report on programme performance.

The purpose of the strategic plan is to align the organization and budget of the agency with its missions and objectives. Strategic plans should guide the formulation and execution of the budget, and act as a tool in setting priorities and allocating resources consistent with those priorities. A strategic plan spans a minimum six-year period: the fiscal year in which it is submitted and at least five years following the fiscal year. The goals and objectives of the strategic plan set the framework for developing annual performance plans. The plan should contain the annual performance goals that the agency will use for gauging its progress towards accomplishing its strategic goals, as well as identify the performance measures the agency will use to assess its progress.

GPRA requires the Office of Management and Budgeting (OMB) to prepare, as part of the budget of the President, a Government-wide performance plan. The Government-wide plan is based on the agency performance plans. The annual performance report must compare actual performance with the projected levels of performance set out in the annual performance plan. When a projected performance level is not met, the report should explain why and describe the steps to be taken to meet the goal in the future. The report should also summarize any programme evaluation completed during the fiscal year.

US AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID)

The RBM system, based on the Government Performance and Results Act, is tailored to the foreign affairs context in which it operates. Each operational unit prepares a strategic plan, while an agency-wide strategic plan is prepared at the corporate level. The strategic plans clarify the strategic objectives the unit seeks to achieve within 5 to 8 years. They also focus the programme activities of the unit on its strategic objectives, expressing a cause-effect relationship among levels of results, selecting performance indicators to measure progress and estimating resources needed for achieving targets.

The first agency-wide strategic plan was prepared in September 1997. The performance indicators at the agency level are largely consistent with the OECD-DAC International Development Targets. The annual plans and results, both at the agency level and at the country department level, include results indicators. The annual reports and plans of the unit are combined in the "results review-resources request". Ideally, the two parts of the report should be linked. The goals at the country level should be within reach. The agency wide Annual Performance plan and accompanying Annual Budget Submission to OMB describe the near-term plan of the agency, which should respond to US foreign policy, administration, and congressional priorities.

During the fiscal year 2001, USAID was expecting to work on some 450 specific "strategic objectives" in nearly 125 countries, including 75 countries in which the Agency has a resident staff. Each of these objectives has a results focus, with performance indicators and targets adapted to the local context.

CANADIAN GOVERNMENT

"Managing for Results" was launched in 1995 as an approach to improving Government operations and the delivery of services to Canadians.

The approach has three steps:

- To identify significant result commitments (what the Government aims to achieve for Canadians);
- To measure and improve performance; and
- To report on achievements in a balanced and credible way.

Building RBM capacity in departments is considered a long-term undertaking, but good progress is being made. RBM is not only found at the federal level. The province of Alberta and other provinces have led the effort in many ways. The approach was launched because there was a political will to solve economic problems. The overall aim was to improve reporting to parliament.

CANADIAN INTERNATIONAL DEVELOPMENT AGENCY (CIDA)

In 1996, as part of a commitment to become more results-oriented, the president of CIDA issued the Results-based Management in the CIDA Policy Statement. The policy statement consolidated the experience of the Agency in implementing RBM and established some of the key terms, basic concepts and implementation principles.

The Agency Accountability Framework, approved in 1998, is another key component of the RBM approach. The framework articulates the accountabilities of CIDA in terms of developmental and operational results at the overall agency level, as well as for its various development initiatives.

NORWEGIAN GOVERNMENT

The RBM system in the Norwegian Government is outlined in the 1997 Government Financial Regulations. The Regulations gather and summarize much of what has been developed in a long process of public sector renewal over the last decades. They cover all the financial and performance management tools, including budgeting, letters of allocation, management of subordinate agencies, activity planning and management of financial transfers.

Budgeting is now more explicitly related to activities and performance. Within the economic framework, greater authority is delegated to agencies that, in return, are expected to account for their performance. To supplement ordinary annual agency reports, the ministries are asked to conduct evaluations of programmes, agencies and activities. Although only summative evaluations are mentioned in the regulations, RBM represents a new way of introducing the systematic use of evaluation to improve the decision-making processes. The Government Financial Regulations clearly state that performance measurement should concentrate on outcomes as well as outputs. In the Norwegian context, a dialogue between stakeholders at different levels is seen almost as a prerequisite for achieving results in improved performance information.

CHAPTER V
SOCIAL PREVENTION

SOCIAL PREVENTION AND PUBLIC EMPOWERMENT

For ease of reference, prevention measures have been classified either as "situational", targeting specific situations in which corruption problems are to be addressed, or "social", targeting more general social or economic factors in order to bring about conditions that are less likely to produce or support corrupt practices. Most "social" prevention measures have to do with raising awareness of corruption and mobilizing citizens to refrain from corrupt practices themselves and to expect integrity on the part of those who provide services, particularly in the public sector. For that reason, many of the social elements of anti-corruption programmes can also be considered as "empowerment" measures, in that they provide powers and incentives for members of the population to take appropriate action.

Other measures in this category, such as oversight and accountability structures work more through surveillance and deterrence, but on a scale so broad that they affect the entire public sector, and in some cases the private sector as well. Thus, for example, transparency measures specific to a situation such as a public procurement process would be considered situational measures, whereas the adoption of access to information laws bringing transparency to the entire public sector would be more in the nature of social prevention. There is, however, some overlap between the two. They are interspersed throughout Chapter II of the United Nations Convention against Corruption, and some specific provisions embody elements of both.[139]

The social measures dealt with in the following section are arguably more powerful instruments than situational prevention measures because of the impact they can achieve. They are, however, much more general in nature. Most include elements that tend to prevent corruption; most, however, go further, including elements that also bring about other desirable outcomes. Generally, raising the awareness, integrity and expectations of large numbers of people will have two outcomes:

[139] Article 7, subparagraphs 1 and 4 deal with general measures, for example, while paragraphs 2 and 3 are specific to situations relating to political activities, including running for and holding elected office and the funding of political parties. The Articles of Chapter II which embody predominantly social prevention measures include Article 5 (general preventive policies and practices), Article 10 (transparency and public reporting), Article 12 (prevention in the private sector), and Article 13 (participation of society).

- It will prevent corruption by increasing deterrence and making those prone to corrupt practices less likely to engage in them;
- It will make reactive elements of anti-corruption strategies stronger and more effective. Mechanisms such as criminal law enforcement and audit structures will become more effective, for example as public expectations make outside interference more difficult, and those affected by corruption more likely to report incidents and cooperate with investigations and prosecutions.

Ultimately, the success or failure of any national anti-corruption strategy will depend to a very large degree on the extent to which it mobilizes popular concern about the true costs of corruption. In the vast majority of cases, it is society as a whole that bears the costs of corruption, and it is the tolerance or apathy of the citizens that allow corruption to flourish. While specific institutions or individuals may be held accountable for specific cases or specific corruption problems, those who hold them accountable are, in turn, accountable to the people. Mobilizing public opinion in support of strong anti-corruption measures also entails mobilizing popular support for high standards of integrity and performance in public and private administration and opposition to corrupt practices wherever they occur. If this is done, anti-corruption strategies will have a greater chance to succeed.

PUBLIC EDUCATION AND INFORMATION CAMPAIGNS.[140]

No two societies are the same and the identification of both the message and target audience will vary to some degree. Generally, however, the focus should be on educating people about the true nature and consequences of corruption in order to ensure that it is recognized when it occurs and to mobilize general opposition to it, and ensuring that the population is kept informed with respect to specific cases, new developments and trends, and the efforts to combat corruption.

Within general populations, many specific groups can be targeted with more specific messages, or by means of specific media, in accordance with their positions. The private citizens who use a particular government bureaucracy might receive information about the standards of ethical conduct expected of it, for example, while the bureaucrats employed in it would receive the same

[140] A number of specific provisions of the United Nations Convention against Corruption are intended to support public information about corruption in some way. See in particular: Article 6, subparagraph 1(b) (role of anti-corruption body or bodies in increasing and disseminating knowledge about corruption) and Article 13, paragraph 2 (ensuring that members of the public are aware of and have access to anti-corruption bodies); Article 9, subparagraph 1(a) (dissemination of specific information about specific public procurement procedures and contracts); Article 10 (public reporting), and in particular Article 10, subparagraphs (a) (public information on functioning and decision-making processes) and (c) (publication of information on the risks of corruption); Article 12, subparagraph 2(a) (private sector transparency); and Article 13 (participation of society), and in particular Article 13, subparagraphs 1(b) and (c) (public access to information and undertaking public information relating to non-tolerance of corruption), and subparagraph 1(d) (freedom to seek, receive and publish information about corruption).

materials, supplemented with deterrence information about such things as audit controls, surveillance or criminal or other sanctions which may apply.

General messages about corruption might be published or broadcast in the general public news media, while more intensive measures such as seminars or more targeted materials can be directed at those directly involved in processes seen as vulnerable to corruption, using media appropriate for the purpose[141]. The following segments will examine the range of media that could be used, the messages to be disseminated by those media, and key sectors, or target audiences, for these messages.

THE MEANS OF DELIVERING ANTI-CORRUPTION MESSAGES

Once basic principles have been formulated, education and awareness raising can be implemented through a variety of activities. As with the substantive content, the means of communicating will vary to some degree depending on the target audience. A strong national anti-corruption programme will incorporate a number of possible options, and a flexible approach to developing or modifying communications plans should the need arise. Means such as surveys of the officials involved and members of the public with whom they deal should also be employed to provide feedback information to help planners assess which methods are effective and which require modification or replacement. Some communications options include the following:

- Media of broad or general distribution, such as radio, television and print media can be used to reach the general population. Information can be disseminated not only using advertising and public service announcements, but also news coverage. Officials who provide information to the media should not manipulate or distort the information, but should ensure that the media are well briefed about both successes and failures in the fight against corruption. In reaching general populations, factors such as literacy, formulation of materials in appropriate linguistic and cultural formats, and the access of target populations to appropriate technical facilities (e.g., telephones, radio or television receivers etc.) must also be considered.
- Where available, the Internet and other computer or communications networks can be used, both to disseminate messages about corruption and as a possible means of encouraging and facilitating reports by those who encounter it. A major advantage is the flexibility of computers in formulating, storing and disseminating information. Major disadvantages include a lack of access to computers and networks among some countries and population groups, and the need for basic standards of technical proficiency and literacy to operate them. Evidence does, however, suggest that such problems are being overcome.

[141] A major success story is that of Hong Kong SAR's Independent Anti-Corruption Commission (ICAC), which annually conducts 2,780 (2000) training sessions to strengthen partnership between anti- corruption agencies and the private and public sectors. Community relations officers reach between 200,000 and 300,000 people on average per year through 800 talks, activities and special projects. The 200 staff members meets annually face to face with between 4-5% of population through meet-the-public sessions, training workshops at workplaces, school talks and seminars designed for businesses and professionals. See Alan Lai, Commissioner of Hong Kong SAR's ICAC in "Building Public Confidence: the Approach of the Hong Kong Special Administrative Area of China". in UN Forum for Crime and Society (2002)
This classification was developed in collaboration with Transparency International.

- Seminars, meetings or workshops can be conducted for specific stakeholders to discuss problems and suggest actions. Though costly and time-consuming, that format offers the advantages of a detailed examination of any materials offered and two-way communication with participants. Meetings can be used to brief participants on various matters, including anti-corruption projects, and to canvass their views about what should be done and how best to explain it. They may also provide a valuable opportunity for specific groups to explore ethical issues and develop ethical principles for themselves.
- Public enquiries or hearings can be conducted into corruption in general or to examine specific corruption problems or cases. While examining corruption on a case-by-case basis is relatively inefficient, it can provide a detailed and transparent examination of problem areas and draw conclusions that may be relevant to other areas. In many countries, such enquiries are limited somewhat by the possibility or presence of criminal proceedings and the procedural rights of accused persons in such proceedings. The State may have to choose between prosecution and an enquiry, or delay any enquiry in some cases until all relevant criminal proceedings have been exhausted.
- Surveys can be used to gather, analyse and publicize information about, for example, the actual rates or frequency of corruption, public perceptions of corruption, the effectiveness of anti-corruption measures and the general overall performance of public administration and its integrity. Surveys tend to measure subjective perceptions of corruption rather than an objective measure of its actual nature and extent. In most strategies, however, objective and subjective assessments will both be important requirements.
- The criminal law is often overlooked as a communications medium. As noted above, however, the development, enactment and publication of criminal offences and procedures concerning corruption set absolute minimum legal standards of behaviour and, in many cases, moral standards too. Criminalization of corrupt behaviour by the legislature sends a powerful message, making it difficult for those engaged in corruption to rationalize or morally justify their behaviour.
- Publication of information about investigations, prosecutions and other proceedings, such as disciplinary proceedings, in corruption cases can also send a strong deterrence message. It also gives the media a chance to explore the nature and costs of corruption in the context of actual cases, which tends to attract greater public interest than if the same materials are published in the abstract.
- The production and dissemination of a national strategy for integrity and anti-corruption measures can also be used to send a message both to the general public and to the specific groups to which the measures will apply. The materials disseminated should be in a format that is likely to interest and be understood by the target audience.
- The publication of more detailed materials in specialized media, such as public affairs programming on television or radio, and academic or professional journals, provides an opportunity for a more in-depth exploration of critical issues. Materials directed at academic and professional groups, as well as the media itself, should be formulated both to educate members of the group and to assist them in educating others. It is important for academic experts to

participate in national strategies, both as a source of policy advice and analysis and as competent external reviewers of Government proposals. Their participation should be supported with resources and access to information.

- Many existing materials produced by Governments, intergovernmental organizations and non-governmental organizations, can also be used effectively, either by disseminating them verbatim, or as sources of information for other more closely targeted materials. Examples include this UN Anti-Corruption Toolkit and international instruments such as the OECD and OAS Conventions. Many academic and professional articles also provide useful research and policy analysis and are an important means of transferring expertise and experience from one country to another.

THE MESSAGES TO BE DELIVERED

The following general points will generally be covered in anti-corruption campaigns. As noted above, for specific target audiences, they will usually be supplemented by more detailed comments and additional messages.

The nature of corruption.

International discussions have illustrated a wide range of attitudes about what constitutes "corruption". At the national level, policy-makers must have a clear concept of corruption, and must communicate it effectively to various target audiences. Opposition to corruption and support for measures against it cannot be mobilized until people have a clear understanding of what it is.

The direct costs of corruption.

To enlist public support, it must be established that corruption is harmful, both to societies and the individuals who live in them. The direct cost of corruption include unfair or irrational procedures for allocating public resources. Those who do business with Government can be told of the additional costs and uncertainties of corrupt bidding processes. More general audiences can be told of the overall increases in costs and decreases in benefits. Essential services such as medical treatment, for example, may be unavailable because the planning and allocation of priority to health care was based on corrupt criteria. Medical services may be unavailable in individual cases because a sick individual could not afford the necessary bribes.

The general or indirect costs of corruption.

Example of the indirect costs of corruption include the failure of internal and external development projects and the corruption of essential institutions such as the courts and political bodies. Populations should be shown that corruption enables a few individuals to gain but the general population will lose far more if public administration is inadequate and institutions fail to function properly, if at all.

Reasonable standards expected in public administration.

Basic standards for general application in all areas of public administration, and in the context of specific institutions or functions, should be set out. Standards of conduct can also be promulgated in the private sector, , where appropriate, particularly in areas where business is carried out with the public sector. Proposing standards of conduct is likely to prompt public discussion and debate

about what is appropriate, which is useful in raising awareness, refining the proposed standards, and creating a sense of public ownership and support for the standards. The absolute minimum standards will generally be set by the criminal law, which defines conduct that will attract prosecution and punishment. In many cases, a higher standard will be expected as a condition of employment or a matter of professional ethics. One important message for officials is that the failure of the legislature to criminalize conduct should not be taken as permission to engage in it, and that the legal judgment of legislatures and courts should not replace individual or professional judgment of right and wrong.

The importance of vigilance and public accountability.

Each member of the population should be encouraged to watch for corruption and take action when it is detected. Public support for mechanisms and institutions that increase accountability, such as requirements that State agencies make their proceedings as public as possible, and the presence of an objective public media to report and comment on those proceedings, should also be encouraged.

Information about anti-corruption programmes.

To enlist cooperation and support for both proactive and reactive programmes, general information is needed about what the programmes are intended to accomplish and why they should be supported, and more specific information about what kind of cooperation is sought and how it can be given. For example, public servants must be convinced that combating corruption is in their interests, and then given specific information, such as addresses or telephone numbers, to which reports can be made. As noted above convincing informants that they will be allowed to remain anonymous or otherwise protected from retaliation is also important. [142]

Specific messages for specific audiences.

The above elements will usually apply across a broad range of public service target audiences. The message that taking bribes causes individual and social harms and may subject the recipient to criminal liability should apply to almost any audience. The specific application of general anti-corruption principles may be different, however, depending on the duties being performed and the "fact situations" commonly encountered by those who perform them. One common approach to developing audience-specific principles or variations is the development of fact situations that raise critical issues in a manner relevant to the audience. Scenarios developed in consultation with groups such as law-enforcement officials, aid-workers, banking or financial officials and health-care workers will ensure that the message is communicated in a meaningful way and that the participants have a sense of commitment to the standards, principles and practices they will be expected to apply.

TARGET AUDIENCES FOR ANTI-CORRUPTION MESSAGES AND

[142] See United Nations Convention against Corruption Article 13, paragraph 2 (States Parties to ensure that anti-corruption bodies are known and accessible to public in order to facilitate reporting of acts of corruption, including anonymous reports), Article 33 (protection of persons who report corruption), and Article 8, paragraph 4 (measures to facilitate reporting by public officials).

MEASURES

The messages to be communicated, their intended recipients and the measures to be actually employed against corruption can all be divided into several basic categories, which tend to classify both the groups who will be urged to apply specific policies or measures and the actual measures they are called upon to apply.[143]

Political and legislative measures and audiences.

While many measures can be implemented without laws, many major or fundamental changes require a basis in national constitutions or statute law. They include:

- Basic judicial independence and separation-of-powers safeguards;
- Basic human rights such as the freedoms of association and expression;
- Rules to protect the independence of key groups such as the media, where necessary; and
- The creation of independent anti-corruption institutions.

The immediate target audiences are legislators, policy-makers in Government and academic institutions and, in some cases, the judiciary. Given the nature of such groups, it is likely that they will be the sources of some elements of the message. Since reforms are inherently political in nature, however, part of the message must usually be directed at general population as well, to generate the necessary political support. Multipartisan support for anti-corruption efforts is necessary. Thus it will be important to formulate and direct information in ways that address the broadest possible range of national political beliefs.

Public sector measures and audiences

Public sector measures advocated by anti-corruption programmes will be directed at public servants in general. In some cases, they will include individuals in judicial and political positions. In many cases, specific groups will be targeted with materials appropriate to their functions positions and levels of seniority. The following measures may be included:

- Greater transparency in critical Government functions by ensuring that operations are open to popular, media, legal and academic scrutiny;
- Greater public participation in critical programmes, both in the form of opportunities to comment on policies and their implementation and, in some cases, through actual participation on boards, committees and other decision-making bodies;
- The development and dissemination of standards of conduct;
- The development of complaint, comment, review and similar functions;
- The regular assessment of public confidence in anti-corruption institutions, judicial, law enforcement and other critical functions;
- The creation and administration of access to information systems; and
- Where necessary, the creation of independent anti-corruption commissions or similar bodies.

[143] The classification was developed in collaboration with Transparency International.

Private sector measures and audiences

Private sector individuals and institutions could be targeted with materials and information intended to educate, aid and empower them to avoid involvement in corrupt practices. That may include the dissemination of ethical standards, codes of conduct, and similar materials. Private sector elements of a national strategy may be limited to transactions or dealings between the private and public sectors or could also address purely private-sector interests.

Civil society measures and audiences

Messages developed could be addressed to civil society generally, or to specific elements, such as non-governmental organizations or academics concerned with specific issues. For some elements, combating corruption is a central policy or raison d'être while, for others, it is only one problem to be resolved in the course of pursuing other objectives, such as the effective delivery of aid, health-care or public services. In many cases, elements of civil society are also an important source of anti-corruption information, which should result in a two-way dialogue. Civil society measures should include the following.:

- The identification, education, awareness and involvement of civil society and its organizations, including the media, non-governmental organizations, professional associations, and research or academic institutes, to research and monitor good governance, the status of corruption and the progress made in combating corruption;
- The creation and strengthening of networks of non-governmental organizations to share information on local, regional and national anti-corruption initiatives;
- Strengthening, equipping and encouraging civil society to demand integrity and fairness in Government and business transactions; and
- Developing databases and networks for ensuring analysis and monitoring of corruption trends and cases, as well as information exchange among the different agencies called upon to deal with corruption.

TOOL #22
ACCESS TO INFORMATION

The dissemination of information about public affairs and the management of public issues is one of the most frequently-cited anti-corruption measures. Populations which are made and kept aware of governance issues which affect them develop expectations about standards and are in a position to put pressure on officials to meet those standards. Many of the tools in this Tool Kit are either specifically intended to bring about transparency as an objective or contain elements of transparency in support of other objectives. Tools #22, 23 and 24 fall into this category, seeking to ensure that accurate and timely information about public issues is available to people when they ask for it (access to information); that information is disseminated proactively so that people who do not ask have some information and those who seek information will have a better basis on which to formulate requests (public information); and that those who specialize in obtaining information and presenting it to the public – journalists – are equipped and motivated to play the most effective role possible. All of these fall within the ambit of Chapter II of the United Nations Convention against Corruption. The general obligation of Chapter II, Article 5, paragraph 1, calls for anti-corruption policies which:

> …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.

Subsequent articles then deal with more specific requirements, many of which can be implemented, in whole or part, through the use of one or more of Tools #22, 23, and 24.[144]

The participation of society in public affairs is a major objective of the Convention, and ensuring that the public has effective access to information is specifically set out as one of the means whereby this objective can be attained.[145] Effective access can also be seen as a means of empowerment, both in the substantive sense that having information about issues and options carries with it the ability to exert influence and affect outcomes, and also in the procedural sense that access to information structures are generally user-initiated. People obtain information because they have asked for it, and having obtained it previously, will ask for it again in the future, often with a growing skill and sense of confidence as their knowledge of public affairs increases. As with all transparency mechanisms, the underlying objective is to educate the public

[144] See in particular Article 7, subparagraph 1(a) (efficiency, transparency and objective criteria for hiring, promotion, etc. of civil servants and non-elected public officials); Article 7, paragraph 4 (systems that promote transparency and prevent conflicts of interest); Article 9, paragraph 1 (procurement systems based on transparency, competition and objective criteria) and subparagraph 1(a) (public distribution of information on procurements); Article 10 (transparency in public administration) and subparagraphs (a) (information on decision-making and other specific areas) and (c) (publication of information); and Article 13 (participation of society).

[145] See Convention Article 13, subparagraph 1(b).

and shed light on public affairs with a view to ensuring a high degree of public accountability. [146]

DESCRIPTION

The primary distinction between access to information systems and other transparency and public reporting mechanisms is that access systems are user-initiated. Where public information systems involve information generated and disseminated by, and on the initiative of, government agencies, access systems generate information when people actually ask for it. In a well-regulated system, there is a balance which ensures that outsiders set the agenda with respect to what information is sought and which issues are pursued, and that some form of independent review ensures that officials cannot arbitrarily or unreasonably deny access or avoid scrutiny, while at the same time shielding from disclosure some limited categories of information for which disclosure might benefit the individual requesting it, but would not be in the general public interest.[147]

Access to Information laws usually incorporate some or all of the following elements:

- Every government agency is required to publish basic information about what it does and how, in order to provide a basic level of information both for purposes of general information and transparency and in order to provide a basis for rational requests for more specific information. Requirements commonly include the publication of such things as legislative and other mandates, budgets, annual or other regular reports summarizing activities, and information about complaint or other oversight bodies, including how they can be contacted and reports on their work or the locations where such reports can be found.[148]
- A legally enforceable right of access to documented information held by the Government is recognized, subject only to such exceptions as are reasonably necessary to protect public interests or personal privacy. The subjects generally excluded from scrutiny include cabinet discussions, judicial functions, law enforcement and public safety, intergovernmental relations and internal working documents. Access is provided by giving applicants a

[146] See Alasdair Roberts, "Access to Government Information: An Overview of Issues", TI Working Paper, http://www.transparency.de/documents/work-papers/martin-feldman/4-preconditions.html, also Marsh, N., QC (ed.), *Public Access to Government-Held Information*, British Institute for International and Comparative Law, London, 1987.

[147] Examples include *bona fide* national security or criminal intelligence information, personal information about private individuals, privileged legal advice to the government, and sensitive commercial information held by the government. Without such limits, access to commercial information would unfairly benefit competitors, and access to such things as criminal intelligence could be used by organised criminal groups to gain information about the efforts against them by law enforcement, for example.

[148] In the case of anti-corruption bodies, publication of this information is required by the United Nations Convention against Corruption (Article 13, paragraph 2). The location of oversight bodies and their reports is often different from that of the agencies they oversee due to the requirements of functional separation and independence.

reasonable opportunity to inspect the document or by supplying them with a copy.

• An independent review mechanism for determining whether information sought is subject to or exempt from access is established and maintained. Usually, for the sake of efficiency, the process involves a presumption that information is accessible, placing the burden of establishing that it should not be disclosed on the government agency involved.[149] There is a review of information by the agency which holds it to identify documents or other elements which in its view should not be disclosed. There follows a review by an independent authority, and if his or her decision is not to disclose any of the material, this can be appealed top a court or other independent tribunal. The independent review is usually needed because the information must be reviewed by someone who is not biased in favour of the government agency, but who at the same time can be relied upon not to disclose sensitive information if the decision to withhold it is maintained. This function is critical – information in dispute is often extremely sensitive, and it is essential that both sides respect the discretion, integrity and neutrality of the review process without either being in a position to fully review its work.

- Time limits and time frames are often established to allow sufficient time for government agencies to search for, gather and review the information sought, and if it proposes not to disclose any of it, for the independent review process to proceed, while at the same time not permitting excessive or indefinite delay.
- Information about private individuals is usually protected from general access, but may be requested by the private individuals themselves. Often rights of individual access are accompanied by rights to dispute information on the basis that it is incomplete or inaccurate and if this is established, to have it amended. Some systems also allow the individual to place challenges or countervailing information on the record if a decision is made not to change the challenged information.

PRECONDITIONS AND RISKS [150]

For the most part, two decades of experience of implementing public information systems has not borne out the initial reluctance and fear of Governments to provide access to information. Governments in all parts of the world have conceded that the public has a right to know about Government operations and functions. Studies indicate that most Government departments have soon adapted to the innovation without much difficulty, and that the cost of providing access to information still represents only a small fraction of the information budgets of Governments.

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[149] This is also a matter of procedural fairness, since the person requesting the information is not allowed to review it at this stage and is therefore not in a position to argue that it should be disclosed based on the content of the information itself.

[150] Robert Martin and Estelle Feldman, "Access to Information in Developing Countries", T.I. Working Paper, http://www.transparency.de/documents/work-papers/martin-feldman/4-preconditions.html

Having said this, there are some grounds on which government agencies should be entitled to withhold information from the public and some practical limits on access to information policy and practice. For some Government functions, the greater public interest may lie with confidentiality, or confidentiality may be essential to the basic process at hand. For example, the need to respect personal privacy, as in health records, or issues involving national security, can legitimately be excluded from public access. More generally, the fact that such things as discussions between public officials become subject to access requests may stifle discussion or the keeping of records about discussion, with harmful effects on accountability and other aspects of governance. For this reason, the education of public officials about the importance of transparency and openness in government should accompany access to information programmes, and in some cases it may be necessary to shield discussions from access in order to ensure full and frank consideration of important issues in specific areas.[151]

There may also be practical limits on access rights in some cases. Even when dealt with by motivated, well-intentioned officials, responding to requests can be costly and complicated. Large numbers of government files may have to be reviewed to identify information which might fall within the scope of the request, and large volumes of information may then need to be carefully reviewed to identify and screen out information which should not be disclosed on legitimate grounds. This may be a great burden, particularly in developing countries, which are under-resourced and lack such things as automated data-filing and processing to accelerate and simplify the search, retrieval and screening processes.

Access to information laws are often accompanied by other laws in related areas, including:

- Privacy laws to ensure the protection of information which is not accessible for reasons of personal privacy or other reasons (e.g., proprietary commercial information);
- Official secrecy legislation to define and identify categories of information which should not be subject to access requests or disclosed for other reasons due to national security or other fundamental interests; and,
- Internal rules imposing requirements for the creation and retention of official files and other records, and limiting the conditions on which records can be destroyed.

[151] In Parliamentary systems based on the UK model, for example, members of cabinets are by convention bound by the principle of solidarity, so that in public ministers of the cabinet speak with one voice. To arrive at a common position and make decisions, on the other hand, it is necessary that ministers be able to disagree and debate in an environment which is shielded from public access and disclosure. For an outline of the issues which have arisen in the UK itself, see DeSmith, S. and Brazier, R., *Constitutional and Administrative Law*, Penguin Books, London (new ed.), Chapter 10, "ministerial responsibility".

RELATED TOOLS

Access to information is one of a series of tools intended to help mobilize civil societies through public education and awareness raising, including:

- Public complaints systems;
- Anti-corruption agencies relying on public inputs;
- Citizens charters and code of conducts;
- Whistleblower legislation;
- National and international ombudsman; and
- Public education and awareness raising.

TOOL #23

PUBLIC EDUCATION AND AWARENESS-RAISING MEASURES

The dissemination of information about public affairs and the management of public issues is one of the most frequently-cited anti-corruption measures. Populations which are made and kept aware of governance issues which affect them develop expectations about standards and are in a position to put pressure on officials to meet those standards. Many of the tools in this Tool Kit are either specifically intended to bring about transparency as an objective or contain elements of transparency in support of other objectives. Tools #22, 23 and 24 fall into this category, seeking to ensure that accurate and timely information about public issues is available to people when they ask for it (access to information); that information is disseminated proactively so that people who do not ask have some information and those who seek information will have a better basis on which to formulate requests (public information); and that those who specialize in obtaining information and presenting it to the public – journalists – are equipped and motivated to play the most effective role possible. All of these fall within the ambit of Chapter II of the United Nations Convention against Corruption. The general obligation of Chapter II, Article 5, paragraph 1, calls for anti-corruption policies which:

> …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.

Subsequent articles then deal with more specific requirements, many of which can be implemented, in whole or part, through the use of one or more of Tools #22, 23, and 24.[152]

Structures for disseminating information can be characterized as proactive or reactive. Reactive structures, in which information is produced in response to a request, include mechanisms such as access to information structures, where the requests may come from members of the general population or private organizations such as the news media, and audit functions, where the information is requested by inspectors or auditors with specific mandates to obtain, review and assess the information. Proactive structures are those in which public sector entities produce information on their own, without any specific request. These include such mechanisms as the routine regular production of reports and similar documents, and more specific activities in which information is provided about ongoing activities, both in the interest of general transparency, and often in an effort to assess the public reaction to an ongoing or proposed course of action.

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[152] See in particular Article 7, subparagraph 1(a) (efficiency, transparency and objective criteria for hiring, promotion, etc. of civil servants and non-elected public officials); Article 7, paragraph 4 (systems that promote transparency and prevent conflicts of interest); Article 9, paragraph 1 (procurement systems based on transparency, competition and objective criteria) and subparagraph 1(a) (public distribution of information on procurements); Article 10 (transparency in public administration) and subparagraphs (a) (information on decision-making and other specific areas) and (c) (publication of information); and Article 13 (participation of society).

Both are important. The routine production of reports provides general background information which can provide the basis for more specific requests or public discussion, and because it is routine, will be difficult to resist. Even without legal requirements to produce a report, an annual report which is delayed or missing is conspicuous, generating political pressures to disclose the information. More general forms of reporting occur when public officials understand the value of good relations with the public when developing and implementing government programmes and the value of taking the initiative to explain what is being done and why proactively. These mechanisms include press-releases and press conferences, public appearances by officials, open access to legislatures, courts and various other decision-making *fora* where possible, and a general bureaucratic culture in which officials are presumed to be permitted to disclose information to the news media and other interested parties unless there is some compelling public-interest justification for secrecy.

An important achievement for any anti-corruption programme is to inform the population. Information about how government works, or how it should be working, develop popular expectations of ethical and effective performance of public functions and make it generally apparent when public sector individuals or institutions are not performing to an acceptable standard. Information about the nature of corruption and the scope and magnitude of the harm it causes raise awareness of its true costs – which are often not readily apparent to general populations in corrupt environments – and mobilises support for anti-corruption policies and programmes. The long-term effects of this process include the mobilisation and empowerment of populations: where people learn how to fight corruption and participate in anti-corruption activities, they also have incentives to participate in public functions in general, and the knowledge and skills needed to do so effectively.

The United Nations Convention against Corruption encompasses all of these policies and objectives. In addition to the general goal of transparency (Article 5, above), specialized anti-corruption bodies are charged with the responsibility of increasing and disseminating knowledge about the prevention of corruption;[153] mechanisms for public procurement should ensure proactive dissemination of information about how the processes work and about the requirements and conditions for specific procurements;[154] mechanisms for proactive dissemination of information about public finances;[155] and the publication of specific information about the risks of corruption.[156] Article 13, dealing with the participation of society, also calls for measures to ensure the proactive dissemination of

[153] Article 6, sub-paragraph 1(b). Article 36, which deals with specialized bodies in law enforcement, does not include the same language, since the drafters saw those bodies as more reactive in nature. Nevertheless, some element of communication between the two bodies – if indeed they are kept separate – may be seen as appropriate, since information about past cases of corruption often provides the basis of future materials for training and general public-awareness-raising. Note that countries have the option of establishing unified bodies or separate bodies under Articles 6 and 36. See agreed notes for the *travaux préparatoires*, A/58/422/Add.1, paragraphs 11 and 39.
[154] Article 9, subparagraphs 1(a)-(c).
[155] Article 9, subparagraphs 2(a)-(b).
[156] Article 10, subparagraph (c).

information both generally,[157] and with respect to information to promote the non-tolerance of corruption[158] and the activities of specialized anti-corruption bodies.[159]

One purpose of Tool #23 is to increase checks and balances by guaranteeing independence of the judiciary, legislative and executive, while at the same time empowering civil society to oversee all organs of State, including the executive, legislative and judiciary. Another purpose of Tool #23 is to show how to earn or win back the trust of the public in anti-corruption efforts, and the importance of managing that trust.

DESCRIPTION

Proactive information mechanisms include a range of options for identifying and developing relevant information, producing it in a form that target audiences can understand,and disseminating it. Often this is a multi-stage process, and some elements may be more reactive than proactive. In many countries, information either produced proactively or reactively by government entities is then digested and analysed by the public news media, academic researchers, opposition politicians or others before being passed on to the general population. Governments, sometimes concerned that the information is altered or distorted in the process, often develop mechanisms of their own in an effort to impart information to the public directly, with as few intermediaries as possible. In a pluralistic information society, accuracy of the information is often less important than ensuring that information from many different sources and perspectives reach the public more-or-less intact, so people can decide for themselves.

Specific options include the following.

Public information campaigns

Information generated by anti-corruption agencies may be disseminated directly to the population using whatever media are available in a particular society. The actual media used can range from the use of the Internet and computer networks; radio and television broadcast media; print media such as newspapers; and personal appearances by government officials. Apart from the degree of availability of these various media, considerations such as literacy levels and the use of appropriate languages an cultural references will generally be important.

Journalistic media

The technical nature of the media (print, broadcast etc.) should be distinguished from their substantive nature. As noted above, the technical media can be used to disseminate information directly, as occurs when governments purchase advertising time, but arguably their greatest role is as independent journalistic

[157] Article 13, paragraph 1.
[158] Article 13, subparagraph 1(c).
[159] Article 13, paragraph 2.

reporters and commentators. Media independence allows journalists the freedom to present information in ways and at times that may be seen as inconvenient or even hostile by politicians and public officials, but it is important to understand that media independence and competence provide far greater benefits in anti-corruption programmes by providing members of the public with reliable and trustworthy information. This is essential not only to identifying and combatting corruption, but in establishing the credibility of programmes and areas of government which are not affected by corruption. Populations will only trus this information if they are confident that journalists are both independent and competent, and independence can only be assured by the demonstrated freedom of the media to identify the issues they choose, to gather, analyze and publish reports on those issues, and to do so at a time and in a format entirely of their own choosing.[160] Apart from not seeking to restrict or regulate the jouralistic media, governments may take measures to support the competence of journalusts, provided that this does not compromise independence. Arguably their most important contribution, however, is simply by ensuring that journalists are given the maximum possible access to information, both proactively and reactively.

Academic, non-governmental organizations and other expert commentary

Academics, interest groups and others who specialize in good governance, anti-corruption efforts, financial analysis and similar matters also play a valuable role. Their principal advantage is their expertise on corruption or related matters, which increases the value and credibility of their analysis. This may at times make it less accessible to the general population, but it can be used directly by those charged with anti-corruption efforts, and made more accessible to the general population by secondary publication in mass-circulation journalistic media. An academic study finding corruption in a public sector such as a criminal courts or military procurement, for example, can attack the problem in a series of public information efforts. In the hands of the appropriate officials, it can form the basis of countermeasures ranging from prevention measures to criminal prosecutions. In the hands of other expert commentators, it becomes part of the larger effort to assess corruption and develop countermeasures. Mass media reporting on the study generates public awareness of the problem, pressure to resolve it, and when measures are taken, places the population in a position to assess for themselves whether enough has been done and whether the problem has been corrected.[161]

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[160] Regarding the freedom and role of the media, see United Nations Convention against Corruption, Article 13, subparagraph 1(d).

[161] See United Nations Convention against Corruption, Article 13, paragraph 1, calling for promotion of the active participation of individuals and groups outside of the public sector, including civil society, non-governmental and community-based organizations. The work of interest groups and academics would also fall within the ambit of Article 13, subparagraph 1(d), discussed in respect of the mass media, above.

Direct access mechanisms: the Internet and other media

As discussed above, direct access to the public is often sought by government entities using mechanisms such as press-conferences, public speeches and the use of advertising, to ensure that the message chosen by the government reaches the public *verbatim*, although it will still be subject to journalistic and other commentary afterwards.

Many experts believe that the Internet has revolutionized direct communications. It is an inexpensive medium and is rapidly becoming a global network as public access proliferates in developed and developing countries alike. It is also amenable to formatting information in accessible formats. Illustrations or audio materials can be used to reach audiences where literacy is limited, for example, and apart from costs associated with basic translation, materials can usually be disseminated in many languages at the same time, allowing users to select the most appropriate.[162] Another important factor is that the Internet is also interactive, allowing the recipients of anti-corruption materials to communicate back, for reporting corruption or other purposes. The Internet is also very difficult to suppress or manipulate, which increases the range of information which can be obtained, but also generates some cause for caution. The same factors which make it difficult for repressive governments to impede the flow of information also eliminate other factors such as journalistic professionalism and editorial integrity, which increase the reliability of information disseminated by more traditional media. Hence, one can find the widest possible range of information on-line, but one cannot always rely on the accuracy of the information available. Governments engaged in anti-corruption efforts can use the Internet first, by ensuring that it is kept independent and made as accessible as possible to as many people as possible. This assists not only anti-corruption information campaigns, but government efforts to educate populations for purposes of social and economic development and efforts in other specific areas, such as HIV-AIDS education and other public-health matters. More specifically, the Internet can be used to disseminate all of the elements of public information campaigns set out below, and as a mechanism whereby people can comment on the messages they are given and can report corruption or other problems directly, and where appropriate, anonymously.

Substantive elements of information programmes

Having chosen the most appropriate media, the messages to be communicated must then be considered. In some cases, these are chosen by the participants themselves: journalists, academics and interest groups, and not the State,

[162] For an example of Internet multilingualism, one need look no further than the United Nations's own site, www.un.org, in which materials can be selected and examined in Arabic, Chinese, English, French, Russian and Spanish, and other sites in which UN materials appear in other languages which are not used officially within the UN system. The United Nations Convention against Corruption, as an official UN document is also available in these languages, and this Toolkit will be made available in languages other than English as these become available. See the web site of the United Nations Office on Drugs and Crime, www.unodc.org for details. Many non-governmental organizations are also "on-line". See for example Transparency International at www.transparency.org.

choose the timing and subject-matter of the information the access and the reports or commentaries they produce. General information campaigns formulated by government entities or dedicated anti-corruption organizations, however tend to incorporate the following elements:

- Not to engage in corrupt conduct themselves. General populations accustomed to paying bribes and similar conduct must generally be made aware that this is unacceptable, and usually criminal conduct.
- The true costs of corruption. Those involved in low-level corruption are often unaware of or at a distance from the costs, as are others around them. It is necessary to demonstrate to corrupt officials and those who pay bribes that there are significant costs and that these costs accrue not at a distance, but against them and their families. The same information disseminated to general populations mobilises opposition and intolerance to corruption.[163]
- The nature and variations of corruption. Set out elsewhere in this Tool Kit, this information assists those who receive it in identifying corruption when it occurs and in accruately labelling it as such.
- The stigma and punishments for corruption. Populations should be made aware that corruption is morally wrong, and subject to criminal, disciplinary and other sanctions for purposes of deterrence.
- The nature and importance of anti-corruption efforts in specific contexts, such as government procurement programmes, elections and other political activities, judicial and other critical sectors.
- The existence and availablilty of anti-corruption elements, such as places where it can be reported and sources of anti-corruption information.[164]

PRECONDITIONS AND RISKS

The cost of an effective public awareness campaign is often underestimated. Powerful and permanent political and budgetary commitments are essential. Altering public thinking is the most difficult and expensive aspect of anti-corruption work. To be successful, given that public attitudes cannot usually be changed overnight, time and consistency in awareness raising will be necessary. In fact, a level of dedication is the only way to achieve sustainable results. In the Hong Kong SAR, ICAC has been educating the public for more than 25 years. In 1998 alone, it spent US$90 million to offer 2,700 workshops for public and private organizations and other public-awareness projects.

RELATED TOOLS

Public Education and Awareness Raising is also one of the basic tools that will be part of most anti corruption strategies attempting to establish new institutions

[163] See United Nations Convention against Corruption, Article 13, subparagraph 1(c).
[164] See United Nations Convention against Corruption, Article 13, paragraph 2.

and measures relying on public trust and inputs. Access to information is therefore likely to be combined with any of the following tools:

- Access to information;
- Mobilizing civil society through public education and awareness raising;
- Public complaints systems;
- Anti-corruption agencies relying on public inputs;
- Citizens charters and code of conducts;
- Whistleblower legislation; and
- National and international ombudsman.

TOOL #24

MEDIA TRAINING AND INVESTIGATIVE JOURNALISM

The media is often underestimated in its ability to shape public attitudes and influence national and international policy. Journalists play an important interface role between the public and the Government. They have a responsibility to report information objectively, fairly and honestly, and where they are sufficiently competent and independent, they provide an essential source of independent, credible and broadly accessible information about the state of corruption and of efforts to control it. A key element of government-media relations is that governments and public officials must realize that, however inconvenient an aggressive and independent media sector might prove on specific occasions, any such disadvantage is far exceeded by the advantages of having a competent and credible source of independent public information and an aware, active and well-informed population.

The dissemination of information about public affairs and the management of public issues is one of the most frequently-cited anti-corruption measures. Populations which are made and kept aware of governance issues which affect them develop expectations about standards and are in a position to put pressure on officials to meet those standards. Many of the tools in this Tool Kit are either specifically intended to bring about transparency as an objective or contain elements of transparency in support of other objectives. Tools #22, 23 and 24 fall into this category, seeking to ensure that accurate and timely information about public issues is available to people when they ask for it (access to information); that information is disseminated proactively so that people who do not ask have some information and those who seek information will have a better basis on which to formulate requests (public information); and that those who specialize in obtaining information and presenting it to the public – journalists – are equipped and motivated to play the most effective role possible. All of these fall within the ambit of Chapter II of the United Nations Convention against Corruption. The general obligation of Chapter II, Article 5, paragraph 1, calls for anti-corruption policies which:

> …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.

Subsequent articles then deal with more specific requirements, many of which can be implemented, in whole or part, through the use of one or more of Tools #22, 23, and 24.[165] Of particular relevance to the public mass media are Article

[165] See in particular Article 7, subparagraph 1(a) (efficiency, transparency and objective criteria for hiring, promotion, etc. of civil servants and non-elected public officials); Article 7, paragraph 4 (systems that promote transparency and prevent conflicts of interest); Article 9, paragraph 1 (procurement systems based on transparency, competition and objective criteria) and subparagraph 1(a) (public distribution of information on procurements); Article 10 (transparency in public administration) and subparagraphs (a) (information on decision-making and other specific areas) and (c) (publication of information); and Article 13 (participation of society).

10, calling on the public sector to make information available, and Article 13, dealing with the participation of society, and in particular calling on State Parties to respect, promote and protect: "…the freedom to seek, receive, publish and disseminate information concerning corruption."[166] Article 8, dealing with codes of conduct for public officials, might also be of use, with some adjustments, in the formulation of codes of conduct for journalists within private media organizations.

The purpose of Tool #24 is to strengthen the credibility, integrity and capability of the media to provide unbiased and responsible coverage and broadcast of corruption cases and anti-corruption initiatives. Such measures will ultimately lead to an increased risk of exposure of corrupt individuals and organizations. A strong media can also increase the knowledge and trust-level between the public and the Government regarding anti-corruption policies and measures.

DESCRIPTION

The role of the media is critical in efforts against corruption. As a result, there must be careful structuring of the relationship between anti-corruption officials and, in many cases, there must also be efforts to develop or enhance the capabilities of the media to ensure that they can function effectively as recipients of information about corruption, appraise such information in an independent manner, use it meaningfully as the basis of further communications and disseminate it to the general public. As noted in the preceding Tools,[167] in addition to independence and credibility, critical functions of the journalistic media include their ability to digest and render detailed technical materials accessible to the general population. This is essential to general awareness-raising and public education, but also entails a high degree of responsibility and the exercise of discretion, since it necessarily involves editorial or "gatekeeping" exercises, in which the media must decide which information to report and which to leave out.

Some of the critical issues in Government-media relations are as follows.

- The autonomy of the media is essential to enable it to assess Government information critically and objectively and to ensure its reports are credible to the population as a whole. Thus, Government contacts with the media must be transparent, and they must not compromise the essential autonomy of the media, either in practice or in public perceptions. Also critical to autonomy and objectivity is the separation of media ownership from Government or political factions or, if this is impossible, ensuring that there is a diverse media to represent a full range of political opinion. Similarly, the staffing of individual media should be multi-partisan, if possible.[168]

[166] Article 13, subparagraph 1(d).
[167] See in particular Tool #22 (Public awareness raising).
[168] Politically neutral or multi-partisan media are critical in media-government relations and autonomy. For the same reasons, more general diversity is also desirable: the media should represent society and reflect the diversity of language, cultural religious or other sectors present

- For the media to assess anti-corruption efforts critically and independently they must possess adequate technical, legal, economic and other expertise. In many cases, other sources, such as retained professional or academic experts, can supplement the knowledge of general media reporters. Training, awareness-raising and technical briefing of media personnel in anti-corruption efforts may also be useful.
- The media should be encouraged to develop and enforce adequate standards of conduct regarding their professional competence and their objectivity.
- Media presentations should clearly distinguish between factual and fictional programmes and between news reporting, which reports fact, and analysis or editorial commentary, which comments on facts.
- The media should be able to reach as much of the population as possible. Where that involves use of public resources, for example to enable coverage of remote areas, there should be controls in place to ensure that the Government cannot withhold such resources to exert influence on the media. The media not only raises public awareness by disseminating information regarding the misuse of public power, but it can influence civil society to support Government anti-corruption initiatives. Moreover, journalists, editors and newspaper owners can take on an active role against corruption by facilitating public debate on the need to introduce anti-corruption policies and measures.
- It is essential to raise awareness on the part of the media of the causes, costs, levels, types and locations of corruption in their country, as well as to explain the on-going efforts of all stakeholders against corruption. Furthermore, journalists should be taught how to evaluate and monitor Government activities, and informed about the achievements and standards of anti-corruption work in the region and at the international level. If journalists are to compare the validity of the policies of their own Government with others and to report on them in the proper perspective, such background information is essential. Internal diversity and pluralism within the media community also develops a capability whereby the media can report on corruption in their own profession.[169]
- Media training should also focus on building an effective information network. That includes informing journalists about governmental and non-governmental institutions active in the field of anti-corruption, about specific areas of responsibility, contact addresses and all other available information. If possible, representatives of those institutions should be chosen to inform journalists about their work, both the successes and the failures. Creating a continuing and interactive exchange of ideas will contribute towards building trust, and that should ultimately guarantee unbiased reporting and encourage Government institutions to ensure an open information policy.

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in the society as a whole. This results in better access and more accurate reporting, and in more credible communications with society.

[169] This includes diversity in both the institutional and individual senses. Diversity of media control and ownership, for example, creates an environment in which one newspaper may be free (and motivated) to report on corruption at another.

Attention must be given to the commitment, responsibilities and risks involved in investigative journalism. Self-regulation should be promoted and the development and adoption of a code of conduct should be encouraged. Knowledge of the professional techniques of obtaining information ethically must also be enhanced on the part of the journalists. Ways of controlling the credibility of sources of information must be discussed. Journalists must be encouraged to respect privacy and to check references, not only for the sake of correct reporting, but also in order to avoid loss of credibility. They must be informed about the risks involved with investigative journalism and about what they can do to limit those risks. They should also be informed about the possibility of seeking protection by Government institutions.

PRECONDITIONS AND RISKS

Media training and training in investigative journalism will be a wasted effort if the media is not free and independent of political influence and if access to information is not guaranteed. The media should be free to decide what stories must be published and whether or not to delve more deeply into researching for more detail. There should be no censorship and Governments should not discriminate against any media by withdrawing advertising, denying access to newsprint, or in any way restricting the work of the media. Thoroughly researched articles and radio programmes reaching a broad cross-section of the public will deter participation in corrupt practices, and increase the risks, cost and uncertainty for those involved in corruption.

The media must also have integrity and credibility in the eyes of the public. Unfortunately, the media is often "for sale" to the highest bidder and in countries with systemic corruption, corrupt individuals and organizations often use the media to enhance their image or suppress or confuse information about their activities. The media as an institution must be strengthened and checks and balances within the media itself introduced. In some countries, professional journalist associations have been established to monitor the integrity of newspapers and journalists. Media councils can also perform such monitoring.

Due consideration must also be given to the particular risks to which investigative journalists are exposed. In recent years, murders of journalists have been attributed to their investigations of corruption cases. It is essential to facilitate their work and to reduce the risks involved, and several institutions are running training courses in this area. The media itself, however, is affected by corruption. Journalists accept payments to write articles against the political opponents of their paymasters while others are paid to prevent stories from appearing. The media itself needs to initiate mechanisms to make it possible for the media to police and monitor itself. That can be done by enforcing codes of conduct, and by establishing media councils that receive and respond to complaints about corruption or other unprofessional or unacceptable practices.

RELATED TOOLS

For the media to do its job of awareness raising and investigative reporting, the following other tools would be useful:

- Public information and awareness-raising
- Access-to-Information Legislation
- Institutions overseeing the enforcement of access to information such as anti-corruption agencies.

TOOL #25
JOINT GOVERNMENT/CIVIL SOCIETY BODIES

The purpose of Tool #25 is to help Governments work more efficiently and to help society participate fully in building the kind of environment that encourages equitable and sustainable growth with timely and cost-effective public service delivery.

The importance of specialized bodies to perform a range of anti-corruption tasks has been widely recognized, including elsewhere in this Tool Kit, and in the United Nations Convention against Corruption.[170] Similarly, the importance of ensuring the involvement of elements of civil society and the wide range of roles they can play is also apparent.[171] Public sector efforts to suppress, dominate or excessively regulate civil society diminish the effectiveness and credibility of the efforts of civil society, and are generally counter-productive. Efforts to support, assist and generally cooperate with civil society, however, may prove beneficial in strengthening the positive role of civil society, while at the same time providing a mechanism whereby public officials can take account of ideas put forward by outside bodies and experts, and put them to work effectively in government anti-corruption efforts.

To bridge the gap and provide channels of communication between public and civil society entities, outsiders can be included on existing bodies, including general-purpose bodies and those established specifically to prevent and combat corruption. Examples of this include outsiders on boards of directors, bodies governing key professions such as the legal profession, corporate and other boards of directors and the like. In some circumstances, outsiders such as journalists, academics or ordinary citizens could be included on anti-corruption commissions. Another possibility is the establishment of consultative bodies specifically intended to bring together representatives of appropriate civil society interests so that they can consult among themselves, and with representatives of the government.

As noted above, the United Nations Convention against Corruption calls for both the establishment of public bodies for specific anti-corruption purposes and for the involvement of society. These are separate provisions, however, leaving to the States Parties the choice of how to involve civil society. Joint boards, commissions or other bodies where public and private or civil-sector experts would participate would serve to implement a number of Convention provisions, however.[172]

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[170] See Chapter III, Tools 3-6, and Convention Articles 6 and 36.
[171] Convention Chapter II, and in particular, Article 13 (participation of society).
[172] See in particular, Articles 5, 6, 7 (paragraphs 2-3), 9, 10, 12 and 13.

DESCRIPTION

Anti-corruption reforms are forcing Governments and civil society to find new solutions and define new strategies that produce significantly improved impact indicators.

Even under the best law enforcement systems, public officials do not always obey the law and follow Government policy. To provide an external incentive for public officials to comply, social control boards have been created in many countries to focus on the monitoring and implementation of anti-corruption reforms. Indeed, countries in all regions and most industrialized countries have experimented with the use of social control mechanisms that aim to improve the quality of public services and reduce corrupt practices.

The boards are composed of civil society representatives and NGOs specialized in specific areas of public-service delivery. Civil-society representatives sit side by side with Government representatives on the boards and often operate on a pro bono basis as, for example, in Honduras, Costa Rica, Singapore, and Botswana.

For more than a decade, international organizations have promoted the principle of enhancing partnerships between civil society and Governments. Most countries, however, continue to navigate in uncharted waters because they do not have specific strategies to make social control mechanisms for anti-corruption initiatives operate effectively. The time has come to address that need, taking into account the explicit background and historical context in each case, as well as the obstacles that can be encountered in strategy formulation.

There are several barriers to the implementation of anti-corruption reforms as described in the Toolkit:

- Absence of the rule of law;
- Lack of access to justice for non-elite groupings;
- Lack of Government accountability; and
- Non-implementation of social, economic and cultural rights.

It is therefore not just a question of raising public awareness about corruption; serious shortcomings in the performance of public institutions and the ways in which impunity undermines the rule of law must also be rigorously identified. Social control boards, composed of members of civil society with a track record of social activism, technical capacity and integrity, are key to improving the chances of preventing anti-corruption reforms being blocked by State-related vested interests

IMPORTANT ELEMENTS OF AN EFFECTIVE SOCIAL CONTROL MECHANISM

Establishment of new links between different stakeholder groups

Today, democratic consolidation processes require the establishment of new links between civil society and political institutions. Civil society must come up with its own strategies both to build awareness of anti-corruption measures and

to find creative mechanisms to bring civil society into appropriate Government programmes. Local civil society organizations, in partnership with State agencies, universities or research centres, play a decisive role in monitoring the characteristics and implementation of reforms. Civil society must be persuaded to voice its concerns and needs through panels of its own representatives located within Government institutions it must do its utmost to incorporate different viewpoints into Government agendas and to enforce the oversight of Government agencies and practices. The creation of partnerships, networks and coalitions is thus essential.

While Governments have the responsibility of providing law and order, the collaboration of key social actors is required to fulfill that obligation. For different reasons in each country, collaboration becomes particularly important where the institutional capacity of a State is becoming weaker in the face of globalization. More than ever, ways of strengthening the capacity of local institutions to support bottom-up social control are more and more necessary. Civil society organizations must also develop their capability to establish "early warning systems" to prevent systemic corruption at high political and administrative levels.

Importance of education, monitoring and documentation

Education, monitoring and documentation are vital elements of truly sustainable, socially driven anti-corruption reforms, as well as being necessary steps towards achieving them. Communities should be encouraged to bring creativity to such processes, using testimony, community and city hall meetings, street theatre, art and informal forums for dialogue. The results of monitoring and documentation can then be collected and shared so that the full spectrum of individual and community efforts can be used to systematically tackle corrupt practices. The creation of accountability mechanisms is also vital to anti-corruption advocacy. In that respect, innumerable grassroots organizations in Latin America and Asia have succeeded in mobilizing resources and making them available to poor communities.

Establishment of a network of anti-corruption observatories.

One possible way of fulfilling such objectives is to establish a network of anti-corruption observatories. A pilot project, launched in December 2000, has been developed under the auspices of the International Law and Economic Development Center at the University of Virginia School of Law. The observatories, established as part of a triangular cooperation among universities/research centres, civil society organizations and State institutions in charge of accountability, will contribute to building databases and developing indicators on a selected set of anti-corruption practices. Observatories can also serve as early warning systems. Anti-corruption observatories help build critical partnerships with existing State institutions, such as public prosecutors and auditing courts, so as to exercise "bottom-up" control on the performance of Governments and the effectiveness of public policies to reach the poor as part of anti-corruption efforts.

Anti-corruption education and the formation of a city-wide anti-corruption community

One valuable initiative designed to produce a fusion of ethical thinking and action to influence public anti-corruption policies is the experience of anti-corruption education and the formation of a city-wide anti-corruption community in Merida (Campo Elias), Venezuela, and in Limpio, Paraguay. In those cities, two international organizations and civil society representatives have come together with the executive and legislative levels of local government to establish a monthly monitoring system involving surveys of public service delivery and samples of complaints related to public service delivery. Civil society representatives work on a pro bono basis while the governments in each case cover all the logistic and operational costs of the survey and other documentation needs. Impact indicators used to assess the relative success/failure of measures include procedural times and complexity in service delivery, effectiveness in service delivery, accountability mechanisms establishing rewards/penalties for public officials, and the degree of public trust in specific institutions

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Empowerment of individuals, communities and Governments by disseminating knowledge

Other case studies show how countries have managed to empower individuals, communities and Governments by disseminating knowledge and thus enhancing transparency within the public sector. Empowerment, in turn, results in greater government accountability, which is integral to building institutional capacity and improving service delivery with less corruption. Such programmes can help Governments work more efficiently and help society participate in building an enabling environment for equitable and sustainable growth resulting in timely and cost-effective public service delivery.

The importance of conomic development, democratic reform, a strong civil society with access to information and the presence of the rule of law.

Organizations in the public and private sector at the local and national level must adopt certain measures if they are to achieve success in the fight against corruption. Economic development, democratic reform, a strong civil society with access to information and the presence of the rule of law appear to be crucial for the prevention of corruption. The following are measures or initiatives implemented at various levels within the public and private sectors of several the performance of public agencies and channelling suggestions and complaints related to service delivery. As such, the social control mechanisms followed the integrated approach to empowering victims of corruption, as outlined in the Tool Kit and its case studies.

The establishment of social control panels or boards

The social control panels or boards, mentioned above, were composed of civil society representatives, all of whom were required to show a track record for integrity, social activism, and experience in dealing with the areas to be monitored by the social control board (e.g. utilities). They were elected in Merida by neighborhood councils. In some cases, the representatives sat on the social control board alongside representatives of the State. Frequently, the roles, characteristics, responsibilities, and attributes of the boards were legalized through local laws and ordinances.

The social control-related reform experiences of Merida, Venezuela

The social control-related reform experiences of Merida, Venezuela provide best practices on how strongly civil society mechanisms impact on the frequency of corruption, transparency, access to institutions, and effectiveness in service delivery.

Impact indicators

Here, we can observe the impact indicators before and after selected internal institutional reforms were introduced in the following areas:

- Simplification of the most common administrative procedures;
- Reduction of the degree of administrative discretion in service delivery;
- Implementation of the legal right of citizens to access information within local State institutions; and
- Monitoring of quality standards in public service delivery through the sampling by social control mechanisms of delivered services.

The importance of monitoring

Monitoring was carried out by social control boards where at least half of its membership was composed of civil society representatives who were already trained in technical aspects dealing with the local government agencies involved, for example, tax, public works, health-care provision, and education. In no case were civil society representatives selected by the State and, in all cases, the social control boards included representatives from the institutions to be monitored. Surveys and institutional reviews were conducted to gather the perceptional and objective indicators respectively. The surveys monitored the levels of perceived effectiveness in service delivery, transparency in service delivery, public trust in service delivery, and accountability in service delivery The results from implementing reforms in those areas are as follows :

TWO-YEAR PERCENTAGE CHANGES IN CORRUPTION RELATED INDICATORS BEFORE AND AFTER SOCIAL CONTROL MECHANISMS

Pilots	Frequency of Access	Access to Institutions	Effectiveness	Transparency	Administrative Complexity
Venezuela Municipality- Campo Elias)	-9.1%	15.9%	7.3%	7.5%	-9,5%

The chart shows the two-year percentage changes in perceived frequencies of corruption, effectiveness, transparency, access to institutions, and the user perspective of administrative complexity applied to the services provided by the municipal services in Campo Elias (Venezuela).

The percentage changes reflect two-year variations at any time during the period 1998-2000. The perceived frequencies were provided by direct users of these services after interacting with the public sector institution involved. In the chart, significant two-year drops can be observed in the frequency of perceived corrupt acts, defined here as occurrences of bribery, conflict of interest, influence peddling and extortion.

As can be seen, frequencies of corruption decrease by 9.1 per cent. An additional 15.9 per cent of those interviewed perceived improvements in the access to municipal services. The two-year increase in the user perception of improvements to the effectiveness of service delivery is 7.3 per cent and in transparency is 7.5 per cent. A large number of studies have shown a relationship between increases in the administrative complexity of an institution, down by 9.5 per cent in the period, and higher frequencies of corruption. Each of the local agencies included in the case study provided data to calculate the differences in administrative complexity applied to the most common procedure in each institution: applying for building permits.

The objective (hard data) indicator for each of the institutions involved here was calculated through a formula that took into account three factors:

- Average procedural times;
- Number of departmental sections involved in processing the service; and
- Number of procedural steps needed by users in order to complete the procedure.

The changes in the administrative complexity indicator were calculated for the same 1998-2000 period and the percentage change decrease is shown in the last column of the chart as a 9.5 per cent decrease.

It is noteworthy that, in all cases, the institutional heads of the pilot departments selected were known for their integrity, political will, and capacity to execute previous reforms. Also key to implementing such reforms is to select departmental areas within which civil society representatives on the social control boards are also willing and able to receive technical training to enable them to adequately monitor the procedures under scrutiny. In most cases, social control boards were not just in charge of monitoring indicators; they were also responsible for channelling and following any user complaints dealing with service delivery. The bodies met on a weekly to monthly basis. In all cases, local or national laws were enacted with the sole purpose of providing institutional identity and formal legitimacy to the boards.

The social control boards provide an operational and implementation arm to the objectives and policies validated by civil society through national or local integrity meetings, focus groups, and national and municipal integrity steering committees.

Preconditions and Risks

The main opposition to any reforms usually emanates from vested interests within local governments and from political groups outside government. In general, four major areas of concern should be monitored and, if necessary, addressed.

Membership of social control boards.

As noted, the selection of members of social control boards must include not only the necessary range of expertise but also serve to establish credibility in the reforms to be implemented. That is particularly true in the early stages, before a board starts its work, as there is no record on which to assess credibility. The perception of having a board held captive by the local, regional, or national Governments must be avoided at all costs

Setting of reasonable goals and expectations.

As with larger national programmes, there is a tendency to underestimate the difficulty of the tasks ahead and set overly ambitious goals. That, in turn, fuels unreasonable expectations. If expectations are not met, the result is frustration, cynicism and a loss of credibility that impede further progress and can even make the problem of corruption worse.

Failure to involve all key stakeholders.

Local social control boards must identify and involve all interested parties as members or participants in their proceedings. That will not only ensure that all relevant interests are taken into consideration, but will validate the work done and the results obtained. It will also ensure that uninvolved stakeholders do not block or impede progress. Elements that are corrupt or perceived as being corrupt should be included.

Failure to mobilize support for anti-corruption efforts.

Of all national anti-corruption bodies, it is the social control boards that have greatest contact with the population. Locally based functions and those who provide and use them are often the most profoundly affected by corruption and, at the same time, the hardest to educate and mobilize. Social control boards must engage local populations in the anti-corruption programme, demonstrating the seriousness of the problem, the importance of the anti-corruption efforts, and what local populations can do to support those efforts. Civil society organizations at the local level should be enlisted in the effort wherever possible.

RELATED TOOLS

Related tools to strengthen social control mechanisms are;

- Establish, disseminate, discuss and enforce a Code of conduct for public servants;
- Establish and disseminate, discuss and enforce a Citizens Charter;

- Establish an independent and credible complaints mechanism where the public and other parts of the criminal justice system can file complaints;
- Establish a disciplinary mechanism with the capability to investigate complaints and enforce disciplinary action when necessary;
- Conduct an independent comprehensive assessment of the levels, cost, coverage and quality of service delivery by the Government, including the perceived trust level between the public service and the public.

TOOL #26
PUBLIC COMPLAINTS MECHANISMS

The objective of a public complaints mechanism is to enable anyone who becomes aware of acts of corruption, corrupt practices or general maladministration, to report this to the competent authorities. This serves the specific objectives of identifying and eliminating corrupt practices or individuals and deterring further corruption by others. More generally, it serves as a powerful tool for increasing expectations with respect to integrity and acceptable standards of service, and instills a sense of public empowerment. Reporting mechanisms must confront some difficult issues, however. First and foremost is the fact that reporting corruption and other crimes may leave the reporting individual open to retaliation and place him or her in danger. For this reason many reporting systems provide for anonymity and other protective safeguards. Another common problem is that reporting systems are sometimes used to falsely report malfeasance in order to settle personal grievances or divert attention away from other problems. This generally makes it necessary to balance the protection of those who report corruption with some process for assessing complaints, and possibly providing for liability in cases of intentionally false, misleading or malicious reporting.

A number of provisions of the United Nations Convention against Corruption deal with these issues. Articles 6 and 36 call, for the establishment of anti-corruption bodies, to which complaints may be reported, particularly the law-enforcement bodies envisaged by Article 36, where these are established separately. Article 13, paragraph 2 calls for measures to ensure that the existence and roles of these bodies are known to the public and accessible for the anonymous reporting of corruption. Article 33 calls specifically for the protection of those who report corruption, with additional protections for victims and witnesses under Article 32 when there are legal or other proceedings. Article 37, paragraph 1 calls for cooperation with law enforcement on the part of those who may have been involved in corruption, and for possible mitigation of punishments where such cooperation is given. Article 8, paragraph 4 calls for more specific measures to encourage and protect reporting by public officials who encounter corruption in the course of their duties or employment.

The expected impacts are:

- To increase the reporting and investigation of corrupt practices;
- To deter corruption by increasing the likelihood of detection and punishment;
- To provide a further mechanism for the identification and reporting of corruption, thereby adding to the overall assessment of the nature and extent of corruption, and to public awareness of the problem;

- To improve public empowerment by involving citizens in enforcing anti-corruption measures; and
- To heighten public confidence in Governmental anti-corruption efforts.

DESCRIPTION

Complaints about corruption trigger investigation, prosecution or other sanctions. Thus complaint mechanisms form an important element of overall strategies, and it is important to provide a number of accessible and secure points at which corruption can be reported throughout the public sector. There should be different institutions to ensure that both citizens and public servants can report corrupt behaviour such as disloyalty, breach of trust, self-promoting or bad judgment without personal or financial disadvantage.

a) Internal and external mechanisms

Mechanisms may be internal to specific agencies or other entities, or external in the sense that they operate over the entire public sector. The former tend to be more accessible and can be staffed by experts specialized in dealing with corruption in the agency at hand, such as military or law-enforcement entities, the judiciary or public procurement systems. Since they are closer to the actual sources of corruption, however, greater precautions may be needed to ensure that they are not subverted and that those who report to them are adequately protected. External agencies may be specialized with respect to corruption and similar malfeasance, such as auditors, ombudsman and inspectors, or law enforcement agencies with general criminal justice mandates that include corruption offences.

Procedures should establish clear obligations for every member of the Government, as well as criteria as to what constitutes a reportable incident or allegation and to whom and how that report must be made. Each organization can develop rules appropriate to its own culture and to that of counterpart organizations. The supervisor would normally be the first point of contact of any allegation but an ethics officer for the entire organization may be designated as primary referral point if the allegation concerns the supervisor. The chain of referral to the appropriate investigating authority should be clear, with time limits and explicit standards governing which allegations must be referred for review by a criminal justice authority.

b) Awareness and independence.

Critical to the success of reporting mechanisms is the awareness of potential sources of information that they exist and afford an environment where malfeasance can be reported without fear of retaliation or other consequences. The measures used to ensure awareness may depend to some degree on whether the mechanism has been established for reporting in a particular

context, or for more general reporting.[173] As with other anti-corruption bodies, a sufficient degree of independence is needed, both to ensure that guarantees of protection can be delivered, and to ensure that cases of reported corruption are acted upon effectively and not compromised.[174]

RELATED TOOLS

Related tools to strengthen social control mechanisms could be:

- Establish, disseminate, discuss and enforce a code of conduct for public servants;
- Establish and disseminate, discuss and enforce a citizens' charter;
- Establish an independent and credible complaints mechanism whereby the public and other elements of the criminal justice system can file complaints;
- Establish a disciplinary mechanism with the capability to investigate complaints and enforce disciplinary action when necessary;
- Conduct an independent comprehensive assessment of the levels, cost, coverage and quality of service delivery, including the perceived trust level between the public service and the public;
- Simplify complaints procedures;
- Raise public awareness as to where and how to complain, for example through campaigns giving the public corruption "hotlines";
- Introduce a computerized complaints system allowing institutions to record and analyse all complaints and to monitor actions taken to deal with the complaints.

[173] See United Nations Convention against Corruption, Article 13, paragraph 2 (general awareness or reporting mechanism) and Article 8, paragraph 4 (reporting and protection of public officials).

[174] Both of the provisions of the United Nations Convention against Corruption which refer to specialized anti-corruption bodies, Articles 6 and 36, include independence as essential elements.

TOOL #27
CITIZENS' CHARTERS

Many anti-corruption measures, including those in this Tool Kit, involve elements intended to establish expectations with respect to ethical and practical standards and best practices. Officials can be trained in good practice and threatened with negative consequences if they fail to meet at least minimum standards, but experience suggests that such measures are less effective in an environment where there are low expectations on the part of those for whom functions are performed and services are delivered. As a result, anti-corruption efforts usually incorporate elements intended to develop, establish and promote basic standards for ethical conduct and good practices. In this context, citizens' charters and similar documents can be seen as complementary to codes of conduct. Where codes of conduct set and enforce standards from within public sector organizations, citizens' charters establish those same standards from outside, by codifying the standards and making outsiders who deal with the organization in question aware of them. Often they are composed in terms of rights or legitimate expectations, in the sense that consumers or users of a service are told that they have a right to expect certain specified standards. In some cases a remedy may be provided for where the standards are not met, and consumers are usually told how to complain.

The key objectives of citizens' charters are:

- To promote better government that provides high quality, efficient and effective public services and regulation, delivered in an accountable, open, accessible and responsive way; and
- To maintain and enhance professional and ethical standards of the civil service and non-departmental public bodies and promote high standards of accountability and openness in the wider public sector.

DESCRIPTION

The principles of a citizens' charter are:

Standards

Explicit standards regarding quality, timeliness, cost, integrity and coverage of services must be published and monitored as a service that individual users can reasonably expect. Performance against those standards must also be published.

Information and Openness

Full and accurate information must be made readily available in plain language about how the service is run, what it costs, how it performs and who is in charge.

Choice and consultation
Wherever possible, choice must be provided. There must be regular and systematic consultation with users, and their views must be taken into account before final decisions are reached on standards.

Courtesy and helpfulness
Public servants must be courteous and provide helpful service. Services are available equally to all who are entitled to them and must be run for their convenience.

Putting things right
If things go wrong, an apology, together with a full explanation and a swift and effective remedy, must be made. An easy-to-use complaint systems must be publicized.

Value for Money
Services must be efficient and economical, within the resources the country can afford. Independent validation of performance against standards must be made.

Where are citizens' charters found? [175]

As an example, there are 40 national charters covering the major public services in England and Wales, Scotland and Northern Ireland, of which the most important are the Patients' Charter, the Parents' Charter and the Passengers' Charter, as these are the public services that affect most people. Each charter sets standards, tells people what they can expect and what to do if they wish to complain. Each organization publishes information showing how well it has performed against the standard. For example, some local railway stations publish information every month showing what percentage of train services have been on time. Every November, the Government publishes league tables of the performance of schools, showing how well the students in every school in the country have performed in the summer national examinations.

A more recent development has been the publication of standards by local bodies such as schools, hospitals and police forces. They cover the same items as the national standards, but are directed at showing how local organizations serve the local community. There are now some 10,000 such standards in the United Kingdom.

Charter Mark

One of the key developments in the United Kingdom was the Charter Mark scheme, a form of quality assurance. Organizations are assessed against six standards and have to show an area of innovation in customer service. If they match the overall standard, they are awarded a Charter Mark that they hold for three years. They then have to reapply.

In the first year (1991) 296 organizations applied and 36 Charter Marks were awarded climbing to 945 applications in 1997. Members of the public were invited

[175] Citizens Charter, by Jim Barron, Head of the Office of Civil Services Commissioners, United Kingdom, Paper presented in Ukraine National Integrity Meeting, 1997

to nominate organizations they think provide good service and in 1997 there were 25,000 such nominations.

One of the aims is to improve customer service by encouraging competition both within the organization and externally.

COMPLAINTS[176]

Another key development was the attention given to complaints procedures. A British Minister once described complaints as "the jewels in the crown", meaning that not only could one correct the mistake but one also had an opportunity to see what had caused the complaint and make improvements to the system.

When a Courts' Charter was mooted in the United Kingdom, public reaction was that such a mechanism was too complicated as it depended on whether a complaint was to be made about the police, the prosecution or the court administration and no one person had responsibility for or knew all the systems. After a heated discussion, it was agreed that members of the public could not be expected to understand that. Thus, one person in every court was given the task of dealing with initial complaints and pointing people in the right direction.

A Charter Unit in the United Kingdom carried out a survey of complaint systems among a range of public services and found much variation. Representatives of consumer groups were therefore asked to participate in a study to develop the key features of a good complaints procedure. The procedure was published as an example of good practice, and organizations were invited to match their systems against it.

The Citizens' Charter Unit

The unit started out in 1991 with 10 people. The number grew rapidly to 30 and staffing remains at that level. The Citizens' Charter Group in the UK worked with the office of the Prime Minister to draw up the national charters. It also led studies into particular topics, such as complaint systems. As the Charter took hold in the public imagination and among public services, the role of the unit changed. The Citizen Charter Group staff became more like facilitators, spreading good practice through discussion with departments, working groups and the annual report and regular newsletters. Instead of assessing Charter Mark, the scale of the scheme now means that the Citizens' Charter Unit now manages a team of assessors who do the work on their behalf. The core function of the unit, however, remains the same: to think about the strategic purpose of the Charter and the way ahead.

The Advisory Panel

The Citizens' Charter Unit in the United Kingdom is assisted by an Advisory Panel. The panel was appointed by Prime Minister to advise on the Charter and how it should be implemented.

Each member has wide experience of customer service in the private or public sector, and is able to work closely with the unit on individual charters and on the strategic development of the initiative.

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[176] See United Nations Convention against Corruption, Article 8, paragraph 4.

PRECONDITIONS AND RISKS

Important preconditions for success are:

Top level commitment.

In the United Kingdom, the Prime Minister held seminars of all Ministers and Permanent Secretaries every six months to ask them what progress they had made. Having to report in such a forum encouraged departments to take the initiative seriously and make sure that they kept up with the pace of other departments.

Public support.

The programme was working hand in glove with development in the public sector. Public services could see that and learn from wider experiencesalthough, in some instances, public services were ahead of what even the private sector was doing.

Measurable performance standards.

The publications both of standards and of measurement of performance against them was key. People knew what to expect and how to complain. Organizations did not like to be shown publicly to be failing, with schools league tables being a prime example, and that led to pressure for improvements,

Incentives.

Rewarding achievement through the Charter Mark scheme was also key. Paradoxically it was shown by failure. One large utility, that had been awarded Charter Mark, began to attract many complaints about its service. There was a great deal of speculation in the press about why it had been given the award, and whether it should keep it. Rather than risk applying again and failing, the utility decided to withdraw from the scheme. That served to emphasize that Charter Mark was an award worth having: indeed a number of private sector organizations applied for it, but of course they were ineligible.

National and local charters.

The move to local charters was also important, as it stressed and encouraged the role of local providers in the local community. Central Government may set out principles, but it cannot manage the many thousands of local services through which most people have contact with the Government.

Lessons learned from mistakes

Be realistic.

In the UK a Charterline was developed. The idea was to provide one telephone number that anyone could ring to find out about standards of service across the public sector and how to complain. Market research had showed there was the potential for such a service and a sophisticated call-management system was developed in partnership with the private sector. When the Charterline was pilot tested, very few calls were received.

The programme had been too ambitious as:

- It was trying to provide information on too many services;
- The cost of storing that information and keeping it up to date was prohibitive; and

- The public had not at that stage seen the difference that the Citizens' Charter would make and so did not see the need for the service.

RELATED TOOLS

Tools that may be required before a citizens' charter can be successfully implemented include:

- Development and promotion of citizen charter and similar documents;
- Tools that raise awareness of the code of conduct and the citizens' charter and establish appropriate expectations on the part of populations, particularly those directly affected by the actions of those subject to the charter, such as publicity campaigns;
- The establishment of corresponding codes of conduct;
- Establishment of an independent and credible complaints mechanisms to deal with complaints that the prescribed standards have not been met;
- Establishment of appropriate disciplinary procedures, including tribunals and other bodies, to investigate complaints, adjudicate cases and impose and enforce appropriate remedies or other outcomes.

Tools that may be needed in conjunction with citizens' charters include:

- Tools that involve the training and awareness-raising of officials subject to each citizens' charter to ensure adherence and identify problems with the charter itself;
- The conducting of regular, independent and comprehensive assessments of institutions and, where necessary, of individuals, to measure performance against the prescribed standards;
- The enforcement of the citizens' charter by investigating and dealing with complaints, as well as more proactive measures such as "integrity testing"; and,
- The linking of procedures to enforce the charter with other measures that may identify corruption, such as more general assessments of performance and the comparison of disclosed assets with known incomes

Citizens' charters can be used with most other tools, but areas of overlap and possible inconsistency may be a concern and should be taken into account when formulating specific provisions. That is particularly true of other rules that may apply to those bound by a particular citizens' charter. For example, citizens' charters should not be at variance with criminal offences. In some systems it may be advisable to reconcile other legal requirements by simply requiring those bound by the charter to obey the law. That effectively incorporates all applicable legislative requirements and automatically reflects any future statutory or regulatory amendments as they occur. Care should also be taken to ensure that charters are consistent with other applicable codes of conduct or that, if an inconsistency or variance is intended, it is clearly specified.

CASE STUDY #18
ACCESS TO INFORMATION

BACKGROUND

The right to Government information was recognized as a constitutional right in Sweden over 230 years ago under the Freedom of the Press Act of 1766. The modern trend towards open government, however, began in 1966 when the United States Congress enacted a Freedom of Information Act applicable to federal agencies, and virtually every American state followed with its own legislation on the subject. In 1982, Canada, Australia and New Zealand recognized a statutory right to information.

RAJASTHAN IN INDIA

In a small and impoverished village in the State of Rajasthan in India, a local grassroots NGO recently demonstrated the potential of an access-to-information law, securing the enactment of such a measure through a 53-day hunger strike. It immediately invoked the new law and revealed to the community the massive and systematic abuse of development funds by local politicians and Government functionaries. In its own quaint fashion, through a six-hour puppet show, it publicized the amounts of money said to have been paid to workers long since dead, had migrated or were non-existent, and the hundreds of bags of cement falsely claimed to have been purchased and used to repair a small primary school building. Within weeks, much of the looted money was recovered[177].

AUSTRALIA, NEW SOUTH WALES, FREEDOM OF INFORMATION ACT 1989

The law seeks to extend the rights of the public to obtain access to information held by the Government, and to ensure that personal records held by the Government are not incomplete, incorrect, out of date or misleading. The objectives would be achieved by:

- Ensuring that information concerning the operations of Government is made available to the public;
- Conferring on each member of the public a legally enforceable right to be given access to documents held by the Government, subject only to such restrictions as are reasonably necessary for proper administration; and
- Enabling all members of the public to apply to the Government for the amendment of their personal records. Provision is also made for an internal review of decisions relating to disclosure, a review by the Ombudsman and a review by the Courts.

IRELAND, ACCESS TO INFORMATION ACT , 1997

The Act recognizes the right of every person to be offered access to any record held by a public body, subject to limited exemptions provided for by law. It

[177] For further Information, consult: Robert Martin and Estelle Feldman, "A Case Study: India and Access to Information", TI Working Paper, http://www. transparency.de/documents/work-papers/martin-feldman/8-india.html

prescribes the procedure for obtaining access; the amendment of records containing personal information that is incomplete, incorrect or misleading; for the review of decisions relating to the implementation of the Act by an Information Commissioner appointed for that purpose; and for appeal to the High Court on a question of law.

UGANDA, RIGHT OF ACCESS TO INFORMATION, ARTICLE 41 OF THE CONSTITUTION OF UGANDA, 1995

The provision of the Constitution of Uganda guarantees all citizens the right of access to information in the possession of the State or any of its organs or agencies, except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of other persons.

UNITED STATES OF AMERICA, FREEDOM OF INFORMATION ACT, PART 552 OF TITLE 5 (U.S. CODE)

The United States was a pioneer in exposing the principle of access to information. The original law enacted in 1966 obliged the Federal Government to allow access to most documents in its possession. The Freedom of Information Act 1974, in an attempt to overcome the cumbersome procedures prescribed in the 1966 legislation, also enabled courts to consider whether particular documents were properly classified as exempt from disclosure.

Other supporting legislation includes the Privacy Act 1974 giving individuals an opportunity to inspect their files and correct them; the Fair Credit Reporting Act giving citizens a right to see the records held on them by credit reference agencies; the Government in the Sunshine Act 1976 that allows the public access to meetings of certain Government bodies; and the Whistleblowers (Civil Service Reform) Act 1978,designed to protect civil servants from any retribution by the Government for disclosing Government wrongdoing or malpractice, or for releasing information that they reasonably believe shows a violation of any rule or regulation, mismanagement, gross waste of funds or an abuse of authority.

CASE STUDY #19

JUDICIAL INTEGRITY AND CAPACITY BUILDING PROJECT IN NIGERIA

BACKGROUND

In this case study, the United Nations Office on Drugs and Crime (UNODC) gives an account[178] of the status of the judicial reform initiatives, both at the Federal level and within 2 of the eleven Nigerian states (Abuja FCT, Benue, Borno, Delta, Ekiti, Enugu, Kaduna, Katsina, Kwara, Lagos and Plateau State) participating in the project. Together with the USAID funded National Centre for State Courts, the DFID funded British Council and the German Agency for Development Cooperation, UNODC supports these initiatives by providing technical expertise, policy advice, management support and financial resources. The purpose of this report is to take stock of the achievements made so far, both at the Federal level and within these pilot states, in order enhance the sharing of information on judicial reform measures and the practical aspects of their implementation throughout all Nigerian states.

Moreover, the report places the UNODC sponsored project on Strengthening Judicial Integrity and Capacity in Nigeria in context by giving an overview of how it fits into a broader international initiative.

INTERNATIONAL CONTEXT

The UNODC project on strengthening judicial integrity and capacity in Nigeria is not, a self-standing exercise but rather part of a larger international judicial reform initiative, guided by an International Judicial Group on Strengthening Judicial Integrity, formed in April 2000 by the Chief Justices of Uganda, Tanzania, South Africa, Nigeria, Bangladesh, India, Nepal and Sri Lanka. Egypt and the Philippines joined the Group recently at its 3rd meeting in Sri Lanka in January 2003.

OUTCOMES OF THE PROJECT BY 2003

Since its first meeting in Vienna 2000, the Group ascertained certain achievements:

- The creation of *a "safe" and productive learning environment for chief justices* in which they can be exposed to best practices regarding judicial reform, management of change and the strengthening of the rule of law;
- The formulation of a concept of judicial accountability which will be of practical effect and raise the level of public confidence in the courts without jeopardizing the principle of judicial independence;

[178] Strengthening Judicial Integrity and Capacity in Nigeria, (2002) Langseth,P. Mohammed.A. Abuja 02

- The establishment of the *objectives, scope and basic principles for judicial reform*;
- The development of *a Universal Declaration of Principles of Judicial Conduct;*
- The design of *a comprehensive assessment methodology*.

During the first meeting, which was organized by UNODC in collaboration with Transparency International, the Group considered means of strengthening judicial institutions and procedures as part of strengthening national integrity systems. Subsequent to delineating the *objectives, scope and basic principles for judicial reform*, three of the participating member states, namely Nigeria, Sri Lanka and Uganda, volunteered to pilot test some of the identified reform measures.

THE PILOT PROJECT IN NIGERIA

Following the First Meeting of the International Judicial Group on Strengthening Judicial Integrity, the Hon. M.L. Uwais, Chief Justice of Nigeria, in collaboration with the UNODC, elaborated a project on Strengthening Judicial Integrity and Capacity in Nigeria, which was launched in October 2001 at the First Federal Integrity Meeting for Chief Judges, in Abuja.

The main objectives of the UNODC supported pilot project are to:

- Develop, based on the findings of *a comprehensive baseline assessment* of the types, locations, levels and cost of corruption in the courts, action plans for strengthening judicial integrity and capacity in three Nigerian pilot states.
- *Implement the action plans* in nine pilot courts across the three pilot states to improve their performance regarding: (i) access to justice; (ii) timeliness and quality of the trial process; (iii) public confidence in the courts; (iv) efficiency and effectiveness in handling complaints against judges and court staff, and (v) co-ordination across the criminal justice system institutions (Judiciary, DPP, Police, Prison Services and the Bar).
- Ensure sustainability of reform measures by transferring planning, monitoring and implementing skills and processes to the judiciaries in the pilot states and closely involve key institutions, such as the Independent Anti-Corruption Commission and the Nigerian Institute of Advanced Legal Studies.
- Identify those measures that have proven to be successful during the pilot phase and support their implementation throughout all thirty-six states in Nigeria.

FIRST FEDERAL INTEGRITY MEETING FOR CHIEF JUDGES, OCT. 2001

The Justice of Nigeria invited, all thirty-six Chief Judges of the Nigerian states, the Minister of Justice, the Police, the Prison Services, Customs and the Independent Corrupt Practices Commission. During this meeting, the participants with the assistance of questionnaires, identified four key areas of judicial reform, namely: (i) quality and timeliness of the trial process, (ii) access to the courts, (iii)

public confidence in the judiciary and (iv) efficiency and effectiveness in dealing with public complaints.

Within these four broad objectives, working groups reached consensus on the introduction of seventeen measures to strengthen the performance of the courts and identified fifty-seven impact indicators against which progress could be measured. The workshop, furthermore, selected Borno, Delta and Lagos as pilot states for implementation.

COMPREHENSIVE ASSESSMENT OF JUDICIAL INTEGRITY AND CAPACITY, FEB/JUN 02

In order to facilitate facts-based action planning and to identify key issues to be addressed during the implementation stage, CICP sub-contracted to the Nigerian Institute of Advanced Legal Studies (NIALS) the task of conducting a comprehensive assessment of judicial integrity and capacity in the three pilot states (Borno, Delta and Lagos), based on the fifty-seven indicators agreed upon by the First Federal Integrity Meeting for Chief Judges. This assessment was aimed at producing a clear and coherent picture of the country's current condition with respect to the (1) levels, locations, types and costs of corruption in the justice system, (2) the institutional structures that encourage corrupt practices and (3) possible remedies for corruption within the justice system. The assessments would also provide the baseline for the monitoring of the judicial reform programme.

For this purpose an assessment methodology was designed including: (i) *a desk review* regarding corruption in the justice system; (ii) *surveys* of a total of 5776 judges, lawyers and prosecutors, court users, court staff and the business community, (iii) *an assessment of the legal anti-corruption framework*, including the Anti-Corruption Act 2000, the Criminal and Penal Act as well as other relevant codes and rules, (iv) *a review of the institutional and organisational framework of the justice system*, in particular focusing on its vulnerability to corrupt practices; and (v) *an assessment of court cases* focusing on the identification of the abuse of procedural or substantive discretion. In November 2002, the first draft of a technical report was submitted and is currently being revised and improved by the Institute. It would appear that local consulting and research capabilities on court-related matters are not in abundance in Nigeria. The National Institute of Advanced Legal Studies encountered a number of difficulties in identifying and securing the necessary specialized expertise required for processing and analyzing this sizeable data set.

STATE INTEGRITY MEETINGS FOR THE JUDICIARIES OF BORN, DELTA LAGOS, SEPTEMBER 2002

Three State Integrity Meetings for the judiciaries of Borno, Delta and Lagos State were conducted in September 2002. The meetings, which were attended, by a broad based group of stakeholders in the justice system established detailed

action plans delineating measures within the broad areas identified at the First Federal Integrity Meeting for Chief Judges.

Action plans developed by the State Integrity Meetings

More specifically the meetings identified actions to (i) improve access to justice, (ii) increase the timeliness and quality of justice, (iii) enhance public confidence in the courts, (iv) establish an efficient, effective and credible complaints system, and (v) enhance co-ordination and collaboration throughout the criminal justice system.

ACCESS TO JUSTICE
Improve daily cause-list management
Publish case lists on court notice boards increasing transparency of case-management and facilitating media coverage of court proceedings
Public enlightenment through general educational statements and information in courts
Issuing and broadly disseminating an Annual Law Report
Enlighten Local Government Councils about limits of jurisdiction powers of traditional rulers
Judges to focus more intensely on dispute resolution and ADR
Judges should award realistic costs to litigants
Judges to be involved in providing legal training to Police
Judges to monitor their staff
Strengthen the maintenance culture among technical court staff
Ban non-professional touts from court premises

QUALITY AND TIMELINESS OF THE COURT PROCESS
Reduce backlogs
Reduce court delays
Judicial officers to control their own case calendars
Efficient use of case management and ADR process / Improve case flow management
Review and eventually amend Rules of Court to eliminate trial delays, to extend jurisdiction of lower courts to award compensation in criminal and civil cases.
Use of electronic trial recordings in court proceedings
Set/monitor performance standards for judges and court officials
Increase public awareness and dialogues with other justice system stakeholders and court users
Training and restraining of judges, magistrates, prosecutors and court staff
Codify Sharia law
Ensure adequate funding
Upgrade infrastructure in the 3 pilot courts
Provide basic working material and judicial information to the judiciary

STRENGTHEN PUBLIC CONFIDENCE IN JUDICIARY
Enhance public enlightenment and awareness, involving local government councils
Increase public information on bail
Appointment of Public Relations Officers of State judiciary
Judges and lawyers to maintain judicial decorum / protocol and propriety of conduct in Courtroom
Transparency of judges and court staff to be monitored by ICPC
Enhance transparency and fairness of the appointment process
Regulate lawyers fees
Review/possibly amend legislation on restitution for crime victims
Increase the use of IT and automatic court recording systems / Enhance use of IT in case management
Restore a workable legal aid system
STRENGTHEN PUBLIC COMPLAINTS SYSTEM
Implement and enforce the Code of Judicial Conduct
Install complaints and suggestions boxes in all courts / Inform public and encourage direct complaints to the courts about Police abuses
Establish a transparent, efficient and independent complaint system
Establish Court User Committee to review, analyse and follow-up on complaints
Strengthen public awareness / conduct campaign (how to make complaint, citizens rights, legal literacy)
Conduct ethics and re-orientation training for judiciary and court staff
Improve public access to the Chief Judge and the Complaints system
Define and establish partnership with ICPC
Enhance knowledge of anti-corruption legislation
Strengthen judicial independence
COORDINATION WITHIN THE CJS
Increase coordination within the CJS
Reactivation of the Criminal Justice Committee (CJC) to enhance coordination and cooperation
Conduct CJS round-tables
A.G. to be appointed immediately by the Governor (Borno)
Harmonise relevant laws and penalties
Invigorate the Bar-Bench Forum
Increase public involvement in court-related matters
Improve co-ordination police + DPP's Office (Liaison Officers)
Stop frequent transfers of investigating police officers
Commissioner of Police to attend all meetings of the CJC
Earliest possible bail in appropriate cases
Provide Black Marias to all prisons
Controller of Prisons to copy monthly prison returns to all stakeholders (Lagos)
ICPC to monitor and evaluate
Allocate sufficient funding for CJS institution's logistics requirements, incl. Black Marias to all prisons
Provide for witness allowances
Review Criminal Procedure Act and Criminal Justice Act

ESTABLISHING AND INSTITUTIONALISING THE IMPLEMENTATION FRAMEWORK

In order to ensure swift and sustainable implementation of the identified reform measures, the meetings also established an institutional framework consisting of several committees. These committees would be staffed by judges and other stakeholders of the justice system, including court users, and would be tasked with the responsibility of designing, conducting and monitoring the implementation of specific reform measures.

Implementation Committees (IC) were granted the mandate to co-ordinate and monitor the implementation of action plans. These committees involve not only representatives of the judiciary or the justice system but also non-governmental stakeholders, such as the Bar Association, the media and the Independent Corrupt Practices Commission (ICPC).[179]

Public Awareness and Training Committees (PATC) were granted the mandate to identify training needs as well as design and implement training programmes. In Borno, this Committee, which is named the Public Complaints and Training Committee is also responsible for receiving, reviewing, screening and following-up complaints, in order to ensure information sharing within the judiciary and to communicate with the public.

Criminal Justice or Administration of Justice Committees (CJAJC) were granted the mandate to strengthen co-ordination throughout the criminal justice system in the state. In most States such committees, although existent, were unfortunately dormant, unfocused or did not involve all relevant stakeholders.

Jurisdictional Review or Rules & Amendment Committees (JRRAC) were granted the mandate to review the rules and procedures of court and propose amendments.

Procurement and Purchasing Committees, (PPC) received the mandate to establish, implement and monitor procurement guidelines for the purchasing of essential items identified as part of the reform.

Court User Committees **(CUC)** were granted the mandate to improve communication and co-ordination between the courts and other stakeholders in the justice system. In some states, the Court User Committee is also responsible for receiving, reviewing, screening and following-up on various complaints.

[179] In Abuja, FCT, the Implementation Committee has been defined as Strategic Planning Centre

ACTION PLAN IMPLEMENTATION, NOV. 2002 - PRESENT

The implementation of the action plans was launched in all three States in November 2002 with the establishment of the Implementation Committees and included some of the other above-mentioned Committees. Implementation was supported by the UNODC and the German Agency for Development Cooperation (GTZ), with a total of approximately US $ 140,000 in the period between November 2002 and March 2003. Funds were used *inter alia* for purchasing electronic court recording machines, basic IT and office equipment (such as computers, printers, copy and fax machines),[180] the upgrading of court buildings, the allowances of the various committees to cover the costs of their regular meetings, the organisation of workshops and the documentation and dissemination of the proceedings documents of the three State Integrity Meetings.

SECOND FEDERAL INTEGRITY MEETING FOR CHIEF JUDGES, DEC. 2002

In December 2002, with the support of the GTZ, a second Federal Integrity Meeting for Chief Judges was conducted in order to (i) review and discuss the results of the assessment of judicial integrity and capacity conducted in the three pilot states, (ii) share action plans developed by the three State Integrity Meetings with all Nigerian Chief Judges, and (iii) brief the participants on the status of the implementation of the action plans. The Chief Justice of Nigeria, the President of the Federal Court of Appeal, and twenty-eight Nigerian Chief Judges endorsed the action plans. Following the Chief Justices' call for action, seven of the Chief Judges present, expressed their intention to immediately commence the implementation of similar reform measures within their respective states.

NATIONAL PROJECT IMPLEMENTATION SUPPORT

The ongoing judicial reform initiative, both at national and state levels, has also received significant support from various national institutes. Apart from the judiciary, implementation has benefited from generous contributions made by the State Attorney Generals, the Police, Bar Associations, the Academia, the National Judicial Institute, the Nigerian Institute of Advanced Legal Studies, the NGO community and the Media

A key partner in the implementing of the judicial reform initiatives has been the Independent Corrupt Practices Commission (ICPC). The Chairman of the ICPC, members of the commission and several senior staff have been closely involved in the implementation of all activities carried out under the UNODC judicial integrity project, as well as some of the activities sponsored by the USAID funded

[180] For each of the pilot states the following equipment was purchased: (i) one PC/R-/1600 - Canon Digital Copier, one PC metal stand, (iii) one box CEX V5 toner, (iv) one PC 2KVA voltage stabiliser, (v) one ream - A4 size paper (vi) four nos. 15" monitors, (vii) four nos. 650 VA UPS, (viii) three nos. HP LJ 1000 W, (x) three VSB cable; (xi) four in cable, (xii) one fax machine (PCK X FP81); (xiii) one fax machine (PCKX - FP85); (xvi) one PC N640P Canon scanner; (xv) four CPU's, and three electronic recording systems (for Lagos only).

National Centre for State Courts. In the long run, it is planned that ICPC, as a part of its mandate, will increasingly take over the judicial integrity and capacity issue and become the focal point for supporting the Nigerian Judiciary in strengthening judicial integrity and capacity. The ICPC has already taken up random monitoring of the performance of judges.

In addition to its investigative and prosecutorial functions, the ICPC has the mandate to work with government institutions, including the judiciary and civil society, in building solid partnerships to tackle corruption and build integrity systems. As a former President of the Federal Appeals Court, the Chairman has first hand knowledge of the challenges facing the judiciary and possesses a profound understanding of judicial integrity, independence and accountability.

The Chairman of the ICPC was invited to the First and Second Federal Integrity Meeting for Chief Judges as a key speaker and was instrumental in addressing important reform issues to the judges. The fact that the CJN invited the ICPC, as an independent watchdog to form part of the reform process proves the firm commitment and willingness of the Nigerian Judiciary in promoting judicial integrity.

The agency's close involvement in the implementation of the project, in particular, in some of the more "generic" activities, such as Integrity Meetings, the development of ethics training as well as several awareness raising initiatives, has also helped prepare the ICPC in its dealings with the legislative and the executive bodies.

A. KATSINA STATE; ANTI CORRUPTION ACTION PLAN

1. IMPLEMENTATION FRAMEWORK	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
1. **Institutionalizing the Implementation Framework**					
- Implementation and Coordination Committee (ICC) - Public Complaints Committee, (PCC) - Court User Committee, (CUC) - Performance monitoring and Evaluation Committee (PMEC) - Administration of Justice (or Criminal Justice Coordination Committee) (AJC) - Public Awareness and Training Committee (PATC) - Rules Amendment Committee (RAC)		CJ CJ Cj CJ CJ CJ Cj CJ	Immediately Immediately Immediately Immediately Immediately Immediately Immediately immediately	Minimal Minimal Minimal Minimal Minimal Minimal Minimal Minimal	- For all Committees: - committee estbl. - TOR distributed: - Regular meeting - Quality of minutes
2. TOR and Secretariat					
All subcommittees will develop Terms of Reference distributing the tasks established under the action plan. All subcommittees will appoint a secretary and establish a secretariat.		ICC, PCC, CUC, AJC, PATC, RAC UNODC	Immediately Immediately	Minimal Staff cost	
3. **Reporting to the ICC**					
All subcommittees to prepare and submit minutes latest 5 working days after the meeting (with copy to UNODC).		PCC, CUC, AJC, PATC, RAC		Minimal	
4. Reporting of the ICC					
Based on minutes submitted by the sub-committees, ICC to prepare monthly report to be submitted to CJN (with copy to UNODC).		ICC		Minimal	
5. Select Pilot Courts					
- High Court No. 1 - Magistrate Court No.1 - Sharia Court No.2		CJ, ICC CJ, ICC CJ, ICC		**Nil**	
ACCESS TO JUSTICE					
6. Reduce costs of accessing the courts					Perceived access to justice by the public
Provision of free legal aid should be among the criteria for appointing lawyers into higher offices in the Judiciary	14.0	CJ, JSC	July 2003	Nil	
Government to offer token fees to lawyers, who take up pro bono cases	14,0	AG, PAC Com (Bar)		TBD	Government to provide funds
Corps members to assist indigent litigants as part of their community development program.	14,0				
Reconsider filing fees and eventually amend rules of the court		RAC	Sept. 2003	Nil	
Establish scale for filing fees for Sharia Courts		RAC		Nil	
Consider the introduction of an legal aid clinic		ICC, NBA, NGOs, Univ.			
Strengthen legal aid council		CJ, ICC, Legal Aid Council		TBD	Reported legal aid cases
Localize legal aid: (i) need for sufficient support (ii) need to mobilize NGO's; (iii) need to employ new lawyers for the legal aid council	11.2	FG MOF NBA		Recurrent budget	
The bar should monitor guidelines on charges for lawyers (to be raised by AJC) Publish scale for lawyer fees in all courts in Katsina		AJC, NBA		NIL	Compliance with scale for lawyer fees.

A. KATSINA STATE; Anti Corruption Action Plan

MEASURES TO ENHANCE ACESS TO JUSTICE	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
7. Adoption of local languages in proceedings	**9**				
Study legal framework governing the language of the Court in the Sharia, Magistrate and High Court and prepare report. Submit report to AG including eventual proposal for amendments of the law.		RAC RAC	August 2003 September 2003	Minimal	Increased use of local language in court proceedings
- Depending on the findings and recommendation of the Report, CJ/ AG to develop a proposal to introduce adequate languages in the courts. - Submission of proposal to the appropriate Organ		CJ/AG CJ/AG/RAC			
3. MEASURES TO ENHANCE QUALITY AND TIMELINESS OF THE COURT PROCESSS					
8. Decentralization of police investigation	9,16				
CJ, with the support of NBA, should recommend to the AG to discuss issue with CoP to keep investigations in locus of criminal offence.		CJ, NBA, CoP	July 2003	Nil	Speed of investigation. No repetition of same investigative steps. Reduce cost for witnesses
9. Time limit for filing charges and the providing legal advice by MoJ	**9,25**				
To establish by law or practice a 30 days time-limits as of receipt case diary to file charges or provide legal advice, failure upon which suspect will released on conditional bail.		CJ, RAC, MoJ	End 2003	Minimal	Law or practice on time-limit for legal advice established
CJ to recommend to AG to propose bill.		CJ, RAC, AG			
NBA to lobby for such a law		NBA			
10. Monitoring Judges for sitting on time	**9**				
CJ, Chief Magistrates to monitor and enforce the sitting on time of judges		CJ, chief Magistrates, PMEC	Immediately	Nil	Speeding up the trial, increase trust and respect for the court
Enlighten Public on official sitting times by judges and invite complaints		PATC	Immediately	Minimal	Compliance of Judges with sitting times
11. Prevent interference of magistrates and police in civil matters	**9,04**				
- CJ to instruct Magistrates to refrain from handling civil matters for which they do not have jurisdiction. - AJC to recommend to the CoP to instruct police to refrain from handling civil matters for which they do not have jurisdictions. - AJC to recommend to the NBA to instruct lawyers to refrain from disguising civil matters as criminal ones with the aim of filing the case with courts that do not have jurisdiction.		CJ, AJC, CoP, NBA	Immediately	Nil	Speed up dispensation of civil matters
12. Immediate granting of bail in all minor cases	8,16				
CJ to advised all judicial officers to grant bail in all minor cases immediately, Art.341 Subsect. 1 C.P.C.		CJ	Immediately	Nil	Reduced Number of long remand cases
13. Encourage judges to sit in prisons in accordance with the Prison Act	**8,91**				
Comptroller of Prisons to inform Administration of Justice Committee Members of Prison Act providing for the possibility of court sitting in prison premises.		CoPris., AJC	July 2003		Number of Judicial officers sitting regularly in court
Administration Justice Committee, to communicate recommendation to Divisional Committees		AJC	August 2003		

A. KATSINA STATE; Anti Corruption Action Plan

3. Measures to Enhance Quality and Timeliness of the Court Process	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
14. **Law report of High Court and Sharia Court of Appeal Decisions to be published**	**9,75**				
Collect court decisions and publish.		PATC	2004	US $ 10.000/annually	Increase quality of justice delivery.
15. Ensure Adequate Funding of the Judiciary					
Raise need for financial independence with Federal and State Legislator					
In the interim lobby for the judiciary to be part of the allocation decision process		ICC, NBA, AG			
Develop comprehensive 5 years budget for the judiciary		ICC			
Financial Resources should be released immediately following the appropriation		ICC MOF State/Federal			
16. Law reform					
Establish the Rules Amendment Committee (RAC)		CJ, MoJ, JSC, NBA, House of Assembly		Sitting allowances 20,000/ meeting	
Review: - High Court Civil Procedure rules - Magistrate and District Court rules - District Court rules - Criminal Procedure code		RAC	August 2003	Nil	
- RAC to review Rules and Procedure recently adopted by other Nigerian States. - RAC to come up with a suggestion for eventual changes of the laws focusing on simplifying procedural law, extension of jurisdiction of lower courts, of court language, etc. - CJ to recommend to the Law Reform Commission (LRC) the laws which should be amended. (Private citizens can also propose amendments to laws through elected representatives)	15.5	RAC, CJ, LRC, AG House of Assembly	September 2003	5 Mio	
Production First Draft		RAC	N500,000 for 500 copies	April 2004	
Workshop on the Proposed New Rules		RAC	N200,000	June, 2004	
Production of Final Draft		RAC	N500,000 for 500 copies	July, 2004	
Submission to House of Assembly		Min. of Justice	No cost	August, 2004	New Rules adopted
17. Provide Working and Reference Materials to the Judiciary					
- PATC to conduct need assessment for working and reference materials in particular of the pilot court (High Court No.1, Magistrate Court No.1 and Sharia Court No.2) - Increase the availability of resources including reference materials in the lower courts and pilot courts based on the needs assessment		PATC, State Gov. UNODC	August 2003	TBD	

A. KATSINA STATE; Anti Corruption Action Plan

MEASURES TO ENHANCE QUALITY AND TIMELINESS OF THE COURT PROCESSS	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
18. Train and retrain judicial officers and court staff					
- PATC to identify training needs of judicial officers and submit to CJ, UNODC, NJI and international donors. - Expose judicial staff to modern trends in court and case-management.	16.4	PATC, University, NJI, Donors	Immediately	20 Million	
Court staff: training should include record keeping, receiving and filing of complaints, professional ethics & Code of Conduct Court staff: introduce and enforce a code of conduct for court staff		IGP/DPP I&CC ICC			
19. Train Police Prosecutors					
- PATC to make develop a curriculum for the training of police prosecutors. - PATC to assist CoP in conducting practical training for police prosecutors,		PATC, CoP, UNODC		October 2003	Training curriculum developed. Number of Police Prosecutors trained.
20. Improve case-management					
- RAC to deploy two committee members to review case management models of Lagos , Abuja and Katsina. - PATC to submit report to ICC. - Establish new case-management system		PATC, UNODC PATC, ICC, CJ, ICC		TBD	More efficient case management system adopted.
4. MEASURE TO ENHANCE PUBLIC TRUST IN THE COURTS					
21. Establish Public Awareness and Training Committee and a Court User Committee					
Court Users Committee: - Membership: CJ-Chair, Judges - NBA, Legal Aid, Traditional, Religious, Community leaders. Trade Unions, NGOs, Women Rights - Organization, A/G office, Prisons, Police.			Monthly	40,000	
Draft TOR for Court User Committee					
Public Awareness Committee Membership: Min. of Justice, NGO, CJ, CR, JSC, NBA, NGOs/Donors			June 2003	20,000 copies at N500,000	
Establish Public Relation Unit in the Judicial Divisions (5 Judicial Divisions will cost)		CJ, PACT, CR, DCRs	N1million	July, 2003	
22. General Enlightenment/awareness campaign	**16,7**				
- Prepare concept paper on radio/ tv program and jingles, including content, costs and select programme moderator. - Record 12 30 min programmes.		ICC/PATC/Min. of Info./ KR TV/ LEPAD, MOI PATC, donors	November 2003	N. 600,000 for 1 year	
Develop Reach Out Program (Places of Workshop, Schools Debate/Quiz)		PACT, MOE, Clergy, Donors, NGO	N100,000	Sept 2003	

A KATSINA STATE; Anti Corruption Action Plan

MEASURE TO ENHANCE PUBLIC TRUST IN THE COURTS	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
23. Targeted Awareness Campaign for stakeholders					
Advocacy through traditional and religious institutions and NGO's	16.05	State govt. Judiciary, NGOs, ICPC & NHRC, CUC, trad. and rel. leaders	Aug 03	15 million	
Organization of a annual the Bar, Bench and Public Forum	16	CUC, NBA, Public & others	Annually,	N100,000	
Awareness Raising Posters to be distributed to court houses, schools and other public places		ICC/PATC	July 03		
Use Print Media to raise awareness, in particular to prepare regular press releases for the Newspapers		ICC/PATC	July 03		
Launch quarterly Newsletter		Public Relation Unit, PACT	N100,000 per issue	September, 2003	
24. Targeted awareness campaign for the youth	**10.3**				
Play and drama Civic training- develop training material for civic teaching in schools Essay competition to raise awareness about corruption		ICC/PATC/ Min of Edu./ School Principles, Students	Oct. 2003	**TBD**	
Prepare in close cooperation with stakeholders a concept paper on an essay competition		ICC/PATC/ MOE./ School Principles, Students	Aug 03		
25. Enhance Performance Monitoring	**14,9**				
Establish Performance Monitoring and Evaluation Committee, (PMEC)					
Establish performance standard Ensure effective monitoring of standard		PMEC, CJ, GK,AG,and CR PMEC CJ, GK and AG	,, ,,	Minimal ,,	
5. MEASURE TO ENHANCE PUBLIC TRUST AND EFFECTIVENESS OF THE COMPLAINTS SYSTEM	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
26. Establish complaints system					
- Establish a broad based Public Complaints Committee (PCC) involving ICPC, Judicial Service Committee and Sharia Court Directors, NBA, NGO's - Conduct Inauguration Meeting - Define Terms of Reference for the adoption by the ICC/ CJ	10.1	CJ, ICC ICC/PCC ICC	June 03 July 03 July 03	Nil	PCC established, Regularity of the Meetings, TOR adopted
Design Procedural chart for the handling of complaints		PCC	August 03		
Consider Decentralization of the complaints system each zone should have their own complaints system and complaints committee,	10.9	CJ/ICC/PCC	July 03	Low cost	
Introduction/ reinvigoration of the complaints system for court staff.		PCC	Sep 2003	Low costs	
Establish Computerized Complaint Registry at the High Court Needs assessment regarding categories (e.g Code of Conduct, ICPC Act, Dissatisfaction with court decisions, (2) Revocation of bail; Delays in the trail process; (3) Lack of fair hearing; (4) Late sitting by judges; (5) Corruption, (6) Incompetence; (7) Abuse of discretion; (8) Nepotism; (9) others) Computer program being developed	10.7	PCC, CJ, UNODC, ICPC	August 2003 Oct. 2003		
Install Petition and Complaints Boxes in all the courts and prisons (with locks and indication for next emptying)	10,1	PCC, ICC, CJ		Medium	
Consider establishment of alternative complaint mechanism e.g. by special interest groups and NGOs		PCC, Special interest groups/NGOs		TBD	

A. KATSINA STATE; Anti Corruption Action Plan

MEASURE TO ENHANCE PUBLIC TRUST IN AND EFFECTIVENESS OF THE COMPLAINTS SYSTEM	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
27. Enforce the Code Of Conduct					
Empower the Public to complain Educate the public about their rights Explore the creation of a Whistle blower act Traditional institutions and religious bodies should be included	10.0	PCC, ICPC, MoJ	2004	None	
Enhance compliance with the code of conduct Awareness raising among the judicial staff generally Know your rights radio and tv (see above) Ethics training (see below) Complaints/ suggestion boxes in court premises (see above) Complaints procedure (see above)	10.1	UNODC			
Ethics training Syllabus for the training on ethics Three workshops have been held with the NCSC Training the trainers procedure 10 trainers over a three day period Judges and magistrate – one day	10.8	ICC CJN CJ NJI NCSC (USAID) UNODC	Ongoing	About N500,000	
28. Review Code Of Conduct	**16,0**				
Code of Conduct Committee (JCCC)		JSC, Min. of Justice, NBA, CJ	No cost	July,2003	
Preparation of Comprehensive Code of conduct for Judicial and not judicial staff		JCCC, Min. of Justice, JSC, NGO and Donors	N2000,000	July/Aug, 2003	
Production of First Draft		JCCC	N50,000	Sept, 2004	
Workshop on the Draft Code		JCCC,JSC, Min. of Justice, NBA, NGO/Donors	N100,000	October, 2004	
Production of Final Copies Distribution		JCCC	N50,000	Nov, 2004	
Practice Directions		Chief Judge	No cost	Nov, 2004	
6. MEASURES TO ENHANCE COORDINATION ACROSS CRIMINAL JUSTICE SYSTEM (CJS))	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
29. Strengthen efficiency of Administration of Justice Committee (AJC)	**14,1**				
Minutes of meetings should be prepared & distributed to all stakeholders within 5 working days. 2 Extract of decisions to be implemented should be forwarded to all heads of relevant stakeholders. 3 Follow up actions to be taken by relevant officials. 4 Feedback on the state of implementation to ICC		Secretary of the AJC Secretary & AJC Chairman Heads of various Stakeholders Secretary & Chairman or CJ	Immediate (Short term)	Minimal	Enhanced Transparency and swift implementation of AJC decisions
Ensure monthly meetings of the AJC Meetings to be hosted by the AG	15,2	CJ/AG			
30. Enhance collaboration between Bar and Bench					
Launch quarterly Bar Bench Forum providing a platform for exchange of common problems in the administration of justice and development of solutions.		Chief Judge, HC Judges, Magistrates and Sharia Court Judge, NBA	August, 2003 (quarterly)	Minimal	

A. KATSINA STATE; Anti Corruption Action Plan

MEASURES TO ENHANCE COORDINATION ACROSS CRIMINAL JUSTICE SYSTEM (CJS)	Priority	Who is Resp.	Starting date	Cost	Impact Indicators
31. Enhance collaboration between DPP and Police	**14,3**				
Ensure DPP host monthly meeting between his office and Police. Extract of decisions to be implemented be forwarded to stakeholders. (CJ, AG and COP). AG should provide funding for hosting the meetings		AJC, DPP and COP Secretary and DPP AG	August 2003 (monthly)		
Restrict/ coordinate transfer of police prosecutors and IPO's who have cases pending in court		AJC, DPP, CoP			
CoP to explore the setting up of a special branch in DPP established solely for public prosecution		AJC, CoP, DPP			
32. Enhance Integrity and Effectiveness of the Police					
Police to introduce and enforce code of conduct					
AJC to review current professional standards governing police.		AJC, CUC			
Prepare a report on the current corruption and integrity challenges. and propose countermeasures including a Code of Conduct		AJC, CUC			
Introduce/ strengthen the complaint system		AJC CoP			
Police; explore the restructuring of the command hierarchy		AJC, CoP, IGoP			
33. Enhance Integrity and Effectiveness of the Prison Services					
Prison Services, with support of AJC committee identify needs for changes in the Prison Act.		AJS, CoPris.			
Prison Services with support of AJC and HRC to identify needs for Prison Reform		AJS, CoPris.			
Prison Services to develop and enforce a code of conduct of prison staff		AJS, CoPris.			
Prison Services to introduce a complaints system within the prisons		AJS, CoPris.			

CASE STUDY #20

UGANDA: INVESTIGATIVE JOURNALISM TRAINING WORKSHOP

Although the economic recovery of Uganda has received widespread recognition, that cannot disguise the fact corruption continues to be a major negative force in society, and that it has the capacity to destabilize its political and economic future.

That risk was officially recognized by the National Resistance Movement (NRM) Government after it took office, through the establishment of the Office of Inspector-General of Government (IGG). That office has, and continues to play, a crucial role in investigating corruption

OBJECTIVES

The objectives of the workshop to train investigative journalists, and the two follow-up workshops in November 1995 and March 1996, were to strengthen the skills and effectiveness of journalists in Uganda in discharging their public interest functions of:

- Raising public awareness and understanding of the damage done to the public interest by corruption; and
- Exposing individual instances of corruption, thereby strengthening the ability of the media to serve as an instrument for transparency and accountability in a democratic society.

Specifically, the workshop aimed to:

- Promote professional awareness and insight into the issues of corruption;
- Promote a sense of commitment and responsibility in investigative journalism;
- Encourage self-regulation within the journalism field by developing an appropriate code of conduct (including, inter alia, provisions for the right of reply and apologies);
- Deepen understanding of professional techniques for obtaining information in a way that is ethical, respects personal privacy, checks references and avoids litigation; and
- Raise the awareness of journalists of the civil service reform programme and its impact on the welfare of the country.

To achieve the objectives, the first Investigative Journalism Workshop was held on a residential basis for one week. It brought together a group of approximately 30 working journalists, as well as a variety of people from Uganda and other countries. Lecturers who stimulated discussion with provocative questions, and allowed the participants to find their own answers, encouraged active

participation. Some role-playing and written work were involved in the practical sessions.

ORGANIZATION OF THE WORKSHOPS

Partner Institutions

The partner institutions for the programme were: the Inspectorate of Government, the Government of Uganda; DANEDUC (a Danish Education Association); and Transparency International-Uganda.

Participants

The 30 investigative journalists attending the workshop were all members of the Uganda Journalists Association and represented a wide variety of newspapers and publications throughout Uganda.

Course Themes

The first course in the series of three investigative journalism workshops covered the following themes:

- Corruption and the Need for Transparency and Accountability;
- Corruption and its Impact on Ugandan Society: Are there any Arguments in Defence of Corruption?;
- The Ethics of Journalism;
- Civil Service Reform and its Role in Containing Future Corruption;
- Investigative Journalism: The Dual Role of the Media and the Civil Service;
- Responsibilities of the Government, Media and Public in Combating Corruption;
- Anti-corruption Legislation in Uganda and its Improvement;
- Role of the Inspector General of Government (IGG) and Auditor General;
- Role of the Parliamentary Committees;
- Role of the Director of Public Prosecution and the Police in Crime Prevention;
- Law, Truth, and Defamation;
- How effectiveness can the media be?

Maximized Interviewing, Reporting, Editing

Programme Outputs and Impacts

This series of three workshops on investigative journalism in Uganda was designed to increase journalistic skills in exposing corruption and its effects on the public welfare. In strengthening the ability of the media to promote transparency and accountability in Uganda, it is hoped that the comprehensive civil service reforms undertaken by the Government of Uganda will find greater support and understanding from those Ugandan citizens wishing to contribute to a democratic society.

REPORT ON DISTRICT JOURNALISM WORKSHOPS[181]

Several observations resulted from the training courses. A major observation was the need to offer similar, affordable training to journalists who work away from capital cities. A proposal was therefore made to hold one-day regional workshops for local journalists working in the districts. A local Ugandan training consultant would be identified to travel to each site and act as the lead facilitator. Materials already developed by the World Bank Institute would be used in the training sessions and local leaders would be invited to speak at them.

The aim of the workshops would be to sensitize local journalists about the dangers of corruption. In view of current policy in Uganda to decentralize Government services, journalists working in the districts would play a tremendous watchdog role. Decentralization had already resulted in the decentralization of much corruption in Uganda, and that posed an even greater challenge to journalists working in those areas, many of whom, it was learned, lacked adequate training.

The workshops were designed to open with an address from a local leader, followed by a keynote address on the problem of corruption. The local trainer would then teach about the basics of journalism, ethics, and the challenges of rural reporting. A discussion session would be included to allow the participants to exchange experiences.

It was planned to conduct 10 workshops between August and October 1999, at a cost of about USD1,500 for each workshop. That sum would cover meals, rental expenses for the training rooms, travel reimbursement, local facility fees and stationery.

The first workshop was held in the Mukono District and brought together over 30 local journalists. The lesson learned from the workshop was that even more journalists lacked training than had been anticipated. Many of them were school dropouts, for whom journalism was the only opportunity to acquire some sort of basic training.

Other workshops were later held in Jinja, Mbale, Soroti, Lira, Arua, Masaka and Kampala. Around 50 people wished to attend the Mbale workshop, which meant that some had to be sent away. It emerged, however, that considerably higher costs were involved in conducting the workshop in distant places such as Arua and Lira. It was impossible to hold the remaining courses planned.

The following lessons were learned from the workshops:

- That there is an overwhelming need for cheap, effective training;
- That most of the Ugandan rural journalists have no basic training. In one instance in Soroti, a local Chief was also the local journalist, raising serious ethical questions as well as conflicts of interest;
- That local-level journalism in Uganda is still a profession for some with " nothing else to do";
- That reporters working in rural areas face unique challenges, ranging from poor communication to absolute lack of basic skills;

[181] In some countries, human rights protections limit the use of general inspections or require additional procedural safeguards once a crime is suspected.

- That following the liberalization of the media, the local journalists form the majority of reporters working for radio programmes and other media in Uganda. Yet they are ill trained.
- That it is possible to recruit local trainers and send them to spend a few days to provide training on basic skills to local journalists;
- That further training is needed if the level of professionalism of rural journalists is to improve;
- That it is possible to provide training in simple situations. For example, in most cases, inexpensive classrooms were used, local cooks were hired to prepare the meals, and the participants were reimbursed the bus fares incurred to attend the workshops. In some cases, however, accommodation expenses had to be covered for participants travelling from distant areas;
- That courses should be linked with other ongoing anti-corruption activities, as was confirmed by speeches made by local officials, that invited the journalists to collaborate with them more actively in fighting corruption.

In early October 1996, further funds were requested to organize a final workshop in Kampala. Kampala has almost 200 journalists and the first workshop covered around 30 of them. The second workshop was held at Pope Paul Memorial Center on 11 November 1996 and attracted some 36 journalists.

During that workshop, it was decided to address the ongoing interest in building coalitions between various actors. The Director of Public Prosecutions, Mr. Richard Buteera, who participated in the Core Course on Controlling Corruption, made a keynote presentation on building coalitions and then engaged in discussions. It was the first time that a Director of Public Prosecutions had engaged in a discussion on building coalitions with Ugandan journalists, and that was considered a great step forward.

The following needs resulted from this experience:

- To follow up the training workshops with a second series of workshops, partly to keep the momentum and also to build on more skills;
- To introduce a component that discusses the modalities of coalition building between participants and local government leaders;
- Further training that could be designed in a similar way, and remain cheap and effective;
- Certificates of attendance for participants to confirm their participation in the workshops.

CASE STUDY #21

VENEZUELA: PROGRAMME TO ACHIEVE EFFICIENT, ACCESSIBLE AND TRANSPARENT MUNICIPAL GOVERNMENT

BACKGROUND

The municipality of Campo Elias (Venezuela) has an area of 572 sq. km and a population of 20,000, of which 89 per cent is urban and 11 per cent is rural. In 1998, it was estimated that 39 per cent of the population was living below the poverty level. In the past, corruption had affected the provision and maintenance of services, and thus the quality of life in Campo Elias.

NEEDS ASSESSMENT

A survey conducted in July 1998 by the World Bank Institute (WBI), showed that the administrative and regulatory framework in Campo Elias generated confusion and was inaccessible to the general population. Because of unpredictable procedures and the duplication of functions, there were no accountable or transparent institutionalized methods for the provision of public services. The lack of accountability and the unregulated discretionary behaviour of local officials only incentivized corruption.

Public and private financial systems, as well as the public procurement system, were all vulnerable to corruption. Citizens often believed that bribery was the most effective way to request and receive services, and they viewed the public sector as an institution not for public service but for personal enrichment. Moreover, citizens were not motivated to participate in the public sector because they judged such participation to be a utopian impossibility.

ACTION PROGRAMME

The programme, implemented in April 1998 and completed in December 1999, was designed to help encourage an efficient, accessible and transparent municipal government in Campo Elias. To achieve such goals, the joint efforts of WBI, the municipal government and civil society were required.

The role of the social control board

A social control board, composed of four members of civil society elected by workshop participants, was equipped by World Bank technical advisers with the knowledge and skills needed to implement a reform strategy in Campo Elias. The Bank funded the hiring of a technical coordinator in charge of advising the government on what reforms were needed and how and where to implement them. The working groups themselves identified and confirmed the existence of critical problem areas, such as the lack of information and accountability in public policy making and the overly complex regulatory framework. The groups, composed of members of civil society and government officials working together, identified the problems, discussed what reforms were needed and defined expected results. All operational funds allocated to the activities were covered by

the local government; the positions of the four members social control board were pro bono.

The implementation of the action plan

An action plan was successfully implemented. It included technical assistance from the Bank to enhance accountability, transparency, cost-effectiveness and credibility in the delivery of services. To achieve those standards, the following instruments were implemented:

- Simplification of administrative procedures, including the implementation of procedural manuals;
- Neighbourhood Public Audiences;
- Public Municipal Session on the Budget,
- Public Accountability Committee,
- Communal Control and Fiscalization Committee,
- Local initial integrity assessment workshops.

It was an exciting initiative where, in essence, the citizens of Campo Elias developed the entire action plan, making them an integral part of the programme and giving them a major incentive to implement reform. They were indeed true stakeholders.

CASE STUDY #22

BATHO PELE MEANS “PEOPLE FIRST”

BACKGROUND

After the first democratic election held in South Africa in April 1994, the new South African Government had to face great challenges. A new constitution had to be drafted and the divided country, previously dominated by Apartheid, had to be reconstructed both socially and economically.

In trying to transform the public service, the Government faced a huge and urgent task. Thus, it proposed a programme to improve public service delivery and thereby fight corruption in public life. The programme, which aimed to grant all citizens the same rights as far as public services were concerned as well as bring a sense of morality into public life, was called "Batho Pele".

Batho Pele is a Sesotho phrase and means "People First". The Batho Pele White Paper, issued by the South African Government, called upon each department of the public service to encourage its various branches to provide a better service; it proposed clean-up initiatives, such as a review of rules and regulations, introduction of a new value system and code of conduct for public servants to provide a meaningful framework for an anti-corruption strategy to improve integrity in the public sector. In its own words: "The purpose of this Batho Pele White Paper is to provide a policy framework and a practical implementation strategy for the transformation of Public Service Delivery".

On 24 November 1995 the white Paper on the Transformation of the Public Service was published. It was not about "what" services were to be provided, but "how" they were to be provided. Intrinsic to that notion, however, was the understanding that the Batho Pele approach would also improve what was to be delivered and would provide information about whether standards of services were being met in practice".

THE BATHO PELE PRINCIPLES

The Batho Pele philosophy is based on eight principles:

- Consultation;
- Service Standard;
- Access;
- Courtesy;
- Information;
- Openness and Transparency;
- Redress; and
- Value for Money.

Consultation

"Citizens should be consulted about the level and the quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered."

Consultation means asking the customers what their needs are and the best way to meet them. There are several ways of doing that but it is essential that consultation should include all people.

"The results of the consultation process must be reported to the relevant Minister/MEC/ executing authority and the relevant Portfolio Committee and made public." and "the results must be widely publicised" .

That means an institutional check on the consultation process as well information exchange between the Government and the institutions.

Service Standards

"Citizen should be told what level and quality of public services they will receive so that they are aware of what to expect"

Thus, the service standards are focused on customer needs. Moreover, it is important to set service standards at a demanding but also realistic level. The services should be customer-focused and should always be measurable. A regular measurement is needed; the performances should be measured and published at least once a year. A set and published standard may not be reduced. If the standard is not met, the reason must be explained. The standards should be progressively raised year after year.

Access

"All citizens should have equal access to the services to which they are entitled"

Everyone should be able to access public services, in other words, all departments are required to facilitate access and to progressively increase access to their services. Different factors affect access. One is geographic. Distance is a problem when there is lack of infrastructure. Language is a problem, as are social, cultural, physical communication; and attitudinal barriers should also be taken into account. Progressively reducing those barriers is an important way of facilitating access to the public services.

Courtesy

"Citizen should be treated with courtesy and consideration"

The concept of courtesy is more than a polite smile and a "please" and "thank you". The existing Code of Conduct for Public Servants issued by the Public Service Commission is an important document that makes clear what courtesy means. All the departments should adopt a code of conduct according to the

Batho Pele principles. It is important to give a warm and friendly service to

Citizens' Charter	Batho Pele Principles
Standards: Explicit standards must be published and monitored. This is the service which individual users can reasonably expect. Performance against those standards must also be published.	**2. Service Standard** Explicit standards must be published and monitored. This is the service which individual users can reasonably expect. Performance against those standards must also be published.
Information and Openness: Full and accurate information must be made readily available in plain language about how the service is run, what it costs, how it performs and who is in charge.	**5. Information** "Citizens should be given full, accurate information about the public services they are entitled to receive" **6. Openness and Transparency** "Citizens should be told how national and provincial department are run, how much they cost, and who is in charge"
Choice and consultation: Where ever possible choice must be provided. There must be regular and systematic consultation with users, and their views must be taken into account before final decisions are reached on standards.	**1. Consultation** "Citizens should be consulted about the level and the quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered."
Courtesy and helpfulness: Public servants must be courteous and provide helpful service. Services are available equally to all who are entitled to them and must be run for their convenience.	**4.Courtesy** "Citizen should be treated with courtesy and consideration"
Putting things right: Public servants must be courteous and provide helpful service. Services are available equally to all who are entitled to them and must be run for their convenience.	**7.Redress** "If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy: and when complains are made, citizens should receive a sympathetic, positive response"
Value for Money: Services must be efficient and economical, within the resources the country can afford. Independent validation of performance against those standards must be made."	**Value for Money** "Public services should be provided economically and efficiently in order to give citizens the best possible value for money"

everyone and monitoring the relationship between the front-line staff and the customers is also very important. Future training programmes and additional training are necessary to achieve a progressively increasing standard of courtesy.

Information

"Citizen should be given full, accurate information about the public services they are entitled to receive"

Everyone must be provided with information; all should be kept well informed. An information strategy should take into account the difficulties of distributing information, such as language problems and customer differences. There are a number of ways of achieving this goal, for instance through the media, posters and leaflets. The delivery location is also important; schools, shops and libraries, for example, are ideal. It is also important to provide a name and a contact number for people to obtain further information and advice.

Openness and Transparency

"Citizens should be told how national and provincial departments are run, how much they cost, and who is in charge"

Openness and transparency are key to building confidence and trust between the public sectors and the people. To achieve this goal an annual report to the citizens is required. Of course, the annual reports should be published as widely as possible. Other initiatives such "open days" are also important to build the necessary trust and confidence. The idea should be to keep people informed as to what is going on and how the public sector is working. In a word, to bring the people closer to public life.

Redress

"If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy: and when complains are made, citizens should receive a sympathetic, positive response"

It is essential to take action when thing are going wrong. That is why complaints are welcomed as they allow things to be put right. The Batho Pele principle of redress is a new approach to handling complaints. Through mistakes it is possible to learn and to offer a better service. It also necessary to improve the complaints system in line with the following principles:

Accessibly:

The complaints system should be widely published and easy to use

Speed;

It should be quick. The longer it takes to respond, the more dissatisfied the citizens will be.

Fairness;

Every complaint should be fully and impartially investigated.

Confidentiality;

Confidentiality is an important factor so that the complainant will not feel that, next time, he will be treated less sympathetically.

Responsiveness:

it is important to consider every complaint. If there has been a mistake, the reaction should be as quick as possible. An apology and a full explanation are important responses as is the capacity to remedy the mistake swiftly.

Review;

making changes when things do not go well can prevent future mistakes and failures.

Training;

It is important to educate staff to handle complaints so that they will know how to manage a difficult situation in a better way.

Value for Money;

"Public services should be provided economically and efficiently in order to give citizens the best possible value for money"

To eliminate waste and inefficiency in the public sector it is important to save money and improve the services. Costs should be minimized, however, but not at the expense of poor service. Eliminating waste and inefficiency is one way of reducing fraud and corruption.

COMPARISON WITH UK COMMITTEE

Drafters of the United Kingdom "Citizens Charter" posited two key objectives in the management of the Civil Service:

"To promote a better government [….]

To maintain and enhance professional and ethical standards of the Civil Service and non departmental public bodies and to promote high standards of accountability and openness in the wider public sector."

The Batho Pele principles are quite similar to British charter. Not only is the goal the same, but the principles involved are almost the same:

In the Batho Pele principles are two further points:

Access

"All citizens should have equal access to the service to which they are entitled"

Information

"Citizens should be given full, accurate information about the public services they are entitled to receive"

One must take into account here that South Africa was, at the time the Batho Pele principles were drawn up, facing problems that occurred with the end of the Apartheid and the institution of a democratic Government. The Government Gazette states: "Public services are not a privilege in a civilised and democratic society: they are a legitimate expectation."

How to put into practice

Once defined, the principles should be put into practice. The following experience is an example how the Batho Pele principles came into everyday life.

MPCC

The Multipurpose Community Centres (MPCCs) in South Africa are the primary vehicles for the implementation of development communication and information programmes. Their purpose is to reach all the people and to grant everyone access to information. Their goal is "to provide every South African Citizen with access information and service within five minutes of their place of residence within 10 years" The MPCCs bring the Government closer to the people with positive results. They have been up and running since December 1999 and have provided the following important lessons:

"…Communities need services from Government and have started to make use of the services offered by MPCCs in greater numbers

…It is very important that the communities choose the services they need as these will be the priority in an area

…It is difficult to sustain technology in rural areas as maintenance and rollout cost a great deal. Creative mechanisms need to be in place to provide communities with access to technology

…The three spheres of government have been able to work together closely to make MPCCs a success

…Traditional Leaders have been key partners in setting MPCCs up. They have been an asset to the process

…As communities have been involved in setting up MPCCs those running have shown how proud the communities are of their centres and ensure they are kept safe from vandals and criminals

…There is a need to see the MPCC launch events as one step in the life of the MPCC. More services and programmes need to be brought to those MPCCs already running to add value to them and make them more successful"

COMMENTS ON THE MPCCS

Commitment

Attendance at meetings to share plans and strategies varies from department to department. Once an MPCC has been established, some departments fail to deliver services consistently. MPCCs are a major innovation in efforts to promote service delivery and some departments are slow to recognize that. Departments/organisations using the MPCC fail to locate a full complementary range of services within the MPCC, and users still have to go long distances to secure a complete service

Funding support

Poor responses towards cost-sharing have been noted, although the initiative has recently begun to attract wider financial support. Launching events that are large community gatherings are costly and need additional funding. Offices need

staff, equipment (phone, computers, safes, and cars) and there is under-funding in those areas.

Communication and reporting lines

Representatives do not report back to their official structures (provincially, nationally and politically). Thus, efforts to promote consistent Government service provision are being stifled. There are no follow-ups regarding feasibility of service provision after requests have been made by communities

Horizontal communication

In very few years the MPCCs have shown also some success. An ambitious project, it is still running. Thirteen MPCCs have been established. More then 80 Government services have been brought in to help communities. Significant lessons have been documented and have been helpful in understanding many aspects of service implementation.

Other positive examples are explained in the Integrated Provincial Support Programme (IPSP Project B). The Eastern Cape government is trying to implement its public services in line with Batho Pele principles. Its idea is to transform the service delivery performance and it offers a detailed summary about how this transformation will take place . The aim would be:

"to improve standards of existing service the extension of service delivery to disadvantaged communities recognition of the need for service to all at an appropriate standard acceptance of the rights of citizens to such service adherence to the principle of accountability and the responsibility for improvement."

Critics

The Batho Pele principles are not easy to implement. As reported in the HIS the Batho Pele principles were received enthusiastically but their implementation is very slow. Another criticism comes from a report written to help the research questions posed in the EU INCO-DC case study . That report in a description of a negative implementation of the Batho Pele principles in the Odi health district.

The Batho Pele "philosophy" is an innovation and it shows the will of the South African people to make a change but still it is hard to put in practice.

CASE STUDY #23;

JUDICIAL INTEGRITY AND CAPACITY IN NIGERIA; ACTION PLAN BASED ON LESSONS LEARNED[182]

BACKGROUND

Under the Framework of the Global Programme Against Corruption and in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna, Austria in April 2000, the United Nations Office on Drugs and Crime (ODC), in collaboration with Transparency International convened a two day workshop for Chief Justices and other senior judges from eight Asian and African countries.[183] The Meeting was chaired by HE Judge Christopher Weeramantry (former Vice-President of the International Court of Justice). The participants were: Chief Justice Latifur Rahman (Bangladesh); Chief Justice Y Bhaskar Rao (Karnataka State, India); Chief Justice M L Uwais (Nigeria); The Hon F L Nyallali (former Chief Justice of Tanzania); Justice B J Odoki (Chairman of the Judicial Service Commission of Uganda); Justice Pius Langa (Vice-President of the Constitutional Court of South Africa); and Justice Govind Bahadur Shrestha (Nepal). Apologies were received from Chief Justice Sarath Silva (Sri Lanka). The rapporteurs of the Meeting were Justice Michael Kirby (Judge of the High Court of Australia) and Dr G di Gennaro (former President of the Supreme Court of Italy). Observers attending the meeting included Dato' Param Cumaraswamy (Malaysia: UN Special Rapporteur on the Independence of Judges and Lawyers); Mr B Ngcuka (DPP, South Africa); Dr E Markel (International Association of Judges, Austria); and Judge R Winter (Austria). The co-ordinators of the meeting were Dr Nihal Jayawickrama and Mr Jeremy Pope (Transparency International, London), and Dr Petter Langseth (UNODC Global Programme against Corruption.[184] The purpose) of the workshop was to consider means of strengthening judicial institutions and procedures as part of strengthening the national integrity systems in the participating countries and beyond. The object was to consider the design of a pilot project for judicial and enforcement reform to be implemented in participating countries. The purpose was also to provide a basis for discussion at subsequent meetings of the Meeting and at other meetings of members of the judiciary from other countries, stimulated by the initiatives taken by the Meeting.

During this Conference, the Chief Justice, in collaboration with CICP, began to develop a preliminary draft action plan for the Nigerian judiciary. This draft as well as the outcomes of the first and second meeting of the Judicial Leadership Meeting served as a basis for the development of a pilot project to strengthen

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[182] This case study is based on*: Strengthening Judicial Integrity and Capacity*: Lessons learned (2002) Stolpe; O.. in Report of the First Integrity Meeting for the Borno State Judiciary Meeting , Sep 19, 2002

[183] See also Case Study #13

[184] For an account of the first meeting of the Judicial Meeting on Strengthening Judicial Integrity refer to: Langseth/ Stolpe, Strengthening the Judiciary against Corruption, in Strengthening Judicial Independence – Eliminating Judicial Corruption, Yearbook 2000, Centre for the Independence of Judges and Lawyers, pp. 53-72

judicial integrity and capacity in Nigeria. The project was launched in October 2001 with the conduct of the first federal integrity meeting for Chief Judges, held in Abuja, Nigeria.[185] Based on the initial plan of action developed by the eight Chief Justices from Asia and Africa the meeting identified 17 measures which would address the most pressing issues of access to justice, timeliness and quality of justice, the public's trust in the judiciary and the development and implementation of a credible and responsive complaints system. The meeting also delineated 57 indicators that should be measured by CICP to provide a baseline against which future progress could be assessed. Further, the meeting agreed to implement the project initially in nine pilot courts in Borno, Delta and Lagos. CICP hired the Nigerian Institute for Advanced Legal Studies (NIALS) to conduct the data collection. The first round of the data collection has been completed and the Centre has initiated in collaboration with NIALS to analyze the data.

The present case study tries to outline lessons learned and emerging best practices from judicial reform projects around the world in the four above mentioned areas that have been found particular relevant by the First Federal Integrity Meeting for Chief Judges.

ACCESS TO JUSTICE

Enhance the Public's Understanding of Basic Rights and Obligations

The First Federal Integrity Meeting concluded *that the Chief Judge is the proper person to brief the media on the rights and obligations of litigants and the workings of the court system, including issues of jurisdiction etc. In this regard, judges were enjoined to move away from the traditional notion that judges should shy away from publicity and therefore, not grant interviews or participate in public enlightenment activities. It was however cautioned that in educating the public on their rights and obligations, judges should avoid controversial issues which are likely to be the subject of legal dispute. The Meeting was of the view that this secondary indicator could be attained within the envisaged 18 months period.*

Best practices; Some Studies suggest that the citizens' lack of information on their rights and obligations as well as the basic information of the court process rank among the most important obstacles to access to justice.[186] Judicial reform initiatives in some countries have, among others, specifically focused on taking a

[185] For a summary account of the First Federal Integrity Meeting of Chief Judges, refer to: Langseth/ Stolpe, The United Nations Approach to Helping Countries Help Themeselves by Strengthening Judicial Integrity – a Case Study from Nigeria, in Corruption, Integrity and Law Enforcement (ed. Fijnaut & Huberts) pp. 310, 325-328

[186] In Colombia in a survey of 4500 rural households 66% and 44% respectively considered "Information on Rights and Obligations" and "Basic Information on the Initial Proceeding" the two most serious obstacles to the access to justice. Buscaglia, Investigating the Links Between Access to Justice and Governance Factors, p. 7. In the Dominican Republic Court User Focus Groups that were interviewed in the context of a World Bank sponsored assessment confirmed, that the lack of legal information was a significant barrier to the exercise of protection of citizen rights, to prevent and resolve conflicts, and to effectively use the justice system, World Bank, Dominican Republic, Statistical Review of the Justice Sector, p. 62

proactive approach towards educating communities and representatives of businesses and schools on issues linked to the administration of justice, including the basic rights and obligations of the citizen. Such community outreach and other communication strategies were not only beneficial for the public but did also contribute to improving the judges public image and, ultimately contributed to enhancing the public's trust towards the judiciary.[187] In some jurisdictions information centers were established in the courts with the purpose of providing information to the public on the court process and case status as well as to receive comments, suggestions and complaints.[188] This did not only facilitate the access to timely and user friendly information by the public but also alleviated the burden previously borne by the judges.

Financial Cost

The First Federal Integrity Meeting *noted that court fees vary from jurisdiction to jurisdiction. Whilst avoiding the temptation to fix uniform fees especially in view of its impracticability, the meeting noted that the fixation of court fees is within the powers of the Chief Justice and the chief judges. The Constitution of the Federal Republic of Nigeria empowers the Chief Justice and Chief Judges to make court rules which encapsulate the fixing of fees. Chief judges were therefore enjoined to take appropriate steps to remove obstacles to easy access to courts, particularly high fees. Other measures proposed include facilitating the appearance of witnesses, and the possible establishment of new courts. The Meeting also proposed the re-introduction of the old system where courts seat in sessions at the various localities in order to carry justice nearer to the people. The Meeting also agreed that this measure is attainable within the envisaged 18 months period.*

Best Practice; Some jurisdictions have used exponentially increases in court fees according to court time used to enhance institutional efficiency. One such example is Singapore where parties are no longer entitled to unlimited use of court time. While the first trial day is free from added fee, thereafter, each additional day of trial incurs an extra charge, which escalates with time in order to curb abuse. As a result over 80% of the cases take only one day to complete.[189] In addition, cost orders are being used against parties and their lawyers for abuses of civil process. This gives the court the flexibility to hold accountable the lawyers rather than their clients. Such a system allows for making at least initially the courts more accessible also to the poor, since additional income from exponentially growing court fees could be used to cut down on the initial cost. However, in most countries more serious obstacles to access to justice are stemming form high-lawyer fees. The possibility of contingency fees and class action law suits as well as law clinics, consultation bureaus, ombudsman offices

[187] Said/ Varela, Colombia, Modernization of the Itagüí Court System, pp. 23, 24; Dakolias/ Said, Judicial Reform, A Process of Change Through Pilot Courts, p. 6
[188] Dakolias/ Said, Judicial Reform, A Process of Change Through Pilot Courts, p. 12, 15
[189] Dakolias, Court performance around the World, pp. 47, 48

and advocacy NGO's can help to some extend.[190] Courts should be aware of such structures and in case indicate them to needy users.

Differing Cultural Norms

The First Federal Integrity Meeting *observed that Nigerian courts have the comparative advantage of using local languages peculiar to the locality of the court in order to transact its business, and that even where a litigant is not versed in the language of the court, an interpreter is made available. It was further noted that this practice is observed in all trial courts, from the lowest court to the high court, notwithstanding the fact that all court records are in English. The Meeting however agreed that training and public enlightenment programmes in various local languages should be pursued.*

Best practices; In some countries alternative dispute resolution mechanisms have been introduced allowing disputing parties to seek their own solutions. The emanating, rather flexible and non-binding decisions are normally more adept to reflect local or tribal cultural norms. Neighborhood councils and complaint panels and boards manned with prominent local residents can enjoy a high level of popular-based legitimacy and become the preferred form of dispute resolution.[191]

Friendly Environment for Litigants, Witnesses, etc.

The First Federal Integrity Meeting *observed that the current practice is for witnesses to be excluded from the court room, and that no waiting facility is provided in most of our courts. It was therefore proposed that new court buildings should include waiting rooms for witnesses, litigants, etc. It was noted that this measure is not immediately attainable, and that the implementation of the measure is not within power of the court, because the resources for such capital expenditures is controlled by the executive. However, the Meeting recommended that Chief Judges should explore the possibility of converting idle rooms in existing court structures into waiting rooms for witnesses, litigants as well as persons released on bail who are awaiting the perfection of their bail conditions.*

Best practices; Inadequate physical facilities that constrain smooth operations of courts are an important aspect of judicial reform. Shortages, rundown conditions, inappropriate space distribution, lack of security, poor lighting, poor maintenance, and a lack of decorum and appropriate symbolism, poor locations and the lack of facilities in rural areas are only the main shortcomings.[192] Many reform projects, therefore, have been addressing court infrastructure through the development of simple conceptual models addressing strategic planning needs, accommodating the increased need for judicial services and the newly implemented orally-based and transparent procedures. In some countries

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[190] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union, p. 23

[191] In Colombia a survey revealed that 61 % of the 4500 sampled rural households actually voiced their preference for the informal system both in terms of timeliness and predictability. Buscaglia, Investigating the Links Between Access to Justice and Governance Factors, p. 11

[192] World Bank, Staff Appraisal Report – Peru, Judicial Reform Project, p. 9; Dakolias/ Said, Judicial Reform, A Process of Change Through Pilot Courts, p. 13

courthouses have consciously been conceptualized a catalysts of change taking into account five main concepts: Cultural and judicial decorum, expansion of facilities, reform oriented spaces taking into account needs for increased transparency, access to the public and upgraded technology.[193]

Prompt Treatment of Bail Applications

The First Federal Integrity Meeting *discussed the issue of bail and noted that to reduce congestion in the prisons, courts are encouraged to grant bail in respect of all offences other than those with capital punishment. The Meeting also appreciated the need to simplify the procedures for bail, but agreed that the accused and his sureties must go to the admin officers to sign the bail bonds, etc. The Meeting noted the high number of persons awaiting trial amongst whom were those whose offences though bailable were not granted bail, and those who have been granted bail but could not perfect the bail conditions, etc. It was therefore resolved that bail should be made available to accused persons in all bailable offences unless there are special circumstances which will warrant the denial of such bail. The Meeting also emphasized the need for public enlightenment as well as proposed the need for a review of the laws so as to introduce "suspended sentences". It was also observed that the fines provided in our statute books are outdated and as such it was proposed that such fines should be reviewed to make them more meaningful.*

Increased Coordination between various Criminal Justice System Institutions

The First Federal Integrity Meeting *extensively discussed the issue of coordination between justice agencies, especially in the area of criminal justice. It was noted that in all the states there exist a coordination mechanism in the form of Criminal Justice Committees which are comprised of the representatives of the Police, the Attorney-General's Office, the Courts and the Prisons Service. It was also observed that Chief Judges periodically carry out visits to prisons with a view to ascertaining the level of inmates awaiting trial and those who are being improperly detained. The Meeting therefore noted that the coordination mechanism necessary for the smooth running of the system is already in place. It was however resolved that participants should ensure the effective use of such mechanisms to reduce the proportion of persons awaiting trial, as well as the harmonious inter-dependence between the various criminal justice agencies, i.e. the investigative, the prosecution, the adjudication, and the penal/reformative.*

Best practices; Criminal Justice Committees are being used in several jurisdiction around the world to enhance the cooperation and coordination of the various institutions involved in the criminal justice process, mainly in order to increase the overall efficiency of the system. Regular meetings of the various actors provide a vehicle for problem identification, the sharing of differing

[193] Malik, Judicial Reform in Latin America and the Caribbean: Venezuela's search for a New Architecture of Justice, p. 9

institutional perspectives, the exchange of information and ideas and the collaborative development of plans for improvement.[194] Particularly useful are such meetings when they involve officials at the operational levels, e.g. at the court level since many coordination problems may not require strategic changes but rather ad-hoc adjustments within existing procedures.[195] In some countries such committees have been formed at various geographical and hierarchical levels. In addition to strategic and practical problem solving, such Committees lend themselves to the organization of interdisciplinary training sessions aiming particularly at increasing the capacity of the various actors to cooperate and coordinate.

Reducing delays

The First Federal Integrity Meeting *observed that certain aspect of Nigerian procedures tend to encourage delays, especially in the filing of pleadings, the attendance of witnesses and even obedience to court orders. It was noted that in the area of civil law, it is within the purview of the judge to deal with contempt of his court or disobedience to court orders.*

Best practices; A more active role of judges in case management rather than leaving the management to the parties and their lawyers has helped in many countries to reduce delays and increase individual clearance rates significantly. As a matter of fact increased judicial activism in case management has proven to be one of the main factors capable of reducing the time it takes to dispose of a case.[196] This may include not the strict enforcement of deadlines but also a more mediating approach to encourage settlement among parties to a dispute. Some countries have established pre-trial conferences, with the sole purpose of encouraging parties to make every effort to resolve their dispute under judicial supervision or with the help of a mediator.[197] A relatively easy way to start, which yields quick success consists in reducing the backlog by identifying inactive cases and purging them from the files.[198]
Other jurisdictions increased court time and extended the hours of the registrars office, a measure which did not only enhance the overall productivity of staff but also increased the access to justice and impacted positively on the perceptions of service users. [199] As a Georgian lawyer stated “Before, you could go there in the middle of the day and not to be able to find a judge. Now, everyone is there, working”.[200]

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[194] The Council for Court Excellence, A Roadmap to a Better Criminal Justice System, p. 3
[195] Hammergren, Enhancing Cooperation in Judicial Reform: Lessons From Latin America, pp. 6,7
[196] Ernst & Young, Reducing Delay in Criminal Justice System, p. 2; In the U.K. in a pilot project aiming at delay reduction in criminal cases, it was possible to decrease the average number of days-to-disposal from 85.5 to 30 by introducing early first hearings and increasing the powers of single judges and justices' clerks to assist case management.
[197] Dakolias, Court Performance around the World, p. 47
[198] Dakolias, Court Performance around the World, p. 14
[199] Dakolias, Court Performance around the World, pp. 28 (Chile), p. 33 (Colombia and p. 48 (Singapore)
[200] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union, p. 8

QUALITY AND TIMELINESS OF JUSTICE

Increase Timeliness of the criminal justice process

The First Federal Integrity Meeting *concluded that cooperation between agencies is vital to the achievement of a speedy justice process. As such, participants proposed that appropriate steps should be taken to increase the cooperation between agencies in the justice system. In addition, there has been a backlog of old outstanding cases which have accumulated as a result of the slow nature of the justice system. It was therefore proposed that in dealing with such cases, some form of prioritization is required. Incessant and unnecessary adjournments was also noted to be a major cause for the delays in the trial process. The need for strictness on adjournment requests was therefore stressed. It was further observed that failure by judges to sit on time also contribute to the delays. To facilitate timeliness in the trial process the performance of the individual judge needs to be monitored. Also, sustained consultation between judiciary and the bar should be encouraged. Delays are also facilitated by some procedural rules. As such it recommended a review of such procedural rules in order to minimize delays and reduce potential abuse of process. Another problem affecting the timeliness of the trial process was the lack of an effective case management system. The Meeting recommended the need to put in place appropriate case management system that will take into cognizance the case loads, case types and length of such cases, so as to minimize undue delays.*

Most countries embarking on judicial reform projects were forced to address delays and extensive backlogs if their reform efforts were to be successful. Extensive delays are one of the main reasons for public distrust undermining the judiciary's legitimacy and ultimately calling for interventions by the executive often limiting its independence. Some countries have tried to solve the issue through simply increasing the number of judges. Hiring more judges is often a favorite solution for problems of inefficiency.[201] The lack of judges has been cited frequently as the main reason for delay.[202] This perception, however, relates primarily to courts that are not well-managed rather than understaffed. While hiring additional staff in some situations may be necessary, more successful have been those attempts aiming at increasing the output of the system through strengthening its efficiency rather than its over all capacity in terms of human resources. [203]

Much of the delay is caused by an unnecessary high number of procedural steps combined with a lack of time-limits. This does not only increase the time-to disposition but also the propensity of the system towards corrupt practices.[204] Delay reduction programmes may include reducing the amount of procedural steps and the complexity of the single steps through more simplified, oral-based

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[201] Buscaglia/ Dakolias, Comparative International Study of Court Performance Indicators, p. 13
[202] National Center for State Courts, How many judges do we nee anyway?, March 1993, p. 1
[203] Dakolias, Court Performance around the World, p. 20
[204] Buscaglia, An Analysis of the Causes of Corruption in the Judiciary, p. 7

procedural codes as well as establishing time-limits for each procedural step.[205] However, "delays cannot be legislated away".[206] Meaningful service delivery deadliness seem only to be achieved, where the judges and court staff are involved in their establishment and commit themselves to the prescribed times.[207] Regular meetings to review if all service deadlines are being met are useful since they confirm the commitment and allow for eventually needed adjustments. Other judicial reform programs address both the issue of time-to-disposition and judicial work culture by improving incentives for court employees, including judges. In most jurisdictions the reduction of procedural times will actually require changes in the respective procedural codes. Such measures will take time and require consolidated action by the judicature, the executive and the legislative. In one country it was possible to reduce the amount of procedures foreseen by the Civil Procedural code from over a 100 to 6.[208]

Delay reduction programs will normally be combined with backlog-solving exercises. It has shown that courts that have reduced the backlog were able also to experience substantial reduction in processing time. Some countries in this regard made good experiences with the hiring of temporary personal whose sole purpose was to review the existing backlog of cases, purging inactive cases from the files, identify those cases that require immediate action by the judge and prepare for the hearing of the case.[209]

Much of the delay is also caused by parties and their lawyers. As already mentioned increasing the judges activism in case management has proven to be highly effective in this regard. This includes making judges personally responsible for their own share of the Court's caseload, insisting on absolute adherence to time schedules, granting permit of adjournments and temporary injunctions only when absolutely justified, limiting or even abolishing the possibility of interlocutory appeals and building a culture of timeliness among advocates and parties.[210] Also minimal court fees, the lack of court fines for rejected motions, a system permitting for appeals in all cases, and the accrual of legal fees on each new procedural step potentially encourage clients and lawyers likewise to pursue claims up to the highest instance regardless of the merit of the case.[211]

Some countries try in addition to reduce delay and increase user satisfaction by emphasizing negotiation and mediation seeking pre-trial settlement.[212] All of them experienced significant success reaching settlement on the average in

[205] Buscaglia, An Economic and Jurimetric Analysis of Official Corruption in Courts, p. 9

[206] Messick, Reducing court delays: Five lessons learned from the United States, PREM notes, Number 34, Des. 1999, p. 1

[207] Said/ Varela, Colombia, Modernization of the Itagüí Court System, pp. 17, 18

[208] World Bank, Staff Appraisal Report – Peru, p. 10

[209] Buscaglia/ Dakolias, Comparative International Study of Court Performance Indicators, p. 15; World Bank, Project Appraisal Report, Model Court Development Project - Argentina, Annex 2

[210] Finnegan, Observations on Tanzania's Commercial Court – A Case Study, p. 7; World Bank, Administration of Justice and the Legal Profession in Slovakia, p. 12;

[211] World Bank, Dominican Republic, Statistical Review of the Justice Sector, p. 4

[212] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Poland), p. 33; Dakolias, Court Performance around the World (Peru), p. 44; World Bank, Dominican Republic -Statistical Review of the Justice Sector, p. 5

more then 70% of the cases.[213] This did not only prevent delay and backlog in the respective courts but reduced also significantly the caseload in appeal.[214]

Reduce proportion of prison population awaiting trial

The First Federal Integrity Meeting *observed that the lack of timeliness in the justice system has resulted in serious congestion in the prison system, which are populated largely by suspects awaiting trial. It was noted that apart from procedural delays, a major problem in this area has to do with non production of such suspects before the court for trial, resulting in some of them spending more years awaiting trial than the would have spent had they been convicted for the offence with which they were charged. In deploring this situation, the Meeting recommended regular de-congestion exercises as well as prison visits with human rights organizations. The Meeting also observed that some delays are caused because of lack of access to books by judicial officers, and recommended that appropriate measures are required to ensure increased access to books for judicial officers*

Best practices; Some countries have undertaken specific measures to reduce congestion in prison caused by a high number of persons awaiting trial. This measures necessarily have to involve the various institutions taking part in the criminal justice process. Particular focus was given to the initial stages of the criminal case processing. Measures included the provision of out of hours advice by the Attorney General's Office, the location of State prosecutors in police stations, the introduction of "early first hearings" in the case of straightforward guilty pleas and of "early administrative hearings" for all other cases as well as the increase of case management powers of judges and justices clerks.[215] In particular regarding misdemeanors administrative hearings and similar caseflow management practices facilitate early negotiations that may lead to rapid, non-trial disposition of the case.[216] Also, non-incarcerative dispositional alternatives for low-level offenders should be considered.[217] In other jurisdiction specialized courts[218] or the function of popularly elected lay judges [219] have been created with the exclusive function of dealing with minor criminal offences and small civil claims.

Jurisdiction on Bail

[213] In Argentina a pilot project succeeded in settling more than 60% of the cases through mediation Dakolias/ Said, Judicial Reform, A Process of Change Through Pilot Courts (Argentina), p. 2. In a pilot court project in Tanzania it was possible to settle 80% of the cases short of trial; Finnegan, Observations on Tanzania's Commercial Court – A Case Study, p. 7. In Singapore, over the last five years, the Mediation Centre reaches an amicable settlement between the parties in 77% of the cases; the Hon. Chief Justice Yong Pung How, Speech at the Launch of "Disputemanager.com", 31 July 2002.
[214] Finnegan, Observations on Tanzania's Commercial Court – A Case Study, p. 7
[215] Ernst & Young, Reducing Delay in Criminal Justice System, p. 2;
[216] Council for Court Excellence, A Roadmap to a Better Criminal Justice System, p. 4
[217] Council for Court Excellence, A Roadmap to a Better Criminal Justice System, p. 5
[218] Dakolias, Court Performance around the World, p. 26
[219] World Bank, Staff Appraisal Report – Peru, Judicial Reform Project, p. 22

The First Federal Integrity Meeting *then discussed the issue of jurisdiction and in particular the need to clarify the jurisdiction of lower courts to grant bail. It was observed that such clarity is essential in order to understand the extent of such jurisdiction. The Meeting expressed the need for public education especially on the issue of bail as it was noted that substantial number of the populace are ignorant of bail rights and procedures. It was however, the opinion of the Meeting that such measures must be complemented with effective monitoring such as frequent court inspections as well as review of case files.*

The First Federal Integrity Meeting *discussed the need for consistency in Sentencing. To achieve this, the Meeting resolved that accurate criminal records are essential which must be made available at the time of sentencing. Most importantly, it was agreed that the development of a coherent sentencing guidelines is imperative as a measure that could enable achievement of consistency in sentencing.*

Best practices; Rulings disregarding laws and jurisprudence generate inconsistencies, uncertainty and unpredictability and, as a consequence increase the propensity of the judiciary towards corrupt practices.[220] In order to improve the predictability and quality of justice many countries have undertaken measures strengthening the capacity, attitude, skills and ethics of judges. Such measures include training, increasing the access to legal materials, developing codes of conduct and improving the incentive system.[221] Various judicial reform projects revealed the lack of timely accessibility to judicial information, including laws, prevailing jurisprudence, doctrines and legal literature due to defective court information systems and antiquated technology as one of the main obstacles to the successful delivery of justice.[222]

Training is probably the field that most donor agencies get involved to. There are several approaches both regarding content as well as organization and follow-up to such training activities. Lately there seems to be an increasing shift from training on theoretical-legal to managerial issues and practical skills, including computer courses, case and court management, quality and productivity and leadership skills.[223] However, critical voices complain that there is still too much emphasis by donor's on training programmes that do not really have any impact because they are run by foreign experts without any knowledge of the specific country's context and they do neither go into the necessary depth nor provide for any follow-up.[224] Therefore, training programmes need to increasingly draw from

[220] Buscaglia/ Langseth, Empowering the Victims of Corruption through Social Control Mechanisms, p. 23
[221] USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality, p. 27
[222] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Poland), p. 32; USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality, p. 45; Dakolias, Court Performance around the World (Ukraine), p. 51; Finnegan, Observations on Tanzania's Commercial Court – A Case Study, p. 5; Buscaglia/ Langseth, Empowering the Victims of Corruption through Social Control Mechanisms, p.24
[223] USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality, pp. 27, 28; Dakolias, Court Performance around the World (Peru), p. 44
[224] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Russia, Georgia, Romania and Romania), pp. 11, 12; Hammergren, Institutional Strengthening and Justice Reform, p. 59

national and regional expertise and ensure sustainability by linking training activity to the curriculum of the respective judicial schools or other training institutions.[225] Training should focus on improving organizational performance. Training evaluations should not be conducted once training is completed but rather when knowledge has been applied. Research demonstrates that training is not effective until worker assimilates the acquired skills and the skill is applied naturally.[226]

Also, training programmes are mostly held in the capital cities and often do only reach the judicial leadership, while the biggest training needs exist at the lower courts, especially outside the capital. Even though the latter may impose even greater challenges of sustainability there is a more urgent need.[227] On the other hand study tours that for long have been observed with suspicion, seem to have potentially an impact that goes beyond a mere increase of professional skills. Participants report that their entire vision of their profession and role in society changed.[228] It is important to observe that training does not only enhance the quality of justice by increasing the professional qualification and even vision, but it also contributes to the attractiveness of the profession as such, which ultimately draws more and better qualified candidates to the bench.[229]

As far as the academic legal training is concerned, in many countries complaints have been raised that teaching methodologies are antiquated, inefficient and actually do not prepare for the profession. Clinical legal education seems to represent a promising alternative.[230] Here in addition to skills, law students acquire values and ethical attitudes. Students under professional supervision provide legal services in actual cases to people who would otherwise not have access to counsel. Clinical law education programmes have been implemented with great success in various countries in Eastern Europe and the former Soviet Union.[231] Key seems to be the relative limited number of students that are coached by a professor and a professional lawyer. Other countries try to bridge the gap between theoretical legal education and judicial praxis by transforming their judicial training centers into actual schools for judges, where senior judges train the magistrates of the future.[232]

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[225] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Romania), p. 13

[226] Said/ Varela, Colombia, Modernization of the Itagüí Court System, pp. 11,12 & 18

[227] USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality, p. 28

[228] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Russia, Georgia, Romania and Romania), p.12; USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality, p. 29; Goddard, Institution Building and Strengthening of Corruption Control Capacity in Romania, Evaluation of UN Centre for International Crime Prevention Project, p. 25

[229] Dakolias, Court Performance around the World (Peru), p. 44

[230] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Romania), p.25

[231] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Romania), p.26; USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality, p. 30

[232] USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality (Romania & Georgia), p. 66

Establishing performance indicators for courts and judges

The First Federal Integrity Meeting also *discussed performance indicators for individual judges, as a way of enhancing the quality of justice. To determine the performance of judges it is necessary to assess whether such judges sit on time, whether they are making efforts to reduce backlog of their cases, the level of procedural errors they commit in the discharge of their functions, number of appeals allowed against their substantive judgements and the level of public complaints against their conduct in court. These indicators could provide a definite and effective method of assessing the performance of Judges. In addition to the role of Chief Judges in monitoring the performance of individual judges, the Meeting also noted the role the National Judicial Council and the Independent Anti-Corruption Commission in this endeavour.*

Best practices; Even though justice is not a service just like any other, there are qualitative and quantitative indicators that allow for reviewing judicial performance. Quantitative, this means the number of cases handled, absolutely and in relation to the total demand, the average time to resolution, and the percentage of cases completed within some reasonable time. Qualitatively, the assessment is more subjective, and requires some external evaluation of predictability, conformity with the law and legitimacy as well as user satisfaction.[233] Several judicial reform projects have proven that establishing performance standards and indicators, both for individual judges and for courts are such can become an extremely effective way of enhancing the efficiency of entire system. In one jurisdiction the Supreme Court sets performance goals for courts across the country. It then measures the performance of each court against these performance goals and awards a 5% bonus to the employees of the court that rank in the top 40%. [234] In a pilot court in another country judges are expected to meet a monthly quota of case solved and court staff have established exact service delivery deadlines for each type of service provided by the administrational office of the court. The compliance with these performance indicators is monitored on a regular basis.[235] Some experts suggest that in addition it would be important to review the number of decisions revoked by higher courts and the reasons for these revocations.[236]

Abuse of Civil Process – ex parte communications

The First Federal Integrity Meeting *noted that the major areas of such abuse are in relation to ex-parte injunctions, improper proceedings in the absence of parties, judgements in chambers instead of open court as well as abuse of process by vacation judges. The Meeting therefore expressed the need for caution by judges in the issuance of ex-pate injunctions and the imperative of serving the ends of justice by fair hearing to all the parties. Whilst stressing that*

[233] Hammergren, Institutional Strengthening and Justice Reform, p. 75
[234] Dakolias, Court Performance around the World (Chile), p. 29
[235] Said/ Varela, Colombia, Modernization of the Itagüí Court System, pp. 17, 18
[236] USAID, Office for Democracy and Governance, Guidance for Promoting Judicial Independence and impartiality (Dominican Republic), p. 114

judges should only give judgements in open court, it was also the view of participants in the Meeting that vacation judges should only hear genuinely urgent matters.

PUBLIC CONFIDENCE IN THE COURTS

Public Confidence in the Courts

The First Federal Integrity Meeting *concluded that there is a direct link between the conduct of judges and other court staff and public confidence in the judiciary. On the conduct of judges, the Meeting cautioned that judges should avoid exhibiting judicial arrogance by behaving as if they are unaccountable. It was the view of the participants that judges are accountable to the people and that it is for that reason that a succinct code of conduct was put in place. It was therefore recommended that Chief Judges should ensure a strict enforcement of the code of conduct as well as the dissemination of such code of conduct to the understanding of the judges and the general public. It was also recommended that a strict monitoring of other court staff is essential in order to ensure that they keep to the tenets of their various responsibilities.*
Another aspect that will enhance public confidence in the courts, according to the Meeting, would be keeping the public informed about what happens in the courts. Public enlightenment is a necessary tool which the courts could effectively employ in winning public confidence.

Best practices; In some countries were efforts made to transform the judicial mentality in order to accept that the role of the judiciary is to provide a service to the public.[237] In other courts the judge in additional to their traditional role (studying cases and issuing judgement), have become social actors and critical member of the local community[238].

Strengthening Social Control System:

The First Federal Integrity Meeting *examined the current system of public complaints by court users. There should be prompt and effective method of dealing with complaints by court users. In this regard it was recommended that Complaints Committees be established in each court and that complaints received should be expeditiously dealt with.*

Best practices; In some countries the implementation of social control boards as part of judicial reform programmes has shown positive results. The so-called "Complaint Panel or Board" can enjoy a high level of popular-based legitimacy.[239] While some of these boards serve mainly the purpose of providing alternative means of dispute resolution to citizens (mostly family and commercial related case types) while others have also been mandated to monitor the functioning of

[237] (Pilot Project Itagüí, Columbia)Maria Dakolias, Javier Said, Judicial Reform. A process of Change Through Pilot Courts, WB 1999 (p.7)
[238] Javier Said, David F. Varela, Columbia, Modernization of the Itagüí Court System. A Management and Leadership Case Study. P.24
[239]Langseth/ Buscaglia, Empowering the Victims of corruption through social control mechanism, p. 18

pilot courts during judicial reforms.[240] As such they may be involved in the monitoring of the impact of reform and, at a more advanced stage, they may be mandated to provide external monitoring of court performance in general. Finally, they may also receive, review and eventually channel citizens' complaints to the appropriate authorities and assist in following-up.

Fairness and Impartiality

The First Federal Integrity Meeting *identified fairness and impartiality as necessary catalysts to public confidence in the courts. It was the view of the Meeting that the conduct of judges both in and outside the court determines a great deal the level of confidence, which the public could repose in the courts. Judges must not only be fair and impartial but must be seen to have been so by the general public. On the part of the Chief Judges, random case allocation and fairness in such case assignments was also seen to be essential.*

Best practices; Judges must not only render impartial judgement, but their entire behavior must project an aura of fairness. In this regard a Code of Conduct and even more the respective guidelines may be extremely helpful giving an account of what behavior is expected and what behavior is not acceptable. Fear of bias may stems in particular from the assignment of sensitive cases to judges (even wrongly) perceived as pro-governmental. Such concerns can be overcome through a system of random case assignment. Even though deliberate and systematic case assignment procedures may have some advantages in terms of optimizing the use of available expertise and of distributing workload equally, they clearly outweigh the disadvantages in terms of possible or actual partisan influence. The equal distribution of workload can still be assured by using formulas estimating the work on certain case types. Also, a potential loss of expertise can be avoided by forming subject related divisions within courts.[241]

Political Neutrality

The First Federal Integrity Meeting *considered theissue of political neutrality as a necessary pre-requisite to the independence and integrity of the judicial system was also discussed. It was the view of the Meeting that judges must not be seen to partake in politics or be in political associations, meetings or gatherings. Indeed, the Meeting even cautioned that Chief Judges as well as other judges must be cautious in the way they relate with the executive, so as not to undermine the cherished concept of separation of powers and judicial independence. The Meeting resolved that except where judges have a specified role to play, they should avoid delving into executive functions.*

Executive-mindedness or a predisposition to favor the government is a serious problem of judges in many countries. Political neutrality and the perception of

[240] These social control boards, composed of civil society representatives at the local level, have varied in nature and scope. For example, in some countries these civil society boards were proposed as simply civil society-based court-monitoring systems (Singapore and Costa Rica) and in other cases, these bodies were recognized and performed their conflict resolution function as alternative –informal mechanisms (in the cases of Chile, Colombia, and Guatemala).

[241] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 48 & 49

such can be challenged by various factors, including the behavior of judges, the appointment process. Among those behaviors that may compromise the appearance of fairness rank also the socializing with members of the executive or the providing of legal opinions even when they detached from the facts of a particular case. Since the latter in some legal traditions may be considered acceptable or even desirable to some extend, there should be some exact guidelines which would be elaborated based on the inputs of the various legal professions, the executive, legislative and civil society.

Inadequate funding for the judiciary

The First Federal Integrity Meeting *concluded that although the issue of funding is one that is beyond the purview of those indicators which the judiciary could handle sui motu, an adequate funding is central to the effective performance of the judiciary as well as the preservation of its independence. The Meeting noted that whilst the other two arms of government to a large extent received adequate resources required for their functions, the judiciary at all times remained starved of the requisite funds for its effective functions. It was the view of participants that the judiciary is yet to attain its independence in the area of resource allocation. This must be pursued and achieved in order to provide for the necessary requirements of the third arm of government.*

Judicial budget is an important economic instrument to ensure a reliable and efficient judicial system.[242] In order to secure the necessary resources to the judiciary and to increase its budgetary independence in some countries a minimum portion of the overall Government budget has been assigned to the judiciary in the constitutions. In several countries the increase of budgetary resources has helped judiciaries to improve their overall performance.[243] A common problem remains the poor allocation and lack of management of resources within the judiciary, rather than or in addition to an overall lack of resources.[244] More detailed studies actually have proven, that budgetary increases were particularly effective where the capital budget grew exponentially comparing to those budgetary resources used for salaries, benefits and additional staff. In a country, as part of a new case management system, a

[242] John McEldowney, Developing the Judicial Budget: An Analysis, p. 3

[243] John McEldowney, Developing the Judicial Budget: An Analysis, pp. 11, 12. Crucial in this context were the development of sound management rules for the judical budget. As e.g. in Venezuela:
The judicial budget should be linked to a transparent system of case management that covers the main sectors of court activity, Budget formulation should be capable of providing information and planning as on of the primary means of implementing efficiency studies in the court. Internal budget arrangement should ensure that policy formulation is implemented and efficiency structures supported, The management of the judicial budget should reflect cases heard by the courts, and the resources needed for each sector of the judicial system should be evaluated as a whole, Internal controls over the judicial budget should assist in the development of a management strategy. Case management systems should be sufficiently flexible to take into account variations in caseload External control such as audit system should be fully integrated into the judicial budget,Judicial statistics should fully reflect the resources allocated and the detail of cases including case outcome,
Capital assets, regular items of expenditure and expenditure on special programs should be fully reflected in the way the judicial budget is organizes.

[244] USAID, Guidance for promoting judicial independence and impartiality, p. 26

decision was taken to adopt strategies to develop sound management of the judicial budget.[245] One important lesson learned in this context seems to be that an increase in capital resources affects time to disposition, but adding general resources to the budget does not. While the latter allows for increasing salaries and number of staff,[246] the first sets aside the necessary monies to improve information technology and facilities in the courts, which in turn increase the clearance rate.[247] E.g. in Singapore a significant increase of capital budget in 1991 was rewarded by a subsequent 39 % decrease of pending cases in 1993. Also in Panama an increase in the capital budget was followed by improved court performance. Increasing salaries of judicial personnel does not seem to have the same effect. However, on the long-run higher salaries should attract better-qualified judges and may also assist in reducing corruption.

Irregular appointments

The First Federal Integrity Meeting *concluded that there is the need to ensure that only qualified and competent persons of Integrity are appointed as judges. The system of appointment of judges was discussed and it was the view of participants that the current centralized system in which the Judicial Council handles the appointment is quite good, as it has helped a great deal in preventing the appointment of judges from being politicized. It was the feeling that due diligence must be exercised in recommending persons for appointment to the bench, in order to prevent irregular appointments or appointment of incompetent persons or those of questionable integrity.*

Best practices; Although it is not possible to determine which selection process works best, some principles are emerging: [248]
Transparency to be achieved i.e. by advertising judicial vacancy widely, publicizing candidate's names, their background as well as the selection process and criteria; inviting public comment on candidates' qualification and dividing responsibility for the process between two separate bodies.
Composition of the judicial council by introducing also additional actors to diluting the influence of any political entity. Recommended should be the participation of lawyers and law professors, lower-level judges, and allowing representative members to be chosen by the sector they represent. That will be increase the likelihood that they will have greater accountability to their own group and autonomy from the other actors.
Merit-based selection. A positive example is the Chile experience. Here the selection was carried out with unprecedented transparency and appears to have achieved positive results both in terms of credibility and qualification of the selected candidates. The recruitment campaign is widely publicized and the Candidate are evaluated based on their background and tested of their knowledge, abilities and physiological fitness, the interviewed. Those selected

[245] Buscaglia/ Dakolias, Comparative International Study of Court Performance Indicators, p. 15
[246] In many countries almost the 95% of the budget is used for salaries.
[247] Buscaglia/ Dakolias, Comparative International Study of Court Performance Indicators, p. 21
[248] USAID, Guidance for promoting judicial independence and impartiality, pp. 17-18

attend a six month course at the judicial academy and the graduates receive preference over external competitors for openings. The obvious disadvantages is its expense. Few judiciaries have resources to provide long-term training for applicants who may not ultimately be selected as judges.

Diversity. A judiciary that reflects the diversity of its country is more likely to garner public confidence, important for a judiciary 's credibility.

The appointment process, terms of appointments, salary level directly impact on the quality of applicants and ultimately on the quality of justice.[249] High salary and terms of appointment for life seem also to contribute to the independence of judges. Regardless of the high salary level, public confidence seems to remain low where judges are appointed only for a limited time period.[250]. Judges appointed to the bench for life with retirement at seventy and regular performance review, incentives to improve their performance such as system of bonuses based on productivity have shown positive results. As far as court staff is concerned, some reforms targeted specifically wide-spread nepotism by prohibiting non-salaried clerical staff and not allowing judges' family members to work in the court.[251]

External Monitoring by the Independent Commission against Corruption

The First Federal Integrity Meeting *saw monitoring as a key to ensuring the integrity of the courts, judges and other personnel. In line with its mandate under the Corrupt Practices and Other Related Offences Act, 2000, the Meeting resolved that the Independent Corrupt Practices and Other Related Offences Commission, ICPC should monitor the courts, the conduct of judges and other court personnel, and where necessary take appropriate steps to report erring judges or court staff to the National Judicial Council, appropriate Judicial Service Committee, or where necessary take appropriate measures in accordance with its mandate. It was also the view that the ICPC should make available its reports to the public.*

Best practices; Philippine Center for Investigative Journalism led in one case to resignation of a supreme court justice. (Guidance for promoting judicial independence and impartiality, USAID, January 2002 , p. 36)

CREDIBLE AND RESPONSIVE COMPLAINTS MECHANISM

Establishment of a Credible and Effective Complaints System

The First Federal Integrity Meeting *commenced by emphasizing that a credible complaint system is an imperative way of holding the judiciary accountable to the general public which it should serve. For this reason, the establishment of such a system is not only necessary but that such a system must be well known to the public. The Meeting observed that although the current complaints system in which general public are to lay their complaints to the Chief Justice of Nigeria, the Chief Judges in the various states, the National Judicial Council or the*

[249] Dakolias , Court Performance around the world, p. 22
[250] Dakolias , Court Performance around the world (Ecuador), p.32
[251] Dakolias , Court Performance around the world (Peru), pp. 43-44

Judicial Service Committees at the Federal and State levels are quite adequate, the general public is not enlightened on these avenues, as well as the procedures for making these complaints. Hence it was resolved that the current complaints system must not only be publicized in courts, but also how such complaints are to be made.
The Meeting also discussed the procedural steps that needed to be taken in relation to such complaints and expressed the need to give fair hearing to the judicial officer complained against and that the result of the decision of the National Judicial Council or Judicial Service Committee should be communicated to the complainant. Indeed, the Meeting went further to recommend that in cases of particular public interest, such decisions should be publicized.
Participants also discussed the need to discourage frivolous and malicious petitions, but stressed that anonymous complaints should be investigated and should only be disregarded if found to be lacking in substance.

Best practices; The need of the public to voice their eventual complaints against judges in order to initiate disciplinary or even criminal action against them is a crucial tool in increasing the accountability of judges and hereby reducing both actual as well as perceived levels of corruption in the judicial domain. All judiciaries around the world have some form of disciplinary body, however, many of them do not contribute to the strengthening of the respect for a strong and independent yet accountable judiciary. Some lack the trust by the public and others even by the judges themselves. In some countries it is the dominant role of the executive branch on the disciplinary body that is perceived by judges as a direct attack on their independence.[252] But also relying exclusively on judges to discipline their colleagues does not only raise problems of credibility, but has also proven problematic in terms of misinterpreted solidarity among judges.[253] Positive experiences, as far as credibility and impartiality are concerned, were made in those countries were disciplinary bodies are composed of all relevant stakeholder groups, including judges from various levels, the bar, Attorney General's Office, the academia, the parliament and civil society.[254]

Another challenge faced by any judicial complaints mechanism is the number and nature of complaints. Experiences from several countries confirm that complaints are filed mainly by disgruntled litigants and are largely unfounded. This needs to be taken into account especially with regard to eventual preliminary action such as suspension. Steps should be taken to ensure that judges are protected from frivolous or unfair attacks by unhappy litigants who seeks to use the disciplinary system as an alternative appellate process or simply

[252] E.g. in Romania one third of the members of the Superior Council of Magistrates, responsible for taking non-criminal disciplinary action are actually prosecutors. USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 60
[253] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 61
[254] E.g. the Ugandan Judicial Commission includes representatives of the supreme court, attorneys chosen by the Uganda Legal Society, the public service commissioner and lay people chosen by the President. In Paraguay the judicial disciplinary board is made up by two Supreme Court Justices, two Members of the Judicial Council, two senators and two deputies, who must be lawyers USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 15 & 116

for revenge.[255] It also puts high pressure on disciplinary boards in terms of capacity. Complaints should be handled in a speedy and effective manner in order to limit the negative professional and personal impact on the concerned judge who turns out to be falsely accused.[256] Citizen education about the role and responsibilities of judges should include information about how to file complaints when judges fail to fulfill their duties. Further, a strict separation of performance evaluation and the handling of complaints as well as discipline seems to be key.[257]

Enforcement of Code of Conduct

The First Federal Integrity Meeting *agreed that the already existing Code of Conduct needed to be complemented by a credible complaint system. The Meeting reasoned that the credibility of any complaints system lies in the ability of the system to effectively respond to such complaints by ensuring that such complaints of misconduct as have been proven are duly punished in accordance with the code of conduct, and the complainant informed of the action taken. This has the advantage of ensuring the effectiveness and integrity of the judiciary as well as building up accountability and public confidence in the institution. The Meeting emphasized the role of the National Judicial Council and the respective Judicial Service Committees in the effective enforcement of the Code of Conduct. Participants also noted that although a succinct code of conduct for judicial officers is in place, the code is not sufficiently publicized to judicial officers and the general public. It was resolved that this is essential for the judicial officers to comply, and for the public to hold them accountable for such compliance.*

Best practices; Enhancing ethical behavior among judges through the development and enforcement of a Code of Conduct is an approach that has been taken up by many countries. However, while the development of the Code of Conduct is quickly achieved, its enforcement in most countries has been much more difficult.[258] Not everywhere a credible monitoring and complaints mechanism could be established. In some countries even constitutional problems occurred because of the membership of non-judges. In other countries even though independent the Commission was formed exclusively by judges causing the above mentioned credibility problems. In any case the independence of the compliance monitoring body is crucial for its credibility in the eyes of the public.[259] An important element is that the public can directly file their complaint with the commission.[260] Besides investigating complaints, statistical analysis and breakdown can be used in order to monitor the behavioral patterns of the judiciary at large. Another tool to ensure the monitoring the judicial behavior

[255] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 115
[256] E.g. in Bolivia the lack of a system capable of resolving the complaints in a timely and effective manner discourage many judges, sometimes deciding to leave their position rather then defending themselves in prolonged disciplinary proceedings. USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 115
[257] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 117
[258] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 31
[259] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 52
[260] USAID, Guidance for Promoting Judicial Independence and Impartiality (Georgia), p. 62

consists in providing access to information to the public, including judicial decisions, the judiciaries' expenditures, its budget, the personal background of judge and other statistical information. Full public disclosure of to avoid conflicts of interest or even the appearance of such conflicts.[261] Additionally, the judiciary needs a mechanism to interpret the code and to keep a record of those interpretations that will be available for those seeking guidance. Judges should not be left solely responsible to determine how the general words of a code apply in particular situations.

At the same time the enforcement mechanism must protect the judges themselves from unfair treatment. Although codes are supposed to have a positive impact on judicial independence, there are some potential abuses. Codes have been used time again to punish judges that have not fully understood the details of the code and what behaviors are prohibited. Second, they have been used to punish judges that have been considered as to independent. Therefore codes should not be used as a basis for disciplinary action until they are widely known and understood.[262]

Creation of Public Communication Channels

The First Federal Integrity Meeting *argued that the judiciary being a service institution, must relate effectively with the people which it is supposed to serve. Hence it was agreed that the judicial arm must move away from the old adage that judicial officers should only be seen and not heard. It was decided that in line with the modern thinking, judicial officers should participate in public education programmes to enlighten the people as to their rights and how to go about enforcing such rights. The Meeting however, cautioned that in performing such functions, judges should endeavour to restrict themselves to fairly straight forward issues and avoid controversial subjects that may call into question their independence and impartiality as judges. Further, the Meeting noted the tendency of the print media to misrepresent facts and opined that judges may consider the use of electronic media to handle such public enlightenment programmes, unless they are sure of the credibility of the print media concerned.*

Best practices; Public enlightenment efforts and media strategy have been important components of several judicial reform programmes. The regular interaction between judges and civil society does not only have an educating aspect, [263] but also contributes to a more favorable public perception.[264] Also, communication is a fundamental element of the change process. The leadership for change must communicate its mission and vision both inside and outside the organization to create the necessary support and pressure points that eventually

[261] USAID, Guidance for Promoting Judicial Independence and Impartiality (USA), pp. 118, 119
[262] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 31
[263] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Russia), p. 21; Argentina, Legal and Judicial Sector Assessment, p. 77;
[264] Said/ Varela, Colombia, Modernization of the Itagüí Court System. A Management and Leadership Case Study, p. 23

will keep the reform initiative alive.[265] A media strategy is essential in this context. This is even more true since the media is not an natural ally to the judiciary. In some countries it actually paints a very negative image of the judges – "absurd misconceptions become conventional wisdom".[266] Journalist, just like the public, may not understand the role of the judiciary and therefore contribute to the negative image of judges. A media strategy should therefore, seek to interest sufficiently at least one media outlet in the process so that it identifies the reforms as a key issue, provides publicity, and calls for transparency. Public relation capacities need to be developed to keep the public informed about the steps taken. This does not only build public support for the judicial system, it also helps to communicate and reinforce through increase public scrutiny the notion that citizens have a legitimate interest in the integrity and capacity of the courts.[267] In one country journalists were trained in legal literacy as part of a judicial reform project in order to improve understanding and accuracy of reporting.[268]

Training on Judicial Ethics:

The First Federal Integrity Meeting *considered training on judicial ethics as a necessary element that will enhance the integrity of the judiciary. Participants therefore stressed the role of the National Judicial Institute in undertaking this endeavour. The Meeting further observed that such training should not be restricted to judges alone but other court staff that work with them. This the Meeting reasoned would ensure the integrity of the whole system.*

A number of expert emphasized the training should be – and rarely is – designed to change the attitude of judges. In large part this means educating judges about the importance of their role in the society. Training in judicial ethics can have an important impact on a judge 's abilities to maintain impartiality. It seems that the most effective training is to work through exercises based on practical problems judges often confront. Also seminars on ethic involving visiting foreign judges have been well received in many countries, especially where the visiting judges make clear that they struggle with the same issue. Discussing common ethical concerns with foreign colleagues may be perfectly acceptable.[269]

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[265] Fuentes-Hernández, Pending challenges for judicial reform: the role of civil society cooperation, pp. 6-9; Dakolias, Court Performance Indicators around the World, p. 32. In the Dominican Republic the judiciary succeeded in establishing such a relationship with the media, USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 129

[266] Said/ Varela, Colombia, Modernization of the Itagüí Court System. A Management and Leadership Case Study, p. 36; World Bank, Argentina, Legal and Judicial Sector Assessment, p. 20; USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 129

[267] USAID, Guidance for Promoting Judicial Independence and Impartiality, p. 39

[268] Dietrich, Legal and Judicial Reform in Central Europe and the Former Soviet Union (Russia), p. 15

[269] USAID, Guidance for promoting judicial independence and impartiality, pp.28-31

CHAPTER VI
ENFORCEMENT

BRINGING CORRUPTION TO LIGHT

A key problem faced by those investigating corruption is that, unlike many traditional crimes, such as robbery or murder, corruption does not have a clear victim likely to complain, and there is no overt occurrence likely to be reported by witnesses. Indeed, in corruption cases, those with direct knowledge of the offence generally profit in some way, making them unlikely to report it. Corruption is not a "victimless" crime, however; the only victim in many cases is the general public interest. For that reason, any anti-corruption strategy should include elements intended to bring to light the presence of corruption:

- Elements to encourage people who witness or are aware of corrupt incidents to report them[270];
- Incentives to complain about substandard public services that may be due to corruption;
- General education about corruption, the harm it causes and basic standards that should be expected in the administration of public affairs[271];
- Elements that generate information and evidence of corruption in other ways, such as audit and inspection requirements; and
- Strategies to encourage the more "direct" victims of corruption, such as the unsuccessful participants in a corrupt competition for a public contract or employment position, to be aware of the possibility of corruption and to report it when suspected.

In encouraging those aware of corruption to report it, the greatest challenge is often their vulnerability to intimidation or retaliation from the offenders, usually because they belong to a vulnerable group or because of the relationship they have with the offenders. Thus, those who deal with officials in circumstances of physical or social isolation, such as new immigrants or residents of rural areas, should be the subject of information campaigns about what standards to expect from officials and given the means to lodge complaints if the standards are not met. Government agencies can also set up channels that permit corruption to be reported internally[272].

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[270] See United Nations Convention against Corruption, Article13, paragraph 2 (general reporting of corruption and awareness of anti-corruption bodies), Article 8, paragraph 4 (reporting from within public service), and Article 33 (protection of persons who report corruption).

[271] See United Nations Convention against Corruption, Article 6, subparagraph 1(b) (mandate to increase and disseminate knowledge about corruption), Article 10, subparagraph 1(c) (publication of information about risks of corruption), Article 13, subparagraphs 1(c) (information activities that contribute to non-tolerance of corruption) and 1(d) (freedom to research and publish information about corruption) and Article 61 (sharing of research and information about corruption).

[272] See United Nations Convention against Corruption, Article 8, paragraph 4.

TOOL #28

GUIDELINES FOR SUCCESSFUL INVESTIGATIONS INTO CORRUPTION

The following guidelines are designed to give members of the law enforcement community some general directions for investigating corruption. There are no universal rules for investigating corruption, but some of the following elements, if incorporated into national strategies, will:

- Help to develop investigative structures able to detect corruption; and
- Permit effective investigations to produce information that can be used to develop and apply effective responses.

Information derived from investigations should be capable of supporting:

- Criminal prosecutions and other responses directed at individuals involved; and
- Measures intended to restructure or reorganize public or private administration to make it more resistant to corruption.

The autonomy and security of investigations is important, both to encourage and protect those who report corruption or assist in other ways, and to ensure that the results of investigations, whether they uncover corruption or not, are valid and credible.

Almost every element of the United Nations Convention against Corruption could be considered as having some relationship to some element of this Tool. The principal provisions, however are the mandatory and optional criminal offences which States Parties are required to establish (or consider establishing) under Chapter III (Articles 15-42). Most of these establish the core offences such as bribery and embezzlement, which will form the basis of investigations and the basis of cooperation between the authorities of different States Parties. Articles 26-42 do not establish offences, but contain other elements that will often relate to investigations, including:

- criminal or other liability of legal persons (Article 26);
- freezing, seizure and confiscation of assets (Article 31);[273]
- requirements for the protection of victims, witnesses and people who report corruption (Articles 32-33);
- provisions for specialized anti-corruption law enforcement bodies (Article 36);
- measures to encourage cooperation with law enforcement authorities (Article 37); and,

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[273] See also Chapter V of the Convention, which deals with the broader question of asset recovery.

- rules of jurisdiction (Article 42).

In addition to these, Chapter IV of the Convention (Articles 43-50) contains provisions for use in dealing with corruption in transnational cases, including a number of measures specifically directed at investigators, including:

- mutual legal assistance requirements (Article 46);
- cooperation between law-enforcement bodies (Article 48);
- provisions relating to joint investigations (Article 49); and,
- provisions encouraging the use of special investigative techniques such as electronic surveillance (Article 50);

EDUCATION ABOUT CORRUPTION

Before corruption can be reported, it must first be identified. Thus, the general population and specific target groups should be educated about what constitutes corruption, the full range of corruption types, its true costs and consequences and, more generally, about reasonable expectations for standards of integrity in public administration and private business practices.

Many people have a very narrow appreciation of corruption and may not understand that the behaviour they witness or engage in is harmful. Others may understand the harm but lack motivation to take any action because the problem is seen as pervasive and unchangeable. In environments where corruption has become institutionalized and accepted, considerable educational efforts may be needed to change the popular perception that corruption is a natural or inevitable phenomenon and to ensure that it is perceived as socially harmful, morally wrong and, in most cases, a crime. In many countries, similar efforts have proved successful in the past with respect to other forms of crime such as driving offences, "white-collar" crime, and environmental crime.

OPPORTUNITIES TO REPORT CORRUPTION [274]

Those with knowledge of corruption must be placed in a position where they are able to report it. Officials must therefore assume the responsibility for dealing with corruption. They must be properly trained to deal with cases, readily accessible to potential complainants or witnesses, and "visible" so that those likely to report corruption are aware of their existence and can readily contact them with information.

Security against retribution

Victims and witnesses will not come forward if they fear retribution. Precautions against retribution are commonly incorporated into instruments dealing with corruption and organized crime, especially where the problem is particularly

[274] See United Nations Convention against Corruption, Article 8, paragraph 4 (reporting by public officials) and Article 13, paragraph 2 (ensuring public aware of places where corruption can be reported).

acute. [275] That is particularly true in cases of official corruption where those who have information are usually relatively close to a corrupt official, and the status of the official affords him or her opportunities to retaliate. Measures are usually formulated to protect not only the informant but also the integrity and confidentiality of the investigation. Common precautions include guarantees of anonymity for the informant, assurances that officials accused of corruption will not have any access to investigative personnel, files or records, and powers to transfer or remove an official during the course of an investigation to prevent intimidation or other tampering with the investigation or evidence.

In cases where the informant is an "insider", additional precautions may be taken because he or she will be working in close proximity to the alleged offenders and because, in some cases, there may be additional legal liabilities for disclosing the information involved. Many countries have adopted "whistleblower" laws and procedures to protect insiders from both the public and private sectors who come forward with information. Additional protection in such cases may include shielding the informant from civil litigation in areas such as breach of confidentiality agreements and libel or slander and, in the case of public officials, from criminal liability for the disclosure of Government or official secrets. Protection may also extend to cases where the information ultimately proved incorrect, provided that it was disclosed in good faith.

Safeguards against abuses by the informants themselves may also be needed, particularly in cases where they are permitted to retain their anonymity or are shielded from legal liability. To balance the interests involved, legislation may limit legal protection to cases of bona fide disclosures or create civil or criminal liability for cases where the informant cannot establish good faith or where the belief that malfeasance had occurred was not based on reasonable grounds.

In cases where the information proves valid and triggers official action, the anonymity of the informant often cannot be maintained, making retribution possible even after charges have been laid. In such cases, legislation may provide for compensation, transfer of the informant to another agency or, if the informer is in more serious danger, relocation and a new identity unknown to the offenders.

Independence and credibility of investigators and prosecutors

Victims, witnesses and informants must receive protection from those under investigation. It is also important for officials or bodies responsible for

[275] Recent international provisions dealing with intimidation or retribution include: United Nations Convention against Corruption, GA/RES/58/4, Articles 32-33 (protection of victims and witnesses, protection of persons who report corruption); United Nations Convention Against Transnational Organized Crime (GA/res/55/25, annex), articles 23 (requiring States Parties to provide criminal penalties for obstruction of justice) and 24 (requiring States Parties to take measures to protect witnesses); the Council of Europe Criminal Law Convention on Corruption (1998), Article 22 (Protection of collaborators and witnesses); the Organisation of American States' Inter-American Convention Against Corruption (1996), Article III (preventative measures); Global Coalition for Africa, Principles to Combat Corruption in African Countries (1999) (Art. 15); and Principles 2 and 5 of the Global Forum's Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials (1999). For a more detailed analysis of all of these instruments except the Convention against Corruption, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption).

investigating corruption to be independent or autonomous. Functional independence ensures that investigations will be effective in identifying corruption by reducing the opportunities for corrupt officials to tamper with the investigation and by ensuring that the evidence obtained will be credible when used in criminal or disciplinary proceedings . Independence is also important to instill confidence both in the investigators and in the bureaucracies or agencies they investigate. Where the investigation is independent, the population will have some assurance that, if corruption exists, it will be identified and eliminated and that, if investigators conclude that corruption does not exist or has been eliminated, the bureaucracy can be trusted. [276]

The mechanics of functional independence vary from one country or justice system to another. Most systems incorporate elements of judicial independence to ensure the integrity of court proceedings,[277] but the means of securing autonomy for the prosecutorial and investigative functions differ. In systems where criminal investigations are carried out by magistrates or other judicial officials, such functions also fall within the ambit of judicial independence. Where investigations and prosecutions are carried out by non-judicial personnel, judicial oversight may still play a role. As the latter will apply only to cases that come before the courts, however, other methods must be found of reviewing or monitoring key functions, such as the conduct of investigations and the decisions that determine who is investigated and whether a prosecution is to be brought before the courts.

The problem of *quis custodiet ipsos custodes?* [278]also arises when structures are being developed to separate anti-corruption investigations from other elements of Government. While the agencies involved must be independent enough to protect their functions against undue interference, they must also be subject to sufficient oversight to prevent abuses and to identify any occurrences of corruption on the part of investigators and prosecutors. Although quite common in any system where law enforcement and prosecutorial agencies are being established, such problems are arguably more critical in dedicated anti-corruption agencies, the reason being that there will almost certainly be attempts to bribe, coerce or exert other undue influences on those involved, often by very sophisticated and well resourced corrupt officials or organized criminal groups. It is essential for investigators to be subject to overall regulation and accountability for their activities. Such oversight should not extend, however, to interference with operational decisions, such as whether a particular individual should be investigated, what methods should be used, or whether a case should be the subject of further action, such as criminal prosecution, once the investigation has concluded.

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[276] See United Nations Convention against Corruption, Article 36 (independent law enforcement bodies) and Article 11, paragraph 2 (special measures to strengthen integrity and prevent corruption for prosecutors having quasi-judicial independence).

[277] . See the Code of Conduct for Law Enforcement Officials contained in the annex to General Assembly resolution 34/169 of 17 December 1979. See also the guidelines on the role of prosecutors contained in the annex to resolution 26 of the Eighth Congress (Eighth United Nations Congress…, pp. 188-194).

[278] Who will watch the watchman

Adequate training and resources for investigators

Adequate training and resources are necessary to ensure that reported cases will be dealt with effectively and to encourage those aware of corruption to come forward with information. Informants will assume the risk of reporting only if they are confident that effective action against corruption will be the result. Such confidence requires assurances that investigations will themselves be independent and free of corruption and also that investigators are actually capable of detecting it, gathering evidence against offenders, and taking whatever measures are needed to eliminate it. The commitment of significant resources also sends a powerful signal that the highest levels of Government are strongly committed to the prevention and elimination of corruption, which both deters offenders and encourages informants.

The wide range of corruption types requires a wide range of specific skills and knowledge on the part of investigators. Most will find frequent need for legal and accounting skills to identify, preserve and present evidence in criminal proceedings, disciplinary proceedings or other fora. Whether there are enough investigators with the necessary skills and training to work effectively depends on whether enough resources are available. Apart from personnel and funding, other resources, such as systems for creation, retention and analysis of records, are also important. The strongest evidence of high-level corruption will often be a long-term pattern in complaints about lesser abuses.

Training investigators in the sophisticated techniques needed to deal with corruption, and especially the complexities of large-scale corruption, corruption by former senior officials and investigations and legal proceedings relating to the tracing, freezing, seizing, confiscation and recovery of the proceeds of corruption represents a particular challenge for law enforcement agencies in developing countries, where resources are limited. Recognizing this problem, the drafters of the United Nations Convention against Corruption and the United Nations General Assembly have called for enhanced financial and material assistance to support the efforts of developing countries to prevent and fight corruption.[279]

Liaison with other investigative agencies

Given the need for autonomy and independence and taking into account the extreme sensitivity of many corruption cases, a careful balance should be struck when establishing the relationship between anti-corruption investigators and other agencies. In environments where corruption is believed to be relatively pervasive and widespread, complete autonomy is advisable. Establishing an anti-corruption unit in a police force may not be advisable, for example, if there is a significant likelihood that the police themselves may be investigated or if they are suspected of corruption. On the other hand, it will be important for anti-corruption investigators to interact effectively with other agencies. For example, information from tax authorities or agencies investigating money-laundering or other economic crimes may uncover evidence of corruption or of unexplained wealth that may have been derived from corruption, and audits of Government agencies may uncover inefficiency or malfeasance that is not due to corruption,

[279] See Convention Article 62, and in particular Article 62, subparagraph 2(b) (financial and material assistance) and subparagraph 2(c) (technical assistance).

but warrants further investigation or reform by other agencies. Article 38 of the United Nations Convention against Corruption requires States Parties to encourage cooperation between investigative and prosecuting authorities and other public officials.

OTHER MEANS OF DETECTING CORRUPTION

While encouraging those who witness corruption to report it is clearly a major means of detection, other methods should not be overlooked. Many methods can also be considered as preventive in nature and are discussed in the previous Tools. Others are examined in more detail in the following segments.

Disclosure and reporting requirements

Requiring public officials to make periodic disclosure of their assets both deters unjust enrichment and provides investigators and auditors with a powerful instrument to detect corruption by identifying the existence of unexplained wealth.

Similarly, non-compliance with requirements to disclose actual or potential conflicts of interest may alert auditors or investigators that the official intends to corruptly exploit undetected or undisclosed conflicts. Even where the official is not honest in complying with the reporting requirements, such measures may be useful as opening up gaps and inconsistencies that may well trigger more thorough investigations. The official may ultimately be held liable not only for non-compliance with the reporting requirements but for corruption itself. Several provisions of the United Nations Convention against Corruption call for disclosure either of assets or potential conflicts of interest, or both. None of these specifically requires the criminalization of failing to make such disclosures or making false or misleading disclosures, although implementing States Parties will generally wish to consider such measures as part of implementation packages.[280] The Convention also calls for the establishment of an offence of illicit enrichment, applicable when the acquisition of disclosed or discovered assets cannot be accounted for from legitimate sources, but this offence is problematic for some countries because it would require the presumption of illicit acquisition, an element of the offence.[281]

Sanctions against non disclosure or false reporting should be approximately as severe as those against the underlying corruption, to prevent offenders from avoiding liability for corruption by committing the lesser disclosure and reporting offences[282]. They should also always permit at least the possibility of dismissal or

[280] See Convention Article 8, paragraph 5 (disclosure by public officials); and Article 9, subparagraph 1(e) (disclosure by public procurement officials). Article 52, paragraph 5 does call on States Parties to consider "…effective financial disclosure systems for appropriate public officials", subject to sanctions for non-compliance, as part of the chapter on asset-recovery.

[281] See Article 20 (optional offence of illicit enrichment).

[282] With respect to relevant recent international principles addressing this issue, see e.g., Principle 5, point 2 of the Global Forum on Fighting Corruption's Guiding Principles for Fighting Corruption and Safeguarding

removal from office. Thus the corrupt behaviour can be ended even where inadequate disclosure is successful in concealing unjust enrichment and underlying corruption. As noted above, regular periodic disclosure is also preferable to requiring disclosure only on entering and leaving office, as that will allow corruption to be detected while it is still ongoing, reducing harm to the public interest.

Audits and inspections

Audits of records, physical inspections of premises or items, or interviews with potential victims, witnesses or others who with relevant information can be used proactively, as a means of monitoring the quality and integrity of public administration and identifying possible abuses, and reactively, as a means of investigating those already suspected of corruption or other malfeasance[283]. Audits may be conducted on an internal or local basis, but overall anti-corruption strategies should provide for a central, national audit agency. Such agencies require adequate resources and expertise, and in order to audit senior levels of Government, they must enjoy a substantial degree of autonomy approaching if not equal to judicial independence. The independence should extend to decisions about which officials, sectors or functions should be audited, how audits should be carried out, the formulation of conclusions about the results of audits and, to some degree, the publication or release of such conclusions.

Auditors and their investigative staffs should have the power to conduct regular or random audits to ensure overall deterrence and surveillance, as well as specifically targeted audits directed at individuals or agencies suspected of malfeasance. In many countries, the mandate goes beyond suspected malfeasance, as auditors are also responsible for identifying and addressing cases of waste or inefficiency deriving from problems other than crime or corruption. Where problems are identified, auditors generally have the power to recommend administrative or legal reforms to address institutional or structural problems, and can refer cases to law enforcement agencies or criminal prosecutors if criminal wrongdoing is suspected.

Auditors should be supported by legal powers, such as requirements that compel individuals or agencies being audited to cooperate. They should not, however, be allowed to become law enforcement agencies. In most countries, once criminal offences are suspected, higher standards of procedural safeguards are applied to protect the human rights of those involved, but once the procedural requirements have been met, criminal investigators are authorized to use much more intrusive powers to detain suspects and gather evidence[284]. Maintaining

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Integrity Among Justice and Security Officials (1999). For a more detailed analysis of this instrument, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption)."

[283]In some countries, human rights protections limit the use of general inspections or require additional procedural safeguards once a crime is suspected.

[284] In many justice systems, a person cannot be compelled to assist investigators once he or she is suspected of having committed a criminal offence. Article 14(3)(g) of the International Covenant on Civil and Political Rights (GA/res/2200A of 12 December 1966, UNTS#14668) establishes the right of a criminal suspect "…Not to be compelled to testify against himself or to confess guilt", which is interpreted in many

the distinction between auditors or inspectors and criminal investigators ensures that the former retain the legal powers needed to monitor relatively broad areas of public administration to identify corruption and inefficiencies and to propose systemic or structural solutions. When individual malfeasance is uncovered as a result, it can then be referred to other agencies with the necessary powers, resources and expertise to conduct criminal investigations and prosecutions.

"Sting" or "integrity-testing" operations

A more controversial but unquestionably effective means of identifying corrupt officials is the use of decoys or other integrity- testing tactics. Such tactics involve the use of undercover agents who offer officials opportunities to engage in corruption in circumstances where evidence of their reaction can be easily and credibly gathered. Depending on local policy or legal constraints, officials may be targeted at random or on the basis of evidence or reason for specific suspicion of corruption.

The criticisms of such tactics are substantial. Arguably, even the most honest official might yield to temptation if the offer were sufficiently convincing; the willingness to do so when approached may not necessarily establish that he or she is inherently corrupt or that similar transgressions have occurred in the past. The problem underpins restrictions intended to prevent "entrapment" in some countries. Usually in such countries, undercover agents are permitted to create opportunities for a suspect to commit an offence, but not to offer any actual encouragement to do so. For example, a police officer might be placed by an undercover agent in a situation where a corrupt officer would normally solicit a bribe but the undercover agents would be prohibited from actually offering a bribe.

Such tactics represent a powerful instrument both for deterring corruption and for detecting and investigating offenders. As no any inside information or assistance is necessarily required, the tactics can be used quickly against any official at virtually any level who is suspected of corruption. If the suspect is corrupt, highly credible evidence is quickly provided, usually in the form of audiotapes, videotapes, photographs and the personal testimony of the investigators involved. Such evidence may form the basis of a criminal prosecution or serve as the justification for other investigative methods such as electronic surveillance or the searching of financial records. If the suspect is not corrupt, his or her refusal to participate also tends to reliably establish that fact, provided that adequate precautions are taken to ensure that investigative targets are not warned beforehand and that undercover agents are well trained and competent.

Electronic surveillance, search and seizure and other investigative methods

Techniques, such as wiretapping, the monitoring of electronic communications and search and seizure, have limited use in the initial detection of corruption in many countries as human rights safeguards usually prohibit their use unless

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national human rights instruments as a general right against self-incrimination. Where such suspicions are established to an appropriate standard, however, criminal investigators gain powers to engage in more intrusive powers of search and seizure in order to obtain the necessary evidence.

there is already substantial evidence that a crime has been, or is about to be, committed[285]. As noted above, procedural protection, questions relating to the competence of investigators and control over the use of intrusive investigative methods, will usually restrict the use of such methods to criminal law enforcement agencies, as opposed to more general surveillance agencies such as auditors, inspectors or ombudsmen. Where evidence of criminal wrongdoing justifies their use, however, they are well established and proven methods of gathering the evidence necessary to identify and link offenders and establish criminality in criminal prosecutions.

Electronic communications using telephones, fax machines, e-mail and other technologies may be intercepted and recorded as evidence, and physical premises, computers, bank or financial records, files and other sources of evidence may be physically or electronically searched. [286]Searches may target virtually any location where there is a reasonable expectation of finding evidence, including locations associated with the suspected offender or third parties. Thus, search warrants or similar documents can be obtained to search not only the bank accounts of persons suspected of taking bribes but also those suspected of paying them. Search warrants may be used not only for initial corruption offences but also for related crimes, such as the concealment or laundering of the proceeds of corruption.

In some cases, intrusive investigative methods used to investigate other crimes may also uncover previously unsuspected corruption, particularly in organized crime cases, where offenders often try to corrupt officials or obstruct justice to shield their other criminal operations from detection or criminal liability. Corruption and the obstruction of justice are both offences for which international cooperation can be sought between States that are party to the United Nations Convention against Transnational Organized Crime[287]. A similar requirement to criminalize obstruction of justice, based on that of the organized crime Convention , was included as Article 25 of the United Nations Convention against Corruption.

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[285] Article 17(1) of the International Covenant on Civil and Political Rights (GA/res/2200A of 12 December 1966, UNTS#14668) provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…", which has been interpreted in many domestic constitutional and legal provisions as requiring prior authorization by a judicial or other independent authority based on adequate grounds to believe that a crime has been or will be committed and that the invasion of privacy is needed to prevent the crime or gather evidence of it.

[286] Article 50, paragraph 1 of the United Nations Convention against Corruption requires States Parties, "…to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law…" to ensure that electronic surveillance techniques may be used in corruption cases. This is found in Chapter IV because such techniques are commonly requested as means of obtaining evidence needed to respond to foreign mutual legal assistance requests.

[287] GA/res/55/25, annex, articles 8 (general corruption) and 23 (obstruction of justice). The obligation upon States Parties to criminalize corruption sets out various forms of corruption applicable to the corruption of any "public official" for any purpose. The obligation regarding obstruction of justice is more specific, covering only corruption which seeks to interfere with investigative or judicial proceedings relating to Convention offences, but it extends to both positive (e.g., offering an "undue advantage") and negative (e.g., force, threat or intimidation) inducements.

Other forms of electronic surveillance, such as the use of video or audio recordings may also be used as evidence in corruption cases. Procedural safeguards and restrictions based on privacy rights may not, however, apply if they are used in circumstances where there is no privacy to protect, such as public places and communications channels used for open broadcasts or where participants are warned that conversations may be monitored. Depending on national laws, it may be possible to routinely or randomly monitor communications between public officials and those they serve, if prior warning can be given and if monitoring is not inconsistent with the public function being performed.

If monitoring is feasible from the standpoint of human rights, technical and cost considerations, it will create a powerful deterrent, as officials always face the possibility that their conversations may be recorded and used as evidence if corrupt transactions take place. Where resources limit the extent of monitoring, a system of universal notification combined with occasional random monitoring may still provide an effective deterrent.

The detection of fraud and other forms of economic corruption may also be accomplished or assisted using forensic accounting techniques. Such techniques generally consist of examining financial records for patterns that are unusual or at variance with the patterns or norms established by other records. Such items as abnormally high balances in accounts used for discretionary spending, abnormal fluctuations in balances, payments that are unusually high or unusually frequent, records kept in formats that make them difficult to read or interpret, or any other pattern of spending or record keeping that cannot be attributed to operational requirements may suggest the presence of corruption or other economic crime. Basic forensic tests may be applied by auditors as part of the process of screening for evidence of corruption, or by criminal investigators gathering evidence about suspect individuals or agencies.

Once corruption is suspected, the time-honoured practice of interviewing suspects and possible witnesses also remains a major investigative tool. The investigative skills needed are similar to those for other forms of criminal investigation, although specialized knowledge of corrupt practices and related matters will generally be an advantage. Given the concerns about retribution against witnesses or informants, investigators should interview contacts in a secure, confidential environment, take steps to protect any information gained, to keep the identity of the source from disclosure, and to be able to conduct interviews in a manner that is reassuring to informants.

Choice when disposing corruption cases

Cases where corruption on the part of individuals is identified can be dealt with in several ways:

- By criminal or administrative prosecutions, leading to incarceration, fines, restitution requirements or other punishments;
- By disciplinary actions, leading to employment-related measures such as dismissal or demotion;

- By bringing or encouraging civil proceedings, in which those directly affected or, in some cases, the State, seek to recover the proceeds of corruption or civil damages; and,
- Remedial actions, such as the retraining of individuals or restructuring of operations in ways that reduce or eliminate opportunities for corruption.

Generally, the same detection techniques, investigative procedures and evidentiary requirements will apply, regardless of the process chosen, although criminal prosecutions will usually entail higher standards of reliability and probative value for evidence because of the serious penal consequences facing offenders. The decision about whether to apply criminal sanctions or to seek less drastic remedies can be exceedingly difficult, balancing moral and ethical considerations against pragmatic costs and benefits, and is itself susceptible to corruption in systems embodying relatively broad prosecutorial discretion.

Criminal prosecutions may not be desirable or possible in the following circumstances:

The conduct may not be a crime

In some cases, behaviour might be considered as "corrupt" for the purposes of a national anti-corruption programme or the internal programmes of a company or Government agency, but it is not a criminal offence. Alternatively, it may be a type of conduct that has been overlooked in the development of the criminal law, or conduct such as purely private-sector malfeasance that is seen as corrupt but does not sufficiently harm the public interest to warrant criminalization.

Available evidence may not support prosecution

As noted above, the evidence and burden of proof in criminal prosecutions involve relatively high standards because of the penal consequences involved. In some cases, there may be sufficient evidence to justify lesser corrective measures but not to support a criminal prosecution. Where that occurs, authorities must generally decide whether the circumstances warrant the additional delay, effort and expense needed to gather sufficient evidence to proceed, or whether measures such as disciplinary or remedial action should be pursued instead. One cost factor in such cases is the cost of leaving a corrupt official in place long enough to complete a full criminal investigation. Another consideration is the possibility that evidence of past corruption has been lost, making prosecution impossible.

Prosecution may not be in the public interest

In some cases, conduct may amount to a crime but official discretion may be exercised not to prosecute the offender on the basis that the public interest is better served by some other course of action. Where large numbers of officials are involved, for example, the costs of prosecution include not only litigation costs but also the costs of incarceration or other punishment, and the concomitant loss of expertise and costs of replacing the convicted officials. Discretionary decisions on such a basis can be extremely problematic. On the one hand, it may be very expensive to prosecute offenders on a case-by-case basis, but if a decision is made not to prosecute, it may create the impression that the justice system itself is corrupt, thus encouraging corruption in other

sectors and seriously eroding any deterrence value in criminal justice measures. Where such a decision is made, it must be well documented and made in the most transparent way possible to prevent corruption itself and dispel any public perception of corruption.

Criminal prosecutions and punishments effectively remove corrupt officials from any position where they can commit further offences, and deter the individuals involved and others in similar positions. Since most corruption is economic in nature and is pre-planned rather than spontaneous, general deterrence is likely to form a significant part of the criminal justice component of anti-corruption strategies. The high financial and human costs impose practical limits on the extent of such prosecutions, however, and attempting large numbers of prosecutions as part of an anti-corruption drive may pressure investigators or prosecutors to engage in improprieties that effectively distort or corrupt the criminal justice system itself.

In formulating anti-corruption strategies, criminal prosecution and punishment should be seen as only one of a number of options. There should also be consideration of other possibilities ranging from preventive measures, such as education/training and the institution of security measures, to administrative or disciplinary sanctions that remove offenders at a lesser cost to the organization and society as a whole. Appropriate measures should be applied.

CASE MANAGEMENT

Managing investigations

Corruption investigations tend to be large, complex and expensive. To ensure the efficient use of resources and a successful outcome, the elements and personnel involved must also be managed effectively. Such management should be seen not only as a matter of administrative necessity but also as part of the overall strategy of protecting the integrity of the investigation and ensuring public confidence in its outcome. As part of an ongoing anti-corruption strategy, some management issues may be dealt with as matters of standing practice or procedure, while others will require attention or review on a case-by-case basis.

Teams working on specific cases will generally require expertise in the use of investigative techniques ranging from financial audits or other inspections to intrusive techniques. If, from the outset, legal proceedings are not excluded as an outcome, there may also be a need for experience in assembling such cases and for legal expertise in areas such as the law of evidence and the human rights constraints on, for example, search and seizure. In large, complex investigations, teams of investigators may be assigned to specific target individuals or precise aspects of the case. One group might be engaged in the tracing of proceeds, for example, while others interview witnesses or maintain surveillance of suspects.

All such functions should be conducted in accordance with an agreed strategy and coordinated under the supervision of an investigative manager or lead investigator who receives timely information about the progress of investigators on a regular and frequent basis. The interviewing of witnesses or the conducting of search and seizure operations will generally disclose the existence of an investigation and, to some degree, its purpose. Thus, it should not be undertaken

until the conclusion of other measures that are effective only if conducted without alerting the targets. On the other hand, such procedures may become urgent if it appears that proceeds will be moved out of the jurisdiction or evidence destroyed unless rapid steps are taken. Coordinating those factors in order to maximize effectiveness requires competent and well informed senior investigators. Given the magnitude of many investigations, human and financial resources will frequently become a concern, and lead investigators will often have to seek the necessary resources and allocate scarce resources to areas of the investigation where they will be used most effectively.

Investigative management must be flexible and capable of quickly adapting both strategy and tactics to take account of experiences and information as they accumulate. While investigators usually develop theories about what individual pieces of information mean and how they fit together, such theories often require amendment as investigations proceed. Thus investigators must always be open to alternative possibilities and information or evidence that appears to be inconsistent with the theory being pursued at any given time. Investigations initiated into particular incidents of corruption will often turn up evidence of other, hitherto unsuspected, corruption or other forms of improper or criminal activity.

MANAGEMENT OF INFORMATION

Internal information

Flexibility should be supported by effective information management. Information should be made available as quickly as possible to those who require it. It should then be retained in a format that is cross-referenced and quickly accessible so that it can be reviewed as needed and so that links to other relevant information become apparent.

For each piece of information there should be an assessment of its relative sensitivity or confidentiality and the assessment linked to the information itself. The degree of sensitivity may not be obvious to those unfamiliar with the information. For example, disclosure of facts that may seem insignificant in the context of an ongoing investigation, may inadvertently disclose or help identify a source or informant who had been promised anonymity, thus reducing the credibility of investigators and their ability to obtain similar information in future cases.

Media relations

Another critical element of information-management is media relations. Ensuring that information is passed to the public media is important to ensuring transparency and the credibility of investigations. More fundamentally, media scrutiny and publicity are essential to raising public expectations, public awareness of the presence of corruption or substandard practices, and to generating political pressure for measures against corruption. Public awareness of the existence of anti-corruption investigators is also an important means of encouraging and assisting those who witness or suspect corruption to report it and provide evidence. Ensuring that the media have access to accurate and authoritative information may also be important as a means of reducing the

tendency to report information that may be incorrect or harmful to the investigation or persons or agencies being investigated.

Measures should be taken to ensure that any information released for publication has been carefully reviewed, both to ensure accuracy and to eliminate disclosures that could be harmful to the investigation. It is also important to ensure that only specified individuals release information or participate in press conferences and similar activities to ensure that information is properly reviewed and that all information given the media is consistent. Those in contact with the media must also be competent, both in media relations and in the subject matter they will discuss. They should not comment on matters that are beyond their expertise.

MANAGING THE SECURITY OF INVESTIGATIONS AND INVESTIGATORS

The management of security is also a critical function. As noted previously, protecting the confidentiality of informants and other sources is often the only way to ensure cooperation; the leaking of sensitive information may warn targets, allowing them to modify their behaviour, conceal or destroy evidence, or make attempts to corrupt or disrupt the investigative process. Maintaining effective security requires an assessment of the full range of possible attempts to penetrate or disrupt anti-corruption investigators, both in general and in the context of specific investigations. Attempts may be directed at obtaining information or denying information to investigators by disrupting, distorting or destroying it; they may be intimidation or even murder of the investigators themselves. The following areas should be assessed:

Physical premises

The premises where investigators base their work and store information should be chosen with a view to being able to control entry, exit and access so that unauthorized persons may be excluded. Premises should also be resistant to attempts to anyone trying to use force or stealth to gain entry when the location is unoccupied. Where premises are part of larger law-enforcement or other Government institution, they should also be isolated from the remainder of the establishment in which they are located. Threats to destroy information or evidence by destroying the premises themselves using methods such as arson or explosives may also require consideration. Also important is security against various forms of electronic surveillance in the form of concealed microphones, transmitters and similar apparatus. Thus premises should be chosen that are resilient to surveillance techniques and there should be regular inspections or "sweeps" to detect devices that may have been installed since the last inspection.

Personnel Security

The physical safety and security of personnel must be assessed and protected to ensure that competent investigators can be employed and to frustrate any attempts to disrupt investigations by threatening, intimidating or actually harming personnel. Investigations may also be disrupted if corrupt individuals succeed in gaining employment for that purpose. Generally, employees should be screened

by examining their past history, family ties or other relationships to identify factors that suggest vulnerability to corruption. Threats to physical safety should be regularly assessed and, when identified, vigorously pursued by other law enforcement agencies. Other protective measures may include advice with respect to security precautions, anonymity and arming investigators.

Information, documents and communications

Most of the security concerns raised by investigations revolve around the possibility that critical information will fall into the hands of investigative targets and frustrate attempts to obtain evidence against them. Addressing such concerns requires management of each investigation so that steps that attract public attention are not taken prematurely, that documents are used, stored and transported in secure conditions, that access to copying equipment is limited and monitored, and that channels of electronic communication including wireless telephones, fax machines, radios, electronic mail and other media are made resistant to unauthorized interception or monitoring. Where the physical security of channels cannot be ensured, the use of encryption or similar technologies should be undertaken to ensure that those who can receive the data cannot decipher and read them.

Relationships with other agencies

Anti-corruption agencies must be ultimately accountable for their activities, which requires some degree of timely disclosure of information to political or judicial bodies responsible for their oversight. The timing of a disclosure may vary, and can be a difficult issue. As a general principle, investigations should be reviewed externally only after they have been concluded. If abuses occur before investigations are over, some harm will occur and, in some cases, it may be irreversible. In such cases, it may be appropriate to permit investigators to consult more senior officials, such as judges, for advice or direction. Many systems make some provision for such an eventuality.

Threat assessment

Threats to the security of investigators and investigations should be assessed both in general terms and in the context of each specific investigation. Relevant factors will include the numbers of individuals suspected, whether they are organized or not, the sophistication of the corruption suspected, the sophistication of the individuals or group targeted, the magnitude and scope of the corruption and its proceeds, whether the targets are involved in crimes other than corruption, and whether there is any specific history of violence or attempts to obstruct investigations or prosecutions.

MANAGING TRANSNATIONAL OR "GRAND CORRUPTION" CASES

Cases involving "grand corruption" or that have significant transnational aspects raise additional management issues. For example, cases where very senior officials are suspected raise exceptional concerns about integrity and security and are likely to attract extensive media attention. Large-scale and sophisticated corruption is well resourced and well connected, making it more likely that

conventional sources of information will either not have the necessary information or evidence or be afraid to cooperate. Senior officials may be in a position to interfere with investigations. The magnitude of proceeds in grand corruption cases makes it more likely that part of the overall case strategy is the tracing and forfeiture of the proceeds, and where they have been transferred abroad, obtaining their return. Allegations that senior officials are corrupt may also be extremely damaging in personal and political terms if they become public and later turn out to be unsubstantiated or false.

Transnational elements are more likely to arise in grand corruption cases. Senior officials realize that there is no domestic shelter for the proceeds while they are in office and generally transfer very large sums abroad, where they are invested or concealed. In many cases, the corruption itself has foreign elements, such as the bribery of officials by foreign companies seeking Government contracts or the avoidance of costly domestic legal standards in areas such as employment or environmental protection. The offenders themselves also often maintain foreign residences and flee there once an investigation becomes apparent.

Generally, transnational or multinational investigations require much the same coordination as do major domestic cases, but the coordination and management must be accomplished by various law enforcement agencies that report to sovereign Governments that have a potentially wide range of political and criminal justice agendas.

Coordination will usually involve liaison between officials at more senior levels and their foreign counterparts to set overall priorities and agendas, and more direct cooperation among investigators within the criteria set out for them. From a substantive standpoint, investigative teams in such cases will generally be much larger and will involve additional areas of specialization such as extradition, mutual legal assistance and international money laundering.

In an era of globalisation of both legitimate and illicit economic activities, a number of transnational justifications were advanced for the development of the United Nations Convention against Corruption. One of the most prominent of these was the fact that countries affected by "grand corruption" were not in a position to take measures against it while it was occurring, and were generally ill-equipped in its aftermath to pursue the often-substantial proceeds transferred abroad by corrupt officials.[288] The result was Chapter V of the Convention, which sets the return of such proceeds as a "fundamental principle" and then sets out a framework for cooperation in such cases.

CASE SELECTION STRATEGIES AND TECHNIQUES

Given the extent of corruption, the range of cases likely to exist, the range of possible outcomes, and the limits imposed by human and financial resource constraints, most national anti-corruption programmes will find it necessary to

[288] See GA/RES/55/188, 56/186 and 57/244. See also Report on the technical workshop on asset recover held in Vienna on 21 June 2002, A/AC.261/L.65, Annex, and Reports of the Secretary General, "Prevention of corrupt practices and transfer of funds of illicit origin", A/55/405, A/56/403 and A/57/158.

make priority choices about which cases to pursue, and what outcomes to seek. Prioritizing involves the exercise of considerable discretion that should be carefully managed to ensure consistency, transparency and the credibility of both the decision-making process and its outcomes. A major element of the process is the setting and, where appropriate, the publication of criteria for case selection. That will ensure that like cases are dealt with similarly, and reassure those who make complaints and members of the general public that decisions not to pursue reported cases are based on objective criteria and not on improper or corrupt motives.

The interaction of criteria will vary from case to case, but criteria generally to be considered should include the following:

Seriousness and prevalence of the alleged corruption

Assuming that the fundamental objective of a national anti-corruption strategy is to reduce overall corruption as quickly as possible, priority may be given to cases that involve the most common forms of corruption. Where large numbers of individuals are involved, the cases will often lead to proactive outcomes such as the setting of new ethical standards and training of officials, rather than criminal prosecutions and punishments.

Legal nature of the alleged corruption

Broadly speaking, corruption can be characterized as including criminal or administrative corruption offences, such as bribery; related criminal offences, such as money laundering or obstruction of justice; and non-criminal corruption. As previously discussed, the legal nature of a certain type of activity will often affect both the availability and choice of outcomes. For example, conduct that is not a crime cannot be punished as such. The nature of the offence will also often determine which agency deals with it and how it is prioritized.

Cases that set precedents

Priority should be given to cases raising social, political or legal issues that, once an initial "test" case is resolved, are applicable to many future cases. Examples include dealing publicly with common conduct not hitherto perceived as corruption in order to change public perceptions, and cases that test the extent of criminal corruption offences, and either set a useful legal precedent or establish the need for legislation to close a legal gap or correct a problem. In the case of legal precedents, time-consuming appeals may be required which is another reason for starting the process as soon as a case that raises the relevant issues is identified.

Viability or probability of satisfactory outcome

Cases may be downgraded or deferred if an initial review establishes that no satisfactory outcome can be achieved. Examples include cases in which the only desirable outcome is a criminal prosecution, but the suspect is deceased or unavailable, or essential evidence has been lost. Part of the assessment of such cases should include a review of possible outcomes to see if other appropriate remedies may be achievable.

Availability of financial, human and technical resources

The overall availability of resources is always a concern in determining how many cases can be dealt with at the same time or within a given period. The tendency for cases to change as investigations proceed also requires periodic reassessment of case loads. Generally such factors will not be related to the setting of priorities with respect to the type of case taken up or the priority of individual cases, but there are exceptions. A single major case, if pursued, may result in the effective deferral of large numbers of more minor cases, for example, and unavailability of specialized human expertise may make specific cases temporarily impossible. An assessment of costs and benefits before any decisions are made is thus important. In the case of "grand corruption" and other transnational cases there will be substantial costs in areas such as travel and foreign legal services, but there may be a greater need to make examples of corrupt senior officials for reasons of deterrence and credibility, and to recover large proceeds hidden at home and abroad.

Criminal intelligence criteria

As national anti-corruption programmes gain overall expertise and knowledge and deal with greater numbers of individual cases, intelligence information should be gathered and assessed. An assessment will usually include research and assessment of overall corruption patterns, with conclusions about which are the most prevalent or which cause the most social or economic harm. It will also include the gathering of confidential information about corruption patterns and links between specific offenders or organized criminal groups. As far as ending the activities of criminal groups and bringing about other far-reaching improvements are concerned, such procedures will assist in identifying the cases with high priority and cases that merit the allocation of significant resources. In some cases, investigations may also be given priority in areas where intelligence is needed, in order to develop sources and gather information.

INVESTIGATIVE TECHNIQUES

Some of the following techniques have proved highly efficient in the investigation of widespread large-scale corruption. In particular, various types of financial investigations into suspected corrupt individuals are often the most direct and successful method of proving criminal acts.

Focus investigations.

If the results of a corruption investigation suggest that corruption and bribery in a certain public service is widespread, it is advisable to concentrate on the systematic checking of the assets of all possible bribe takers (See Financial Investigations & Monitoring of Assets). Such an exercise may not yield enough information to warrant further investigation, however. For example, certain Government functions "invite" widespread corruption in terms of a large number officials receiving small-scale bribes. Branches involved in licensing and permit issuing are good examples. A high volume of potential bribe-givers, namely the public, visits such branches on a daily basis. Quite often, the frustrations of applying for a driving licence, obtaining permission to construct a new home, requesting copies of documents or just about any other service to the public becomes a quagmire of government "red tape" and delay. Such an environment

breeds bribery as a means to quickly solving the frustration and delays. In such cases, an investigation into the working files of the branch will be more effective and efficient than investigating the financial records of employees. Before devoting efforts to any investigation, it is important to evaluate the most cost-effective means of deploying staff and focusing investigative energies.

Terms of reference.

Before starting investigations, clear and comprehensive terms of reference (TOR) should be drafted. They should contain a comprehensive list of all the resources needed (human, financial, equipment) to conduct the investigations. Particular consideration should be given to the possible need of additional resources to maintain the secrecy of the investigation. The suspect corrupt civil servant may have connections to other civil servants who may alert him or her to investigations; he or she may even be a member of the criminal justice system and thus have access to restricted information. It is therefore essential at the outset to evaluate methods to ensure the confidentiality of the investigation. Steps taken to protect the secrecy of the investigations could include:

- Renting non-police or undercover locations and making them secure;
- Use of fictitious names to purchase or rent equipment; and
- Use of stand-alone computer systems not tied into any other governmental operation.

Policy document.

In addition to the TOR, a policy and procedures document must be created containing a clear description of the facts giving rise to the investigation, all decisions taken during the investigation, along with their justifications and the reasons for the involvement/non-involvement of the senior management of the institution for which the suspect works. It should be noted that there can be hidden costs in an investigation, such as loss of morale within the target institution and potential loss of public trust. Every investigation must be evaluated on a case-by-case basis with regard to its cost and benefit to the Government and the public.

Selection of the investigation team.

The selection of an effective team will be crucial to the success of an investigation. Members should possess the specific investigative skills needed, should have proven integrity and high ethical standards and be willing to undertake the work. Their backgrounds should be thoroughly checked, including their social and family ties and lifestyle. The team must be made aware of the personal implications of the investigation, in particular when undercover work needs to be conducted. Skills typically needed to conduct large-scale corruption investigations include financial investigative skills, undercover and surveillance skills, information technology skills, interviewing and witness preparation abilities, intelligence and analysis, excellent report writing skills and the ability to analyse intelligence.

Both are vital in corruption investigation. During the course of investigation, fragments of information or intelligence are collected. The intelligence must be analysed so that the investigator can piece together fragments of information and

have a clear picture of the relationships and events that, taken together, can constitute proof of criminal activity. Unlike other crimes, such as theft or murder, where a complainant with an interest in uncovering the crime comes forward, crimes of corruption and bribery are committed in the shadows with both parties benefiting from the crime. The unique relationship, since neither party believes himself or herself to be a victim of any crime, prevents authorities from knowing that a crime has taken place. It is unlikely that either party will report the crime. For that reason, corruption investigation is especially challenging and difficult. Intelligence gathering and analysis are therefore critical in uncovering corruption. A constant analysis of the results will help to redirect and adjust efforts and thus help to allocate resources efficiently.

Proactive integrity testing.

Although such an activity may initially require considerable preparation and resources, it can produce rapid results that serve as an excellent deterrent. Close monitoring and strict guidelines are essential to avoid the danger of entrapping a target. Any decision to use integrity testing must have a sound and defensible basis. The test itself must be fair to the target so that can be defended in court as reasonable and equitable (see Integrity Testing). All integrity testing should be electronically recorded in the interests of fairness to the target and for accurate evaluation of criminal responsibility by judge and jury. Convictions resulting from integrity testing must be based clearly on the necessary *mens rea*, or criminal intent, on the part of the accused. The Government must not engage in convincing anyone to commit a crime that he or she is not predisposed to commit. More than in any other area of policing, the public must be protected from false accusations or behaviour tending to entrap an individual into committing an offence he or she would not have otherwise committed but for the encouragement of the police.

Multi-faceted approach.

Rather than following only one investigative path, it is advisable to pursue all reasonable leads that may prove useful. It is not unusual for seemingly insignificant information to become vital in proving criminal activity. The same applies to statements and documents. Everything should be carefully analysed and cross-referenced using the names, places and all other information that can help provide information and may serve to confirm the validity of evidence gathered.

Identify middleman and facilitators.

Middlemen are often involved in committing corruption on behalf of others. For example, politicians often provide the necessary link between bribe givers and bribe takers; international businesspersons may facilitate the creation of slush funds, carry out the actual bribe transaction and help to launder the proceeds of corruption.

Financial investigation.

One of the most successful ways of producing evidence against corrupt public officials is to conduct financial investigations to prove that they spend or possess assets beyond the scope of their income (see Financial Investigations and Monitoring of Assets). Such an investigation can help produce a great deal of evidence of corruption, and can identify illegal assets that might later be confiscated. Suspects are, however, unlikely to place the proceeds of a bribe into their bank accounts and instead may transform them into other forms of property. Financial investigations, therefore, should also concentrate on the lifestyles, expenditures and property of the suspected persons. In that respect, it might be extremely helpful to look not only at what has actually been spent, but also to compare the amounts of money deposited into the bank accounts of suspects in previous years. Efforts should also be focused on identifying whether the suspected corrupt person maintains foreign accounts. The very existence of such an account can be suspicious and can indicate that funds are being hidden. In order to be effective, financial investigations should be extended to the family members of the suspected persons and those living in the same household: experience shows that they are often used as conduits for corruption proceeds.

Identification of slush funds.

To avoid paying bribes directly out of the corporate bank account, it is common practice for larger organizations to create so-called slush funds: funds that do not appear in official corporate accounts and records. Money needed to pay bribes can be taken from such funds, as needed. The methods adopted to create the funds are very similar to techniques used to launder money. One common method is to falsify the costs of services or goods and transfer funds to pay for the alleged services or goods into the slush fund account. It is usually extremely difficult to prove the actual receipt of this money as, for example, in the case where consultants are hired and schemes enacted where monies paid are actually returned to the slush fund in cash.

Investigation into the slush fund.

Once a slush fund has been identified, the investigation should be broadened to include all payments made out of the fund. All individuals with access to the funds should be identified. Companies and private individuals that have ongoing business with the State and are found to have paid a bribe on one occasion are very likely to have paid a bribe on several occasions.

Court orders.

If court orders are needed to carry out specific covert evidence-gathering activities, particular attention should be paid to the particular judge receiving the request. It is not unusual that politically and socially connected suspects and other suspects having links to the criminal justice system might contact the judge issuing the order.

Suspension.

During the period of investigation, a decision may be made to suspend suspects from their official duties. In particular, if they are involved in making important decisions and a subsequent conviction may negatively influence the validity of

their decisions, actual or perceived, it may become necessary to remove them from any approval processes. When the suspect is employed by an institution of the criminal justice system, measures should be taken to prevent him from "networking" after any suspension. Colleagues of the suspected persons should be given strong warnings about relaying information to the suspended colleague who should be authorized to contact only one specific supervisor within the organization.

Witnesses.

A comprehensive interviewing strategy should be designed. It should include measures to overcome obstructive lawyers, to provide witness protection, to ensure the credibility of the witness and to avoid suspected illegal managing of witnesses. Witnesses often have a criminal background themselves and therefore may not be very credible. It is essential that witnesses admit their involvement in prior criminal acts, particularly if they are involved in the acts of corruption for which the suspects are being investigated. Nothing is more damaging to a prosecutorial case than an important witness being exposed to the jury as a criminal. Any criminal background of the witness must be offered to the jury as soon as possible in the proceedings. Witnesses must be protected against threats. The most cost-effective means of doing that is to protect the identity of witnesses for as long as possible. The best way to avoid allegations of illegal enquiry methods or promises made to witnesses by the investigating team is to record all interviews electronically. It should be noted that the United Nations Conventions against both Transnational Organized Crime and Corruption contain requirements for the protection of victims, witnesses, and in the latter case, persons who report corruption.[289]

Preparation of court presentation.

It is essential that as many facts as possible are corroborated. In particular, if witnesses are used, it is important to obtain secondary evidence, where possible, to support their credibility. In systems where the police are not required by law to conduct investigations under the direct supervision of a public prosecutor, it is crucial to involve the Office of the Prosecutor at a very early stage.

Media strategy.

During investigations and court proceedings, a clear media strategy should be elaborated that assigns one person to interface with and report to the media All other personnel and investigators involved should be made aware of the potential damage that may be caused to the successful outcome of the investigation and prosecution if they make comments to the media. The same injunction applies to the witnesses. If a public official is accused, the senior managers of the institution

[289] See United Nations Convention against Transnational Organized Crime, GA/RES/55/25, Annex I, Articles 24 and 25, and Convention against Corruption, GA/RES/58/4, Articles 32 (protection of victims and witnesses) and 33 (protection of persons who report corruption). In both cases, protections extended to witnesses also extend to victims in cases where they are also witnesses. The provisions dealing with witness-protection include relocation, and encourage States Parties to enter into agreements with other States Parties for foreign relocations, where appropriate.

in which the accused works should be informed of the risks of commenting to the media. At the same time, basic transparency requires that the media be kept informed of proceedings and allowed to report fairly and independently, provided that this does not compromise the investigation and prosecution itself.

International focus.

Cases of grand corruption often include international aspects. For example, the bribe giver may be a foreign investor, the slush fund might be located in a country other than that where the bribe is paid, or the bribe may be transferred directly into the foreign bank account of the recipient. Investigators and prosecutors should therefore be trained on mutual legal assistance and exchange of information procedures at the international level.

PRECONDITIONS AND RISKS

The following factors contribute to successful investigations:

Independence of the prosecutor, both internally and externally.

Especially in cases of investigations into high-level corruption, political interference can detract from investigations and prevent prosecution if executive branches of Government directly control the Office of the Prosecutor. The judicial police should report directly to the prosecutor in order to integrate investigation and prosecution, to ensure mutual loyalty and to protect investigations from being jeopardized by undue political interference in the work of the investigating police team.

Secrecy of the first stages of the investigation.

There should be no obligation to inform the suspect about the investigation during its early stage. When a suspect has knowledge of an investigation prior to the time the police can secure sufficient evidence, the suspect may destroy evidence and warn other targeted persons to do the same.

Strong investigative powers.

Strong investigative powers are fundamental to successful investigation. In particular, the ability to order searches and seizures without court authorization, to suspend banking secrecy during investigations and to request preventive detention and telephone interception have proved extremely helpful.

Plea-bargaining and summary proceedings.

The possibility of having recourse to plea bargaining and summary proceedings have been extremely helpful in increasing efficiency during what are normally long and complex proceedings. Plea-bargaining has also been successfully used to help identify other criminal activity that is reported by suspects wishing to reduce the severity of a potential conviction.

Seeking the support of the media and general public support.

Several factors are likely to place investigation and prosecution of corruption at risk. They include:

Statutes of limitation.

Given the complexity of investigations into "victimless" crimes such as corruption, statutes of limitation often expire before the accused is charged with a crime. Therefore, an extension or exception to a statute of limitation should be considered especially in those cases where the lengthiness of the investigation is due to factors beyond the control of the Government. [290]

Inefficient international cooperation.

Requests for information and for mutual legal assistance should be submitted as soon as possible as experience shows that even well meaning collaborating jurisdictions normally give the lowest priority to requests for assistance.

POSSIBLE RELATED TOOLS COULD BE:

- Establish, disseminate, discuss and enforce a Code of Conduct for public servants;
- Establish and disseminate, discuss and enforce a Citizens' charter;
- Establish an independent and credible complaints mechanism where the public and other parts of the criminal justice system can file complaints;
- Establish a Disciplinary Mechanism with the capability of investigating complaints and enforcing disciplinary action when necessary;
- Conduct an independent comprehensive assessment of the levels, cost, coverage and quality of service delivery, including the perceived trust level between the public service and the public;
- Simplify complaints procedures;
- Raise public awareness where and how to complain, for example through campaigns telling to public what telephone number to call; and
- Introduce a computerized complaints system allowing institutions to record and analyse all complaints and monitor actions taken to deal with them.

[290] See Article 29 of the United Nations Convention against Corruption, which requires long statutory limitation periods on prosecutions, with extended periods where delays are attributable to the fact that the accused offender has evaded justice.

TOOL #29

FINANCIAL INVESTIGATIONS AND THE MONITORING OF ASSETS

Financial investigations, in addition to assessments of directly or indirectly owned assets, are an extremely efficient tool for investigating corruption. The information gained can be used either as a starting point for further investigation or as back-up evidence for corruption allegations.

DESCRIPTION

Initial target (group) restriction.

When financial investigations are used in a traditional law enforcement context, for example, after a suspect has been caught and his or her crime identified, the target of the financial investigation is already well defined. The finances of the suspect should then be specifically investigated to uncover additional evidence of the crime. Forensic accountants can be used to unravel even the most complex and confusing financial crimes, especially where there is a specific target on which to focus their efforts.

In cases where an anti-corruption agency or similar institution desires to use financial disclosure information or other indicators of the finances and purchasing power of a specific individual to uncover potential corruption, the task is much more difficult. Proactive monitoring, aimed at targeting indicators of corruption, such as, for example, living "beyond one's means", requires clever use of available resources and careful consideration as to who will be targeted and why. Of course, where resources are not limited, it is possible to investigate each and every official or group thoroughly. As such a scenario is unlikely in just about every jurisdiction, selective and efficient allocation of resources is necessary.

Where monitoring resources are limited, rigorous evaluation in selecting a target group should include the likelihood of uncovering corruption within that target group. For example, if available data suggest that employees of the authority issuing driving licences have solicited bribes, it may be tempting to launch a review of financial disclosures filed by employees of that office. Such an exercise will, however, be most likely a waste of time and energy. The amount of bribes paid to such employees is likely to be small in monetary terms and, in all probability, is used as "pocket money" and not deposited into a bank account or used to make large purchases. Investigators should instead direct their efforts towards reviewing disclosures by employees whose public duties expose them to a higher level of potential bribes. [291] While it is probable that a larger percentage

[291] In many systems, disclosure requirements apply only to employees at relatively high seniority levels or in positions believed to be particularly vulnerable to corruption, in order to reduce bureaucratic demands and focus review resources to where they will generate the greatest effects. The United Nations Convention against Corruption takes into account both possibilities, requiring States Parties to endeavour to establish declaration or disclosure requirements for all public officials (Article 8, paragraph 5), and establishing more specific requirements for public

of employees in a licensing office solicit bribes versus the percentage of employees in, for example, a procurement office, for the purposes of allocating proactive financial investigative resources, there is a greater likelihood of uncovering indicators of corruption when reviewing the financial disclosures of procurement office employees.

Evaluation of key lifestyle indicators.

Prior to in-depth asset and life-style monitoring, the lifestyle of a target should undergo superficial screening to determine whether further investigation should be undertaken. Screening may be restricted to a few significant assets that are given priority over others, such as homes, second houses or holiday homes, means of transport and other items of significant value.

Initial screening methods.

The methods used should be limited to acquisition of readily accessible information, such as public registers and direct observation. The latter has proven to be more accurate as corrupt officials tend to disguise their acquisitions by registering property in the names of others.

Target definition.

Once grounds for suspicion have been established and a concrete target for further investigation has been identified, the screening should not be limited to the suspected persons, but should also target persons with whom they have strong ties, such as spouses and family members. Quite frequently, corruption proceeds are deposited into bank accounts belonging to husbands or wives (less frequently into those of children, brothers or parents). The same scheme to disguise actual ownership is often used for the registration of property.

Lifestyle indicators.

Investigators should focus on owned or rented residential homes, including short-term vacation rentals, cars, boats, planes, holiday trips, recreational expenses (for example, restaurants), clothing expenses, purchase of works of art, antiques and jewellery, medical expenses and other large purchases in general. Such parameters are usually used to verify whether an in-depth asset assessment is justified.

Sources of information.

The instruments used to investigate disproportionate living standards include public registers and contracts that can indicate excessive availability of money or property, for example, a contract for the lease of a particularly expensive house. Bank and company documentation may contain further information. Verification of expenses incurred by the public officials or persons close to them has also proved extremely effective in uncovering corruption indicators.

Financial disclosure requirements.

Requiring public officials, and in particular those at senior levels or who occupy positions seen as particularly susceptible to corruption, to make regular financial

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procurement officials (Article 9, subparagraph (1)(e)) and those prominent public officials likely to illicitly transfer assets (Article 52, paragraph 5).

disclosures deters corruption by making it difficult to conceal illicit wealth and easy to detect investigate and prosecute offences of illicit enrichment.[292] Typically, officials are required to disclose total net worth and all sources of income when assuming a position, and to make disclosure at regular intervals while holding office. In some cases, to deter late payments, further disclosure might also be required. Disclosure would include a statement of: total wealth, assets and income acquired or disposed of during the disclosure period, and information about the sources of any income. Failing to make a full and complete disclosure, and making a disclosure which is false or misleading would be considered an offence. Disclosures are reviewed, and audited, and illicit or unaccounted-for wealth may trigger measures ranging from dismissal or discipline to criminal prosecution and confiscation of the wealth. To protect the privacy of public officials, disclosures may be made to auditors or other review bodies placed under a legal obligation not to disclose them publicly, except where necessary for purposes such as discipline or prosecution.

Third Party Protection.

In-depth investigations into the origins of third party property should be made only when the suspicion that third parties possess property belonging to the suspected corrupt official can be reasonably justified.

International Investigations.

Unlawfully received money is frequently hidden in foreign bank accounts registered under false names or corporations. Illegal property is also sometimes registered in foreign jurisdictions using false identities while the corrupt official enjoys the property. For example, vacation homes and boats are examples of property whose ownership can be disguised by the use of registration under a false name or corporation. Depending on whether or not the jurisdiction in which the funds are deposited has signed a Mutual Legal Assistance document, it can be very difficult to obtain assistance from that jurisdiction in identifying and recovering stolen assets. The United Nations Corruption has extensive provisions dealing with international cooperation in general, in the context of the tracing, freezing, seizing, and forfeiture of the proceeds of corruption in transnational cases, and with the recovery of assets.[293] Depending on the nature of the corrupt conduct and the countries involved, the United Nations Convention against Transnational Organized Crime and other global and regional legal instruments may also be used in some cases.[294]

Illicit enrichment offences and reversal of onus

Some jurisdictions have introduced offences that place the burden on public officials to establish that assets they have acquired come from legitimate

[292] See United nations Convention against Corruption, Article 8, paragraph 5, Article 9, subparagraph 1(e) and Article 52, paragraph 5. Article 7, subparagraph 1(b) calls for additional measures in respect of positions considered especially vulnerable to corruption.
[293] See generally, Convention Articles 14 and 23 (money-laundering); Article 31 (freezing, seizure and confiscation); Articles 43-48 (general cooperation); and Chapter V, Articles 51-59 (Asset recovery).
[294] See UN Convention against Transnational Organized Crime, GA/RES/55/25, annex I, Articles 6-7 (money-laundering); 8-9 (criminalization of corruption); Articles 12-14 (freezing, seizure and confiscation); and 16-21 (general cooperation).

sources. Essentially, public officials are required to periodically disclose their total income and accumulated wealth. Failure to do so, or making false or misleading disclosures is usually an offence.[295] There is also a legal presumption that any increase in wealth derives from illegitimate sources, placing the official in the position of having to account for the wealth in order to avoid criminal liability. If drafted and used carefully, such measures can be extremely effective. In some countries, however, these may infringe constitutional or other protections dealing with self-incrimination and the right to be presumed innocent. Others consider that placing the basic burden of proving enrichment on the prosecution preserves the presumption of innocence, and have implemented such measures on that basis. For these reasons, the offence of illicit enrichment was included in the United nations Convention against Corruption, but was made optional.[296] Measures of this nature are discussed in greater detail in Tool #[36], below.

PRECONDITIONS AND RISKS

National laws must provide for comprehensive registration of assets and identification of the beneficial owners of such assets. They must also empower the monitoring agency to gain access to official registers and to company and bank documentation. Anonymity of ownership is the natural enemy of transparency and accountability. If the legislation of a country does not provide for transparency in such instances, then financial monitoring and investigative efforts will probably not produce meaningful results.

RELATED TOOLS

Tools that may be required before declaration of assets can be successfully implemented include:

- A code of conduct that spells out who has to declare their assets and how that should be done;
- The establishment of an independent and credible complaints mechanism to deal with complaints that the prescribed standards have not been met; and
- The establishment of appropriate disciplinary procedures, including tribunals and other bodies, to investigate complaints, adjudicate cases and impose and enforce appropriate remedies or other outcomes;

Tools that may be needed in conjunction with codes of conduct include:

- Tools involving the training and awareness-raising of officials subject to each code of conduct to ensure adherence and identify problems with the code itself;

[295] See United Nations Convention against Corruption, Article 52, paragraph 5 (disclosure and appropriate sanctions). Other disclosure provisions include Article 8, paragraph 5 and Article 9, subparagraph 1(e).

[296] Optional requirement to criminalize "…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", Convention Article 20.

- Assessments of institutions and, where necessary, of individuals;
- The enforcement of the code of conduct by investigating and dealing with complaints, as well as more proactive measures such as "integrity testing"; and,
- The linking of procedures to enforce the code of conduct with other measures that may identify corruption, such as more general assessments of performance and the comparison of disclosed assets with known incomes, discretion in deciding whether or not to engage in criminal or other inappropriate behavior. The employee may be offered a bribe by an agent provocateur or be presented with an opportunity to solicit a bribe.

TOOL #30
INTEGRITY TESTING[297]

Integrity testing is an instrument that enhances both the prevention and prosecution of corruption. The objectives of integrity testing are to:

- Determine whether or not a public civil servant or branch of Government engages in corrupt practices and;
- Increase the actual and perceived risk for corrupt officials that they will be detected, thereby deterring corrupt behaviour

DESCRIPTION

Sting operations

A controversial, but also unquestionably effective, means of identifying corrupt officials is the use of decoys or other integrity testing tactics. Tactics involve undercover agents who offer officials opportunities to engage in corruption in circumstances where evidence of their reaction can be easily and credibly gathered. Depending on local policy or legal constraints, officials may be targeted at random or on the basis of evidence of, or reason for, a specific suspicion of corruption.

The tactics represent a powerful instrument both for deterring corruption and detecting and investigating offenders. As they do not necessarily require any inside information or assistance, they can be used quickly against any official at virtually any level who is suspected of corruption. If the suspect is corrupt, they quickly provide highly credible evidence, usually in the form of audiotapes or videotapes, photographs and the personal testimony of the investigators involved. Such evidence may form the basis of a criminal prosecution or serve as the justification for other investigative methods, such as electronic surveillance or the search of financial records. If the suspect is not corrupt, his or her refusal to take part in corrupt activities also tends to reliably establish that fact, provided that adequate confidentiality precautions are take to ensure that investigative targets are not warned beforehand and that undercover agents are well trained and competent.

The criticisms of such tactics are substantial. Arguably, even the most honest officials may yield to temptation if the offer is sufficiently convincing. Their willingness to succumb to a bribe when approached may not necessarily establish that they are inherently corrupt or that they have committed similar transgressions in the past.

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[297] Integrity testing is not dealt with specifically in the United Nations Convention against Corruption. Where variants are considered legally and constitutionally acceptable to the States Parties involved, however fall within the ambit of Article 50. That Article urges the use of special investigative techniques, including but not limited to controlled delivery and electronic surveillance. Where integrity testing was also considered as a special investigative technique, States Parties are called upon to ensure that it could be used, and that evidence obtained was admissible.

For that reason, there are restrictions intended to prevent "entrapment" in some countries, with undercover agents being permitted to create opportunities for a suspect to commit an offence but not allowed to offer any actual encouragement to do so. For example, an undercover agent may place a police officer might be placed in a situation where a corrupt officer would normally solicit a bribe but the undercover agents would be prohibited from actually offering a bribe.

INTEGRITY TESTING

Integrity testing has been used effectively to "test" whether public officials resist offers of bribe and refrain from soliciting them. Integrity tests have proved to be an extremely effective and efficient deterrent to corruption.

Targeted and random integrity testing.

Integrity testing can be used to verify the integrity or dishonesty of an employee in a specific situation. A scenario is created in which, for example, a public civil servant is placed in a typical everyday situation where he or she has the opportunity to use personal discretion in deciding whether or not to engage in criminal or other inappropriate behaviour. The employee may be offered a bribe by an agent provocateur or be presented with an opportunity to solicit a bribe.

Integrity testing can also be used as a "targeted test" to help verify the genuineness of an allegation or a suspicion of corrupt behaviour. Members of the public, criminals or other officials may have provided information to law enforcement authorities alleging that a certain person or even an entire branch of Government is corrupt. Quite frequently, complainants allege that a corrupt official has solicited a bribe from them.

Where law enforcement has, for example, actively identified groups of officials or entire operations particularly susceptible to corruption, random testing can be used to ascertain the degree of corruption present. When carried out in secret, very reliable data can be gathered that will assist in accurately gauging the true extent of corrupt practices within the group selected. After reliable baseline data has been established, corrupt targets have been identified and other secret use of the data has been completed, integrity testing can be used as an effective deterrent to corrupt behaviour. Public notification that such testing will be carried out at random and with consistency serves to greatly deter corruption.

Fairness.

In democratic society, it is unacceptable for Government to engage in activities that encourage individuals to commit crimes. It is, however, quite acceptable for Government to observe whether or not someone will commit a crime under ordinary, everyday circumstances. For that reason, integrity testing must be carried out with the strictest discipline. As integrity testing is, effectively, an aggressive Government act, there must be audio and video recording of the actual event to show that the accused person was not acting with any motivation other than his own free will. The recordings will also help to ensure that a Government has sufficient evidence to pursue a successful prosecution.

As an additional safeguard for both the Government and the person subjected to testing, witnesses should be placed in the vicinity of the test to corroborate what may or may not be seen and heard on the recording devices. Both random and

targeted tests must be as realistic as possible in order not to expose the test-taker to a greater temptation than that to which he or she is normally exposed. In order to ensure the fairness of the test and for it to be accepted by both those subjected to it and the general public, the methods and scenarios used should be evaluated and approved by competent authorities. The test should be carefully prepared to include detailed intelligence work about the types, situations, forms and amounts of bribes that the tested person might be exposed to.

Regular repetition.

Experiences in various police forces where integrity tests have been carried out, such as the London Metropolitan Police, the Police of Queensland, Australia, and the New York Police Department, have shown that it is not enough to "clean up" an area of corruption when problems appear. Instead, systems must be developed that help to ensure that follow-up testing is undertaken. The most desirable situation possible includes publication of the fact that consistent integrity testing of all Government branches is performed at certain intervals. Even where that is not possible, the object is to convince potential bribe takers that integrity testing is performed regularly.

PRECONDITIONS AND RISKS

Integrity testing and constitutional concerns.

Although integrity tests can be extremely effective as an investigative tool as well as an excellent deterrent, courts do not always easily accept it as a method of collecting evidence. Notwithstanding, there are substantial reasons for its use. It is one of the most effective tools for eradicating corrupt practices in Government services in an extremely short time. In particular, in cases of rampant corruption and low trust levels by the public, it is one of the few tools that can promise immediate results and help restore trust in public administration. Legal systems that provide for "agent provocateur" scenarios should try to ensure that they are never designed to instigate conduct that makes criminals out of those who might otherwise have reacted honestly. It is therefore important to ensure that the degree of temptation is not extreme and unreasonable. Many criminal law systems exclude evidence of an agent provocateur when the provocation is considered to be excessive.

Appropriate public service salaries.

If public service salaries are extremely low, there is the risk that integrity testing will not be accepted as fair play either by the tested person or by the general public. In that case, the tests will be counter-productive and can serve to damage the morale of those in the public service.

TOOL #31
ELECTRONIC SURVEILLANCE OPERATIONS

Electronic surveillance encompasses all information or intelligence gathering by use of electronic means. Information may be recorded at the source, using audio microphones or video cameras, or intercepted in transit, as is the case with such communications as telephone calls and electronic mail. Recording equipment may concealed on individuals participating in unlawful activities, concealed in places where such activities are believed likely to occur, or incorporated into existing communications systems to intercept information flowing through them. It can include, covert, consensual and overt surveillance. Given the covert nature of most corruption-related activities, various forms of electronic surveillance provide a powerful tool for investigators and prosecutors for obtaining, preserving and presenting critical evidence. The use of electronic surveillance is specifically encouraged by the United Nations Convention against Corruption.[298]

Covert surveillance, as used here, is undertaken where none of the parties whose activities are being observed is aware that law enforcement is secretly listening and/or watching. A typical example would be the placing of a broadcast or recording device in a room where criminal suspects were likely to meet. Recording equipment in places where public officials work would be considered as covert surveillance unless they were told that it was there.

Consensual surveillance always involves the knowledge and consent of at least one of the parties to a conversation or activity. Typically, one party to a telephone communication might consent to have the call monitored and recorded, or one party to a physical meeting might agree to carry surreptitious recording equipment.

Overt surveillance, in which monitoring or recording equipment is openly located in a public place is becoming increasingly common. Generally, the purpose is to deter crime and to create an audio, or more commonly video, record of illicit activity should it occur. The most common example is the increasing use of "CCTV" (closed-circuit television) equipment in large cities. Overtly monitoring the work of public officials in various ways is a common means of ensuring high standards and deterring corruption and other malfeasance.

DESCRIPTION

Electronic surveillance, as an investigative tool, is often the only method available to investigators that is powerful enough to penetrate the veil of secrecy surrounding corrupt activities. The most commonly used form of electronic surveillance is consensual in nature and involves the assistance of collaborating witnesses, whistle blowers and victims of extortion and other corrupt offers. It is used because, in most democratic societies, members of the public enjoy a right

[298] Article 50, paragraph 1.

to privacy from Government intrusion and have the expectation that their words and actions will not be subject to interception by the police. Where one of the parties to a corrupt or criminal conspiracy decides to expose the enterprise using electronic means to secure evidence, however, society tolerates the invasion by Government of an otherwise private affair. Society does not easily tolerate the Government deciding to 'spy' on the conversations and activities of citizens secretly and without the consent or knowledge of any of the parties.

The lack of tolerance for covert activities on the part of Government stems from distrust by society of Government in general. Past abuses of Government authority arising from political interests, personal vendettas and other nefarious motives have served to instil public distrust to the point where society is unwilling to entrust the Government with the unbridled authority to 'spy' on the activities of the citizenry. In the United States, for example, the Constitution protects citizens from "unreasonable searches and seizures" by the Government[299]. Although that provision of American law was written over 200 years ago, the principle is arguably stronger today, having been developed in extensive case law relating to search, seizure and electronic surveillance. Similar protections exist in other countries, and in international law.[300]

Generally, electronic surveillance is permitted as a means of gathering evidence, provided that the process is subject to oversight which is independent of the investigation (usually by an independent judge), and that safeguards are in place with respect to the justification for the surveillance and the means whereby it is carried out. In some cases, safeguards may vary in proportion to the degree of intrusiveness inherent in the techniques used, the nature of the information intercepted or obtained, and the locations placed under surveillance. The rapid proliferation of information and communications technologies in recent decades has posed a major challenge to law enforcement seeking lawful access to those communications and to legislatures seeking to regulate such access while maintaining a balance between effective investigative powers and the protection of privacy and other rights.

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[299] W.H. Heath, Civil Processes to Combat Corruption, paper presented at the 9th International Anti-Corruption Conference, http://www.transparency.de/iacc/9th_iacc/papers/day3/ws1/d3ws1_whheath.html

[300] See, for example, International Covenant on Civil and Political Rights, Article 17 and European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8. Here too, the basic protection has been developed by case law. See *Klass v. Federal Republic of Germany*, 1 EHRR 241, holding that Germany's use of electronic surveillance, which involved carefully structured judicial discretion, conformed to the Convention, and *Malone v. U.K.* 7 EHRR 14, holding that the U.K. system, which lacked the same safeguards, did not.

Typical Requirements and Considerations For Electronic Surveillance[301]

Use of judicial orders or authorizations

Generally, electronic surveillance is an offence, and some form of judicial authorization is needed to invoke an exception to the offence for law enforcement applications. Such authorizations are obtained *ex parte* (i.e., without warning or notification to the subject or target of the surveillance), based on information provided by the law enforcement agency. It will usually have to establish some investigative justification or explanation why the surveillance is needed. In some systems, agents must also establish that other, less-intrusive means are not available or practicable. The judicial order or authorization will usually set out limits, such as listing the places or telephone lines that may be targeted and the length of time surveillance may continue, to avoid unnecessary invasions of privacy.

Extent to which privacy is invaded

In many systems, the extent to which safeguards apply may depend on the degree to which expectations of privacy would be infringed by the type of surveillance proposed. There is a difference, for example, between recording a telephone conversation or reading the content of an electronic mail message, and simply accessing so-called "traffic data" such as e-mail addresses or telephone number logs to identify the parties to a particular communication, the latter usually being considered as less-invasive. Similarly, higher standards may apply to places with a high expectation of privacy, such as private dwellings or the offices of doctors or lawyers, than to more public places. In many systems, the use of overt surveillance systems is subject to little or no control, on the basis that those who come within range of cameras or other equipment are aware of the surveillance when it is taking place.

On a similar basis, less-stringent safeguards may apply to consent-based surveillance, in which one of the parties to a communication consents to allow its interception and recording by law-enforcement. Common examples include cases where one party is an undercover law enforcement officer who has infiltrated a criminal organization or activity, and cases where one of the parties is an informer who has agreed to assist investigators. Many corruption investigations involve electronic surveillance of this kind. In such cases surveillance and recordings can be used not only to obtain and preserve evidence, but to monitor the reliability of the informer, and in some cases to monitor a meeting or criminal activity in order to be able to intervene to assist or rescue the informer should his or her role be uncovered or suspected, or to prevent a criminal offence from taking place.

[301] These are loosely based on procedures followed in the United States of America, which has the oldest, and one of the most elaborate regulatory frameworks. Law enforcement agencies involved in anti-corruption investigations should familiarize themselves with applicable domestic legal requirements. Some knowledge or appropriate foreign requirements may also be useful in dealing with mutual legal assistance requests in transnational cases.

Recording and preservation as evidence

All intercepted communications should be recorded when possible, and the recordings carefully protected, both to avoid loss or destruction and to ensure that accuracy and authenticity can be established should they be required for use as evidence. Back-up copies may be advisable as an additional precaution. Recording media include analog audio and video tapes and various digital media. Digital media should be used with caution. Since they are easier to alter in ways which are difficult to detect, it can be more difficult to establish authenticity in court. In some countries, recordings are also important because they must be disclosed to defence counsel in case they contain evidence which might exculpate the accused.

CASE STUDY #24

INTEGRITY TESTING IN THE LONDON METROPOLITAN POLICE[302]

In the early 1990s the Metropolitan Police Service (MPS) identified a serious corruption problem and realized that it had to take drastic steps to address it. Various covert units and sensitive initiatives were set in motion. The idea of the Integrity Testing Unit (ITU) emanated from these initiatives and became a proposal.

In February 1999 the ITU commenced undertaking random integrity testing and in April 1999 it commenced intelligence led integrity tests.

From the outset, in order to ensure that the ITU could be accepted by the police employees and by the general public, it operated under strict control with ongoing liaison with the legal authorities to ensure the methods proposed were fair, legal and capable of close scrutiny.

The ITU accepted that clear definitions would have to be agreed upon for the targeted integrity test, which is now called the "intelligence led integrity test", and for the random integrity test, now renamed "quality assurance check".

The Quality Assurance Check is a check (or programme of checks) deployed to address an area or areas of corporate concern. It creates a condition or situation designed to generate a reaction by an individual or individuals in order that their conduct and the policies, processes and procedures of the Metropolitan Police Service can be assessed.

MPS who have identified a serious corporate concern, will ask the ITU to undertake a series of Quality Assurance Checks to "test the health" of the organization. The scenarios prepared by the ITU will reflect a realistic situation which employees may have to deal as part of their everyday duties.

The intelligence-led integrity test is a test that targets identified individuals, groups or locations as a result of specific intelligence. It creates a condition or situation designed to generate a reaction by an individual or individuals so that their conduct can be assessed.

The intelligence led integrity test always results from specific intelligence in relation to malpractice/ corruption by individuals or groups of individuals. The intelligence is evaluated and all options are considered. The detective inspector allocates the operation to a team of officers who carry out a feasibility study and prepare proposals for an intelligence led integrity test scenario. Normally, these proposals mirror the alleged malpractice/corruption the person(s) are believed to be involved in.

The safeguard of the rights of the tested persons or groups of persons is guaranteed by an oversight panel that represents all the various groups within

[302] See John Stevens, Integrity is Non-negotiable. Scotland Yard's Strategic Response to the Dangers of Corruption, paper presented at the 9th International Anti-Corruption Conference, http://www.transparency.de/iacc/9…rs/day2/w11/d2ws11_jstevens.html

the police, including community leaders and politicians, civil staff union, academic and members of parliament.

The ITU identified that service employees supported the concept of intelligence led integrity tests but did not favour random integrity tests. This was addressed by undertaking a number of seminars attended by service employees of all ranks within the MPS. Analysis of the seminars revealed that the majority of the service employees accepted undergoing intelligence led integrity tests. However, the use of the term "random integrity testing met with strong opposition and resulted in it being renamed quality assurance check.

In carrying out its activity, the ITU pursues two main objectives:

- To ensure that the public get a quality service from the police; and
- To ensure that procedures are in place to unearth corruption and unethical behavior from within, and to create an environment in which the possibility of such conduct being detected is ever present in the minds of police personnel who may be tempted along such a path.

Results have been positive: a number of intelligence-led integrity tests have resulted in prosecutions and convictions. The quality assurance checks programme has resulted in changes of policy, changes of practice and procedures and additional training.

CASE STUDY #25

INTEGRITY TESTING IN THE NEW YORK CITY POLICE DEPARTMENT

BACKGROUND AND DEFINITION

The New York City Police Department approaches corruption proactively. The Integrity Testing Programme is one of the tools used by the Department to effectively reduce the number of corruption complaints against members of the NYPD and maintain a level of integrity within the Department.

An integrity test requires that an artificial condition or situation be created by investigators designed to generate a reaction by the subject of the test. This reaction is monitored as closely as possible without jeopardizing the validity of the test. This allows the subject complete freedom to perform, or fail to perform, in the manner consistent with the Department and legal guidelines.

TYPES OF INTEGRITY TESTS:

New Police is using following types of integrity tests:

- Random: a condition is created without regard for a particular person(s) who may encounter that condition and become the subject of the test. This form of testing usually addresses statistically identified corruption trends. Its purpose is to either confirm or refute the statistics while giving notice to all members of the service that their activities are being monitored and that acceptable standards must be maintained. Such testing usually consists of a sufficient number of individual tests to evaluate the accuracy of these statistically perceived trends. The actual number of test conducted is determined by the time and preparation involved and the particular type of tests considered, and the complexity of the follow-up investigations.

- Targeted: an identified member(s) of the service is the subject of a particular test, designed to recreate specific circumstances under which it is reasonably believed that the member of the service may violate the law or engage in misconduct. This testing is usually employed in response to an allegation of misconduct, when a pattern of recidivism is detected in allegations against a particular member(s) of the service, or other cumulative factors.

POSSIBLE RESULTS FROM AN INTEGRITY TEST

- PASS: The member(s) of the service responds to the planned scenario and takes proper action.
- FAIL: The member(s) of the service responds to a planned scenario and commits a criminal act or other administrative violation. Three separate failure categories have been established.
- Criminal Failure: Criminal violations have occurred and the matter has been referred to the appropriate District Attorney for review. Once the matter has been referred to the appropriate prosecutor, the criminal failure

designation will apply even if the prosecutor decides not to proceed criminally.

- Procedural Failure: behaviour encountered during the test was not criminal but other misconduct and/or performance deficiencies were noted.
- Supervisory Failure: supervisory deficiencies were noted during the testing situations.

CASE STUDY 26

UNIFORM GUIDELINES FOR INVESTIGATIONS[303]

PREAMBLE

International and multilateral institutions have engaged in reform efforts designed to promote accountability and efficiency: such institutions have established internal offices with responsibility for the conduct of investigations. Toward that end, the participating investigative offices have agreed on the need to harmonize their practices and endorse a set of uniform guidelines for investigations.

The Guidelines set out in this document are intended to be used as guidance in the conduct of investigations in conjunction with the rules and regulations applicable in the organization carrying out the investigation.

They do not and are not intended to confer, impose or imply any duties, obligations or rights actionable in a court of law or in administrative proceedings on the organization carrying out the investigation. Nothing in the present guidelines should be interpreted as limiting the rights and obligations of the staff of the organization as per its rules and regulations.

UNIFORM GUIDELINES FOR INVESTIGATIONS

Key concepts: predicates

Organization

1. Establish, publish, and update clear rules of conduct for staff, investigators, and relevant parties.
2. Provide assigned responsibilities clearly and in writing.
3. Provide for fairness, transparency and consistency in the application of the rules of the Organization.
4. Establish and publish a mandate for the investigation function with the effect of a rule or principle.
5. Work to maintain fairness in the application of sanctions.
6. Provide rules that encourage witnesses and other persons to assist in investigations.

Staff

1. Protect the interests of the Organization in the conduct of their work.
2. Abide by the rules and regulations published by the Organization.
3. Abide by procedures published by the Organization.
4. Cooperate with investigations pursuant to the Mandate.

[303] This guidelines were endorsed by United Nations, World Bank, OLAF an d the European Development Bank in April

Investigators

1. Abide by mandate provisions, rules and regulations of the Organization and applicable laws of relevant jurisdictions.
2. Operate with objectivity and independence.
3. Maintain confidentiality
4. Disclose any actual or potential conflicts of interest to supervisors, and recuse themselves from any involvement in the investigation.

Terms used

Investigations:

- A legally-based and analytic process designed to gather information in order to determine whether wrongdoing occurred and if so, the persons or entities responsible.

Persons:

- Natural persons

Parties:

- Persons or entities engaged in contractual arrangements with the Organization or its members.

Complaint:

- A written or verbal report alleging wrongdoing in, or involving, the Organization.

Complainant:

- A person or entity making a complaint.

Investigative office / oversight office:

- The office designated by the Organization to conduct investigations, or to supervise the conduct of investigations.

Managers:

- Persons at senior levels designated by the Organization to supervise people, projects, and/or financing of the Organization.

Principles

A. Investigation is a profession requiring the highest personal integrity.
B. Persons responsible for the conduct of an investigation should demonstrate competence.
C. Investigators should maintain objectivity, impartiality and fairness throughout the investigative process and timely disclose any conflicts of interest to supervisors
D. Investigators should endeavor to maintain both the confidentiality and, to the extent possible, the protection of witnesses**.**
E. The conduct of the investigation should demonstrate the Investigator's commitment to ascertaining the facts of the case.
F. Investigative findings should be based on substantiated facts and related analysis, not suppositions or assumptions.
G. Recommendations should be supported by the investigative findings.

Procedural Guidelines

Preparation

1. Complaints brought to the attention of the IO should be subject to careful analysis and handling.
2. Complaints, which may include criminal conduct or acts contrary to the rules and regulations of the Organization, should be registered, reviewed and evaluated to determine if they fall within the jurisdiction or authority of IO.
3. Information received by the IO should be protected from unauthorized disclosure.
4. The identities of those who make complaints to the IO should be protected from unauthorized disclosure.
5. Every investigation should be documented by the IO.
6. Decisions on which investigations should be pursued, and on which investigative activities are to be utilized in a particular case, rest with the IO, and should include in any decision whether there is a legitimate basis to warrant the investigation and commit the necessary resources.
7. The preparation for the conduct of an investigation should include necessary research of the relevant national laws, and rules and regulations of the organization; the evaluation of the risks involved in the case; the application of analytical rigor to the evidence to be obtained and the assessment of the value, relevance and weight of the evidence; the measurement of the evidence against the relevant laws, rules and regulations; and the consideration of the means and time by which the findings should be reported and to whom.
8. The planning and conduct of the investigation should reasonably ensure that the resources devoted to an investigation are proportionate to the allegation and the potential benefits of the outcome.
9. The planning should include the development of success criteria for the identification of appropriate and attainable goals for the investigation.

Investigative Activity

1. Investigative activity should include the collection and analysis of documents and other material; the review of assets and premises of the Organization; interviews of witnesses; observations of the Investigators; and the opportunity for the subject(s) to respond to the complaints.
2. Investigative activity and critical decisions should be documented and reviewed regularly with the IO managers.
3. Investigative activity should require the examination of all evidence, both inculpatory and exculpatory.
4. Evidence should be subject to validation including corroborative testimonial, forensic and documentary evidence.
5. To the extent possible, interviews should be conducted by two Investigators.
6. Documentary evidence should be identified and filed with the designation of origin of the document, location and date with the name of the filing Investigator.
7. Evidence likely to be used for judicial or administrative hearings should be secured and custody maintained.

8. Investigative activities by an IO should not be inconsistent with the rules and regulations of the Organization, and with due consideration to the applicable laws of the State where such activities occur.
9. The IO may utilize informants and other sources of information and may assume responsibility for reasonable expenses incurred by such informants or sources.
10. Interviews should be conducted in the language of the person being interviewed using independent interpreters, unless otherwise agreed.
11. The IO may seek advice on the legal, cultural, and ethical norms in connection with an investigation.

Confidentiality and the protection of witnesses

1. Where it is has been established that a witness, or other person assisting in the IO's investigation, has suffered retaliation because of assistance in an investigation, the IO should undertake, or otherwise engage management to undertake, actions so as to prevent such acts from taking effect or otherwise causing harm to the person.
2. Where an individual makes a complaint on a matter subject to the authority of the IO, that individual's identity should be protected from unauthorized disclosure by the IO.
3. Where there has been an unauthorized disclosure of the identity of a witness, or other person assisting in the IO's investigation, by a staff member of the IO, available disciplinary measures should be pursued.

Due Process

1. Subjects of investigation should be advised by the IO of the complaints against them, with the time and manner of disclosure to be made keeping in mind fairness to the subject, the need to protect the integrity of the investigation and the interests and rules of the Organization.
2. Investigative methods may include the gathering of documentary, video, audio, photographic or computer forensic evidence at the election of the IO, provided such activities are not inconsistent with the applicable rules and regulations of the Organization, and with due consideration to the applicable laws of the State where the activity occurs.
3. Information received from witnesses and subjects should be documented in writing.

Findings

1. Where the investigative findings substantiate the complaint, those findings should be reported to the appropriate managers along with recommendations for corrective action, where appropriate, which may include redress in courts, in disciplinary or debarment proceedings and in other sanctions available to the manager, and for the steps needed to minimize the risk of recurrence.
2. Where investigative findings are either insufficient to substantiate or discredit the complaint, those findings should be reported and the affected subject cleared.

3. Where investigative findings adduced during an investigation tend to show that the laws of a State have been violated, consideration should be given to referring the case to the appropriate national law enforcement agency.
4. Where there are investigative findings tending to prove that the complaint was made in bad faith or with malicious or negligent disregard of the facts, the IO may recommend that appropriate action be taken against the complainant. However the mere fact that the complaint is found by the IO to be unsubstantiated is insufficient for such response.
5. The standard of proof should conform to the standards required by the Organization and/or by the national jurisdiction for referrals to them, but should generally be reasonably sufficient evidence.
6. The IO should strive to ensure that its recommendations are implemented in a timely fashion.

TOOL #32
INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS

Some corruption is transnational in nature or has transnational elements. Other forms of corruption are purely national or domestic yet they affect domestic capabilities, standards of living and even social, economic and political stability to the extent of becoming international concerns, particularly on the part of governmental, intergovernmental and non-governmental entities responsible for international development.

Growing concern about corruption as an international problem increased through the 1980s and 1990s and a number of instruments and other documents were developed in response to it. They include:

- Binding legal instruments setting concrete requirements or standards that are in the nature of legal obligations, binding on States Parties to the instrument concerned in international law;
- Normative legal instruments that set standards that are legal in nature but not legally binding;
- Normative instruments that set standards that are not legal in nature, for example, the allocation of resources to combat corruption; and
- Other documents or instruments that may contain, for example, political commitments, mandates for the creation of instruments or other actions against corruption, and similar subject matter.

UNITED NATIONS INSTRUMENTS AND DOCUMENTS

The United Nations Convention against Corruption[304]

The United Nations Convention against Corruption, finalized on 30 September 2003 and adopted by the General Assembly in its resolution 58/4 of 31 October 2003, represents a major step forward in the global fight against corruption, and in particular in the efforts of UN Member States to develop a common approach to both domestic efforts and international cooperation. The Convention is open for signature from 9 December 2003 to 9 December 2005, after which further countries may still join by accession. In accordance with the provisions of the Convention itself, it will come into force on the 90th day following ratification or accession by the 30th country to do so. Countries wishing to inquire about the substantive requirements for ratification and implementation should contact the United Nations Office on Drugs and Crime either directly or through their

[304] For a more detailed review of the procedural history and substantive content of the Convention, see the introductory chapter to this Tool Kit. Reference may also be had to the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, UNODC, forthcoming.

Permanent Missions in Vienna.[305] Countries wishing to inquire about the procedural requirements for filing instruments of ratification or accession should contact the Treaty Section of the United Nations Office of Legal Affairs either directly or though their Permanent Missions in New York.[306]

The text of the Convention covers the following major areas.

General provisions (Chapter I, Articles 1-4). The opening Articles of the Convention include a statement of purpose (Article 1) which covers both the promotion of integrity and accountability within each country and the support of international cooperation and technical assistance between States Parties. They also include definitions of critical terms used in the instrument. Some of these are similar to those used in other instruments, and in particular the *Convention against Transnational Organized Crime*, but those defining "public official", "foreign public official", and " official of a public international organization" are new and are important for determining the scope of application of the Convention in these areas.

Preventive measures (Chapter II, Articles 5-14). The Convention contains a compendium of preventive measures which goes far beyond those of previous instruments in both scope and detail, reflecting the importance of prevention and the wide range of specific measures which have been identified by experts in recent years. Specific requirements include the establishment of specialized procedures and bodies to develop domestic prevention measures; private-sector prevention measures; measures directed at general prevention in the public sector as well as at specific critical areas such as public procurement and financial management and the judiciary; and measures to prevent money-laundering.[307]

Criminalization and law enforcement measures (Chapter III, Articles 15-44). While the development of the Convention reflects the recognition that efforts to control corruption must go beyond the criminal law, criminal justice measures are still clearly a major element of the package. The Convention calls on States Parties to establish or maintain a series of specific criminal offences including not only long-established crimes such as various forms of bribery and embezzlement, but also conduct which may not already be criminalised in many States, such as trading in official influence and other abuses of official functions.

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[305] [XXXInsert relevant telephone and e-mail contacts for whoever is running the pre-ratification programme at CICP hereXXX]

[306] Information about technical assistance available can be found on line at *http://untreaty.un.org/ola-internet/Assistance/Section1.htm* (for languages other than English see the general U.N. site at *www.un.org*. The Treaty Section can be contacted directly at: Tel. (212) 963-5048, Fax (212) 963-3693 or by e-mail at *treaty@un.org*.

[307] The measures of Chapter II (Art.14) are directed at the prevention of money-laundering in general. Further prevention and other measures relating to laundering and other problems specifically involving proceeds, instrumentalities or other property or assets associated with corruption offences are found in Art.23 (criminalisation of money-laundering) and Chapter V (Asset Recovery). The scopes of Chapters II, III and V vary: some deal with property or assets linked to any form of crime, while others focus only on property or assets linked specifically to either all offences established by the Convention, including optional offences, or on only those Convention offences which have actually been established in the domestic laws of the States Parties concerned in accordance with the Convention.

The broad range of ways in which corruption has manifested itself in different countries and the novelty of some of the offences pose serious legislative and constitutional challenges, a fact reflected in the decision of the Ad Hoc Committee to make some of the requirements either optional on the part of States Parties ("…shall consider adopting…") or subject to domestic constitutional or other fundamental requirements ("…subject to its constitution and the fundamental principles of its legal system…"). An example of this is the offence of illicit enrichment,[308] in which the onus of proving that a significant increase in the assets of a public official were not illicit would be placed on the official. This has proven a powerful anti-corruption instrument in the hands of many States, but would be impossible for others to implement because of constitutional or legal requirements, particularly those regarding the presumption of innocence.[309] Other provisions[310] are intended to support the use of non-criminal measures to secure compensation and other remedies to address the consequences of corruption.

Other measures found in Chapter III are similar to those of the 1988 *United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and the 2000 *United Nations Convention against Transnational Organized Crime*. These include offences relating to obstruction of justice and money laundering,[311] the establishment of jurisdiction to prosecute,[312] the seizing, freezing and confiscation of proceeds or other property,[313] protection of witnesses, experts and victims and others,[314] other matters relating to investigations and prosecutions,[315] and the requirement that some form of civil, criminal or administrative liability must be established for legal persons.[316]

Elements of the provisions dealing with money-laundering and the subject of the sharing or return of corruption proceeds are significantly expanded from earlier treaties (see Chapter V), reflecting the greater importance attached to the return of corruption proceeds, particularly in so-called "grand corruption" cases, in which very large amounts of money have been systematically looted by government insiders from State treasuries or assets and are pursued by subsequent governments.

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[308] Article 20.

[309] The basic right to be presumed innocent until proven guilty according to law is universal, and found in Art.14, para.(2) of the *International Covenant on Civil and Political Rights*. Some legal systems apply this principle to all essential elements of the offence, including the presumption that unaccounted-for wealth was illicitly acquired. In other systems, the right to be presumed innocent is considered to have been satisfied by proof by the State of only some elements of an offence. In such cases, proof that wealth has been acquired is seen as sufficient to raise an evidentiary burden on the accused official to demonstrate that it was acquired by legitimate means, or in some cases to at least establish a reasonable doubt as to illicit acquisition.

[310] Articles 34-35.

[311] Articles 25 and 23.

[312] Article 42.

[313] Article 31.

[314] Articles 32-33.

[315] Articles 36-41.

[316] Article 26.

Measures dealing with international cooperation (Chapter IV, Articles 43-49). Chapter IV contains a series of measures which deal with international cooperation in general, but it should be noted that a number of additional and more specific cooperation provisions can also be found in Chapters dealing with other subject-matter, such as asset recovery[317] and technical assistance.[318] The core material in Chapter IV deals with the same basic areas of cooperation as previous instruments, including the extradition of offenders, mutual legal assistance and less-formal forms of cooperation in the course of investigations and other law-enforcement activities.

A key issue in developing the international cooperation requirements arose with respect to the scope or range of offences to which they would apply. The broad range of corruption problems faced by many countries resulted in proposals to criminalise a wide range of conduct. This in turn confronted many countries with conduct they could not criminalise (as with the illicit enrichment offence discussed in the previous segment) and which were made optional as a result. Many delegations were willing to accept that others could not criminalise specific acts of corruption for constitutional or other fundamental reasons, but still wanted to ensure that countries which did not criminalise such conduct would be obliged to cooperate with other States which had done so. The result of this process was a compromise, in which dual criminality requirements were narrowed as much as possible within the fundamental legal requirements of the States which cannot criminalise some of the offences established by the Convention.

This is reflected in several different principles. Offenders may be extradited without dual criminality where this is permitted by the law of the requested State Party.[319] Mutual legal assistance may be refused in the absence of dual criminality, but only if the assistance requested involves some form of coercive action, such as arrest, search or seizure, and States Parties are encouraged to allow a wider scope of assistance without dual criminality where possible.[320] The underlying rule, applicable to all forms of cooperation, is that where dual-criminality is required, it must be based on the fact that the relevant States Parties have criminalised the conduct underlying an offence, and not whether the actual offence provisions coincide.[321] Various provisions dealing with civil recovery[322] are formulated so as to allow one State Party to seek civil recovery in another irrespective of criminalization, and States Parties are encouraged to assist one another in civil matters in the same way as is the case for criminal matters.[323]

Asset recovery (Chapter V, Articles 51-59). As noted above, the development of a legal basis for cooperation in the return of assets derived from or associated in some way with corruption was a major concern of developing countries, a

[317] See in particular Articles 54-56.
[318] Articles 60-62.
[319] Art.44, para.2.
[320] Art.46, para.9.
[321] Art.43, para.2.
[322] See, for example, Art. 34, 35 and 53.
[323] Article 43, paragraph 1 makes cooperation in criminal matters mandatory and calls upon States Parties to consider cooperation in civil and administrative matters.

number of which are seeking the return of assets alleged to have been corruptly obtained by former leaders or senior officials.[324] To assist delegations, a technical workshop featuring expert presentations on asset recovery was held in conjunction with the 2nd session of the Ad Hoc Committee,[325] and the subject-matter was discussed extensively during the proceedings of the Committee. Generally, countries seeking assets sought to establish presumptions which would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which return was likely to be sought, on the other hand, had concerns about the incorporation of language which might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure, forfeiture and return of such assets. From a practical standpoint, there were also efforts to make the process of asset recovery as straightforward as possible, provided that basic safeguards were not compromised, as well as some concerns about the potential for overlap or inconsistencies with anti-money-laundering and related provisions elsewhere in the Convention and in other instruments

The provisions of the Convention dealing with asset recovery begin with the statement that the return of assets is a "fundamental principle" of the Convention, with annotation in the *travaux préparatoires* to the effect that this does not have legal consequences for the more specific provisions dealing with recovery.[326] The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. A further issue was the question of whether assets should be returned to requesting State Parties or directly to individual victims if these could be identified or were pursuing claims. The result was a series of provisions which favour return to the requesting State Party, depending on how closely the assets were linked to it in the first place. Thus, funds embezzled from the State are returned to it, even if subsequently laundered,[327] and proceeds of other offences covered by the Convention are to be returned to the requesting State Party if it establishes ownership or damages recognized by the requested State Party as a basis for return.[328] In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.[329]

The chapter also provides mechanisms for direct recovery in civil or other proceedings[330] and a comprehensive framework for international cooperation[331] which incorporates the more general mutual legal assistance requirements, *mutatis mutandis*. Recognizing that recovering assets once transferred and

[324] This was the subject of extensive research and discussion for some time prior to the mandate of the Ad Hoc Committee. See, for example, reports of the Secretary General to the General Assembly at its 55th session (A/55/405, see also GA/RES/55/188); 56th session (A/56/403) and 57th session (A/57/158).
[325] See A/AC.261/6/Add.1 and A/AC.261/7, Annex I.
[326] Art. 51 and A/58/422/Add.1, para.48
[327] Art.57, subparagraph 3(a).
[328] Art.57, subparagraph 3(b).
[329] Art.57, subparagraph 3(c).
[330] Article 53.
[331] Articles 54-55.

concealed is an exceedingly costly, complex, and all-too-often unsuccessful process, the chapter also incorporates elements intended to prevent illicit transfers and generate records which can be used should illicit transfers eventually have to be traced, frozen, seized and confiscated.[332] The identification of experts who can assist developing countries in this process is also included as a form of technical assistance.[333]

Technical assistance and information exchange (Chapter VI, Articles 60-62). The provisions for research, analysis, training, technical assistance and economic development and technical assistance are similar to those developed with respect to transnational organised crime in the 2000 Convention, modified to take account of the broader and more extensive nature of corruption and to exclude some areas of research or analysis seen as specific to organized crime. Generally, the forms of technical assistance under the Convention against Corruption will include established criminal justice elements such as investigations, punishments and the use of mutual legal assistance, but also institution-building and the development of strategic anti-corruption policies.[334] Also called for is work through international and regional organizations (many of who already have established anti-corruption programmes), research efforts, and the contribution of financial resources both directly to developing countries and countries with economies in transition and to the United Nations Office on Drugs and Crime,[335] which is expected to support pre-ratification assistance and to provide secretariat services to the Ad Hoc Committee and Conference of States Parties as the Convention proceeds through the ratification process and enters into force.[336]

Mechanisms for implementation (Chapter VII, Articles 63-64). The means of implementation expected of individual States Parties are generally dealt with in each specific provision, which sets out what is expected, whether it is mandatory, optional, or entails some element of discretion.[337] Chapter VII deals with international implementation through the Conference of States Parties and the

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[332] Article 52.
[333] Article 60, paragraph 5.
[334] Art.60, para.1.
[335] Art.60, paras.3-8.
[336] GA/RES/58/4, paragraphs 8 and 9 and Convention Art.64. UNODC is already designated as the secretariat for the Ad Hoc Committee pursuant to GA/RES/55/61, paragraphs 2 and 8 and GA/RES/56/261, paragraphs 6 and 13. By convention, the General Assembly calls on the Secretary General to provide the necessary resources and services, leaving to his discretion the designation of particular U.N. entities and staff to do so.
[337] Apart from the basic formulations specifying that States "shall" or "may" carry out the specified activities, some provisions either require them to at least consider doing so, or impose mandatory requirements to act, while leaving to the States themselves discretion to choose the specific means of meeting the requirement. An example of the latter is Article 8, paragraph 1, which requires actions which "…promote, inter alia, integrity, honesty and responsibility…" among public officials without specifying what those actions should consist of, although some possibilities, including the 1996 International Code of Conduct for Public Officials, are specifically mentioned. Generally, discretion is reserved in the prevention Chapter, where measures must often be tailored to individual societies and institutions, and in the criminalization chapter, where some offences cannot be implemented in some countries due to constitutional or other fundamental legal constraints.

U.N. Secretariat. As with the 2000 Convention against Transnational Organized Crime, the Secretary General is called upon to convene the first meeting of the Conference within one year of the entry of the Convention into force,[338] and the Ad Hoc Committee which produced the Convention is preserved and called upon to meet one final time to prepare draft rules of procedure for adoption by the Conference, "well before" its first meeting.[339] The bribery of officials of public international organizations is dealt with in the Convention only on a limited basis (Art.16), and the General Assembly has also called upon the Conference of States Parties to further address criminalization and related issues once it is convened.[340]

Final Provisions (Chapter VIII, Articles 65-71). The final provisions are based on templates provided by the United Nations Office of Legal Affairs and are similar to those found in other U.N. treaties. Key provisions include those which ensure that the Convention requirements are to be interpreted as minimum standards, which States Parties are free to exceed with measures which are "more strict or severe" than those set out in the specific provisions,[341] and the two Articles governing signature and ratification and coming into force. As noted at the beginning of this segment, the Convention is open for signature from 9 December 2003 to 9 December 2005, and to accession by States which have not signed any time after that. It will come into force on the 90th day following the deposit of the 30th instrument of ratification or accession with the Office of Legal Affairs Treaty Section at U.N. Headquarters in New York.[342]

The United Nations Convention against Transnational Organized Crime

The United Nations Convention against Transnational Organized Crime[343]is principally focused on the activities of organized criminal groups. It does, however, recognize that, in many cases, corruption is both an instrument and an effect of organized criminal activity, and that a significant portion of the corruption associated with organized crime is sufficiently transnational in nature to warrant the development of several provisions in the Convention. The Convention is a binding international legal instrument, although the degree to which each provision is binding depends on the language used[344]. It is presently open for

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[338] Art.63, para.2.
[339] GA/RES/58/4, para.5.
[340] GA/RES/58/4, para.6.
[341] Art.65, para.2.
[342] Art. 67 (*signature, ratification, acceptance, approval and accession*) and 68 (*Entry into force*) For further information see the segment on procedural history and footnotes 10 and 11 (sources of assistance), above.
[343]GA/res/55/25, annex, of 15 November 2000.

[344] The core obligations to create criminal offences and for cooperation in the areas of mutual legal assistance and extradition are generally binding, but other provisions incorporate additional conditions, limits or discretion on the part of the States Parties. The obligations to create criminal offences (articles 5, 6, 8 and 23), for example, use the language "…shall adopt…", whereas other articles use language such as "…shall take appropriate measures within its means…" (article 24), or "…shall consider…" the obligation in question (article 28).

signature and ratification, and may achieve the necessary number of ratifications, 40, to come into force during 2002 or 2003.

The Convention establishes four specific crimes to combat activities commonly used in support of transnational organized crime activities: participation in organized criminal groups, money-laundering, corruption and obstruction of justice. States Parties are required to criminalize those activities, as well as to adopt legislation and administrative systems to provide for extradition, mutual legal assistance, investigative cooperation, preventive and other measures, as necessary, to bring existing powers and provisions up to the standards set by the Convention. In addition to establishing a corruption offence (Article 8), the instrument also requires the adoption of measures to prevent and combat corruption (Article 9).

The criminalization requirements include central provisions that are binding on States Parties and supplementary provisions that are discretionary. The mandatory corruption offences capture both active and passive corruption: "…the promise, offering or giving…" as well as "…the solicitation or acceptance…" of any "undue advantage".

In both offences, the corrupted person must be a "public official"[345], the advantage conferred must be linked in some way to acting corruptly or refraining from acting corruptly in the course of official duties, and the advantage corruptly conferred may be conferred directly or indirectly. States Parties are also required to criminalize participation as an accomplice in such offences. In addition to the mandatory offences, States Parties are also required to consider criminalizing the same conduct where the person promising, offering or giving the benefit is in one country and the public official who solicits or accepts it is in another. States Parties are also required to consider criminalizing other forms of corruption. In cases where the public official involved worked in a criminal justice system and the corruption was directed at legal proceedings, the Convention offence relating to the obstruction of justice would also generally apply.

In addition to the criminalization requirements, the Convention also requires the adoption of additional measures against corruption. The text calls for: "…legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials".

It does not specify details of the measures to be adopted, but does require further measures to ensure that officials take effective action, including ensuring that the appropriate authorities possess sufficient independence to deter inappropriate influences on them.

Other Convention provisions, notably the articles establishing the money laundering offence and providing for the tracing, seizure and forfeiture of the proceeds of crime may also prove useful in specific corruption cases. The Convention requires States Parties to adopt, to the greatest extent possible within their domestic legal systems, provisions to enable the confiscation of any

[345] Article 8, paragraph 4 provides that "public official" includes any person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party concerned. See also travaux preparatoires note, A/55/383/Add.1, paragraph 19.

proceeds derived from offences under the Convention and any other property used in or destined for use in a offence under the Convention. Courts or other competent authorities must have powers to order disclosure or seizure of bank, financial or commercial records to assist in tracing, and bank secrecy cannot be raised as an obstacle to either the tracing of proceeds of crime or the provision of mutual legal assistance in general. Once proceeds or other property have been confiscated, they can be disposed of in accordance with the domestic laws of the State that has confiscated them, but that State is required to give "…priority consideration…" to returning them to a requesting State Party in order to facilitate compensation of victims or return of property to its legitimate owner[346].

The application of the Convention is generally limited to cases that involve an "organized criminal group" and events that are "transnational in nature". That does not apply to the corruption offence itself, that must be enacted by countries in a format that criminalizes the specified acts of corruption whether they involve organized crime and transnational aspects, or not. The requirements of transnationality and organized criminal group involvement would have to be met, however, to invoke the various international cooperation requirements in corruption cases[347]. Where the requirements are met, a wide range of assistance and cooperation provisions would apply to assist in investigations and, ultimately, to secure the extradition or prosecution of offenders among States Parties to the Convention[348].

The plan of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century

The Vienna Declaration on Crime and Justice, the political declaration of the Tenth United Nations Congress on Crime Prevention and Criminal Justice, held at Vienna from 10-17 April 2000, dealt with a full range of the major crime issues confronting the Congress, including corruption.

Paragraph 16 of the Vienna Declaration calls for enhanced international action against corruption, building on the Code of Conduct and Declaration against Corruption and Bribery in International Commercial Transactions (see below), as well as regional instrument [349] On endorsing the Vienna Declaration, the General Assembly requested the Secretary-General to prepare plans of action for the implementation and follow-up of the commitments in the Declaration for the consideration and action of the United Nations Commission for Crime Prevention and Criminal Justice. Plans of action were duly completed at the tenth session of the Commission, including a Plan of Action against Corruption [350].

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[346] Article 14, paragraph 2. The travaux preparatoires will also make reference to the use of confiscated assets to cover the costs of assisting and protecting witnesses in organized crime cases. See A/55/383/Add.1, paragraph 25.

[347] A broader standard also applies to mutual legal assistance, which is often needed to establish the involvement of transnational organized crime as a prerequisite of applying other Convention provisions.

[348] Where a country does not extradite a fugitive because the individual is one of its nationals, there is an obligation to prosecute the case in the same manner and with the same priority as if it was a domestic case.

[349] Report of the Tenth United Nations Congress on Crime Prevention and Criminal Justice, chapter I, part 1, paragraph 16.

[350] E/CN.15/2001/14/Rev.2, paragraphs 5-9. Also included in the final Report of the Commission, E/CN.15/2001/30/Rev.1

The Plan of Action is divided into national and international actions. The national actions called for include:

- Various efforts in support of the proposed United Nations Convention against Corruption; and
- Various measures to combat domestic corruption, including:
  - The assessment of the extent of domestic problems;
  - The development of national strategies and action plans;
  - National offences, powers and procedures to deal with corruption and related problems;
  - Strengthening of domestic institutions, including institutional independence;
  - Institutions and structures to foster transparency;
  - The development of expertise in anti-corruption measures; and,

- Various measures to combat transnational corruption, including:
  - Signature, ratification and implementation of international instruments;
  - Ensuring that domestic capacity exists to assist other States in transnational corruption cases;
  - Raising the awareness of officials;
  - Providing material and other assistance to other States, directly and via the United Nations Global Programme against Corruption; and,
  - Reducing the opportunities for those engaged in corruption to transfer and conceal proceeds in other countries.

In addition to the Plan of Action against Corruption, the text produced by the Commission also contains a Plan of Action against Transnational Organized Crime and a Plan of Action against Money-Laundering. The first calls for ratification and implementation of the United Nations Convention that, as noted above, contains a series of provisions dealing with, or relevant to, efforts against corruption. The second sets out a series of national actions, including national laws criminalizing money- laundering in all its aspects; the implementation of effective regulatory, administrative and investigative provisions; and support for international initiatives in that area. It does not deal with the question of the repatriation of proceeds recovered in other countries but that is discussed in relation to corruption in paragraph 8, subparagraph (f) of the Plan of Action against Corruption.

The texts of the plans of action are not legally binding. The text of the various plans specifies that "…States will endeavour, as appropriate…" to support the specific actions called for in each plan. “The resolution under which the plans of action were submitted to the General Assembly invites Governments to carefully consider and use the various plans for guidance in their efforts to formulate legislation, policies and programmes in the subject areas dealt with[351].

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[351] Draft resolution of Finland and Germany as amended and adopted by the Commission, E/CN.15/2001/L.13

The United Nations International Code Of Conduct For Public Officials of 1996

Following consideration of corruption issues by the Fifth Session of the United Nations Commission for Crime Prevention and Criminal Justice, the General Assembly adopted the International Code of Conduct for Public Officials[352]. The Code emphasizes the need for loyalty of officials to the public interest, the pursuit of efficiency, effectiveness and integrity, the avoidance of bias or preferential treatment, and ensuring responsible administration of public funds and resources. It calls for the avoidance of conflicts of interest by disqualification or non-participation where a private interest conflicts with a public responsibility while in office and with respect to previous offices. It also calls for the disclosure of assets, refusal of gifts or favours and the protection of confidential information obtained in the course of public office. It also discusses issues arising from conflicts between partisan political activity and the public interest, calling for the avoidance of political activity by public officials and then outlining exceptions to that principle. Officials should not engage in major political activity unless the office itself is political, that is, an elected office. More routine political activities should be limited to those that do not impair the function of the office or confidence in it, thus striking a flexible balance that would vary depending on the nature both of the political activities and the public office involved. The Code of Conduct is written in relatively general terms for the guidance of legislative and administrative measures, and is not legally binding on United Nations Member States.

The United Nations Declaration against Corruption and Bribery in International Commercial Transactions of 1996

In 1996, the General Assembly also adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions[353]. Where the Code of Conduct is concerned with public sector corruption, the Declaration deals with both the private and public sectors. It calls for the enactment and enforcement of laws prohibiting bribery in international transactions; laws criminalizing the bribery of foreign public officials; and laws ensuring that bribes are not tax deductible. It also calls for international cooperation in areas such as investigation, prosecution and extradition, and for countries to ensure that bank secrecy is not an obstacle to such cooperation. It proposes a partial definition of bribery that includes both active and passive bribery; the definition is, however, limited to cases involving "…any public official or elected representative…", and to “breaches of a public duty in respect of an international commercial transaction”. Neither "public official" nor "international commercial transaction" is defined. The Declaration also calls for the development of accounting standards and practices to improve transparency and

[352] GA/res/51/59 of 12 December 1996, annex. . See also United Nations Convention against Corruption, Article 8, paragraph 3, which calls on States Parties to take account of the Code of Conduct in developing codes for their own officials in order to implement Article 8.

[353] Further information, including the texts of the OECD instruments, can be obtained from: OECD, 2 rue André Pascal, F-75775 Paris Cedex 16, France, or on-line at www.oecd.org.

business codes, standards or best practices that prohibit "…corruption, bribery and related business practices" in international commercial transactions. The text is in the nature of a political commitment and not a legal obligation, with actions to be taken through institutions at the international, national and regional levels, and subject to the constitution, fundamental legal principles, national laws and procedures of each State.

INSTRUMENTS AND DOCUMENTS OF THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

The mandate of the OECD includes a number of areas that are affected by domestic and transnational corruption or that may be relevant to anti-corruption strategies. They include general work in areas such as economic reform, good governance and sustainable development, and specific concerns, such as international trade regulation, import-export structures, taxation policies and laws, and measures against money-laundering. The OECD is responsible for several legal instruments and other documents, such as assistance materials regarding specific countries, regions or issues. It also issues reports of the many meetings and conferences sponsored by the OECD that deal with corruption and related issues[354].

OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS OF 1997

The OECD General Council adopted an advisory instrument, the Revised Recommendation on Combating Bribery in International Business Transactions on 23 May 1997[355]. It called, inter alia, for effective measures to deter, prevent and combat the bribery of foreign public officials, including the adoption of appropriate criminal offences in domestic law.

It concluded the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 21 November 1997 (89). The instrument is in the form of a series of legal commitments binding on the States Parties, and came into force following ratification by five of the ten OECD countries with the largest economies on 15 February 1999.[356] As of early 2001, 27 countries had ratified the Convention and a further seven countries were considering or in the process of ratifying it.

The OECD Convention, as its name implies, is relatively narrow and specific in its scope. Its sole focus is the use of domestic law to criminalize the bribery of foreign public officials. It applies both to active and passive bribery but does not apply to forms of corruption other than bribery, to bribery that is purely domestic or to bribery in which the direct, indirect or intended recipient of the benefit is not a public official. It also does not include cases where the bribe was paid for

[354] Further information, including the texts of the OECD instruments, can be obtained from: OECD, 2 rue André Pascal, F-75775 Paris Cedex 16, France, or on-line at www.oecd.org

[355] OECD document C(97)123/FINAL.

[356] The measure of economic size is export share, set out in OECD document DAFFE/IME/BR(97)18/FINAL. See Convention article 15.

purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

The obligation to criminalize[357] includes any case where the offender offers, promises or gives "…any undue pecuniary or other advantage …to a foreign public official…" in order to induce the recipient or another person to act or refrain from acting in relation to a public duty, if the purpose was to obtain or retain some business or improper advantage in the conduct of international business. States Parties are required to ensure that incitement, aiding and abetting or authorizing bribery are also criminalized, and that the offences apply to corporations and other legal persons. Attempts at bribery and conspiracies to bribe, which pose a problem for some legal systems, must be criminalized if the equivalent conduct of bribing a domestic public official is criminalized. Prosecutorial discretion is recognized but the Convention requires that it should be exercised on the basis of professional rather than political criteria.[358]

Punishments must be "effective, proportionate and dissuasive", and of sufficient seriousness to trigger the application of domestic laws governing mutual legal assistance and extradition. Any proceeds, or property of equivalent value, must be either the subject of powers of seizure and forfeiture or the imposition of equivalent monetary sanctions. Bribing foreign public officials must also trigger national money-laundering laws to the same extent as the equivalent bribery of a domestic official. In addition to criminal penalties, the instrument requires measures to deter and detect bribery in the form of accounting practices and safeguards to prevent domestic companies from concealing bribes paid to foreign officials, as well as appropriate civil, administrative or criminal penalties to ensure compliance.

Since the OECD Convention came into force, the OECD Working Group on Bribery in International Business Transactions has adopted a rigorous process of assessing the status of implementation and compliance with its terms. Countries assess their own progress as well as that of other States Parties. Since 1999, 21 of the 34 States Parties have been reviewed by their peers. For each of those countries, the Working Group adopted a report, including an evaluation, that was made available to the public subsequent to the OECD meeting. The Working Group, in its June 2000 Report, expressed satisfaction about the state of overall compliance.

REVISED RECOMMENDATIONS OF THE OECD COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

The OECD Council has also issued a series of non-binding recommendations dealing with bribery in international business transactions. The original text, adopted in 1994, was reviewed and further revised in 1997, based on the research and experiences of the OECD in dealing with the problem (94). It represents consensus within the OECD countries but, as a non-binding document, it is able to go beyond the text of the Convention, making recommendations that are both more specific and more flexible in that they allow

[357] Article 1.

[358] Article 5. The text also refers to the 1997 revised recommendation, which states that investigations and prosecutions should be allocated adequate resources and priority.

countries to tailor the proposed measures to their domestic legal systems and to national priorities for combating particular aspects of the corruption problem. The first substantive recommendation, to the effect that countries "…take concrete and meaningful steps…[to adopt] …criminal laws…", for example, is accompanied by an annex setting out agreed common elements for criminal laws to assist national drafters and for common elements of procedure to assist law enforcement and prosecutors in applying such laws. Some recommendations, such as the elements of a basic bribery offence, are similar to those found in the OECD Convention; others, such as the criteria for exercising prosecutorial discretion, are covered in greater detail. The following measures are recommended, each being accompanied by text giving additional detail or explanations:

- The creation and application of criminal laws;
- The creation and application of tax laws, regulations and practices;
- Appropriate company and business accounting practices;
- Banking, financial and other relevant provisions;
- The denial of public subsidies, licences, Government procurement contracts or other public advantages as a sanction in bribery cases;
- In addition to criminalization (see above), ensuring that bribery is illegal under civil, commercial and administrative laws; and,
- Providing for international cooperation in investigations and other legal proceedings.

RECOMMENDATION OF THE OECD COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

The OECD determined that many of its transnational bribery cases involved the payment of bribes by companies or other corporate interests to secure some foreign advantage or, in some instances, to offset actual or perceived advantages on the part of competitors using similar tactics. It thus chose taxation policies and laws as a key element to combat the problem.

Corporations are primarily motivated by the overall financial implications of a proposed activity or transaction, and tax implications are a significant factor in such a consideration. In most countries, corporate taxes are levied against profits, allowing the corporate taxpayers to deduct expenses incurred in generating such profits, such as research and development, negotiation, shipping and other costs. The bribery of foreign officials can constitute a significant cost, particularly if the officials involved are large in numbers or occupy very senior positions.

The 1996 Recommendation is to the effect that countries should address the problem by ensuring that foreign bribes are not allowed as deductible business expenses for tax purposes. The Recommendation, however, may have been largely overtaken by the 1997 Recommendation and the Convention, both of which advocate the criminalization of such bribery. In most countries, moreover, costs incurred in the commission of a crime would not be tax deductible as a general policy under pre-existing tax laws. The Convention and its commentaries do not refer to tax measures specifically, although the Convention does call for

"additional civil or administrative sanctions" against bribe payers as well as for business accounting practices that would make it impossible to conceal the true nature of bribery expenses.[359] The 1996 Recommendation that bribes should not be allowed as tax deductions is restated as Recommendation IV of the 1997 Revised Recommendations.

COUNCIL OF EUROPE INSTRUMENTS AND DOCUMENTS

The Council of Europe has been actively engaged in the development and adoption of anti-corruption measures, many of which are open to adoption or accession by non-European countries, or may be useful as precedents for other countries developing national or regional legal provisions of their own. In 1999, the Council established the Group of States against Corruption (GRECO), to strengthen capacities to fight corruption, and monitor compliance with international instruments and other documents.[360]

CRIMINAL LAW CONVENTION ON CORRUPTION OF 1998

The Committee of Ministers of the Council of Europe adopted the text of the Criminal Law Convention on Corruption[361] in November 1998. In addition to European countries, it is also open for signature and ratification by other, non-Member States that participated in its negotiation. Other States can also join by accession once the instrument is in force, provided that certain preconditions are met, including the consent of all the contracting States that sit in the Committee of Ministers[362] of the Council. As of October 2001, the Convention was not in force, only nine of the required fourteen States having ratified it. The Convention is drafted as a binding legal instrument.

The Convention applies to a broad range of occupations and circumstances but is relatively narrow in the range of actions or conduct that States Parties are required to criminalize.[363] It contains provisions criminalizing a list of specific forms of corruption; and it extends to both active and passive forms of corruption and to both private and public sector cases. The Convention also deals with a range of transnational cases. Bribery of foreign public officials and members of foreign public assemblies is expressly included; offences established pursuant to the private sector criminalization provisions would generally apply in transnational cases in any State Party where a sufficient portion of the offence had taken place to trigger domestic jurisdictional rules. The majority of offences established are limited to bribery, which the instrument does not define. Trading in influence and laundering the proceeds of corruption must also be criminalized, but the instrument does not deal with any of the other forms of corruption, such as extortion, embezzlement, nepotism or insider trading, and it does not seek to define or criminalize corruption in general.

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[359] Article 3, paragraph 4 and article 8.
[360] Council of Europe resolution (99)5, 1 May 1999.
[361] European Treaty Series # 173.
[362] See Article 33.
[363] The criminalisation requirements are found in Chapter II, Articles 2-14. Aiding and abetting must also be criminalized under Article 15, and corporate liability is required under Article 18.

The Convention requires States Parties to ensure that they have specialized "persons or entities" dedicated to the fight against corruption, and that such persons or entities have sufficient independence, training and resources to enable them to operate effectively.[364] It also provides for the protection of informants and witnesses who cooperate with investigators, the extradition of offenders, mutual legal assistance and other forms of cooperation.[365] The tracing, seizing and freezing of property used in corruption and the proceeds of corruption are also provided for but the text is framed in terms of international cooperation and does not deal with the return or other disposal of recovered proceeds.[366] Mutual legal assistance may be refused if the request undermines the fundamental interests, national sovereignty, national security or 'ordre public' of the requested Party, but not on the grounds of bank secrecy.[367]

CIVIL LAW CONVENTION ON CORRUPTION OF 1999

The Civil Law Convention on Corruption of the Council of Europe is the first attempt to define common international rules for civil litigation in corruption cases. Where the Criminal Law Convention seeks to control corruption by ensuring that offences and punishments are in place, the Civil Law Convention requires States Parties to ensure that those affected by corruption can sue the perpetrators under civil law, effectively drawing the victims of corruption into the anti-corruption strategy of the Council.

Generally, that has the advantage of making corruption controls partly self-enforcing by empowering victims to take action on their own initiative but it also entails some loss of control on the part of Government agencies. Some potential litigants may effectively be excluded by lack of resources, lack of access to legal counsel or similar factors; corporate civil litigants, however, who have the financial means to bring a civil action, will usually decide whether to sue, and may settle or discontinue proceedings based on business or economic criteria that may not accord with the overall anti-corruption strategy of the Government. Creating a civil action may also create some potential for conflicting or parallel civil and criminal proceedings, and rules for resolving such problems may be needed where they do not already exist.

As with the Criminal Law Convention, the Civil Law Convention is drafted as a binding legal instrument. Civil law provisions must be enacted that ensure that anyone who has suffered damage resulting from corruption can recover "…material damage, loss of profits and non-pecuniary loss."[368] Damages can be recovered against anyone who has committed a corrupt act, authorized someone else to do so, or failed to take reasonable steps to prevent the act, (including the State itself), provided that a causal link between the act and the damages claimed can be proved.[369] Where appropriate, courts also have the power to declare contractual obligations where the consent of any party to the

[364] See Article 20.
[365] Articles 22 and 25-31.
[366] Article 23.
[367] Article 26, paragraphs 2 and 3.
[368] Article 3, paragraph 2.
[369] Articles 4 and 5.

contract has been "undermined" by corruption[370] to be null and void. The instrument also requires States Parties to "cooperate effectively" in civil cases, take steps to protect those who report corruption, and to ensure the validity of private sector accounts and audits.[371] The Civil Law Convention is narrower that its criminal law counterpart in the scope of the types of corruption to which it applies, as it extends only to bribery and similar acts. It does, however, apply to such acts in both the private and public sector. It is not in force, having been ratified by only three of the necessary fourteen countries.

THE TWENTY GUIDING PRINCIPLES FOR THE FIGHT AGAINST CORRUPTION OF 1997

The Council of Europe Committee of Ministers adopted a resolution setting out "Twenty Guiding Principles for the Fight against Corruption" in November 1997.[372] The principles are multidisciplinary, covering the use of criminal and civil law measures, civil prevention, administrative reforms, transparency measures and research. They are directed at encouraging individual countries to consult one another and coordinate national measures as a further precaution against transnational corruption problems. Attention is also drawn to the links between corruption and other forms of crime, particularly money-laundering and organized crime.

MODEL CODE OF CONDUCT FOR PUBLIC OFFICIALS OF 2000

The Council of Europe, like the United Nations, has developed and adopted a Model Code for the Conduct of Public Officials.[373] The language of some of the individual standards is of a mandatory nature, but the document itself is in the nature of a recommendation and is intended as a precedent for countries drafting their own mandatory codes of conduct.

Many of the standards set deal with subject matter that is similar to the United Nations text, but the Council of Europe text is much broader, covering a wide range of aspects of public service conduct, rather than only those that are linked to anti-corruption measures or policies. Article 6, for example, which deals with arbitrary actions, is broad enough to cover problems such as general discrimination as well as conduct that is specifically biased by corrupt influences. The more important elements from an anti-corruption standpoint include:

- Avoidance of conflicts of interest (articles 8 and 13-16);
- Duties to act loyally (article 5), legally (article 4), and impartially (article 7);
- Dealing with gifts, improper offers and other forms of influence (articles 18-20); and,
- Accountability of public officials (articles 10, 25).

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[370] Article 8.
[371] Articles 13, 9 and 10.
[372] Resolution 97 (24) of 6 November 1997. The principles were developed by the Multidisciplinary Group on Corruption, established as a result of the 1994 Malta Conference of the European Ministers of Justice.
[373] Council of Europe Recommendation Rec(2000) 10, of 11 May 2000, Appendix.

Of particular interest are articles 13-16, that deal with conflicts of interest in more detail than most other instruments. The provisions discuss the possible range of conflicts that may arise, and place positive obligations on the official involved, (who will often be the only person aware of the existence of a conflict), to identify and disclose potential conflicts, to take appropriate steps to avoid them, and to comply with any legal or operational decisions taken by others to resolve the conflict. The Code notes that potential sources of frequent or regular conflicts may be incompatible with some areas of public activity altogether[374], but it does not discuss any specific means of resolving such conflicts.[375] The need for controls to strike a balance between legitimate forms of protected partisan political activity and conflicts between partisanship are also discussed. They deal with public officials in general but not with those who serve by reason of their election to partisan political positions.[376]

EUROPEAN UNION INSTRUMENTS AND DOCUMENTS

Convention on the protection of the European Communities' financial interests and protocols thereto

The Convention (1995) and its two protocols (1996 and 1997)[377] represent an attempt on the part of the European Union (EU) to address forms of malfeasance that are harmful to its own financial interests. They are legally binding and address corruption and other financial or economic crimes, as well as related conduct, but only insofar as the conduct involved affects the interests of the EU itself. The Convention deals with a list of conduct designated as "fraud affecting the European Communities' financial interests".

The first protocol deals with active and passive corruption, and the second with money-laundering and the confiscation of the proceeds of fraud and corruption, as set out in the previous instruments. The forms of active and passive corruption dealt with in the first protocol generally consist of bribery and similar conduct, in which some promise, benefit or advantage is solicited, offered or exchanged in return for undue influence on the exercise of a public duty.

The forms of fraud set out in the Convention itself cover other areas of corruption, such as the submission of false information to a public authority to induce it to pay funds or transfer property that it would not otherwise have done. The first protocol distinguishes between the criminal conduct of officials, who can commit "passive corruption" by requesting or receiving bribes or similar considerations, and others, who commit "active corruption" by promising or giving such considerations for improper purposes.

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[374] Article 15.

[375] Article 15 simply requires the public official involved to identify and disclose such conflicts, and seek the approval of superiors for situations that may raise general conflicts. The only practical means of addressing such conflicts are usually either requiring the official involved to divest or disassociate himself from the private conflicting interest or to discharge or reassign the official to ensure that the public duties do not conflict. This is discussed in Part 4.I.h. of the Toolkit.

[376] Article 1, paragraph 4 excludes from the term "public official" those elected to office, members of the government and holders of judicial office.

[377] E.U. documents 495A1127(03), Official Journal C 316, 27/11/1995, pp.0049-0057 (Convention), 496A1023(01), Official Journal C 313, 23/10/1996, pp.0002-0010, and 497A0719(02), Official Journal C 221, 19/07/1997, pp.0012-0022.

The other instruments simply require States Parties to incorporate ("transpose") the principles set out into their national criminal law, which would generally result in offences applicable to everyone who engages in the conduct prohibited. Generally, the question of liability of legal persons, such as corporations, would be covered by the same principle. Article 3 of the Convention further calls for specific individual criminal liability for the heads of businesses or those exercising control within the business to be held criminally liable in cases where the business commits a fraud offence.

The Convention on the fight against corruption involving European Community officials or officials of Member States of 1997

The Convention[378] incorporates essentially the same terms as the 1995 Convention on the protection of financial interests (see above), but deals only with conduct on the part of officials of the European Community and its Member States. The conduct to which it applies is essentially bribery and similar offences that States Parties are required to criminalize. It does not deal with fraud, money-laundering or other corruption-related offences.

Joint Action of 22 December 1998 on corruption in the private sector by the Council of the European Union

The Joint Action of 22 December 1998[379] incorporates many similar provisions to preceding European instruments with one fundamental difference. Here, the focus is on corruption in the private sector. The obligation is to criminalize both active and passive corruption conducted "in the course of business activities", which would include cases where neither the payer nor the recipient of a bribe was connected in any way with public administration, as well as cases where the "business activities" involved business with Government. The underlying policy is to use the criminal law of Member States to combat corrupt private-sector practices on the basis that they distort free competition within the common market, thereby raising the possibility of economic damage to others not involved in the activity.[380] The text is drafted in binding legal terms, and Member States are required to bring forward proposals for implementation within two years of its entry into force.

INSTRUMENTS AND DOCUMENTS OF THE ORGANIZATION OF AMERICAN STATES (OAS)

The Inter-American Convention against Corruption

The principal focus of the anti-corruption strategy of the OAS has been the 1996 Inter-American Convention against Corruption.[381] The Inter-American Convention is drafted as a binding legal instrument, although some specific provisions contain language that limits or provides some element of discretion with respect to application. Generally, the obligations to criminalize acts of corruption are mandatory, while States Parties need only consider instituting others, such as the implementation of certain preventive measures. The

[378] Document 497A0625(01), Official Journal C 195, 25/06/1997, pp.0002-0011.
[379] Document # 498X0742, Official Journal L 358, 31/12/1998, pp. 0002-004.
[380] See article 2 paragraph 2 and article 3 paragraph 2.
[381] OAS General Assembly resolution AG/res. 1398 (XXVI-0/96) of 29 March 1996, annex. All OAS instruments are available in Spanish, English, French and Portuguese.

instrument has been in force since 6 March 1997, having been ratified by 20 OAS countries.[382] Countries that are not OAS members may also become Parties by acceding to it .[383]

The Inter-American Convention is broader in scope than the European and OECD instruments. They focus primarily on bribery and its variations, but are still limited to conduct that is committed by or that affects "…a government official or a person who performs public functions…", both of which are defined.[384] In addition to passive and active bribery, the Convention also applies to any acts or omissions on the part of a person or official for the purpose of illicitly obtaining any benefits and the fraudulent use or concealment of property derived from corruption. It is open to States Parties to apply it to other forms of corruption if the countries involved so agree. The instrument also applies to attempted offences and to various forms of participants, such as conspirators and those who instigate, aid or abet offenders.[385] States Parties are required to adopt those acts or omissions, as well as transnational bribery and illicit enrichment (see below), as domestic offences, and to ensure that adequate provision is made to facilitate the required forms of cooperation, such as mutual legal assistance and extradition.[386]

The questions of transnational bribery and illicit enrichment are dealt with separately. Faced with constitutional difficulties on the part of some States, those offences are made subject to the Constitution and fundamental principles of the legal system of each State Party, while acknowledging that constitutional constraints may preclude or limit full implementation. Where that is the case, and a State Party does not establish offences for those reasons, it is still obliged to assist and cooperate with other States Parties in such cases, "…insofar as its laws permit." Transnational bribery and illicit enrichment are also designated as "acts of corruption", making them subject to the other provisions of the instrument.

The transnational bribery provision requires that States Parties "…shall prohibit and punish…" the offering or granting of a bribe to a foreign Government official by anyone who is a national, habitual resident, or a business domiciled in their territory".[387] The language is broader than that of the equivalent provisions of the OECD Convention, covering not only bribery where the purpose relates to a contract or business transaction but also any other case where the bribe relates to "any act or omission in the performance of that official's public functions." The illicit enrichment provision simply requires the establishment of an offence for the accumulation of a "significant increase" in assets by any Government official if that official cannot reasonably explain the increase in relation to his or her lawful functions and earnings.

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[382] Argentina, Bahamas (Commonwealth), Bolivia, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, United States of America, Uruguay and Venezuela.
[383] Article XXIII.
[384] Article I.
[385] Article VI.
[386] Article VII.
[387] Article VIII.

The foregoing criminalization requirements are essentially mandatory. In addition, States Parties are also asked to consider a series of further offences that, if adopted, also become "acts of corruption" under the Convention, and trigger its cooperation requirements even among States that have not adopted them.[388]

- Improper use of confidential information by an official;
- Improper use of Government property by an official;
- Seeking any decision from a public authority for illicit gain; and
- Improper diversion of any State property, monies or securities.

The Convention creates a series of preventive measures although, as noted above, they are not mandatory[389]:

- Standards of conduct for public functions and mechanisms to enforce them;
- The instruction of Government personnel on responsibilities and ethical rules;
- Systems for registering the incomes, assets and liabilities of those who perform public functions;
- Government revenue and control systems that deter corruption;
- Tax laws that deny favourable treatment for corruption-related expenditures;
- Protection for those who report corruption;
- Oversight bodies to prevent, detect, punish and eradicate corruption; and,
- The study of further preventive measures.

As with several other instruments, bank secrecy cannot be invoked as a reason for not cooperating, but where information protected by bank secrecy is disclosed, it cannot be used for purposes outside the scope of the initial request without authorization from the State that provided it.[390] The fact that an act of corruption involved political motives or purposes does not necessarily make any offences involved "political offences" so as to exempt them from legal assistance and extradition procedures.[391] The Convention does not require States Parties to create retroactive crimes but it does apply to acts of corruption committed before it came into force.[392]

Mechanism for follow-up on implementation of the Inter-American Convention against Corruption

Following the coming into force of the Inter-American Convention, the first Conference of States Parties was held from May 2-4, 2001 in Buenos Aires to

[388] Article XI.
[389] Article III.
[390] Article XVI.
[391] Article XVII.
[392] Article XIX.

establish a mechanism to follow up on the implementation of the instrument.[393] The Conference called for the establishment of a mechanism to promote implementation, follow up on specific Convention commitments, facilitate technical cooperation activities and facilitate harmonization of relevant national laws. A committee of experts was established to conduct technical analysis of the Convention and its individual provisions as implemented by States Parties. Its reports and recommendations would then be reviewed by the Conference of States Parties, representing all the countries involved and would have the authority to implement recommendations.

The committee of experts would select countries impartially for review, obtain information using a questionnaire, and prepare a preliminary report. Each country reviewed would be notified in advance, and given an opportunity to review preliminary report texts. Ultimately, the Conference of States Parties would review final reports, that would then be published. The committee of experts, called upon to adopt and disseminate its own procedural rules, is directed to make provision for the appropriate participation of civil society in the process.

[393] OAS General Assembly resolution AG/RES.1784 (XXXI-O/01), 5 June 2001, and Summary Minutes of the Conference of State Parties, annexed.

TOOL #33

NATIONAL LEGAL INSTRUMENTS

Corruption has been defined as the abuse of (public) power for private gain. The difficulty of defining many acts as corruption lies in the fact that only from time to time do they actually cause damage to the State, the individual or the public at large. Often the harm they cause consists mainly of a negative perception that ultimately results in a decrease in the trust of the public towards the State.

CRIMINAL LAW

Sanctioning of corruption and related acts

Corruption, as defined, includes criminal acts such as bribery, embezzlement and theft of public resources by public officials, fraud damaging the State and extortion, as well as the laundering of the proceeds from such activities. Certain other behaviour such as favouritism and nepotism, conflicts of interest and contributions to political parties may, under specific conditions, be considered worth sanctioning by means of criminal or administrative law.

Another measure worth considering is the criminalization of the creation of slush funds, the accumulation of assets "off the books" with the purpose of using such funds to pay bribes. In many national legal systems, the creation of slush funds is not necessarily illegal.

There is an increasing tendency, both at the national and international levels, to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation. Several national legislatures have introduced such provisions and, at the international level, the offence of "illicit enrichment" or "unexplained wealth" has become an accepted instrument in the fight against corruption.[394]

Since legal persons, in particular corporate entities, often commit business and high-level corruption, normative solutions must be developed regarding their criminal liability. The issue has been recognized by many jurisdictions and is provided for in some international legal instruments. Companies that do not have any risk of being dissolved or losing their assets if they engage in, or tolerate, criminal activities on the part of their staff, are unlikely to strengthen their

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[394] See United Nations Convention against Corruption, Article 20 (illicit enrichment). The presumption that wealth, once proven to have been acquired, was acquired illegally, is considered in some countries to infringe the right to be presumed innocent, but has proven a powerful anti-corruption measure in others. For discussion of the issues and some alternative options, see Tools #29 (Financial Investigations and the Monitoring of Assets) and #36[37] (Meeting the burden of proof in criminal cases: reversal of onus and Legal provisions to facilitate the gathering and use of evidence corruption cases).

compliance with the law. That is especially true if there are incentives not to comply with the law, as is often the case in the context of corruption. Both the United Nations Convention against Transnational Organized Crime and the Criminal Law Convention of the Council of Europe foresee establishing (criminal) liability of legal persons for participation in the offences of active and passive corruption and money-laundering.[395]

Criminalization requirements of the United Nations Convention against Corruption

Chapter III of the United Nations Convention against Corruption sets out a total of 12 corruption offences, 5 offences related to money-laundering, and two offences related to the obstruction of justice. Of these, 8 are mandatory and 2 are required, subject to the basic concepts of the legal system of each State Party. The remainder must be considered by each State Party but need not necessarily be enacted. The Convention also sets out the principle that its provisions establish only minimum standards and that States Parties are free to adopt or maintain provisions which are "more strict or severe" than those prescribed.[396] The criminalization requirements are as follow:

- Active bribery of domestic public official (Article 15, subparagraph (a))
- Passive bribery in relation to domestic public official (Article 15, subparagraph (b))
- Active bribery of foreign public official or official of international organization, in relation to conduct of international business (Article 16, paragraph 1)
- Passive bribery of foreign public official or official of international organization (Article 16, paragraph 2)
- Embezzlement, misappropriation or other diversion of property by a public official (Article 17)
- Active bribery of public official in relation to abuse of influence (Article 18, subparagraph (a))
- Passive bribery of public official in relation to abuse of influence (Article 18, subparagraph (b))
- Abuse of functions (illegal performance or failure to perform act for undue advantage) ((Article 19)
- Illicit enrichment (significant increase of assets not reasonably explicable by lawful income) (Article 20)

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[395] See United Nations Convention against Corruption, Article 26. This follows the precedent of the earlier United Nations Convention against Transnational Organized Crime, GA/RES/55/25, Annex I, Article 10. Since not all countries' legal systems allow the extension of criminal liability to legal persons, both provisions allow for criminal, civil or administrative forms of liability, at the option of the implementing legislature. Both provisions also require the application of sanctions that are "effective, proportionate and dissuasive". See Convention against Corruption, Article 10, paragraph 4.

[396] Article 65, paragraph 2.

- Active bribery of person in private sector in the course of financial or commercial activities (Article 21, subparagraph (a))
- Passive bribery of person in private sector in the course of financial or commercial activities (Article 21, subparagraph (b))
- Embezzlement of property in the private sector (Article 22)
- Conversion or transfer of proceeds of crime for purpose of concealing or disguising illicit origin (Article 23, subparagraph 1(a)(i))
- Concealment or disguise of true nature, of proceeds of crime, etc. (Article 23, subparagraph 1(a)(ii))
- Acquisition, possession or use of proceeds of crime (Article 23, subparagraph 1(b)(i))
- Concealment (concealment or continued retention knowing property resulting from Convention offence) (Article 24)
- Obstruction of justice in relation to testimony or other evidence (Article 25, subparagraph (a))
- Obstruction of justice in relation to exercise of official duties (Article 25, subparagraph (b))

CONFISCATION OF THE PROCEEDS OF CORRUPTION

The confiscation of proceeds of crime and other property used in or destined for use in crime has been applied as a deterrent and sanction for some time. Basic frameworks for tracing, freezing, seizing and confiscating such assets or property, and for international cooperation in doing so, are found in both the Convention against Illicit Traffic in Narcotic Drugs an Psychotropic Substances of 1988 and the Convention against Transnational Organized Crime of 2000. Similar provisions now appear in the 2003 United Nations Convention against Corruption, with a significant expansion into the area of the recovery of assets illicitly transferred from one country to another.[397]

Confiscation proceedings have in the past raised a number of legal and practical problems, some of which have been addressed in various legal systems. While there are usually concerns about the presumption of innocence and due process rights, civil or quasi-civil forfeiture may be allowed in some countries based on the lower civil "balance of probabilities" burden of proof.[398] A reduced burden is also permitted in some systems with respect to forfeiture once the accused has been convicted of the predicate offence using the normal criminal law burden of

[397] See Convention against Corruption, Articles 31 (freezing, seizure and confiscation) and 55 (international cooperation for purposes of confiscation). All of Chapter V, Articles 51-59 deals with asset recovery.

[398] This approach has proven viable in Italy and the United States, and in a different variation, in Germany. In establishing such systems, legislators should bear in mind, however, that the more closely the processes and outcomes associated with forfeiture are linked to predicate criminal offences and resemble criminal proceedings and punishments, the more likely national courts are to apply the higher evidentiary standards and stricter procedural requirements usually associated with criminal prosecutions.

proof. To deal with the problem of proceeds or other property linked to crimes which cannot be prosecuted, many systems allow for confiscation (*in rem* forfeiture) without any conviction at all where there is proof beyond a reasonable doubt that the assets are proceeds. Some systems limit this further, by requiring proof that the accused offender has died, has absconded, or cannot be prosecuted for any other reason. A similar principle might be extended to cases where the accused offender cannot be prosecuted by reason of some privileges or immunities. Confiscation could also be linked to offences such as illicit enrichment in systems where this is not seen as inconsistent with the presumption of innocence.

LAWS TO FACILITATE THE DETECTION OF CORRUPTION

Although corruption is not a victimless crime per se, unlike most crimes, the victim is often not easily identifiable. Usually, those involved are beneficiaries in some way and have an interest in preserving secrecy. Clear evidence of the actual payment of a bribe can be exceptionally hard to obtain and corrupt practices frequently remain unpunished. The traditional methods of evidence gathering will often not lead to satisfactory results. Additional laws are needed, providing for more innovative evidence-gathering procedures, such as integrity testing, amnesty regulations for those involved in the corrupt transaction, whistleblower protection, abolition and/or limiting of enhanced bank, corporate and professional secrecy, money- laundering statutes, and access to information.[399]

MONEY-LAUNDERING STATUTES

Money-laundering statutes can contribute significantly to the detection of corruption and related offences by providing the basis for financial investigations. Identifying and recording obligations as well as reporting suspicious transactions, as is also required by the UN Convention against Transnational Organized Crime and the United Nations Convention against Corruption,[400] will not only facilitate detection of the crime of money-laundering but will also help identify the criminal acts from which the illicit proceeds originated. It is therefore essential to establish corruption as a predicate offence to money-laundering.

Identification by financial institutions of the true beneficiaries of a transaction can often be difficult. Criminals engaged in money- laundering typically use false identities. Financial institutions must refrain from entering into business relations where true identification is questionable and, in particular, when identification is impossible because of the use of company schemes that are mainly designed to

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[399] See United Nations Convention against Corruption, Article 8, paragraph 4 (measures to facilitate reporting of corruption within public service); Article 13, paragraph 2 (ensuring public awareness of bodies to which corruption can be reported); Articles 32-33 (protection of victims, witnesses and persons who report corruption); Article 37(measures to facilitate cooperation with law enforcement, mitigation, etc.); Article 40 (mechanisms to overcome bank secrecy); Articles 46-49 (cooperation, assistance, etc., involving foreign authorities); and Article 50 (special investigative techniques).

[400] See Article 14, subparagraph 1(a). See also Article 52, paragraph 1, calling for enhanced scrutiny of specific transactions or accounts representing a high risk of illicit transfers.

guarantee anonymity. Furthermore, all relevant information regarding the client and the transaction needs to be registered. In order to make that a manageable task, there should, at the very minimum, be an obligation to register a transaction where it exceeds a certain value or where the client wants to enter into a permanent business relationship with the institution, for example when opening an account. Regardless of the value of the single transaction, financial operators should be obliged to report transactions that give rise to reasonable suspicions that the assets involved derive from one of the predicate offences of money-laundering. The reporting obligation should be independent of the institution actually executing the transaction.

To support financial institutions in implementing that obligation, "Red Flag Catalogues" that indicate the instances in which institutions should pay special attention to transactions having no apparent economic or obvious lawful purpose, should be provided. Criteria relating to corruption/money laundering will be different from those "red flags" pointing towards drug/money-laundering. It is possible to make distinctions between high-risk areas, industries and persons, and risky transactions. It might therefore be advisable to include in the traditional lists of "red flags" situations pointing to possible corruption proceeds.

The above obligations should not necessarily be limited to institutions entitled to execute financial operations. Extending the obligations to other businesses that are typically conducting transactions of considerable value, such as broker/dealers in gold, company shares and other precious commodities should also be considered.

The statute should also provide for sufficient penalties for violation of the obligations. In some jurisdictions, providing for procedures that ensure the adequate protection of bank personnel could be considered.

LIMITATION OF BANK AND PROFESSIONAL SECRECY AS WELL AS THE INTRODUCTION OF ADEQUATE CORPORATE LAWS

Banking secrecy laws are a serious obstacle to successful corruption investigations. The Narcotic Drug Convention, the Convention against Transnational Organized Crime and the Convention against Corruption[401] address the issue of bank secrecy in the context of confiscation. Efforts at reducing the secrecy of account ownership has resulted in some traditional tax havens adjusting procedures to allow more access to accounts and greater possibility of confiscation, while other jurisdictions have used the opportunity to capture a greater share of the international market by offering enhanced bank secrecy.

Bank secrecy, however, is not the only obstacle to investigations. Accounts opened in the name of a company often provide for the true beneficiaries to remain anonymous. Banking laws and regulations that prevent the obtaining of information on the true identity of beneficiaries have been identified as a source of concern at various international forums, such as the Paris Expert Group on

[401] Article 40. See also Article 46, paragraph 8 (bank secrecy not a basis for refusal of mutual legal assistance)

Corruption and its Financial Channels and the OECD Working Group on Corruption.[402]

ACCESS TO INFORMATION LEGISLATION

Access to Information Laws usually adopts four methods to achieve their objective, namely:

- Every Government agency should be required to publish an annual statement of its operations;
- A legally enforceable right of access to documented information held by the Government should be recognized, subject only to such exceptions as are reasonably necessary to protect public interests or personal privacy;
- The right of individuals to apply to amend any record containing information about them that they believe to be incomplete, incorrect, out of date or misleading should be recognized; and
- Independent bodies should provide a two-tier system to appeal against any refusal to provide access.

ADMINISTRATIVE LAW

Judicially supervised administrative procedures, involving the right of citizens to a hearing, notice requirements and a right to a statement of reasons for the decision of a public official, are all effective mechanisms for preventing and controlling corrupt practices because they give civil society a tool to challenge abuse of authority. They are also an effective mechanism for citizens to challenge non-transparent policymaking.

By creating judicially enforceable procedural administrative rights, politicians decentralize the monitoring function to their constituents, who can bring suits to place public pressure in cases of political or bureaucratic abuse of power. In such cases, administrative substantive laws and procedures could be seen as a means of ensuring accountability and acting as instruments of political control over the State. They serve the purpose of monitoring and disciplining public officials.

There are also some drawbacks that need to be taken into account when introducing administrative law as an anti-corruption **tool**. Extensive administrative procedures may entail a slower, less flexible administration. At the same time, the procedural rights that extend to the opponents of politicians may be used for political purposes to gain electoral advantages.

[402] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C.6 (f), and I.D.11.

TOOL #34

AMNESTY, IMMUNITY AND MITIGATION OF PUNISHMENT

BACKGROUND

Generally the application of amnesty or immunity in corruption cases is inconsistent with the goals of deterrence, criminal responsibility, and the removal of persons found to have engaged in corrupt conduct from positions where it is likely to be repeated. Several provisions of the United Nations Convention against Corruption support these policies, most notably Article 30, which calls for the imposition of sanctions that take into account the gravity of the offence.[403] There are, however, situations in which amnesty or immunity might be warranted. Immunity or the mitigation of otherwise-applicable punishments may be offered in cases where the accused person has reported corruption or otherwise assisted or cooperated with competent authorities, options expressly raised by Article 37 of the Convention. More generally, where large numbers of low-level officials are involved, a general amnesty followed by re-training may well be seen as preferable to the costs associated with large numbers of prosecutions and the replacement of large numbers of public officials. Governments seeking a fresh start may also prefer a limited or general amnesty to make a clean break with the past and focus scarce resources on the implementation of reforms which prevent future corruption rather than prosecutions which would punish past corruption. Finally, in cases of "grand corruption" amnesty may be offered to the most senior officials in the course of negotiating a smooth, non-violent transfer of power and/or the return of proceeds. Aside from immunity or mitigation under Article 37 (cooperation with authorities) these are political questions for the governments involved and are usually determined on a case-by-case basis. Those faced with such decisions are under a heavy obligation to make them in the best interest of the State and its people, both at the time of the decision and in the future.

THE MECHANICS OF AMNESTY, IMMUNITYAND MITIGATION.

An amnesty is a legal mechanism of general application, in which the appropriate authority decides that a certain specified category of offence and/or offender will not be made subject to prosecution. Thus all offenders who committed a certain offence, or who committed a specified offence or one of a list of offences before a certain date might be excluded from prosecution. How this is done will depend to some degree on the rule of law and how it is implemented in the constitutional structure of each State. Usually, if the legislature is the supreme law-making body, it will not be possible for an executive or judicial authority to create an amnesty unless the authority to do so has been established and granted by the legislature. This is distinct from the discretion of prosecutors in some systems not to prosecute offences, and of judicial powers to stop prosecutions or acquit

[403] Article 30, paragraph 1. See also paragraph 3, which calls for the exercise of discretion in ways which favour effective law-enforcement and deterrence, and paragraphs 6 and 7 dealing with the suspension or removal of persons involved in corruption from public office.

persons charged with offences. These operate when the appropriate officials exercise their legal discretion on a case-by-case basis. Amnesties operate when the legislature or some power delegated by it declares that no one within a certain class will be prosecuted for a specified offence or offences.

In many cases, amnesties are subject to terms and conditions, and legislatures should carefully circumscribe amnesties in accordance with the policy intended, and bearing in mind that overbroad amnesties will erode deterrence and the rule of law. Amnesty provisions should, among other things, be limited so that immunity is only given for necessary offences, usually those involving or related to corruption or specific types of corruption. They should also be limited as to time, and not be applicable to any future malfeasance. Such provisions, moreover, are often conditional on future good behaviour, rendering those who continue to engage in corruption after the amnesty period liable to prosecution for acts committed earlier. Consideration could also be given to excluding from the amnesty those who have committed particularly serious or prejudicial offences, or providing some added element of discretion to prosecute such cases notwithstanding the general amnesty. Legislatures formulating amnesty provisions should also carefully consider the implications of Article 44, paragraph 11 of the United Nations Convention against Corruption, which obliges States Parties to either extradite offenders on request or to prosecute themselves. While an amnesty which excused domestic offenders and offences may not raise concerns, an amnesty which would prevent the State from extraditing offenders to face justice elsewhere, or from prosecuting them at home if it was not able to extradite them, could well place the State in breach of its treaty obligations.

Immunity and mitigation, which are usually applied in cases where a person being prosecuted has cooperated with authorities, involve the exercise of discretion in each specific case, and the nature and extent of the discretion depends on the fundamental principles of the legal system of the State involved. In some systems, prosecutors have discretion not to prosecute and can undertake not to do so if the accused cooperates. In other systems, prosecutors who have evidence of an offence are legally obliged to prosecute it, and in such cases a statutory immunity provision is needed. This will generally provide for immunity or mitigation where the accused co-operates, as well as some basis for making the determination that the immunity applies in each case. The mitigation or reduction of the otherwise-applicable punishments can be difficult to implement in practice because of judicial independence. Essentially, judges must pass sentences based on their own assessment of guilt and seriousness and on whatever basis is provided by the legislature. Prosecutors may advise this process, but judges are under no obligation to follow such advice. Commonly, in such systems, the legislature may include mitigation in principles or rules for sentencing, and prosecutors offer not mitigation, but the undertaking to urge the judge to mitigate.

TRUTH AND RECONCILIATION.

A process of "truth and reconciliation" would require public admission of the act to be forgiven by the individual(s) responsible and the redistribution of the

proceeds in exchange for immunity from prosecution. Public forgiveness without restitution of the proceeds of the corruption would probably not be accepted by the community. It may be the case that those reporting their crimes are unable to make full restitution. In such cases, the possibility of not insisting on full restitution should be considered. The current property of those requesting truth and reconciliation could be taxed instead, regardless of its actual origin. The percentage to be paid in tax should also be determined.

Criminals who admit their involvement in corrupt practices may consider an admission to be a chance for clearing up their past criminal activities in a relatively "cheap" way. The public should be made aware of the need for and advantages of such a reconciliation mechanism. If such "plea bargaining" were not permitted, it is likely that many past offences would go unreported and opportunities to collect at least partial repayments would never materialize.

In addition to admitting the corruption offences, amnesty seekers should have to identify all other persons involved in the offences. They should also be encouraged to reveal any other information in their possession regarding corrupt practices.

Recovered monies and property should be paid into an "integrity fund" that could be used to provide higher incentives for the public service in general and to support governmental anti-corruption strategies.

PRECONDITIONS AND RISKS

It may be advisable to use amnesty, immunity or mitigation rather than the traditional criminal justice system if:

- The Government is establishing new laws or policies and deems it necessary to make a clean break with the past;
- Corruption has been, or still is, systemic and the large number of cases will probably paralyze the criminal justice system or disable large units of the public service; and
- Many public servants, because of their low salaries, were forced to use corrupt practices in order to survive
- Immunity or mitigation is offered to specific accused or suspected persons in exchange for their cooperation in taking action against corruption.

Risks which may arise if a general amnesty is used include the general erosion of deterrence and the rule of law, which may lead to future acts of corruption in the expectation that they, too, will be excused or ignored. This is a particular concern in environments in which corrupt officials have enjoyed impunity in the past and an amnesty may be perceived as simply an extension of past policies rather than a fresh start. It is also a strong incentive not to use amnesties more than once. Repeated use of amnesties in the past will virtually always lead to expectations that they will be used in the future, and deterrence will be lost as a result. Other risks include problems which may arise if amnesties are not carefully circumscribed by law: those who should be prosecuted for other

malfeasance may not be, for example. A further risk relates to the recovery of proceeds of corruption from other countries. The return of such assets is established as a “fundamental principle” for the first time by the United Nations Convention against Corruption, but cooperation in such cases is usually contingent on the bringing of a criminal prosecution, and other States Parties may not be willing to provide necessary cooperation in cases where the State which asks for it is not willing itself to prosecute and punish the offenders. As noted above, international obligations to prosecute or extradite offenders (*aut dedere aut judicare*) might also be affected if an amnesty is too broad in scope.

Risks which may arise in cases where an amnesty is considered and not applied include encumbering the criminal justice system, disciplinary and other tribunals with large numbers of relatively minor corruption cases, diverting resources from other, more important programmes. If large numbers of officials are prosecuted the bureaucracies from which they come may also be seriously weakened and their effectiveness compromised. Large-scale prosecutions may also be seen as unjust in environments where corruption was widespread and systematic, causing problems of non-compliance and a general backlash against the criminal justice system.

TOOL #35

STANDARDS TO PREVENT AND CONTROL THE LAUNDERING OF CORRUPTION PROCEEDS

The prevention and control of money-laundering activities has several main aims:

- To protect the stability of the international financial system;
- To facilitate law enforcement activities;
- To deprive offenders of the proceeds of crime, and hence, of the incentives to commit offences in the first place; and,
- To facilitate the confiscation and return of proceeds for use in compensating victims or further combating corruption.

DESCRIPTION

The connection between corruption and the laundering of its proceeds is not new and has been highlighted on several occasions in the past. The United Nations General Assembly has repeatedly expressed concern about the links between corruption and other serious forms of crime, in particular organized crime and economic crime, including money-laundering.[404] Since then, the United Nations Commission on Crime Prevention and Criminal Justice has addressed the connection between corruption and money-laundering in its annual sessions.[405] Other international agencies have also been active in the area. Both the OECD Convention on Combating Bribery of Officials in International Business Transactions and the Criminal Law Convention on Corruption of the Council of Europe address both transnational corruption and the laundering of its proceeds.[406] The 2000 United Nations Convention against Transnational Organized Crime includes measures to prevent and combat money-laundering, and establishes an offence of public-sector corruption which is a predicate offence to the Convention offence of money-laundering.[407] The 2003 United Nations Convention against Corruption contains similar measures to prevent and combat the laundering of proceeds of corruption and related offences, as well as an entire chapter containing expanded provisions dealing with the recovery or

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[404] See GA/RES/5/59, 54/128, 55/61, 55/188, 56/186, 56/260, 57/244, and reports A/AC.261/6, A/55/405, A/56/403 and A/57/158.

[405] Commission on Crime Prevention and Criminal Justice, "Promotion and Maintenance of the Rule of Law and Good Governance - Action against Corruption", Report of the Secretary-General, p. 7 and Addendum p. 5; Commission on Crime Prevention and Criminal Justice, Report on the Seventh Session, "Draft Resolution for Adoption by the Economic and Social Council", p. 13, and "Promotion and Maintenance of the Rule of Law: Action Against Corruption and Bribery", p. 49.

[406] OECD, Convention on Combating Bribery of Officials in International Business Transactions, 21. 11. 1997, Article 7; European Council, Criminal Law Convention on Corruption ETS No.173, Article 13.

[407] United Nations Convention against Transnational Organized Crime, GA/RES/55/25, Articles 6 and 7. See also Articles 12-14 dealing with the tracing, freezing, seizure, confiscation and disposal of proceeds of offences covered by the Convention, as well as other property used in or destined for use in such offences.

return of assets which have been illicitly transferred from one country to another.[408]

The link between money-laundering and corruption is not only related to the laundering of corruption proceeds, but goes much further. Money-laundering, as such, produces a corrupting effect on national and international financial systems. Nevertheless, for most banks and bankers the decision of whether or not to refuse criminal proceeds is based exclusively on financial considerations. As long as the possible returns outweigh the risks for both the banks and bankers, money-laundering will continue to erode and undermine the financial system. Although banks recently have, or at least pretend to have, recognized the financial advantages to be made from complying with the change of mind-set, that is still not reflected in the actual transaction of business and, in particular, in the internal reward system. As long as the financial system continues to reward its employees for attracting new business but does not reward them for being cautious when dealing with clients, the flow of illegal proceeds will continue to corrupt individuals and institutions alike.[409]

Because of the close link between corruption and money-laundering, various international forums have noted that a comprehensive anti-corruption strategy must also include actions to prevent and control the laundering of corruption proceeds. [410]

The particular connection between money-laundering schemes, under-regulated financial systems and corruption is also being given increased intention. The expert group meeting on corruption and its financial channels, held in Paris in April 1999, stated clearly that money-laundering methods are not only being used in a phase *post delictum,* but also during and even before the bribe money is actually paid. Bribe givers and bribe takers are bound by the confidentiality of a covert arrangement and seek to dissociate the origin of the bribe money from its destination. It was further noted that, in order to camouflage the origin and destination of bribes, the respective financial flows are channelled through States and territories that do not possess a comprehensive and effective system to detect money-laundering and similar illegal transactions. Their financial sectors are generally inadequately regulated and supervised, their legislation does not guarantee the judicial authorities access to information and their corporate laws allow the founding of shell companies and trusts to conceal the true identity of the beneficiaries of transactions and the actual owners of funds. [411]

The actual transaction of bribe money is the most significant element of the offence of corruption. Once the money is transferred into an under-regulated financial system, investigators will find it extremely difficult, if not impossible, to

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[408] United Nations Convention against Corruption, Articles 14 (measures to prevent money-laundering), 23 (criminalization of money-laundering offences), 24 (offence of concealment or continued retention of assets), 31 (freezing, seizure and confiscation) and Chapter V, Asset Recovery (Articles 51-59).

[409] Oliver Stolpe, Geldwäsche and Mafia, Kriminalistik, No. 2, 2000, p. 99 and 101.

[410] Report of the Expert Group Meeting on Corruption and its Financial Channels, Paris, 30 March to 1 April, 199.

[411] ibid.

gather evidence. The method is especially likely to be used in cases of bribery of foreign public officials and it represents a serious obstacle for the efficacy of the OECD Convention and other binding international instruments.

In their attempts to contain money-laundering, national legislators and international organizations have emphasized that a comprehensive approach is needed that combines preventive (regulatory) and sanction-oriented measures.[412] The objective of the first is to prevent the abuse of the financial system for money-laundering purposes and to create a paper trail, which is a precondition for successful investigative work. The second component of the approach depends heavily on the criminal sanctioning of the various forms of money-laundering, including the laundering of corrupt proceeds.

REGULATORY APPROACH

The following rules have been developed with the aim of preventing money-laundering but also follow a much broader agenda. [413]Their primary goal is to establish a paper trail for all businesses, including all legitimate businesses, and thereby to create "structures of global control" in the financial sector.[414] As regarding corruption prevention, the more difficult it becomes to hide and launder corruption proceeds, the greater the deterrent effect of anti-laundering legislation.

The "Know your Customer" rule (KYC). [415]

The KYC aims at preventing financial institutes from doing business with unknown customers, but could acquire an entirely new dimension if it were applied to the beneficial owner. When it is impossible to identify the beneficial owner[416] because the company schemes used are mainly designed to guarantee anonymity (such as International Business Corporations (IBCs), trusts, Anstalten, Stiftungen and joint accounts) financial operators should be clearly obliged not to enter into business relations. Although, when carried out seriously, the requirement is very demanding, it could provide a relatively manageable way to deal with companies incorporated in under-regulated financial centres. It would allow IBCs and other such facilities to be isolated without the need to blacklist the uncooperative financial centres, an approach that is still a source of controversy.[417]

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[412] id

[413] See the Basel Statement of Principles of 1998.

[414] Mark Pieth, "The Harmonisation of Law against Economic Crime," European Journal of Law Reform, 1999, p. 530 et seq.; idem, in: European Journal of Crime, Criminal Law and Criminal Justice, 1998, p. 159 et seq.

[415] See United Nations Convention against Corruption, Article 14, subparagraph 1(a) and paragraph 3.

[416] FATF 1996 R. 11 and the related Interpretative Notes.

[417] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C.6 (e).

Due diligence. [418]

The term "due diligence" refers to three additional relevant provisions:

- The obligation to be even more diligent in unusual circumstances; [419]
- The obligation to keep identification files and records on the economic background of unusual transactions; [420]
- The obligation to inform the competent authorities about suspicious transactions.[421]

The rules have been promoted at the international and national level for quite some time. Large-scale money-laundering cases continue to occur, however, even in countries that have adopted the rules and in financial institutions that advertise their compliance with those rules.

Revise existing red flag catalogues.

The obligation to "pay special attention to all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or visible lawful purpose" [422] is especially relevant. A series of criteria may lead to a transaction or business pattern seeming unusual, and it is almost certain that the criteria relating to corruption/money-laundering will be different from those "red flags" pointing towards drug/money-laundering. It might be advisable to include in the traditional lists of "red flags" all those situations that point to possible corruption proceeds. For example, recent discussions among experts has led to the idea that there should be regulations requiring financial institutions to report on the account activity of all higher-level politicians and Government leaders. The indicators should encourage financial operators to apply special caution when dealing with large sums originating from areas with endemic corruption. Even greater caution should be exercised when the client or beneficiary performs an important public function, whether it be as Head of State, minister, or party leader. Furthermore, clients involved in specific business sectors, such as the arms trade, should be asked to answer additional questions relating to the background of the transactions, the origin of the funds and their destination.

Sensitize financial operators.

To sensitize financial operators and create a stimulus for financial institutions, money-laundering situations could be simulated. Such integrity testing could help:

- To make financial operators more attentive; and
- To identify training needs.

In addition, disincentives and sanctions should be introduced for institutions or their personnel that fail the test.

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[418] See United Nations Convention against Corruption, Article 14, subparagraph 1(a) and paragraph 2, as well as Article 52, paragraphs 1-3 and 6.
[419] FATF 1996 R. 14.
[420] FATF 1996 R. 12 and 14.
[421] FATF 1996 R. 15.
[422] FATF R. 14.

PROTECTION OF BANK PERSONNEL. [423]

Bank personnel who have used "whistleblower" anonymity to report suspicious transactions should be guaranteed protection.

IDENTIFY NON-COMPLYING FINANCIAL INSTITUTIONS AND OPERATORS.

Integrity testing could also be used as a proactive approach to identify financial institutions and operators that, because of a lack of will or capacity, do not comply with the rules of "due diligence" and "know your customer" or are actively involved in the laundering of money.[424] Such institutions should then be administratively sanctioned. Depending on the seriousness of the failure to comply, the compulsory administration of the institution and the temporary or permanent exclusion of the responsible financial operator from exercising the financial profession might be considered. If there is a suspicion that an institution is involved in money-laundering, similar tests could also be used to gather supportive evidence. They must, however, guarantee the right to a fair trial and the presumption of innocence.

CRIMINAL LAW

The following criminal law provisions are relevant to fighting corruption/money-laundering.

- **Make Corruption a Predicate Offence to Money-Laundering.** [425]In some legal systems, corruption has not yet been made a predicate offence to money-laundering, but this is changing. Bringing corruption offences within the ambit of anti-money-laundering schemes is a requirement of both the United Nations Convention against Transnational Organized Crime, and for the United Nations Convention against Corruption.[426] The issue deserves to be studied from a technical rather than a political perspective. It may turn out to be a crucial instrument for making large-scale transnational bribery more risky and costly. [427]

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[423] See United Nations Convention against Corruption, Article 33 (protection of persons who report corruption)

[424] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.E.14 (i).

[425] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.E.14 (a).

[426] Convention against Transnational Organized Crime, Article 6, subparagraph 2(b), and Convention against Corruption, Article 23, subparagraph 2(b). The Corruption Convention establishes a total of 19 corruption and corruption-related offences, and States Parties are not necessarily required to include them all. The requirement is to include "…at a minimum, a comprehensive range of criminal offences established in accordance…" with the Convention. In practice, this is likely to encompass the 10 fully-mandatory offences and most or all of the optional offences which are actually criminalized by the State Party concerned.

[427] See the Paris Conclusions, p.4.

- **Introduction of Minimum Standards on International Cooperation.**[428] In particular, the application of the clause, "A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the grounds of bank secrecy" should be promoted.[429] The most difficult topic in international cooperation, however, is still how to secure prompt and effective assistance without forcing Member States to depart from their fundamental legal principles and without harming human rights.[430] Again, the instruments developed in the context of the Council of Europe could be a very valuable resource here.

- **Criminalize the Creation of Slush Funds.** In many national legal systems, the creation of slush funds is not necessarily illegal. The diversion of funds "off the books" might represent a breach of the accounting rules of one country and perhaps even of its criminal law. [431]There is no guarantee, however, that countries that have not signed the OECD instruments against bribery, and especially the under-regulated financial centres, would be ready to clamp down on the diversion of funds. It is therefore necessary to promote the criminalization of slush funds at both the international and national levels. [432]

- **Introduce Criminal Liability of Companies.** [433] [434] The criminal liability of companies is a complementary but essential rule for increasing the risk for private enterprises of tolerating the involvement of their staff in corrupt practices, money-laundering or other economic or financial crimes. Companies that run no risk of being dissolved or losing their assets if they engage in criminal activities or tolerate criminal activities on the part of their staff, are very unlikely to strengthen their compliance with the law, especially if there are high incentives not to do so, as often happens with corruption and money-laundering.

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[428] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C. 7-8.

[429] This provision has been included in most recent treaties where money-laundering was dealt with. See OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Article 9, paragraph 3; United Nations Convention against Transnational Organized Crime Article 12, paragraph 6, and Article 18, paragraph 8; and United Nations Convention against Corruption, Article 31, paragraph 7, and Article 46, paragraph 8.

[430] See p. 4 of the Paris Conclusions.

[431] Art. 8 of the OECD Convention and Art. V. of the OECD Recommendation (Note 3).

[432] See also the Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.E.14 (k).

[433] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C.6 (b) and I.E.14 (c).

[434] See United Nations Convention against Transnational Organized Crime, Article 10 and United Nations Convention against Corruption, Article 26. Under both instruments, some form of liability for legal persons must be established. To accommodate legal systems where criminal liability is not possible in such cases, both provisions allow for “criminal, civil or administrative” liability, but require that applicable sanctions be “effective, proportionate and dissuasive”.

PRIVATE COMPANY REGULATIONS

Promotion of adequate company regulations. [435]

Company regulations that prevent the disclosure of the true identity of beneficiaries have been identified as a source of concern at various international forums, such as the Paris Expert Group on Corruption and its Financial Channels and the OECD Working Group on Corruption. [436] It is an area that needs more extensive study.[437] New laws on meaningful registers, however, might prove unnecessary if clients in the financial sector are made to provide thorough identification. Some of the provisions described above already apply to all Financial Action Task Force (FATF) Member Countries and, with minor modifications, to the Caribbean FATF (CFATF). Indirectly, through the United Nations and OAS model codes, they have also been exported to other areas of the world. In some regions they have been picked up and embedded in binding international or national law.[438] To some extent, the details may have been delegated to the self-regulation bodies of the financial industries. The worldwide coverage goes way beyond the banking sector and includes all sorts of financial intermediaries. At the moment, however, the challenge is no longer merely to ensure the adoption of the FATF recommendations at the global level, but also to enforce them through proper training, controls and sanctions.

Measures at the International Level

There are at least four different ways to promote harmonized substantive standards for under-regulated financial centres. [439]

- **Step-by-step approach.**

  ` The under-regulated financial centres should be encouraged to join initiatives that promote a step-by-step approach to reach compliance with the FATF Recommendations. Groups such as the OECD Working Group on Bribery or the UN Global Offshore Forum have been established for that purpose. Under-regulated financial centres should be convinced to introduce the standards without having to join such working groups, for example, in the context of regional participant groups.

- **Listing of uncooperative jurisdiction.**

  Under-regulated financial centres could be encouraged to make an effort to comply with international legislation or, alternatively, be listed as

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[435] See United Nations Convention against Corruption, Article 12, which calls for measures to prevent corruption in the private sector. The audit controls set out in Article 12, subparagraph 2(f) and paragraph 3 would, if formulated and implemented diligently, suppress money-laundering as well.

[436] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, 30 March to 1 April 1999), I.C.6 (f), and I.D.11.

[437] See III.4 of the Limassol Conclusions.

[438] See the Council of Europe Convention 141 (see above note 3) and the EC Directive of 1991.

[439] UNODCCP, Financial Havens, Banking Secrecy and Money Laundering, Vienna, 29 May 1998. Control and Crime Prevention has created the Global Offshore Forum, an initiative aimed at denying criminals access to the global offshore financial services market for the purpose of laundering the proceeds of their crime.

uncooperative if they continue to ignore international anti-money-laundering statutes.[440] Some international bodies are pursuing such action or a similar approach to pressuring uncooperative offshore centres. Legal obstacles, however, are only partially responsible for a lack of cooperation. Many studies suggest that the insufficient responsiveness to mutual legal assistance requests and police cooperation inquiries seem to depend mainly on factual rather than legal obstacles. It is not in the so-called offshore centres that law enforcement agencies show reluctance to respond to international legal aid requests.[441]

- **Isolation of uncooperative jurisdictions.**

  As an alternative to coercion, insistence on strict customer identification for all financial operations by institutions in the OECD and the FATF areas, including the identification of beneficial owners, could indirectly isolate the unwilling under-regulated financial centres. The rules established on identification would, however, require some clarification. No financial institution could simply rely on identification made by another financial institution domiciled in an under-regulated offshore financial centre (OFC). The identification would have to be repeated even in business relations with correspondent banks domiciled in such locations (perhaps with the exception of subsidiaries, if they are subjected to the same standards as the parent bank).

PRECONDITIONS AND RISKS

Ad hoc working group of the Financial Stability Forum.

The Financial Stability Forum established an ad hoc working group on offshore financial centres on 14 April 1999, in which several European, American and Asian States as well as the Basel Committee on Banking Supervision, the International Association of Insurance Supervisors, the International Organization of Securities Commissions and the OECD participated. Its primary interest is to evaluate the risks that OFCs pose for the stability of the world financial system (by addressing prudential and market integrity concerns). It also endeavours to develop a methodology to assess compliance with international standards. Its final report was published in April 2000.

UN International Financial Centre Initiative.

The United Nations Office on Drugs and Crime has promoted the International Financial Centre Initiative to deny criminals access to international financial services for the purposes of laundering the proceeds of crime. It does so by ensuring that all centres have internationally accepted anti-money-laundering measures in place and that the supervision and regulation of financial institutions reflect those standards.

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[440] Report of the Expert Group Meeting on Corruption and its Financial Channels (Paris, from 30 March to 1 April 1999), I.E.13 (d).

[441] Oliver Stolpe, Geldwäsche and Mafia, Kriminalistik, No. 2, 2000, p. 99-107.

The Financial Action Task Force (FATF).

The 40 FATF Recommendations, updated in 1996, cover a central part of the concerns in regulating the financial sector. Apart from its regular work, FATF has established an ad hoc group on "non-cooperative jurisdictions."

The Council of Europe

The Council of Europe Convention on Money-Laundering, Search, Seizure and Confiscation of Proceeds from Crime, its Convention on Mutual Legal Assistance in Criminal Matters and its criminal and civil law conventions on corruption,[442] together with the Group of States against Corruption (GRECO) Agreement Establishing the Group of States Against Corruption, [443]contribute considerably to a legal framework of cooperation.

The European Union.

The European Union is primarily approaching the issue of corruption with a view to protecting its financial interests. Therefore, its work on OFCs is set in the context of preventing tax fraud. (168) Further input may be expected from the EU initiatives to combat serious organized crime, especially in the area of international cooperation.

With so many initiatives at the international and regional levels regarding the issue of offshore centres, there is a great danger of duplication. Close coordination and information-sharing are therefore essential if duplication of efforts and the wasting of resources are to be avoided.

[442] See Note 3.
[443] GRECO, Strasbourg, 12 May 1999.

TOOL #36

WHISTLEBLOWERS: PROTECTION OF PERSONS WHO REPORT CORRUPTION

The purpose of whistleblower protection is to encourage people to report crime, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against victimization, dismissal and other forms of reprisal.

Corruption flourishes in a culture of inertia, secrecy and silence. People are often aware of misconduct but are frightened to report it. Public inquiries into major disasters and scandals have shown that such a workplace culture has cost lives, damaged livelihoods, caused thousands of jobs to be lost and undermined public confidence in major institutions. In some cases, victims may have been compensated but no one was held accountable for what happened. Cultures of silence persist when those who "blow the whistle" are victimized. To overcome that and to promote a culture of transparency and accountability, a clear and simple framework should be established that encourages legitimate reporting of corruption and other malfeasance and protects such "whistleblowers" from victimization or retaliation. The particular importance of such protections in anti-corruption efforts is illustrated by the fact that, in drafting the United Nations Convention against Corruption, Member States not only provided the same basic protections for victims and witnesses used in the earlier Convention against Transnational Organized Crime, but also added a further article dealing specifically with the protection of persons who report corruption "…in good faith and on reasonable grounds…"[444]

A LAW TO PROTECT WHISTLEBLOWERS.

The main purpose of whistleblower laws is to provide protection for insiders who report cases of maladministration, corruption and other illicit or improper behaviour. This provides incentives to report, or at a minimum, prevents potential whistleblowers from being deterred by the possibility of retaliation or other unpleasant consequences. It also ensures fair and just treatment for those who risk their own position for the good of the organization. Most potential

[444] On the protection of victims and witnesses, see United Nations Convention against Transnational Organized Crime (2000), Articles 24 and 25 and United Nations Convention against Corruption (2003), Article 32. The later instrument merges the provisions and incorporates protection for experts who testify in corruption cases, but otherwise the provisions are similar. On the protection of those who report corruption, see article 33 of the Convention against Corruption, which provides that:

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.

whistleblowers will be affected not by the mere existence of a law, but by some plausible assurance that they will actually be protected from consequences that may range from minor harassment to murder. It is therefore essential that, once laws are in place, they be actively enforced and administered, and that this is readily apparent.

Whistleblower laws also require the striking of a balance. While reporting genuine malfeasance is important, false or malicious reports also occur by those seeking to conceal their own wrongdoing, settle scores or for other purposes. This can waste valuable investigative resources and damage the credibility of anti-corruption programmes, and it is therefore important that whistleblower laws provide for some test of legitimacy, and that they are administered so as to distinguish between genuine and false reporting. This in turn could be used improperly against genuine whistleblowers, but this can be addressed by establishing a presumption in favour of the whistleblower. In a provision based on Article 33 of the United Nations Convention against Corruption, for example, the protection would apply to any person who reports corruption *in good faith and on reasonable grounds*. Good faith should be presumed in favour of the person claiming protection, but where it is proved that the report was false and not in good faith, there should be sanctions against that person. Those who exploit anti-corruption measures improperly are arguably just as great a threat as the corruption itself.

Immediate protection.

The first aim of any whistleblower law is to prevent the person making the disclosure from being victimized, dismissed or treated unfairly in any other way, for having revealed the information. The best way to do this is to keep the identity of the whistleblower and the content of the disclosure confidential for as long as possible. Where this is not possible or cannot be assured, an immediate assessment of the extent of the threat to the person should be made, and if it is serious, removal to a safe location and subsequent concealment may be needed. Under the United Nations Convention against Corruption, in the case of someone who only reports corruption, unspecified "appropriate measures to provide protection" are required. Where the individual becomes a witness in proceedings, this may extend to physical protection, remote testimony, relocation, and even relocation to another country.[445]

Deterrence.

The law should establish an offence for employers or others who retaliate against or take any adverse action against whistleblowers for disclosures made in accordance with the law.

[445] Article 32, subparagraphs 2(a) (physical protection and relocation), 2(b) special rules for testimony) and paragraph 3 (relocation to another State). Under paragraph 3, foreign relocations would be based on specific agreements or arrangements between countries, and need not necessarily be to another State Party to the Convention itself.

Compensation.

The law should oblige the recipient of the disclosure to treat its content and the identity of the whistleblower confidentially. It should also contain rules providing for compensation or reinstatement in case whistleblowers suffer victimization or retaliation for disclosing the information. In the case of dismissal, it may not always be acceptable for whistleblowers to be reinstated into their position. The law should therefore provide for alternative solutions by obliging employers either to provide for a job in another branch or organization of the same institution, or to pay financial compensation.

Coordination with the legal framework.

The part of the whistleblower law that seeks to protect whistleblowers from unfair dismissal must be coordinated with labour laws. The degree of protection may depend to some degree on the extent to which workers are protected in general. Where employment standards and remedies for unjust or wrongful dismissal apply, for example, it will be necessary only to ensure that these are extended to whistleblowers and not circumvented in some way. In countries where "employment at will" or similar policies apply that allow for dismissal or other measures without any cause on the employer's part, stricter and more carefully tailored protections may be needed. Employees need to be protected against dismissal, but where whistleblowing places the employee in a stronger position than otherwise, precautions against false reports may be needed as well. Related to this would also be the extent to which abuses are criminalized (see preceding paragraph).

Who to report to.

Generally, the law should provide for at least two levels of institutions to which whistleblowers can report their suspicions or offer evidence. The first level should include entities within the organization for which the whistleblower works, such as supervisors, heads of the organization or internal or external oversight bodies created specifically to deal with maladministration. If the whistleblower is a public servant he or she should be enabled to report to bodies such as an ombudsman, an anti-corruption agency or an Auditor General.

Whistleblowers should be allowed to turn to a second level of institutions if their disclosures to one of the first-level institutions have not produced appropriate results and, in particular, if the person or institution to which the information was disclosed:

- Decided not to investigate:
- Did not complete the investigation within a reasonable time;
- Took no action regardless of the positive results of the investigation; or
- Did not report back to the whistleblower within a certain time.

Whistleblowers should also be given the possibility to directly address the second level institutions if they:

- Have reason to believe that they would be victimized if they raise the matter internally or with a prescribed external body;
- Reasonably fear a cover-up.

Second-level institutions could be designated members of the legislature, the Government or the media.

Implementation.

Experience shows that whistleblower laws alone will not encourage people to come forward. In a survey carried out among public officials in New South Wales, Australia, regarding the effectiveness of the protection of the Whistleblower Act 1992, 85 per cent of the interviewees were unsure about either the willingness or the desire of their employers to protect them. Some 50 per cent stated that they would refuse to make a disclosure for fear of reprisal. The Independent Commission against Corruption (ICAC) of New South Wales concluded that, in order to help the Whistleblower Act work:

- There must be a real commitment within the organization to act upon disclosures and to protect those making them; and
- An effective internal reporting system must be established and widely publicized in the organization.

A law to protect against false allegations.

Since whistle blowing can be a double-edged sword, it is necessary to protect the rights and reputations of persons against frivolous, vexatious and malicious allegations. The events in the post-war United States and the phenomenon of the "informer" in authoritarian States, underscores the danger. Whistleblower legislation should therefore include clear rules to restore damage caused by false allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes normally contain provisions penalizing those who knowingly come forward with false allegations. It should be made clear to whistleblowers that those rules apply also to them if their allegations are not made in good faith. As noted above, there should generally be a presumption that a report was made in good faith, but where it is proved that a report was false and not in good faith, appropriate sanctions should be applied.

Dealing with whistleblowers and managing their expectations.

In order to ensure effective implementation of whistleblower legislation, those people or institutions that receive the disclosures must be trained in dealing with whistleblowers. Whistleblowers often invest much of their time and energy on the allegations they make. They suffer from a high level of stress. If their expectations are not managed properly, it might prove fatal for the investigation and damage trust in the investigating body. In particular, the investigation process and the expected outcome (criminal charges, disciplinary action) must be explained to the whistleblowers, as well as the likelihood of producing sufficient evidence to take action, and the duration and difficulties of investigation. Whistleblowers should also be informed that the further the investigation proceeds, the more likely it will become for their identity to be revealed and for them to be subjected to various forms of reprisal.

Make the whistleblower "last the distance".

During the investigation, whistleblowers must be kept updated about progress made. Concern about the effectiveness of protection must be acknowledged. The law will never be able to provide full protection, and whistleblowers must be made aware of that. It is therefore essential for the investigating body to make every effort to ensure that whistleblowers "last the distance" by informing them about all of the steps taken and to be taken and the implications for the continued anonymity of the whistleblower, reactions they may encounter as well as other factors that may impact the willingness of whistleblowers to continue providing information to authorities. In addition, they should be given legal advice and counseling.

Avoid leakage of information.

The most effective way of protecting whistleblowers is to maintain confidentiality regarding their identity and the content of their disclosures. Some country experiences, however, show that the recipients of disclosures do not pay enough attention to that important factor. Quite often, information is leaked, rumours spread, and whistleblowers suffer reprisals. It is not enough to sanction the leakage of information. Instead, it may be more effective to train the recipients of disclosures on how to conduct investigations while protecting the identity of the whistleblower for as long as possible.

PRECONDITIONS AND RISKS

Perception that commitment is lacking.

If whistleblowers are not convinced that the investigating body is committed, to both their own protection and action against corruption, they will turn away and probably not take any further steps.

Credible investigating body.

If there are no external independent bodies to which whistleblowers can directly turn, many potential whistleblowers will not voice their concern.

Clarity of the law.

Since the law must instill trust and the target audience may often have modest educational backgrounds, it must be drafted in an way that is easily understood.

CASE STUDY 27

DEALING WITH THE PAST; AMNESTY, RECONCILIATION AND OTHER ALTERNATIVES

INTRODUCTION

Numerous countries are discussing what kind of formula can help enable them make a break with the past and start afresh. So far, however, for various reasons, but mainly because of the opposition of the public to the idea of leaving culprits unpunished, amnesty, reconciliation and similar attempts to deal with the past have only been implemented in a few exceptional cases.

TRUTH AND RECONCILIATION COMMISSIONS

The issue becomes even more important in the context of corruption reform, because many powerful interests have reason to fear that a new dispensation might represent an unnecessary threat for them. Discussions focus on the role of "truth and reconciliation commissions" (such as that in post-apartheid South Africa), and on the fact that a general amnesty in the Hong Kong Special Administrative Region (SAR) provoked such a negative reaction as to threaten the whole reform process and forced the terms of the amnesty to be changed. As a matter of fact, the Governor of Hong Kong SAR announced an amnesty after 2,000 police marched to the head quarters of the Independent Commission Against Corruption (ICAC) and almost caused a riot. The amnesty was highly controversial, since many claimed that it was timed to catch petty criminals while the "big fish" were allowed to escape. Confidence in the ICAC dipped, and so did staff morale. After some time, however, the amnesty was considered a blessing in disguise, even though its timing had been somewhat forced. It gave those who were corrupt a chance to go straight, while those that did not change their behaviour were shown no mercy. The police themselves were the first to acknowledge that it was a correct procedure. Nevertheless, while ICAC might have failed without an amnesty, even though it was a rushed response to a crisis and many considered it unfair.

PUBLIC HEARINGS

The issue of whether or not "public hearings" accompanied by some form of immunity (and perhaps a "tax" being levied on declared illicit wealth as has been the practice with some income tax amnesties) would be effective and publicly acceptable is still being widely debated. The corrupt rich would be given a choice. They could pay an affordable tax and legitimize their wealth, but they could also have to face the humiliation of a public hearing like those conducted in the Australian state of New South Wales. Alternatively, they could quietly settle their accounts with the State. Until workable solutions that are acceptable to an angry public can be developed, however, it will continue to be one of the largest single obstacles to any reform.

In Uganda it was suggested that amnesty should be granted only to those who reported both the levels and the source of their illicit enrichment. Within a set period of time, all civil servants should disclose whether or not they had been involved in corrupt practices. Those admitting involvement should be asked whether they agreed to give back between 20 per cent and 80 per cent of the money they had corruptly acquired over the last 10 years. Once they had fulfilled that condition they would no longer be punishable for any corrupt behaviour taking place before the amnesty programme began.

Furthermore, it was proposed to establish an "integrity fund" into which the money would be kept. This money could then be used to improve incentives (housing conditions, wages), management and the tools for independent anti-corruption agencies. The establishment of a witness/whistleblower protection programme was also proposed, together with the possibility of hiring international lawyers to sue any international companies bribing civil servants.

CASE STUDY #28

THE AUSTRALIAN TRANSACTION REPORT AND ANALYSIS CENTRE (AUSTRAC)

AUSTRAC is within the portfolio of the Minister of Justice and Customs, which falls under the larger Ministry of the Attorney General. AUSTRAC is empowered by law to monitor the compliance of financial institutions with anti-money-laundering regulations.

AUSTRAC is divided into three departments with the task of processing all financial transactions (40 million per day), money-laundering deterrence and information technology. The National Crime Authority (NCA) is attached to the unit and works in close collaboration with it. Its role is to review any suspicious transactions identified by AUSTRAC.

The staff members are presently being increased from 70 to around 90. The staff profiles vary from time to time, particularly in relation to the number of IT contractors they have.

The primary task of AUSTRAC is to collect the reports from the financial institutions, incorporate them in the database and analyse them, either systematically or by targeting specific data, in order to detect illicit transactions. Furthermore, AUSTRAC provides assistance to financial institutions to meet their obligations under the Financial Transaction Reports Act 1988, using operationally effective compliance systems.

The annual budget of AUSTRAC amounts to US$5,306,843. As the unit has the on-line system with the banks, the operating costs are relatively low.

AUSTRAC actively analyses the 40 million or so transactions on its database every day, using rule-based systems to identify patterns of unusual transactions. In 1995, the number of reports of suspicious operations received was 4,014.

CASE STUDY #29

FINANCIAL INTELLIGENCE PROCESSING UNIT, BELGIUM

The Financial Intelligence Processing Unit of Belgium (Cellule de Traitement des Informations Financieres, CTIF) is established directly under the supervision of the Ministers of Justice and Finance and is headed by a magistrate or his/her deputy detailed from the Office of the Public Prosecutor.[446]

The unit is composed of a minimum of three and a maximum of six effective members, among them the president, the deputy president and the vice president,[447] who are financial experts[448]. In addition to the permanent members of the unit, external experts can also be selected and called upon by the unit .[449]

The job of the unit is to analyse the information transmitted to it by the financial institutions and individuals specified by the law. When the unit identifies a violation of the anti-money laundering legislation in the information provided by the financial institutions, it transmits the information to the Crown Prosecutor who takes the necessary decisions and then imposes administrative sanctions.[450] The unit can use its power to oppose execution of a transaction for 24 hours.[451] In short, the role of the CTIF is to collect information, to sort and analyse it ready for the preliminary investigation, to cross check the information it receives and to take part in international information exchange.

The unit is financed by contributions from the institutions and individuals that are obliged to report any suspicious transactions to it [452]and amounts to a total of 858,000 Belgian francs (BEF).[453]

During five years of activity, from 1 December 1993 to 30 November 1998, the unit turned over 1,645 case files to the Office of the Public Prosecutor. That amount represents 61 per cent of the suspicious transaction reports investigated by CTIF. The case files involve BEF 157 billion, or some 77 per cent of all suspicious amounts detected. On 30 June 1998, 117 case files gave rise to criminal sentences, 67 were brought before the correctional courts and 13 were handed over to foreign judicial authorities. Some 202 individuals were sentenced to a total of 480 years of imprisonment and BEF 258 million in fines were imposed. Confiscation worth over BEF 5 million were made. [454]

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[446] Annual Report CTIF, Assignments of the Unit, No. 5.
[447] Royal Decree of 11 June 1993, Chapter II, Article 2.
[448] Annual Report CTIF, Assignments of the Unit, No. 5.
[449] Royal Decree of 11 June 1993, Chapter VII, Article 9.
[450] Annual Report CTIF, Assignment of the Unit, No. 7.
[451] Law of 11 January 1993 on preventing use of the financial system for purposes of laundering money, Chapter III, Article 12, paragraph 2.
[452] J.-F. Thony, Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units, p. 277.
[453] Royal Decree of 11 June 1993, Chapter X, Article 12.
[454] Annual Report CTI, Preface.

CASE STUDY #30

CROATIAN ANTI-MONEY-LAUNDERING DEPARTMENT

The Croatian Anti-Money-Laundering Department (AMLD) was established in 1997 in accordance with the Law on Prevention of Money-Laundering (1 November 1997) and Government Decree (4 December 1997) as an administrative body and an independent part of the financial police within the Ministry of Finance.

The Croatian Anti-Money Laundering Department is divided into two departments, one of which investigates suspicious transactions and deals with international cooperation, while the other is responsible for information technology, analysis and supervision of compliance.

The department has 13 employees, including financial inspectors, specialists in computer science and secretarial staff. Most have a background in law or economics.

The AMLD is automatically informed by the financial institutions about all transactions over a value of US$ 17,000 and also receives suspicious transaction reports. The main task of the department is the screening of information received to trace laundered money via computer. The AMLD is also in charge of controlling and monitoring the compliance of financial institutions with the anti-money-laundering legislation.

The budget of the AMLD falls within the budget of the financial police within the office of the Minister of Finance.

AMLD receives and processes approximately 120,000 transaction reports per year, of which 150 are forwarded for further investigation to the financial police, the criminal police or directly to the office of the public prosecutor.

CASE STUDY #31

DUTCH OFFICE FOR THE DISCLOSURE OF UNUSUAL TRANSACTIONS (MOT)

The MOT is an administrative unit within the Dutch Ministry of Justice. It is divided into five substantive departments that deal with the processing of suspicious transaction reports, system management, policy and law enforcement liaison, analysis and international cooperation.

MOT has around 20 employees. The eight members of the processing unit have a financial or law enforcement background while the others come from varied professional backgrounds.

MOT serves as a buffer unit. In other words, financial institutions report to MOT when they encounter transactions that are unusual either objectively (the amount exceeds Euros 40,000 or subjectively (the customer is nervous) The unit then passes on the information to the law enforcement side if there is a suspicion of money- laundering. In order to process the information, MOT has access to different public and police databases that are automatically updated on a daily basis. Moreover, MOT is entitled to ask financial institutions for further information regarding the transaction, although it has no law enforcement competence.

The budget of MOT falls within the budget of the Ministry of Justice.

MOT receives on average 16,000 unusual transaction reports per year (19,303 in 1999), 10 per cent of which are passed to law enforcement. Besides the 160 banks generating half those reports, MOT obtains other reports, mainly from exchange offices, casinos, credit card companies, stockbrokers and insurance companies.

CASE STUDY #32

ILLICIT ENRICHMENT

The relevant text from Tool #t33 is provided here (*.....*) for the convenience of the reader.

* There is an increasing tendency, both at the national and international levels, to criminalize the possession of unexplained wealth by introducing offences that penalize any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory explanation. Several national legislators have introduced such provisions and, at the international level, the offence of "illicit enrichment" or "unexplained wealth" has become an accepted instrument in the fight against corruption.[455] An alternative to criminalization of unexplained wealth could be to provide instead for administrative sanctions that do not require the unconditional presumption of innocence and that do not carry the stigma of conviction or make a person liable to imprisonment. Examples would be loss of office, loss of licences and procurement contracts, and exclusion from certain professions. [456]

Since legal persons, in particular corporate entities, often commit business and high-level corruption, normative solutions must be developed regarding their criminal liability. The issue has been recognized by many jurisdictions and is provided for in some international legal instruments. Companies that do not have any risk of being dissolved or losing their assets if they engage in, or tolerate, criminal activities on the part of their staff, are unlikely to strengthen their compliance with the law. That is especially true if there are incentives not to comply with the law, as is often the case in the context of corruption. Both the UN Convention against Transnational Organized Crime and the Criminal Law Convention of the Council of Europe foresee establishing (criminal) liability of legal persons for participation in the offences of active and passive corruption, and money-laundering. *

INTER-AMERICAN CONVENTION AGAINST CORRUPTION, ART. IX , ILLICIT ENRICHMENT

The Inter-American Convention is broader in scope than the instruments of the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe both of which focus primarily on bribery and its variations, but is still limited to conduct which is committed by or which affects "…a government official or a person who performs public functions…", both of which are defined.[457]

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[455] For example, Hong Kong Prevention of Bribery Ordinance Section 10; Botswana Corruption and Economic Crime Act, Art. 34; Organization of American States, Inter-American Convention against Corruption, Art. IX; National Law of the Republic of Indonesia on combating the criminal act of corruption No. 31/ 1999, Art. 37

[456] For example, Italian Law No. 575/1965.

[457] Article I.

In addition to passive and active bribery, the Convention also applies to any acts or omissions by the person or official for the purpose of illicitly obtaining any benefits; and the fraudulent use or concealment of property derived from corruption. It is open to States Parties to apply it to other forms of corruption if the countries involved so agree. The instrument also applies to attempted offences and to various forms of offenders such as conspirators and those who instigate, aid or abet offenders.[458] States Parties are required to adopt those acts or omissions, as well as transnational bribery and illicit enrichment as domestic offences, and to ensure that adequate provision is made to facilitate the required forms of cooperation, such as mutual legal assistance and extradition.[459]

Subject to its constitution and the fundamental principles of its legal system each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offence a significant increase in the assets of Government officials that they cannot reasonably explain in relation to their lawful earnings during the performance of their functions.

Among the State Parties that have established illicit enrichment as an offence, such an offence shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established illicit enrichment as an offence shall, insofar as its laws permit, provide assistance and cooperation with respect to the offence as provided in the Convention.

HONG KONG SAR, PREVENTION OF BRIBERY ORDINANCE, ART.10, POSSESSION OF UNEXPLAINED WEALTH

Any person who, being or having been a public servant, maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of pecuniary resources or property disproportionate to his past official emoluments shall, unless he gives satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

BOTSWANA, CORRUPTION AND ECONOMIC CRIME ACT, ART. 34, POSSESSION OF UNEXPLAINED PROPERTY

The Director or any officer of the Directorate authorized in writing by the Director may investigate any person where there are reasonable grounds to suspect that that person maintains a standard of living above that which is commensurate with his present or past known sources of incomes or assets; or is in control or possession of pecuniary resources or property disproportionate to his present or past known sources of income or assets.

A person is guilty of corruption if he fails to give a satisfactory explanation to the Director or the officer conducting the investigation under subsection 10 as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control or possession.

[458] Article VI.
[459] Article VII.

CASE STUDY #33
CRIMINAL CONFISCATION

INTRODUCTION

The relevant text from Tools in Chapter V is provided here (*.....*) for the convenience of the reader.

*Public officials should have property confiscated if they maintain standards of living, or if they control or possess pecuniary resources or property that are disproportionate to their present or past known sources of income, and if they fail to give a satisfactory explanation in that regard. The beneficiary of excessive wealth, and nobody else, is in the best position to explain how they came into such possessions. The jurisprudence of most legal systems agrees that courts can require defendants to establish, at least on the balance of probabilities, the existence of facts "peculiarly within their own knowledge". Such is the case with personal possessions.

This does not reverse the burden of proof but simply establishes rules for the gathering and evaluation of evidence that allows the court to base its decision on a realistic foundation. Unexplained wealth that is totally out of proportion with past and present sources of income points to some sort of hidden income. Although such wealth may be totally legal (such as inheritance, gifts from wealthy relatives, or a win on the lottery) it is likely to be illegal if the owner cannot, or is unwilling to, provide a satisfactory explanation for it[460].

Both the United Nations Convention against Transnational Organized Crime and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provide a useful model with respect to easing the onus of proof and provides a procedural mechanism that can be of immense significance in anti-corruption efforts. The approach has both tactical and strategic appeal. As a tactical weapon, it offers a means of forfeiture that requires relatively few resources and involves little risk of unfairness or error. Placing the burden of identification and explanation of assets on the possessing official is tantamount to conducting psychological and tactical warfare against corruption. The constant fear of being required to account for ill-gotten possessions should give rise to a state of anxiety which should have a deterrent effect.

In easing the burden of proof and shifting the onus of proving ownership of excessive wealth on to the beneficiary, careful consideration must be given to the principles of due process which, in many jurisdictions, are an integral part of the constitutional protection of human rights. To ensure consistency with constitutional principles, no change would be made in the presumption of innocence or the obligation of the prosecuting authority to prove guilt. What may be established is a procedural or evidentiary rule of a rebuttable presumption. Some countries, such as Italy[461] and the United States[462], in order to overcome

[460]German Criminal Code Art. 73d, Singapore, Corruption Confiscation of Benefits Act, Art. 5; Art. 34a Norwegian General Civil Penal Code

[461]Other states like Italy also enriched their legal framework with special administrative procedures that allow for forfeiture and confiscation of assets independently of criminal conviction. Art. 2 ter of the Law 31 May

constitutional concerns, provide for the possibility of civil or administrative confiscation. Unlike confiscation in criminal matters, such legislation does not require proof of illicit origin "beyond reasonable doubt". Instead, it considers a high probability of illicit origin and the inability of the owner to prove to the contrary as sufficient to meet this requirement. The more sanctions resemble criminal penalties, however, the more they lead to criticisms based on human rights. It is interesting to note that Germany, in order to overcome concerns raised with regard to the presumption of innocence, has reintroduced the property penalty recalling medieval penal proceedings. The provision, as its name indicates, does not enable the confiscation of property of illegal or apparently illegal origin, but establish a real penalty that applies independent of the actual origin of the concerned assets. By introducing the provision, the legislature has tried to avoid any limitation of the presumption of innocence. *

SINGAPORE, CORRUPTION CONFISCATION OF BENEFITS ACT, ART. 5

Subject to section 23, for the purposes of this Act, the benefits derived by any person from corruption shall be any property or interest held by the person at any time, whether before or after 10th July 1989, being property or interest disproportionate to his known sources of income and the holding of which cannot be explained to the satisfaction of the court.

VIENNA CONVENTION AGAINST ILLICIT TRAFFIC OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES 1988, ARTICLE 5, AND VIENNA CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME 2000, ARTICLE 7

"Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings."

When implementing this article of the 1988 Convention, national legislators came up with a large variety of provisions, ranging from a mere easing, through a

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1965/ No. 575 foresees the seizure of property that is owned directly or indirectly by any person suspected of participating in Mafia-type associations when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said goods are the proceeds of unlawful activities or the use thereof. The seized property consequently becomes subject to confiscation if its lawful origin cannot be proved. The United States Anti-Drug Abuse Act 31 U.S.C. § 5316 foresees a so-called "civil confiscation". Differently from criminal confiscation, this type of measure does not require proof beyond reasonable doubt of the illicit origin of the property to be confiscated, but considers a probable cause to be sufficient. The rules of evidence of criminal procedure are not applicable. If the illegal origin is probable, the burden of proof shifts to the owner who has to prove the legal origin of the property. However, civil confiscation has been strongly criticized for violating the rights of defence and of private property.

[462] The United States Anti-Drug Abuse Act 31 U.S.C. § 5316 foresees a so-called "civil confiscation". Differently from criminal confiscation, this type of measure does not require proof beyond reasonable doubt of the illicit origin of the property to be confiscated, but considers a probable cause to be sufficient. The rules of evidence of criminal procedure are not applicable. If the illegal origin is probable, the burden of proof shifts to the owner who has to prove the legal origin of the property. However, civil confiscation has been strongly criticized for violating the rights of defence and of private property.

reversion of the burden of proof, to an irrefutable presumption of the illegal origin of the concerned assets. The last, of course, would be inconsistent with the presumption of innocence as it would presume the very opposite. Such a provision has been adopted by **El Salvador i**n Art. 46 of the Law No. 78 of 5 March 1991. The article establishes a presumption in law that the "monies or proceeds are derived from transactions connected with drug related offences if, within a maximum period of three years computed retroactively, their negotiation has been proposed or requested by or on behalf of a person prosecuted for any of the offences under this Law."

It seems, however, that most Member States have simply eased the burden of proof in favour of the public prosecutors, in cases where they can produce circumstantial evidence indicating the likely illicit origin of the concerned assets and the defence cannot or will not refute it. Regulations such as Art. 18 of the **Japanese** Anti-Drug Special Law and Art. 12 of the **Italian** Law No. 501/ 1994 contain such presumptions.

Other Member States, such as **Greece** and **Kenya**, have opted for a refutable reversal of the burden of proof in the case of certain drug related offences. According to the respective provisions, it should be presumed that the offender's property that has been acquired during a certain time period preceding the offence has been generated by similar crimes, unless the defence can prove the opposite; Arts. 2 and 3 of the Law on Money-Laundering, 24 August 1995/ No. 2331 of Greece; Arts. 36 and 40 of the Narcotic Drugs and Psychotropic Substances Act, 8 July 1994/ No. 4 of Kenya.

CASE STUDY #34

PROPERTY PENALTY

The relevant text from Tool #33 is provided here (*.....*) for the convenience of the reader.

*In easing the burden of proof and shifting the onus of proving ownership of excessive wealth on to the beneficiary, careful consideration must be given to the principles of due process which, in many jurisdictions, are an integral part of the constitutional protection of human rights. To ensure consistency with constitutional principles, no change would be made in the presumption of innocence or the obligation of the prosecuting authority to prove guilt. What may be established is a procedural or evidentiary rule of a refutable presumption. Some countries, such as Italy and the United States, in order to overcome constitutional concerns, provide for the possibility of civil or administrative confiscation. Unlike confiscation in criminal matters, such legislation does not require proof of illicit origin "beyond reasonable doubt". Instead, it considers a high probability of illicit origin and the inability of the owner to prove to the contrary as sufficient to meet the requirement. The more such sanctions resemble criminal penalties, however, the more they lead to criticisms based on human rights. It is interesting to note that Germany, in order to overcome concerns raised with regard to the presumption of innocence, has reintroduced the property penalty, recalling medieval penal proceedings. That provision, as the name indicates, does not enable the confiscation of property of illegal or apparently illegal origin, but establishes a real penalty that applies independently of the actual origin of the assets concerned. By introducing that provision, the legislature has tried to avoid any limitation of the presumption of innocence. *

GERMANY, CRIMINAL CODE, ART. 43A, PROPERTY PENALTY

The court can impose a life sentence or a sentence of imprisonment of more than two years, or under another article, issue the obligation to pay a sum that is limited to the total property and assets owned by the convicted person. Property that is subject to confiscation will not be included in determining the total value of property and assets. The total value of property and assets can be estimated.

Other States have also introduced "confiscation" provisions, that are much more similar to the above-mentioned "property penalty". For example, the French Criminal Code establishes a "wide confiscation" that, in the case of certain particularly serious crimes, deprives the offenders of their entire property regardless of its origin. The United Kingdom Drug Trafficking Offence Act of 1986 and the Drug Trafficking Act of 1994 foresee confiscation that resembles an independent additional penalty rather than confiscation in the classical sense. It empowers the court in the case of certain drug-related offences to confiscate the entire patrimony of an offender if a part of it has been proved to originate from drug-related offences. The only requirement is that the source of the property is more likely to be illegal than legal.

ADMINISTRATIVE ASSET FORFEITURE AND CONFISCATION ITALY, LAW NO. 575/ 1965, PREVENTIVE ASSET FORFEITURE AND CONFISCATION

In its fight against organized crime, the Italian legislative has introduced several innovative provisions to guarantee the forfeiture and confiscation of the proceeds of organized crime. Traditional criminal forfeiture and confiscation have been widened significantly by easing the burden of proof regarding the illicit origin of the proceeds (Art. 12, sexies law No. 501/ 1994). With regard to the prevention of organized crime, the legislator has also introduced a system by which particularly dangerous individuals (associates of Mafia-type organisations and drug rings) can be deprived of their ill-gotten properties even before they are condemned for the related crimes (Art. 2 bis and ter Law No. 575/ 1965). Both laws follow a similar approach regarding the evidence needed to prove the illegal origin of the assets. It is enough for the public prosecutor to prove that the property significantly exceeds the declared or known sources of income of individuals, who in turn are unable or unwilling to produce a satisfactory explanation. Both provisions have been found not to violate the constitutional right of the *in dubio pro reo* doctrine.

CIVIL LAW IN THE FIGHT AGAINST CORRUPTION

Council of Europe, Civil Law Convention on Corruption, 4.11.1999

The Council of Europe Civil Law Convention on Corruption provides the victim of corruption with effective remedies to obtain compensation for the damages suffered as a result of acts of corruption. It obliges the parties to the Convention to provide in their internal law for effective procedures for the acquisition of evidence. It does not, however, ask for any easing of the burden of proof regarding the offence of corruption. To what extent the Convention will significantly contribute to the fight against corruption will therefore depend on what measures the States Parties introduce to support the plaintiffs in their search for evidence.

CASE STUDY #35
WHISTLEBLOWERS PROTECTION BILL

The relevant text from Tools in Chapter V is provided here (*.....*) for the convenience of the reader.

*Victims and witnesses will not come forward if they fear retribution, and precautions against this are commonly incorporated into instruments dealing with corruption and organized crime, where the problem is particularly acute. That is particularly true in cases of official corruption, where those who have information are usually relatively close to a corrupt official, and the status of the official affords him or her opportunities to retaliate. Measures are usually formulated to protect not only the informant but also the integrity and confidentiality of the investigation. Common precautions against that include guarantees of anonymity for the informant, assurances that officials accused of corruption will not have any access to investigative personnel, files or records, and powers to transfer or remove an official during the course of an investigation to prevent intimidation or other tampering with the investigation or evidence.

In cases where the informant is an "insider", additional precautions may be taken because of his or her employment in close proximity to the offenders and because, in some cases, there may be additional legal liabilities for disclosing the information involved. Many countries have adopted "whistleblower" laws and procedures that protect insiders who come forward with information. The protection may apply to inside informants from both the public and private sectors. Additional protection in such cases may include shielding the informant from civil litigation in areas such as breach of confidentiality agreements and libel or slander, and in the case of public officials, from criminal liability for the disclosure of Government or official secrets. Such protection may extend to cases where the information was incorrect, provided that it was disclosed in good faith.

Safeguards against abuses by the informants themselves may also be needed, particularly in cases where they are permitted to remain anonymous or are broadly shielded from legal liability. To balance the interests involved, legislation may limit legal protection to cases of bona fide disclosures or create civil or criminal liability for cases where the informant cannot establish good faith or where the belief that malfeasance had occurred was not based on reasonable grounds.

In cases where the information proves valid and triggers official action, the anonymity of the informant often cannot be maintained, making retribution possible even after changes have been made to address the complaint. In such cases, legislation may provide for compensation, transfers to other agencies or employment removed from those involved in the case or ,in extreme cases where the informer is in more serious danger, relocation and a new identity unknown to the offenders.*

AUSTRALIA, WHISTLEBLOWERS PROTECTION BILL 1992 (NEW SOUTH WALES)

The object of the Bill was to encourage and facilitate the disclosure of corrupt conduct, maladministration and substantial waste in the public sector in the interest of the public. It did this by enhancing and augmenting established procedures for making disclosures concerning such matters; by protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and by providing for those disclosures to be properly investigated and dealt with.

AUSTRALIA, WHISTLEBLOWERS PROTECTION ACT 1994 (QUEENSLAND)

The principal object of the Act was to promote the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector; danger to public health or safety; or danger to the environment. Because the protection is very broad, the Act contains a number of balancing mechanisms intended to focus the protection where it is needed; make it easier to decide whether the special protection applies to a disclosure; ensure that appropriate consideration is also given to the interests of persons against whom disclosures are made; and prevent the law from adversely affecting the independence of the judiciary and the commercial operation of GOCs. The law only protects a "public interest disclosure", which is a particular type of disclosure defined by the person who makes it, the type of information disclosed and the entity to which the disclosure is made.

UNITED KINGDOM, PUBLIC INTEREST DISCLOSURE ACT 1998

The law is an amendment to the Employment Rights Act 1996. It is designed to encourage people to raise concerns about malpractice in the workplace, and to help ensure that organizations respond by addressing the message rather than the messenger, or by resisting the temptation to cover up serious malpractice. It applies to people at work who raise genuine concerns about crime, civil liabilities (including negligence, breach of contract and breach of administrative law), miscarriage of justice, danger to health and safety or the environment, and the cover up of any of such malpractices. It applies whether or not the information is confidential and extends to malpractice occurring overseas.

In the United Kingdom, a non-governmental organization, Public Concern at Work, that, together with the Campaign for Freedom of Information, was responsible for activating the legislative process, now seeks to promote compliance with the law. It does so by publicizing the law and providing free expert help to people who are unclear about how to go about blowing the whistle or are unsure whether they should do so. It also offers practical guidance, assurances and support to organisations setting up whistleblowing procedures, trains staff, and promotes the new culture.

UNITED STATES OF AMERICA, WHISTLEBLOWER REINFORCEMENT ACT OF 1998

Two amendments to the District of Columbia (DC) Government Comprehensive Merit Personnel Act of 1978 seek to increase protection for DC government employees who report waste, fraud, abuse of authority, violations of law, or threats to public health or safety. It also seeks to oblige DC Government supervisors to report violations of law when necessary, and to provide whistleblower protection to DC Government employees and employees of DC contractors.

TOOL #37

MEETING THE BURDEN OF PROOF IN CORRUPTION-RELATED LEGAL PROCEEDINGS

The purpose of Tool #37 is to assist legislatures in developing legal provisions, which strike a balance between the need to ensure effective sanctioning, in particular of high-level corruption cases, and the basic principle of the presumption of innocence, taking into account domestic needs and circumstances.

DESCRIPTION

One of the most difficult issues facing prosecutors in large-scale corruption cases is meeting the basic burden of proof when prosecuting offenders and seeking to recover proceeds. International law, and the basic human rights protections of most countries, require that persons accused of a crime or in jeopardy of criminal punishment of any kind have the right to be presumed innocent, and not to be convicted or subject to any punishment unless guilt is proven beyond a reasonable doubt before a competent, independent and impartial tribunal.[463]

At the same time, the nature of major corruption cases makes such a high burden of proof particularly difficult to meet. Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best. Corruption at the highest levels can also corrupt the law itself, presenting successor administrations with the double challenge of reforming the law and public institutions which administer it, while at the same time attempting to prosecute accused offenders for acts committed at a time when old laws and old administrative practices were in effect.

These are difficult choices, requiring legislatures and officials to strike an appropriate balance between some of the most fundamental criminal justice safeguards on the one hand, and the need for laws and practices which be effective in redressing past acts of corruption and retrieving the proceeds of such acts and in deterring and preventing future corruption. If basic safeguards are unduly eroded, corruption may be controlled in the short term, but at the expense of weakening criminal justice mechanisms needed to deal with corruption and other social problems over the longer term as a country develops. The application of laws or practices which fall short of international standards may also affect the willingness or ability of other countries to cooperate in

[463] Universal Declaration of Human Rights, Art. 11 para 1; the International Covenant on Civil and Political Rights, Art. 14 para 2, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 para 2, the American Convention on Human Rights, Art. 8 para 2, and the African Charta of Human and Peoples Rights, Art. 7 para 1.

transnational cases. If effective measures are not taken, however, those accused of involvement in corruption gain a degree of impunity: corruption may continue, proceeds remain in the hands of the corrupt, and essential public confidence in new laws and institutions may be lost.

The basic presumption of innocence is a fundamental human rights standard and procedural safeguard which should not be varied. Having said this, there are a number of measures, which may be available to address the problem of proof in corruption cases without compromising on basic standards. The feasibility of each measure and the extent to which it can be enacted without offending international and domestic human rights protections is likely to vary from country to country. This tool gives an overview of such legislative approaches, which have been found effective in facilitating the gathering of evidence in corruption related proceedings, and, at the same time, in compliance with international and domestic human rights standards. Each country will have to find its own solution, taking into account international and regional human rights conventions as well as national basic legal principles.

Generally measures which could be considered include the following.

Measures which expedite the gathering and production of evidence

While the basic burden of proof applies in all criminal cases, changes may be made to expedite the gathering and production of the evidence needed for prosecutors to meet that burden. Legislation may increase investigative powers or simplify the requirements for admission in proceedings. Effectively, prosecutors must still meet the basic burden of proof, but may find it easier to produce the evidence needed to accomplish this. Specific measures may include the establishment of investigative powers to ensure that evidence may be found, and if found, preserved and seized for use in court. Increasingly, these must deal with evidence stored or transmitted using information and communications technologies, as well as more traditional issues, such as dealing with bank secrecy and similar laws or practices. Generally, powers which are based on suspicions of crime or are used in support of a criminal investigation are subject to additional safeguards, but more routine powers of audit or disclosure requirements which apply to all public servants regardless of any suspicion may also be considered. These may be supplemented by criminal offences for conduct such as making false disclosures or obstructing inspections or audits such that corrupt officials, who fail to comply with transparency requirements that would expose corrupt conduct, may be prosecuted for the disclosure offences instead.

The use of non-criminal proceedings

The basic presumption of innocence and the high onus of proving guilt beyond a reasonable doubt generally apply only in criminal cases. The International Covenant on Civil and Political Rights and other international and regional human rights instruments as well as national human rights protections refer only to cases where someone is “…charged with a criminal offence…”, however, there

are variations with respect to how this should be interpreted and applied. The narrow interpretation is that the presumption would not apply in proceedings prior to the laying of charges, and would not apply to cases where there were no charges or prosecution, even if criminal or quasi-criminal punishments, such as the confiscation of property, might be applied. The broader interpretation would extend the presumption to all procedures or proceedings, which might lead to criminal or quasi-criminal sanctions, including both of these scenarios. Thus, in some countries, it may be possible to use non-criminal proceedings, and a lower burden of proof, than in others. Some types of these non-criminal proceedings include the following.

Civil or preventive forfeiture of corruption proceeds

A lower, balance-of-probabilities standard of proof, may be used where domestic constitutional or other requirements allow this in any case where no one is actually charged with a crime. They may also be used if the remedy of recovering assets is fashioned in a way that it amounts to the civil recovery of wrongfully-obtained assets to their rightful owners, as opposed to a form of criminal punishment. How this distinction is made will generally depend on the formulation of domestic human rights and procedural principles and how these are applied in practice by officials and the courts. The use of civil or preventive proceedings is also a significant issue in international cooperation, as some countries allow the broad use of such proceedings and remedies, while others limit them in order to ensure that they are not used to circumvent or avoid the human rights safeguards which apply to criminal proceedings.

Countries such as Italy [464], Ireland [465] and the United States [466] provide, under varying conditions, for the possibility of civil or preventive confiscation of assets suspected to be derived from certain criminal activity. Unlike confiscation in criminal proceedings, such forfeiture laws do not require proof of illicit origin "beyond reasonable doubt". Instead, they consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.

In considering the Italian law, the European Commission and the European Court of Human Rights have upheld that the use of civil proceedings and the lesser burden of proof, holding that the presumption of innocence was not infringed because the targeting of assets was to prevent their use by a Mafia-type organization and was not a sufficiently-serious penalty to be classed as criminal law. In other systems, courts have held that such proceedings are criminal law

[464] Art. 2ter Italian Law No.575/ 1965, provides for the seizure of property, owned directly or indirectly by any person suspected of participating in a Mafia-type association, when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said property constitutes the proceeds of unlawful activities. The seized property becomes subject to confiscation if no satisfactory explanation can be provided for its lawful origin.

[465] According to the Proceeds of Crime Act 1996 of Ireland the High Court upon application can seize assets that are suspected to be derived from criminal activity. Seizure can be ordered without prior conviction or proof of criminal activity on the part of the (civil) respondent, who, to defeat the claim, is required to establish the innocent origins of his suspicious and hitherto unexplained wealth.

[466] The US Forfeiture Laws introduced the concept of "civil action" against the property itself, which allows for proofing the illicit origin on a balance of probabilities.

and do require the presumption of innocence, either because of the role of the State in bringing proceedings or because confiscation is in the nature of a criminal penalty, or both.[467,468]

The use of regulatory, administrative or disciplinary proceedings

While the presumption of innocence and high standard of proof apply to cases involving a "criminal" offence, many countries have administrative or regulatory measures which involve lesser burdens of proof. As above, what is designated as "criminal" varies from country to country, depending on the nature and consequences of the proceedings and the consequences of determining whether they are of a criminal nature or not. Apart from the fact that criminal proceedings and punishments usually attract stricter procedural safeguards, in some federal systems, federal or regional constitutional competences to make and enforce or administer the laws may depend on this determination, for example. One key element is often the consequences, with imprisonment and the more harsh of monetary or property-related measures such as the imposition of fines or confiscation of property other than the proceeds of the offence usually designated as criminal. On the other hand, proceedings by employers, professional bodies and the like are usually seen as non-criminal because the State is not involved and because the potential punishments tend to involve professional or employment measures such as loss of wages or status, dismissal, or loss of the right to work in or practice a profession. In such cases, burdens of proof may be reduced or even shifted to some degree against the accused or defendant. Other safeguards triggered by the criminal law may also not apply: the right not to be tried twice for the same offence (right against "double-jeopardy") usually would not preclude a person convicted of criminal bribery from also being dismissed from public or private-sector employment or barred from holding public office for example.

The field of regulatory or administrative law holds many possibilities both for the prosecution of offenders and the development of laws intended to prevent or control corruption. Where private-sector bribery is not made a crime, for example, administrative offences and punishments established for the purpose of regulating companies or financial markets might still apply. Regulations or standards of practice for public servants or regulated professions, such as law, might also include offences and sanctions for corrupt conduct which lead to

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467 [**Cite appropriate case law here. This is essential to ensuring a balanced text!**]

468 In the case of the Italian Art. 2ter Law No. 575/ 1965, the European Human Rights Commission and the European Human Rights Courts were called upon to review the consistency of this provision with the principle of the presumption of innocence (European Human Rights Commission, No. 12386/ 1986). Based on three criteria for determining the criminal nature of a provision, namely the classification of the proceedings under national law, their essential nature, and the type and severity of the penalty, the Commission concluded that the confiscation, which is classified as preventive measure, had not the degree of severity of a criminal sanction. The Commission assigned particular relevance to the fact that the confiscation did not imply a judgement of guilt, but of social danger of the respondent, based on the founded suspicion of his participation in a Mafia-type organization and applied only to such properties, that on a balance of probabilities had been found to derive from illicit sources. With regard to the property right as provided by Art. 1 Protocol No. 1 to the European Human Rights Convention, the European Human Rights Court affirmed the proportionality of the preventive confiscation as an instrument in the fight against the Mafia.

professional discipline, discharge or removal of practicing privileges. Where officials are found to have been involved in corruption, employment or professional discipline can be an important way of removing them from positions where they could otherwise engage in further corruption or conduct intended to frustrate efforts to investigate and prosecute past acts of corruption, even if a criminal charge cannot be successfully prosecuted.

The use of a reduced burden of proof in specific elements of criminal proceedings

In some legal systems, after the basic legal burden of proof has been discharged, certain facts may be presumed to the advantage of the State. The effect is to force the accused to establish that one or more elements of the offence did not occur, usually in areas where he or she will have the necessary evidence and it cannot easily be obtained by the State. In some cases, this must be established on a balance of probabilities (legal burden of proof) and in others, it may only be necessary to produce sufficient evidence to raise a reasonable doubt on a particular issue once the State has met its own burden of proof (evidentiary burden of proof).

Criminal forfeiture of assets on a reduced burden of proof

One example which commonly arises allows the proceeds of crime to be traced, seized and forfeited based on a reduced standard of proof, once someone has been convicted of a crime. In such cases, the crime itself usually must be established beyond a reasonable doubt, but this standard is then reduced for evidence which establishes that the proceeds are in the possession of the person from whom they are to be confiscated (who need not necessarily be the same person convicted of the crime) and that they are the proceeds of the crime which has been proved. Where permissible, such mechanisms may be useful for recovering the proceeds of corruption, but they cannot be used to establish criminal guilt or impose sanctions other than recovery of proceeds. The most common scenario is where the crime is proved in proceedings which lead to the conviction of offenders, but some countries' laws also allow for proof that an offence has occurred and that the targeted assets are proceeds even without any prosecution in cases where the actual offenders are deceased, out of the jurisdiction or cannot be prosecuted for other reasons.

While the formulation of such provisions differ,[469] most of them are based on the concept that criminal consequences such as imprisonment stem from the conviction and not the forfeiture proceedings, and that the reduced burden of proof applies only to proceedings in which the principal issues are the origin of the assets and whether ownership or possession should remain with the person against whom the proceedings are brought or be transferred to either the State or some other party, usually one or more victims of crime. An additional

[469] E.g Art. 12 para 7 of the TOC Convention calls upon State Parties to consider the possibility of requiring that an offender demonstrates the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

consideration is the practical matter that a person in possession of targeted assets is usually in a much better position to produce evidence as to how they were obtained than is the State. Thus assets may be presumed to derive from criminal activities on the basis that the person who has them has been convicted of one or more crimes which generated proceeds, or on the basis of some evidence that they are derived from a crime proven to have occurred in other proceedings, usually the prosecution of some third party. In some systems, if there is no criminal conviction, the occurrence of the crime must still be proven beyond a reasonable doubt, and proof of the fact that the targeted assets are proceeds may have to meet this standard as well.

In many systems, the burden is not placed on the person who has the assets from the outset. Usually the State must first convict that person of the crime or prove to a criminal standard that the crime occurred and generated proceeds. It may also have to prove that the person against whom the forfeiture is sought actually has effective possession or control of the assets. In some cases, especially those relating to corruption offences, the presumption may also be triggered by proof that the person against whom the forfeiture is sought has assets in excess of what he or she could lawfully have acquired. At this stage the respondent is requested to provide an explanation or rebuttal evidence, which, if satisfactory, places the burden of proof once again and completely upon the prosecution.[470]

As far as courts have been called upon to review such provisions, they have found them in consistency with the presumption of innocence.[471] For example,

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[470] Examples of such provisions in national laws include Art. 12sexies Italian Law No. 356/ 1992; Section 4 Singapore Confiscation of Benefits Act; Section 12A Hong Kong Prevention of Bribery Ordinance; Art. 34a Norwegian General Civil Penal Code; Art. 78d German Criminal Code; Art. 36 and 40 Kenyan Narcotic Drugs and Psychotropic Substances Act. No.4/ 1994; Art. 8 Japanese Anti-Drug Special Law and the Art. 72 AA UK Criminal Justice Act 1988, as amended by the Drug Trafficking Act 1994.

[471] The Italian Constitutional Court and Court of Cassation had to consider whether Art. 12sexies of the Law 356/ 1992 did comply with the presumption of innocence as provided by the Italian Constitution. Art. 12sexies establishes, in case of conviction for certain serious criminal offences, mandatory confiscation of all monies, property and other pecuniary resources, which are under the direct or indirect control of the offender, when their value appears to be out of all proportions to his income and he is unwilling or unable to provide a satisfactory explanation. Both courts concluded that the presumption of innocence was not applicable to Art. 12sexies Law. 356/ 1992. According to the courts, the purpose of the provision was not to sanction the offender, but rather to prevent the financing future criminal activities (Cassazione Penale, Sezione VI, 15 April 1996 and Corte Costituzionale, Ordinanza N. 18/1996). The House of Lords in Regina v. Rezvi had to consider whether the various assumptions contained in Section 72 AA of the Criminal Justice Act 1988, were compatible with the presumption of innocence. Art. 72 AA provides for the assumption that any property appearing to the court to be held by or transferred to the defendant at the date of the conviction was received by him as a result of or in connection with the commission of offences to which this act applies. The key issue to be examined by the Lords was, whether the confiscation order based on Art. 72AA implied that the offender had committed other crimes besides the one he had been found guilty of. The Lords concluded that confiscation was a "financial penalty" imposed for the offence of which the offender has been convicted and involved no accusation of any other offence. (see also McIntosh v. Lord Advocate, 2001 and Regina v. Benjafield 2000).

the European Court for Human Rights was examined the consistency of the confiscation under UK Drug legislation with Art. 6 para 2 European Human Rights Convention.[472] The key question for the court regarding the applicability of Art. 6 para 2 to the confiscation proceedings was, whether the prosecutor's application for a confiscation order following the accused's conviction amounted to the bringing of a new "charge" within the meaning of the Article. While the Court recognized that implicitly the 1994 Act required the national court to assume that the defendant had been involved in other unlawful drug-related activity prior to the offence of which he was convicted, it affirmed that the application of confiscation under the UK Drug Trafficking Act 1994 did not involve any new charge, since the purpose of this procedure was not the conviction or acquittal of the applicant. Hence, it could not be concluded that the applicant was charged with a criminal offence beyond the one he had already been found guilty of.

Therefore with reference to the above-mentioned courts in some countries have held these measures consistent with the presumption of innocence, but that the courts in others have not, or have set limits on what may be presumed.

Criminal offences in which some elements are presumed against the accused

The second common example is the establishment of criminal offences in which, once some elements are proven, others may be presumed against the accused. The most common use of such measures in anti-corruption legislation is the use of offences of illicit enrichment, in which significant unexplained wealth is presumed to have been illicitly acquired, once the basic acquisition of the wealth is proved. In systems where asset-disclosure is mandatory, for example, proof that a public servant had more wealth than he or she had declared would result in conviction for illicit enrichment unless the accused public servant could establish a legitimate source for the wealth.

Such offences are unquestionably effective, and are based on the policy that the person in possession of the wealth is in the best possible position to produce evidence of how it was acquired, but in many countries they also infringe the basic right to be presumed innocent. Whether they are seen as valid or not depends to a large degree on how the right to the presumption of innocence is interpreted and applied in each country and the fundamental principles on which its legal system is based. For example, following the adoption of the OAS Convention on corruption the countries of Latin and South America, which have European civil-law systems, established the (mere) possession of unexplained wealth as a criminal offence. Canada and the United States did not, on the basis that this would have infringed constitutional guarantees of the presumption of innocence. More recently, in developing the United Nations Convention against Corruption, the requirement to establish domestic offences relating to illicit enrichment was made subject to the constitutional and fundamental legal principles of each State Party on the basis that such offences would attract constitutional scrutiny in many countries and would not be viable if the element of

[472] European Court of Human Rights, Case of Phillips v. the UK, No. 41087/1998

illicit enrichment was presumed against the accused.[473] One line of interpretation holds that the right to be presumed innocent overall includes the right to be presumed innocent on each essential element of an offence. In this model it is argued that safeguards are needed to ensure that the innocent are not convicted and to prevent legislatures from simply overturning inconvenient or difficult areas of proof or from shifting difficult investigative or evidentiary problems into offence elements which are presumed against the accused.[474] The other line of interpretation holds that, once basic core elements of each offence are proved beyond a reasonable doubt, this effectively raises an evidentiary burden to rebut prosecution evidence and to prove additional facts against the prosecution. In this model, once it is proved that the accused public official has wealth which exceeds all legitimate sources, an evidentiary burden then may be imposed on him or her to establish that it was obtained from legitimate and not illicit sources.[475]

In some cases, the constitutional or legal viability of reversed or diminished burdens of proof will depend on the relationship between what must be proved by the prosecution and what must then be proved by the accused. If there is some factual link such that, once the prosecution's case is proved, there is little or no rational explanation other than the guilt of the accused, the presumption is more

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[473] See United Nations Convention against Corruption, Article 20 (illicit enrichment). This provision would otherwise have required States Parties to adopt offences in which "…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" would be presumed to be illicit enrichment. This was made optional in part because several delegations expressed the view that it would be impossible to fully implement because of the constitutional right to be presumed innocent.

[474] E.g. *R. v. Vaillancourt* [1987] 2 S.C.R. 636 at 656, and *R. v. Whyte* [1988] 2 S.C.R. 3. In both, the Canadian Supreme Court holds that the right to the presumption of innocence under Art. 11(d) of that country's *Charter of Rights and Freedoms* extends to each essential element of the offence, and that this rule must be applied in such a way that a person accused of a crime cannot be convicted if there remains any reasonable doubt about innocence or guilt.

[475] This approach was followed by the U.K. Judicial Committee of the Privy Council in a 1993 appeal from Hong Kong (*Attorney General of Hong Kong v. Lee Kwong-kut* [1993] A.C. 951). The Privy Council, examined whether Section 10 of the Hong Kong Bill of Rights Ordinance 1991 had entrenched the presumption of innocence by providing that any present or former public servant, who maintains a standard of living above that which is commensurate with his present or past official emoluments; or is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall be guilty, unless he gives 'a satisfactory explanation' to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control. The Court held that Section 10 casts a burden of proving the absence of corruption upon a defendant. But before prosecution had to prove beyond reasonable doubt the accused's public servant status, his standard of living during the charge period, his total official emoluments during that period, and that his standard of living could not reasonably, in all the circumstances, have been afforded out of his total official emoluments. The court observed that where corruption is concerned, there was a need – within reason – for special powers of investigation and an explanation requirement. Specific corrupt acts were inherently difficult to detect, let alone proved in the normal way. Accordingly, section 10 was found consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary (Attorney General v. Lee Kwong-kut, 1993, AC 951).

likely to be upheld.[476] In the case of illicit enrichment offences, this would apply where the legislation and proceedings were structured so as to eliminate all possible legitimate sources of wealth before proven enrichment was presumed to derive from illicit sources.

RELATED TOOLS

- Disclosure of assets and liabilities of public officials.
- Financial investigation and the monitoring of assets.
- International and regional legal instruments.
- Standards to prevent and control the laundering of corruption proceeds.

[476] In the Salabiuka Case the European Human Rights Court examined whether the French Customs Code (Art. 414, 417 and 392) infringed the presumption of innocence as provided by Art. 6 para. 2 ECHR (*Salabiuka v. France* [1987] ECHR, Case No. 14/1987). As applied by the French courts, these norms provide that any person in possession of goods, which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him and shall, therefore, be guilty of the offence of smuggling. The Court affirmed that in principle, State Parties to the European Human Rights Convention may, under certain conditions, penalize a simple objective fact as such. The European Human Rights Convention clearly does not prohibit presumptions of law or fact in principle. It does, however, require the Contracting States to remain within certain limits as regards criminal law. Art. 6 para 2 of the Convention does not regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits, which take into account the importance of what is at stake and maintain the rights of defense.

CHAPTER VIII
MONITORING AND EVALUATION

WHY BOTHER TO MEASURE?

There are several related reasons why measurement and assessment of corruption is important.[477] Assessment at the beginning of anti-corruption programmes serves to identify the nature and extent of corruption, identify possible actions against it and helps in the setting of priorities and the sequencing of elements of the programme. It also provides essential "base-line" information against which later assessments can be compared, which in turn can form the basis of further adjustments in elements of the programme. Accurate and unbiased assessment is essential and must often be protected against those who would distort or falsify information to conceal malfeasance or a simple lack of success.

Measurements are needed not only of corruption itself, but of information in any subject area likely to be affected by corruption. This enables comparisons and other forms of analysis and creates redundancies which protect against inaccuracy or distortion. Figures which show that the number of corruption incidents in a government department are reduced can be cross-checked against other performance indicators, for example, to determine whether corruption itself has actually been reduced or merely displaced into areas where it is harder to detect. Measurement from a range of different perspectives is also important. Most government information is generated from within, but it is also important to use external and extrinsic assessments. Internal assessments showing that performance has improved might be treated with some skepticism if the outsiders who use the service are reporting that it has deteriorated.

This is a precaution against fraudulent assessment methods, but external assessment also serves the purpose of revealing to insiders what their consumers consider to be success. For example, police and law-enforcement agencies in many countries have been surprised on occasion to learn that, while they saw their primary objective as catching and prosecuting criminal offenders, the crime victims reported that they felt the primary indicator of success should be the mitigation of harm to victims, especially in crimes such as sexual assault/rape, where treatment of the victim was critical. In this context, measurement from different perspectives informs the assessment process itself, not only determining whether a programme has succeeded, but assisting in the definition of success itself. Once success is appropriately defined, further data is then generated: once people become aware what their tax payments should be buying, they become more critical and more likely to report cases where their expectations of success are not met.

Successful reforms can in some cases impede their own assessment. Streamlining and downsizing can make agencies more efficient, but may also

[477] See also Tools #1 and #2 for a more detailed explanation.

reduce the financial and human resources needed to gather the information on which assessments are based. Changing personnel and administrative reforms can also make “before” and “after” comparisons difficult.

In public service provision, there are a number of questions to which managers of public services need the answers if they are to overcome information constraints.

The first set of questions addresses the issue of what needs reform. What can be changed? What should be changed first? How much is gained from each of the actions taken? How does one measure progress? What is the confidence level of the answers obtained?

The second set of questions deals with the focus of the actions. Some of the questions include the following. Should we focus on particular service providers? Are there any special groups of service users (ethnic, generational and gender divisions are typical stratifications) especially harmed by system leakage? Are there any multiplier effects or combinations of actions that produce more than the sum of their individual effects?

A third set of questions deals with the financial and political costs of reducing system leakage. How much will the stakeholder information system cost to implement? How long do we have to wait for the returns? What evidence exists of community or constituency acceptance or a public mandate for change? What is the level of institutional acceptance from the service delivery agencies?

The solution to such information asymmetries and constraints requires a measurement interface between services and users: a process whereby the community voice can be built into planning. Service delivery surveys have been designed and implemented in a number of countries with the goal of providing such a measurement interface.

TOOL #38

SERVICE DELIVERY SURVEYS (SDSS)

The service delivery survey (SDS) is useful in a number of ways; it gives service providers the information necessary to implement reform and it gives service users information to help them promote reform. SDSs are valuable for a number of reasons:

- They give consumers a "voice" and allow them to exert pressure on service providers to delivery higher quality services;
- They provide concrete data about perceptions in a relatively unambiguous way; and
- They provide greater participation among service users in the service delivery process.

The SDS is especially useful as a management tool. Ultimately, it could be used internally by managers at all levels of the Government and externally by governmental oversight agencies, politicians, the public and international donors. The SDS would establish a baseline for service delivery to the public that could be used to improve the design of a reform programme. The indicators could be measured periodically to ascertain the progress of the reform. A service delivery survey would also build capacity within the country to design and implement surveys, as well as to implement results-oriented management.

Several provisions of the United Nations Convention against Corruption call indirectly for research into corruption, but it is silent as to specific methodologies or areas for research. Generally, the Convention calls for a number of measures which may well depend on research to gather the information needed to make them work, but leaves to the States Parties themselves the development of specific research programmes. Article 5, paragraph 3 calls on States Parties to periodically evaluate relevant legal instruments and administrative measures, and Article 6, subparagraph 1(b) calls for anti-corruption bodies which increase and disseminate knowledge about corruption, which could include various forms of research. Article 60, paragraph 4 calls on States Parties to assist one another, on request, in conducting “evaluations, studies and research” into the “types, causes, effects and costs” of corruption. Article subparagraph 4(a) then mandates the Conference of States Parties to facilitate a range of activities, including research and the mobilization of voluntary contributions. The extent to which the Conference will become involved in such activities and how it will draw upon the work of other bodies is left to the Conference itself.[478]

[478] The Conference is not first convened until at least 30 countries have ratified the Convention and it is in force. Article 63, paragraph 2 calls on the Secretary General to convene the first session within a year of the effective date of the Convention. Article 68, paragraph 1 brings the Convention itself into force on the 90th day following the filing of the 30th instrument of ratification, acceptance, approval or accession with the U.N. Treaty Office in New York. The resolution which adopts the Convention, GA/RES/58/4 of 31 October 2003, establishes some initial mandates for

DESCRIPTION

Service delivery surveys originate from a community-based action-research process developed in Latin America in the mid-1980s, known as Sentinel Community Surveillance. Since then, such stakeholder information systems have been implemented with World Bank support in Bosnia and Herzegovina, Mali, Nicaragua, Tanzania and Uganda. With the help of UNICEF and UNDP, they have been established in Bolivia, Burkina Faso, Costa Rica, Nepal and Pakistan.

The scheme was originally conceived to build capacities while producing accurate, detailed and "actionable" data rapidly and at low cost. Ordinarily, SDSs focus on the generation and communication of evidence for planning purposes at the level of a municipality, city, state, province or an entire country. In each of the settings, a representative sample of communities is selected to represent the full spread of conditions. The approach permits community-based, fact-finding through a reiterative process, addressing one set of issues at a time.

The SDS process[479] starts with a baseline of service coverage, impact and costs in a representative panel of communities. That involves a household survey, where local interviewers are trained to knock on doors and ask a limited number of well focused questions about use of services, levels of satisfaction, bribes paid and suggestions for change. Such data, and the institutional review from the same communities, are discussed in each community with the service workers and community leaders. The quantitative aspects are used to benchmark progress with subsequent reiterations of the survey. The logistics of the SDS focus on repeated measurement at the same sites, reducing sampling error and making impact estimation straightforward. The qualitative dimensions reveal what should be done about the problem.

Central to SDS is interaction with the research partners: the communities. The product is therefore the aggregation of data from the epidemiological analysis distilled through interaction with communities.[480] By feeding information back to the communities, dialogue for action is stimulated within households, in communities, and between communities and local authorities. The resulting mobilization to resolve specific problems also serves as a basis for empowerment. That involves initiation of cycles following a fairly constant rhythm, independent of the subject matter involved. Experience over more than a decade of implementation in 40 countries has shown that ownership and commitment on the part of the client is vital to successful development projects. The greater the intensity of participation (in terms of information sharing, consultation, decision making and initiating action), the greater the sustainability.

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the Conference when it convenes, but does not speak of research, which is thereby left to the Conference itself.

[479] *Service Delivery Survey (SDS): A Management Tool*. Langseth, Petter, Patricia Langan and Robert Taliercio. Washington: EDI, 1995.

[480] Webster's New Collegiate Dictionary defines "epidemiology" as: i) a branch of medical science that deals with the incidence, distribution, and control of disease in a population, ii) the sum of factors controlling the presence or absence of a disease or pathogen.

The method has been used to measure impact, coverage and cost of land mines, economic sanctions, environmental interventions, urban transport, agricultural extension, health services, judiciary and institutional restructuring. It has proved useful in generating community-designed strategies to combat corruption in the public services in several countries. Actionable results are provided in a short time and at low cost. Typically, the duration of a whole cycle, from the design stage to the report writing, is six to eight weeks.

SOME RESULTS OF THE SERVICE DELIVERY SURVEY (SDS)

Corruption (almost by definition) represents a separation between leaders and their constituencies and between public servants and the public. ***The first*** contribution of a SDS in overcoming that separation is that all segments of the public are reflected in the collected data. The data give a voice to the urban and rural, male and female, rich and poor, young and old and even those who do not have access to certain public services for physical or social reasons. Stratified focus groups are assembled to identify potential solutions so that each group is enabled to voice its opinions and solutions.

Simply to be included in the sample as people who give opinions on the services is, however, a fragile representation of the community voice. ***The second*** way in which SDSs reduce the separation is by involving stakeholders actively in the social audit process. Feedback of the data to the communities (as in Tanzania and Uganda) and systematic use of data to build solutions adds another dimension to the community voice in planning. In the examples given, the participants of the focus groups were invited to meetings with the local community leaders to discuss the feasibility and implications of the solutions.

The third way in which SDSs close the gap is by providing feedback in a positive way, using results to reveal options for the achievement of goals rather than underscoring deficiencies. Communities or districts with the poorest indicators are shown how certain reforms can improve their situation. Further, having a voice in the interpretation and analysis of the resulting data helps to build confidence among the stakeholders and provides a favourable climate for community mobilization.

The fourth way SDSs can help to bring the governed and governing together is by using results to manage a change process. The process starts with a necessary commitment by the Government to communicate results. The results of each cycle are then communicated to public service providers through a series of "change management" workshops. In Tanzania, the results were discussed in a cabinet retreat, where a national policy against corruption was formulated. In Uganda, the results were presented at a retreat of parliamentarians. Media workshops in both countries familiarized journalists with the data and the correct management of positive examples. In that way, the change-management workshops help build a sense of accountability, transparency and open Government.

SDSs also provide data necessary for results-oriented development planning. It is a fact that most local governments in developing countries are characterized

by poor fiscal outcomes. A results-oriented approach can help improve the outcomes. Results-oriented management, however, needs detailed "actionable" quantitative data. For a Government or municipal authority to act on behalf of a vulnerable subgroup, hard data are required to identify the subgroup concerned and for it to act as a benchmark to measure progress. Complementary qualitative data are also needed to indicate the cultural and gender constraints and opportunities as well as to confirm the analysis given to the quantitative data.

DIFFERENT TYPES OF MONITORING AT THE INTERNATIONAL LEVEL

At least three types of monitoring mechanisms are currently in use as part of anti-corruption programmes:

- Those based on international instruments;
- Those based on national instruments; and
- Those of a more general nature[481]

The advantage of instruments-based mechanisms is that the legal framework is clear: the monitoring focuses on the implementation and impact of the various provisions of the instruments. Examples of such monitoring are the mechanisms relating to the Convention on Combating Bribery of Officials in International Business Transactions of the Organisation of Co-operation and Development (OECD), the GRECO Programme of the Council of Europe and the various monitoring exercises within the European Union.

All official monitoring or review of the United Nations Convention against Corruption will fall to the Conference of States Parties established by Article 63 of the Convention. Drafters avoided the term “monitoring”, but once the Convention is in force and the Conference is convened,[482] Article 63, paragraph 5 calls on the Conference to:

> 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.

Article 63, paragraph 6 then calls on States 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 States Parties, competent international organizations and , if it chooses, relevant non-governmental organizations.

[481] Petter, Langseth; (2001) Helping Member Countries Build Integrity to Prevent Corruption, Vienna 2002

[482] See GA/RES/58/4, paragraphs 4-6, Convention Articles 63 and 68, and the previous footnote for details.

Even without such a formal framework, however, monitoring the effectiveness of national strategies has been accomplished via the use of surveys. An example is the recently established monitoring mechanism used in Lithuania, Poland and Romania. Instead of being based on a legal instrument, monitoring takes place on the basis of questionnaires, listing relevant questions on national policies and legislation. Two other examples include the perception indices developed by Transparency International as well as the annual independent survey conducted by Independent Commission Against Corruption (ICAC) in the Hong Kong Special Administrative Region (SAR) that measures, inter alia, the trust level between ICAC and the public, the prosecution rate, as well as levels, types, location and causes of corruption. The United Nations is currently testing a method in two pilot countries using a so-called country assessment based on both facts and perceptions using hard facts, surveys focus groups and case studies.

CHALLENGES OF MEASURING THE IMPACT OF ANTI-CORRUPTION STRATEGIES

There are certainly many challenges in accurately measuring the impact of anti-corruption strategies, policies and measures.

First, collected data must be analysed by a competent and independent institution capable of interpreting it and extracting as much useful information and analysis as possible. Analysis highlighting differences and identifying so-called "best practices" can then be carried out. Availability of resources will always be a factor influencing credibility. That holds true even for monitoring mechanisms based on international instruments, where it is critical that monitoring bodies and secretariats are adequately resourced. Without appropriate resources, research may be under funded and inadequate, and without independent resources, research agendas may be dictated by financial officials or donors, thereby lacking the necessary objectivity and credibility.[483]

Secondly, current international monitoring mechanisms are unevenly distributed throughout the world. In some regions, countries tend to participate in more than one monitoring exercise, while in other parts of the world there are no operational monitoring mechanisms at all, as, for example, in most parts of Asia. Of course, the other extreme involves instances where there are multiple mechanisms applicable to the same region, and the challenge arises as to how to avoid duplication of effort.

Thirdly, monitoring can never be an end in itself. Rather, it should be an effective tool to bring about changes in international and national policies and improve the

[483] See GA/RES/58/4, paragraphs 4 and 9, calling on Member States to support efforts to ratify and implement the Convention and calling on the Secretary General to ensure that the secretariat serving both the pre-ratification assistance effort and the Conference of States Parties are adequately funded. See also United Nations Convention against Corruption Article 62, subparagraph 2(c), calling on States Parties to support technical assistance efforts. Apart from the basic provision of secretariat services as above, the financing of activities undertaken by the Conference of States Parties is left to that body once it convenes. See Article 63, paragraph 3.

quality of decision making. If the monitoring exercise is linked to an international instrument, the primary objective should be to ensure proper implementation of the technical aspects of the instrument and then the practical impact of its implementation. Monitoring can thus serve two immediate purposes. It helps to reveal any differences in interpretation of the instruments concerned and it can stimulate swift and effective translation of the provisions of those instruments into national policies and legislation. If it is determined that incomplete or ineffective implementation has occurred, sanctions can be imposed to motivate stronger efforts to achieve success. Accurate monitoring is therefore critical with respect to launching any successful anti-corruption initiative.

In the case of the OECD Convention, a built-in sanction requires that reports of the discussions on implementation be made available to the public. Such publicity can be an important mechanism in helping promote more effective measures. Reference can be made in that regard to the publicity surrounding the perception indices of Transparency International (TI). Even though the indices simply register the level of corruption as perceived by primarily the international private sector, they gain wide publicity. While the TI indexes are useful, however, a distinct disadvantage is that they:

- Do not always reflect the real situation,
- Do not involve the victims of corruption in the countries surveyed;
- Offer little or no guidance of what could be done to address the problem; and
- Can discourage countries from taking serious measures when their anti-corruption programme efforts are not seen as being successful by an improved score against the TI Index.

Fourthly, monitoring exercises cannot be separated from the issue of technical assistance. It is critical that monitoring not only addresses levels of corruption, but also its location, cost, cause and the potential impact of different remedies. Furthermore, since the trust level between the public and anti-corruption agencies is critical for the success of anti-corruption efforts, public trust levels should also be monitored.

It may be that participating countries agree on the need for implementing the measures identified as "best practices" but lack financial, human or technical resources to implement them. Under those circumstances, monitoring exercises would be much more effective if they were accompanied by targeted assistance programmes. It should be added, however, that not all measures require major resources, especially in the context of preventive measures where much can be done at relatively low cost.

Most of the data collection by the traditional development institutions is based on an approach that can be described as "data collection by outsiders for outside use". International surveys help spark debate about countries that fare badly. They help to place issues on the national agenda and keep them at the forefront of public debate. International surveys are, however, comparative and fraught with statistical difficulties.

They have, however, been important in highlighting the need for national surveys which are now being undertaken with increasing thoroughness. With public awareness of levels, types, causes and remedies of corruption having dramatically improved over the last five years, collecting data about corruption is useful because it increases the accountability of the State towards its public by establishing measurable performance indicators that are transparently and independently monitored over time.

TOOL #39

UNITED NATIONS COUNTRY ASSESSMENTS

United Nations country assessments aim to produce a clear and coherent picture of the current condition of a given country with respect to the:

- Levels, locations, types and cost of corruption;
- Causes of corruption; and
- Remedies for corruption.

Only about 20 per cent of the resources and efforts, however, are spent on the assessment as such. The main objective is to use and disseminate collected data in order to:

- Raise awareness among key stakeholders and the public;
- Empower civil society to oversee the State;
- Provide a foundation for evidence-based action plans;
- Establish measurable performance indicators; and
- Monitor the implementation of the anti-corruption action plan.

Country assessments are one of a number of specific research and analysis methods that could be used to develop programmes for the implementation of the United Nations Convention against Corruption and to assess implementation as it proceeds. Several provisions of the United Nations Convention against Corruption call indirectly for research into corruption, but it is silent as to specific methodologies or areas for research. Generally, the Convention calls for a number of measures which may well depend on research to gather the information needed to make them work, but leaves to the States Parties themselves the development of specific research programmes. Article 5, paragraph 3 calls on States Parties to periodically evaluate relevant legal instruments and administrative measures, and Article 6, subparagraph 1(b) calls for anti-corruption bodies which increase and disseminate knowledge about corruption, which could include various forms of research. Article 60, paragraph 4 calls on States Parties to assist one another, on request, in conducting "evaluations, studies and research" into the "types, causes, effects and costs" of corruption. Article subparagraph 4(a) then mandates the Conference of States Parties to facilitate a range of activities, including research and the mobilization of voluntary contributions. The extent to which the Conference will become involved in such activities and how it will draw upon the work of other bodies is left to the Conference itself.[484]

[484] The Conference is not first convened until at least 30 countries have ratified the Convention and it is in force. Article 63, paragraph 2 calls on the Secretary General to convene the first session within a year of the effective date of the Convention. Article 68, paragraph 1 brings the Convention itself into force on the 90th day following the filing of the 30th instrument of ratification, acceptance, approval or accession with the U.N. Treaty Office in New York. The resolution which adopts the Convention, GA/RES/58/4 of 31 October 2003, establishes some initial mandates for

DESCRIPTION

Country assessments resulting in a corruption monitoring protocol could be issued regularly (once every two to four years) to document levels and locations of corruption as well as progress by a Member State in fighting it. Such country assessments can be conducted by the United Nations Office on Drugs and Crime (Crime Programme),[485] in collaboration with the United Nations International Criminal Justice Research Institute (UNICRI) and various other research institutes, such as Gallup.

TYPES, LEVELS AND LOCATIONS OF CORRUPTION.

The assessments monitor trends regarding the three main types of corruption:

- Corruption in public administration and "street-level" corruption;
- Business corruption (especially in medium-sized businesses); and
- High-level corruption in finance and politics.

In order to assess the types, levels and locations of corruption, various techniques are combined into an integrated and comprehensive approach. Some of the techniques include:

Desk Review.

The initial step is to conduct a desk review by compiling all relevant anti-corruption information already available.

Public Opinion Surveys.

Such surveys help to determine the types, levels and locations of corruption, based on both concrete experiences and perceptions. Significant efforts are undertaken to help guarantee the quality of data by choosing a representative sample and sample size, by ensuring that the survey is implemented according to the terms of reference and by cross-checking the survey data. The sample size is chosen to produce quality data at both the national and sub national levels. As an example, in Uganda, the survey data for each of the 46 districts of the country would be compared with the national average. Such a survey was requested by the Inspector General of Government who felt that the only way to fight corruption was to have information about corruption levels across sub national units.

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the Conference when it convenes, but does not speak of research, which is thereby left to the Conference itself.

[485] Formerly the United Nations Centre for International Crime Prevention (CICP), which was merged with the U.N. Drug Control Programme to form the U.N Office on Drugs and Crime (UNODC) in August 2003. The adopting resolution for the Convention against Corruption calls on the Secretary General to designate the new UNODC as the secretariat for the Conference of States Parties to the new Convention. Within UNODC, the anti-corruption unit will deal with substantive anti-corruption programmes, while matters relating to the Convention, including pre-ratification assistance, will be handled by the Treaty and Legal Affairs Branch. For information about the Office, see: http://www.unodc.org/unodc/en/about.html.

Focus Groups.

Another diagnostic technique used in country assessments is focus groups, whereby targeted interest groups in Government and society hold in-depth discussion sessions. The technique often produces extremely detailed information concerning views on corruption, precipitating causes, as well as valuable ideas on how Governments can fight it. The focus group sessions usually concentrate on the following issues:

- Extent of the corruption problem;
- Types and locations of corruption;
- Negative effects of corruption;
- Root causes;
- Effectiveness of current laws and programs;
- Possible solutions; and
- Prioritizing issues

Case Studies.

Local experts use case studies to describe typical corruption cases in great detail. The exercise can help everyone to understand how corruption actually takes place. Carefully documented practical case studies also help anti-corruption agencies to fine-tune their efforts and can assist in educating the public and potential whistleblowers.

Legal Assessment.

The entire anti-corruption framework is assessed, including criminal and civil procedure codes, civil service laws (standing orders), public procurement regulations, anti-money laundering statutes, codes of conduct and other relevant codes and rules. Where appropriate, inefficiencies and inconsistencies between various laws are analysed with a view to integrating a comprehensive solution to strengthen the legal system.

Assessment of the Institutional Framework.

The capacity and resources of the relevant institutional anti-corruption framework is analysed. That includes an assessment of the effectiveness of control mechanisms and oversight bodies responsible for monitoring and guaranteeing the quality and integrity of the relevant institutional framework. The objective is to evaluate to what extent the judiciary, executive and legislative bodies are already active in preventing and fighting corruption. Particular attention is paid to the balance of powers, and an assessment is made of the independence of the judiciary, the legislative and the media (often called "the fourth estate"). The aim is to identify the specific problems faced by each body and agency as well as their root causes. The United Nations country assessments concentrate in particular on "process mapping" to analyse the functions, procedures, reporting relationships, access to information and incentives within the institutional framework. Such mapping specifies how the organization carries out its mission, identifies efficiencies and inefficiencies, assesses potential for conflict of interest and identifies hazards for extortion (bribe taking) and bribe giving.

Assessment of Civil Society.

The sixth and last technique used is the assessment of civil society and the media. For civil society and the media to hold the Government accountable, they must have access to information. The media must also enjoy freedom from political influence and be independent. With respect to access of information, country assessments do more than merely confirm that some form of freedom of information law exists. They also assess to what extent journalists or citizens do, in fact, have access to certain information in a timely and free fashion.

PRECONDITIONS AND RISKS

While international surveys tend to be conducted by outsiders for use outside the country, national or subnational surveys are ideally performed by local people (in some cases with the assistance of outsiders) and for local use.

International surveys help trigger public debate in the countries with the most problems. They also help to place the issue on national agendas and to keep them at the forefront of public debate. Public awareness regarding the levels, types, causes of and remedies for corruption have improved dramatically over the last five years, and collecting data about corruption will increase the accountability of the State towards its public by establishing measurable performance indicators that can be transparently monitored over time

TOOL #40

MIRROR STATISTICS AS AN INVESTIGATIVE AND PREVENTIVE TOOL

The purpose of Tool #40 is to uncover corruption levels by assessing secondary indicators such as the extent of the grey economy, which includes such commodities as illegally imported cigarettes, liquor and other items. The link between corruption and the grey economy is especially important as corrupt practices usually "enable" the inflow and outflow of resources to and from the sector. Where the economic environment in a country is tightly regulated with effective import regulations and other measures, it would be difficult for the grey economy to operate profitably without resorting to corruption to defeat existing enforcement of regulations.

DESCRIPTION

The use of mirror statistics to track the flow of "resources" of the grey economy and to estimate the size of the sector in the economy is not new, having proved to be an important analytical instrument that can target economic sectors suffering from corrupt practices.

TWO METHODS FOR USING MIRROR STATISTICS INFORMATION

Method One

The basic information resource is statistical information about the import and export of commodities between two or more countries. The objective is to compare data for exports and imports from country X to country Y and from country Y back to country X. In principle, the mirror (export/import) figures should match. There should be no discrepancies between the volume of export from country X to country Y and the volume of import in country Y from country X. The basic precondition is access to accurate data. Using such methodology, comparisons could be made, inter alia, of commodity groups, branches of the economy and periods of time.

The interpretation of results should be made with care and should take into account several important factors that could contribute to the result. First, an analysis should be made of the accounting methodologies used by different countries. Adjustments should be applied to equalize the data. Secondly, careful examination of the import/export customs rules and regulations in the mirrored countries and methods of their implementation must be understood. That step helps to equalize the data. Once all of the contextual factors have been identified and accounted for, any imbalances in the statistics could be interpreted as illegal flows of resources (import and export), and further analysis could be performed using a more detailed structure of resources flows.

Method Two

Another method for using mirroring information compares customs import data with market research information. In countries where comprehensive research on

the volume and structure of different markets exists, the data provide fairly accurate estimates of the actual volume of imported goods for a certain commodity group. The information may be compared directly to import information from the customs authorities. Differences in the volumes can point to possible illegal import and could be explored further in greater detail.

Use of the information obtained

There are at least two ways of using the information obtained through the methods described above:

- ***As an investigative (intelligence) tool.***

  Results obtained could be used to target the efforts of specialized law enforcement agencies. Although the information obtained is "depersonalized", it provides clues as to the main areas of illegal export and import, as well as the probable volume of illegal trade. Thus, specific plans for investigation and preventive work could be designed. Furthermore, mirror statistics could act as an evaluation tool that helps assess the effectiveness of the measures that have already been taken.

- ***As a preventive tool.***

  The results could also be used to analyse and redesign the legal and institutional framework. The existence of substantial discrepancies continuing over time is an immediate indicator that existing rules and regulations are failing to work. That could be because of deficiencies in the legal or the institutional framework. Both should therefore be subjected to closer analysis and inspection. In-depth analysis could provide solid evidence that existing systems fail because of the very regulations designed to support legitimate economic activity or for other reasons. Efforts can then be focused on rehabilitating the regulations so that they can function to maximize the economic activity of the country.

TOOL #41

MEASURABLE PERFORMANCE INDICATORS FOR JUDICIARY

A key element in developing and implementing reforms to the judiciary is the need to develop measures which will be effective in bringing about changes which will serve to prevent corruption by modifying practices and procedures to enhance transparency and accountability and reduce opportunities for corruption, while at the same time preserving the high degree of independence and autonomy which is essential for the judiciary to function in its assigned role. One means of doing this is to assist judges in developing and implementing measures in programmes which are formulated and fully implemented by the judiciary itself. Generally, this will entail the development of performance criteria, and review and transparency mechanisms in which judges review the performance of their peers and of the judiciary in general, and in which the general population is made aware of both the performance expected and the performance actually delivered by its judges.

This is one of several tools which could be used to implement Article 11 of the United Nations Convention against Corruption, which calls for anti-corruption measures within the judiciary and in prosecutory institutions where these enjoy a similar degree of independence to judges. Article 11, paragraph 1 calls for the preservation of judicial independence and general measures to strengthen integrity and prevent opportunities for corruption, which may include rules with respect to the conduct of judges.

Basic goals of anti-corruption reforms include the following:

- Improving Access to Justice;
- Improving the Quality of Justice;
- Raising the Level of Public Confidence in the Judicial Process; and
- Improving efficiency and effectiveness in responding to public complaints about the judicial process.
- Raising the Level of Public Confidence in the Judicial Process; and
- Improving efficiency and effectiveness in responding to public complaints about the judicial process.

DESCRIPTION

A series of steps may be taken to develop basic goals, performance indicators and a mechanism for performance review to see if the indicators prove valid and have been met in practice. Groups of judges should be convened, under the auspices of the appropriate governing body, association, or Chief Justice of the country where possible. Groups of judges, with each group containing a representative cross-section of judges as to trial and appeal judges and judges responsible for specific subject-matter where applicable, can then be asked to consider basic goals, with a view to developing strategies and methods for achieving the basic goals and a series of performance indicators that, when observed, would help establish whether the goals have been met. As with anti-corruption efforts in other sectors, participating judges and facilitators should bear in mind that indicators which fall under specific goals are often linked with other indicators. Factors such as increases in the number of cases heard and reductions in pre-hearing delays would indicate better access to justice, for example, but might not signify overall improvements if other reviews suggest that the quality of adjudication has fallen as a result.

Judicial independence requires that all stages of this programme must be primarily controlled and driven by the judges themselves, and that oversight be primarily through general public transparency unless action against specific judges is required as a result of specific malfeasance by the judge. Other personnel often bring significant insight and a different perspective, however, and should also be incorporated into the process wherever possible. These include representative samples of lawyers, including prosecutors, defence counsel and legal counsel in civil proceedings; court workers and support staff; and the litigants themselves.

Lists of some of the possible performance indicators are as follow.[486]

ACCESS TO JUSTICE

Measure 1 Implementation of a relevant and up-to-date code of conduct for judicial officers

Impact indicators:

1. Date of most recent review of code of conduct;
2. Number of complaints received under the code of conduct;
3. Percentage of complaints received that were investigated;
4. Percentage of complaints received and investigated that were disposed of;
5. Code of conduct complying with best international standards;
6. Percentage of officers trained on code of conduct.

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[486] These were developed by UNODC and a Federal Judicial Integrity and Action Planning Meeting for Chief Justices of Nigeria, held in Abuja October 27-28 2001. The meeting was attended by all 36 Chief Justices in Nigeria, was chaired by the Chief Justice and facilitated by UNODC's Global Programme against Corruption (GPAC).

Measure 2 Enhance public understanding of basic rights and obligations dealing with court-related procedural matters

Impact indicators:

7. The number of judges involved in public information programmes offered to the media and to the general public;
8. Availability of the judicial code of conduct to the public.

Measure 3 Ease of access of witnesses in civil/criminal procedural matters

Impact indicators:

9 Number of instances in which witnesses provide evidence without attending court;
10. Average time and expense for a witness to attend a case.

Measure 4 Affordable court fees

Impact Indicator:

11. Percentage of fees set at too high a level.

Measure 5 Adequate physical facilities for witness attending court

Impact Indicator:

12. Adequate Witnesses and Litigants waiting room.

Measure 6 Itinerant judges with the capacity to adjudicate cases outside the court building reaching distant rural areas

Impact Indicators:

13. Number of itinerant judges
14. Availability of necessary transport

Measure 7 Level of informed citizens (and court-users in particular) on the nature scale, and scope of bail-related procedures

Impact Indicator:

15. Number of courts offering basic information on bail-related aspects in a systematic manner.

Measure 8 Use of suspended sentences and updated fine levels

Impact Indicators:

16. Passage of empowering legislation;
17. Existing number of cases where suspended sentences were applied;
18. Number of cases where fine penalties were applied

QUALITY OF JUSTICE

Measure 9 Timeliness of court proceedings

Impact indicators:

19. Level of cooperation between agencies;
20. Prioritization of old outstanding cases;
21. Number of adjournment requests granted;
22. Percentage of courts where sittings begin on time;
23. Percentage of judges whose performance is monitored;
24. Levels of consultations between judiciary and the bar;
25. Procedural rules that reduce the potential abuse of process;
26. Number of judges practising case management;
27. Type of case management being practised;
28. Regular congestion exercises undertaken;
29. Regular prison visits undertaken with Human Rights NGOs and other stakeholders
30. Level of access to books for judicial officers;
31. Functioning criminal justice and other committees (including NGOs).

Measure 10 Courts exercising powers within their jurisdiction

Impact Indicators:

32. Number of judges/registrars trained/retrained in last year
33. Extent to which bail jurisdiction clear and implemented
34. Percentage of weekly court returns made and reviewed
35. Number of court inspections
36. Number of files called up under powers of review

Measure 11 Consistency in sentencing

Impact indicator:

37. Availability of criminal records at time of sentencing
38. Development of and compliance with sentencing guidelines

Measure 12 Performance of individual judges

Impact Indicators:

39. Percentage of cases where sits on time;
40. Backlog of cases? Going up? Down?
41. Number of errors in procedures;
42. Number of appeals allowed against substantive judgements;
43. Conduct in court;
44 Number of public complaints;
45 Level of understanding of code of conduct;
46 Percentage of sentences imposed within the sentencing guidelines.

Measure 13 Compliance with requirements of civil process

Impact Indicators:

47 Number of cases where abuse of ex parte injunctions;
48 Number of non-urgent cases heard by vacation judges;
49 Number of instances of proceeding improperly in the absence of parties;
50 Number of chambers judgements (not given in open court).

Measure 14 Ensuring propriety in the appointment of judges

Impact indicator:

51 Level of confidence among other judges

Measure 15 Raising level of public awareness of the judicial Code of conduct

Impact indicators:

52 Availability of code of conduct
53 Number of complaints made concerning alleged breaches

PUBLIC CONFIDENCE IN THE COURTS

Measure 16 Public confidence in the courts

Impact Indicators

54. Level of confidence among lawyers, judges, litigants, court administrators, police, general public, prisoners, and court users;
55. Number of complaints (see above);
56. Number of inspections by ICPC;
57. Effectiveness of policies regarding formal and social contact between the judiciary and the executive;
58. Nature, scope and scale of involvement of civil society in court user committees

IMPROVING EFFICIENCY AND EFFECTIVENESS IN RESPONDING TO PUBLIC COMPLAINTS ABOUT THE JUDICIAL PROCESS

Measure 17 Existence of credible complaints mechanisms

Impact Indicators:

59. Complaints mechanisms that comply with best practice
60. Extent to which public are aware of and willing to use the complaints mechanisms
61. Readiness to admit anonymous complaints in appropriate circumstances

POSSIBLE NEXT STEPS IN IMPROVING JUDICIAL PERFORMANCE IN THE FOUR AREAS

Access to justice

Code of conduct reviewed and, where necessary, revised in ways that will impact on the indicators agreed at the Workshop. That includes comparing it with other more recent codes, including the Bangalore Code. It would also include an amendment to give guidance to judges about the propriety of certain forms of conduct in their relations with the executive (for example, attending airports to farewell or welcome Governors). Ensure that anonymous complaints are received and investigated appropriately. (Measure 1.1; 1.6; 16.4; 17.3) Action: Chief Justice of the Federation.

Enforcement of code of conduct. Consider how the judicial code of conduct can be made more widely available to the public (for example in handouts, posters in the courts) (Measure 2.2) Action: individual chief justices)

Increase public awareness. Consider how best chief justices can become involved in enhancing public understanding of basic rights and freedoms, particularly through the media. (Measure 2.1) Action: individual chief justices

Court fees to be reviewed to ensure that they are both appropriate and affordable. (Measure 4.1) Action: all chief justices

Review the adequacy of waiting rooms for witnesses and others, and where these are lacking establish whether there are any unused rooms etc. that might be used for this purpose. Where rooms are not available explore other possibilities to provide shade and shelter for witnesses in the immediate proximity of courts (Measure 5.1) Action: all chief justices

Review the number of itinerant judges with the capacity to adjudge cases away from the court centre. (Measure 5.1) Action: all chief justices; Chief Justice of the Federation

Review arrangements in their courts to ensure that they offer basic information to the public on bail-related matters. (Measure 7.1) Action: All chief justices Revise sentencing and fine levels. Press for empowerment of the court to impose suspended sentences and updated fine levels. (Measure 8.1) Action: Chief Justice of the Federation

Quality of Justice

Increased cooperation. Ensure high levels of cooperation between the various agencies responsible for court matters (police, prosecutors, prisons) (Measure 9.2) Action: all chief justices

Review of efficiency. Criminal justice and other court user committees to be reviewed for effectiveness and established where not present, including participation by relevant non-governmental organizations. (Measure 9.13; 16.5) Action: all chief justices

Prioritize old cases. Old outstanding cases to be given priority and regular decongestion exercises undertaken. (Measure 9.2; 9.10) Action: all chief justices Adjournment requests to be dealt with as more serious matters and granted less frequently. (Measure 9.3) action: All chief justices; Chief Justice of the Federation

Review of procedural rules to be undertaken to eliminate provisions with potential for abuse. (Measure 9.7) Action: all chief justices and Chief Justice of the Federation

Time management. Courts at all levels to commence sittings on time. (Measure 9.4) Action: all chief justices

Reduce delays. Increased consultations between judiciary and the bar to eliminate delay and increase efficiency. (Measure 9.6) Action: all chief justices

Increase number of judges. Review and, if necessary, increase the number of judges practising case management. (Measure 9.8) Action: all chief justices

Ensure regular prison visits undertaken together with Human Rights NGOs and other stakeholders. (Measure 9.12; 16.5) Action: all chief justices

Clarify jurisdiction of lower courts to grant bail (for example in capital cases). (Measure 10.2)

*Court inspections***.** Review and ensure the adequacy of the number of court inspections. (Measure 10.4) Action: all chief justices

Review and ensure the adequacy of the number of files called up under powers of review. (Measure 10.5) Action: all chief justices

Examine ways in which the availability of accurate criminal records can be made available at the time of sentencing. (Measure 11.1) Action: all chief justices and Chief Justice of the Federation

Develop sentencing guidelines (based on the United States model). Measure 11.2) Action: Chief Justice of the Federation

Monitor cases where ex parte injunctions are granted, where judgements are delivered in chambers, and where proceedings are conducted improperly in the absence of the parties to check against abuse. (Measure 13.1; 13.3; 13.4) Action: all chief justices and Chief Justice of the Federation

Ensure that vacation judges hear only urgent cases by reviewing the lists and files. (Measure 13.2) Action: all chief justices and Chief Justice of the Federation.

Public Confidence in the Courts

Introduce random inspections of courts by an independent credible institution (Measure 16.3) Action: Independent Commission for the Prevention of Corruption.

CASE STUDY #36

DISSEMINATION AND USE OF DATA IN UGANDA: IMPROVED DECISION-MAKING AT THE SUB-NATIONAL LEVEL

INTRODUCTION

In 1998, the Inspector General of Government (IGG) in Uganda requested a National Integrity Survey to be conducted among more than 18,412 households. (96) The survey results were then discussed among 348 focus groups with more than 5,000 participants across 46 districts. Households were asked in particular about their experiences with services such as: primary education, health, police, local administration, judiciary and the Uganda Revenue Authority (URA). The survey was part of an integrated approach to measure corruption in Uganda.

SURVEYS INCLUDED

The following surveys were included:

Integrity Survey.

An integrity survey, in which randomly selected households were interviewed by locally trained and internationally supervised consultants, was developed and pilot tested in Uganda by CIET international, in close collaboration with the Office of the IGG. (97) The sample size was large enough to obtain specific findings for each of the 46 districts in Uganda. The sentinel survey method was used, whereby the same households are surveyed every two to three years, to allow progress to be monitored against the baseline established in the first survey.

Focus Groups.

Professionally facilitated focus groups were organized, and allowed respondents to clarify the reasons for the survey percentages in terms of "real" pain and concerns. During the group sessions, the respondents were asked about their perceptions of problems and possible solutions. One quote was collected from each focus group as evidence of the real "pain level" caused by corruption.

Service Provider Survey.

A service provider survey was conducted among 1,500 civil servants to obtain their perspective on the problem.

Opinion-maker Focus Groups.

Focus groups with key opinion makers reviewed the problematic areas and prioritized causes of corruption. More importantly, the groups assessed the viability of the changes suggested by the citizens, the focus groups and the service providers; in other words, a "reality test" was performed on the recommendations made.

Workshops.

Integrity workshops and meetings became a cornerstone of the participatory process to curb corruption at all levels of Government. It became the key tool for moving from awareness raising to action. Central to the workshops were the small working groups that developed action plans, using visioning to shift

discussion from complaint to action. Participatory workshops were also used to develop broad-based participation to maintain momentum. The broader the base of participation, the wider the degree of ownership of the action plan in all its stages, the more likely it was to be carried out and sustained.

USE OF THE DATA AND OUTCOMES OF THE PROCESS

Investigative Journalism Workshops.

The role of the media in raising awareness has been critical to the strategy for developing accountability in Uganda. The work of newspaper journalists, who credibly investigate malfeasance at the highest level, has led to the censuring of political figures at the highest level of Government, with strong support from an active parliament. Since fewer than 15 per cent of Ugandans get their news from print, training for radio journalists began in 1999, at a time when the number of district-level radio stations, often broadcasting in local dialect, began to increase. As much as print journalist training proved a key ingredient in spurring the national debate, radio journalist training proved instrumental in buttressing the participatory process to curb corruption at the district level.

Censuring of Corrupt Ministers.

During 1998, the Ugandan Parliament was involved in four cases in which ministers close to the president were censured for illicit enrichment or resigned as a result of a motion of censure. Such actions would have been unthinkable previously. Since 1997, however, the strengthened media, parliament and IGG were able to make grand corruption a lower-profit and higher-risk proposition. The three institutions complement each other in addressing corruption at the highest levels. They foster insecurity among the corrupt and fuel a national debate on transparency and good governance. The key challenge for any parliament seeking to reduce corruption is to ensure that its own house is in order. Preventive measures in Uganda have included monitoring and publishing the declared assets of parliamentarians and strengthening the parliamentary ethics committee. So far, the process of censure appears to have been largely transparent and based on facts. Nevertheless, there has been some criticism of the process.

Judicial Commission of Inquiry.

Pressure was put on the police by the more than 30 district integrity workshops disseminating the survey. The findings indicated that an average of 63 per cent of the people surveyed had experienced corruption when dealing with the police. The findings, coupled with another finding that more than 50 per cent of the citizens had experienced corruption in dealings with the courts, created anger among the public who demanded change (83) In response, the Government was obliged to come up with a credible response. A three-person commission, headed by a judge, decided to travel across the country to listen to complaints about police corruption. As a result of that process, more than 400 senior police officers were suspended. In response, the police commissioner attacked the credibility of the survey. The media then reported on his illicit wealth and he was forced to resign.

One of the challenges that continues to face the qualitative approach in Uganda is in assisting the IGG staff to help the local district administration to follow up and implement the action plans resulting from the process. Although that is a different and probably more demanding skill to develop, it is crucial if the districts are to have any chances to curb corruption.

The second country assessment was scheduled for late 2000 or early 2001. With the first survey as a benchmark, the real accountability will be in place the moment the results from the second survey are disseminated broadly across all 45 districts.

CASE STUDY #37

DISSEMINATION AND USE OF DATA TO IMPROVE QUALITY OF DECISION-MAKING IN HUNGARY

INTRODUCTION

A comprehensive country assessment is in the final stages of completion in Hungary. Supported by the United Nations, the assessment examines the levels, locations, costs, causes of and remedies for corruption, and the effectiveness and credibility of the efforts of the Government to contain corruption. The country assessment includes surveys of the general public, private sector and civil servants, as well as case studies and focus groups, both at the national and municipal level. An international meeting was organized at Vienna on 26 October 2000 to discuss the outcome of the comprehensive country assessment and to elicit the comments of other international experts and United Nations Member Countries. A national integrity meeting was held on March 20-21 2003 in Budapest, where between 100 and 150 representatives from key stakeholder groups (Government, parliament, private sector, civil society, media and others) prioritized the issues and designed a national integrity strategy and an anti-corruption action plan, based on:

- The country assessment (findings from the surveys and the focus groups);
- The case studies;
- Inputs from international experts in certain strategic areas; and
- The 25-point programme of the Minister of Justice

The Hungarian Government has also appointed an independent National Integrity Steering Committee (NISC) with representatives from the international community, civil society, academe, media, Government, parliament and the private sector. It oversees the development of the national integrity strategy and the implementation of a credible anti-corruption action plan for the criminal justice system.

SURVEY FINDINGS FROM GALLUP

A short summary of the surveys performed on population samples in Budapest and in the whole country

Description of the research

Following preliminary survey of corruption in 1999, the Hungarian Gallup Institution, within the framework of the Global Programme Against Corruption organized by the United Nations Office of Drug Control and Crime Prevention (UN ODCCP) and its Interregional Crime and Justice Research Institute (UNICRI), performed a corruption assessment survey in 2000. The survey was performed among the population of Budapest, the national population, the population and employees of five municipalities and among small and medium-sized enterprises, with questionnaires and focus group discussions in several areas of employment.

In 2003, as a follow-up to this research, Gallup performed a survey among the population of Budapest and among the national population. For its researches Gallup used the questions of the standardized questionnaire used in many capitals of the world for UN's victimization surveys and some other questions, too. The survey of 2003 in Budapest and the national survey of 2003 have repeated certain questions of the previous Budapest and national surveys so in these cases we could make comparisons.

Main findings of the research

In its surveys Gallup characterizes corruption as those cases where a citizen offers or is requested to offer money or payments during a given procedure so that he/ she can use a service to which he/she is legally entitled or so that he/she can get help.

1. The survey conducted in 2000 showed that the various behaviour forms falling within this sphere are considered as corruption by the population to a varying extent. For example, almost everyone considers it corruption when officials or politicians, for a fee, tolerate the activities of organized crime or when people bribe the decision-makers to gain employment, or win orders and contracts. On the other hand, gratuities to physicians are considered as corruption only by just over one quarter of the population while tips are considered as corruption by one fifth.

2. Compared with the situation 10 years ago the population does not feel there have been comprehensive changes in the transparency or culture of the public administration or that the tendency of officials to accept bribes has increased or decreased. The proportion of those who feel it is harder to get proper treatment today is higher than the proportion of those who feel the opposite, but the difference is within the margin of error. As for the question as to whether it is easier or harder today to get an official to do a favour, the

proportion of those who did not know or who did not want to answer was very high (38 per cent); the proportion of those who think it is harder was higher (21 per cent) than of those who think it is easier (19 per cent); but the difference is again within the margin of error. Some 21 per cent thinks nothing has changed in this regard.

3. If an individual wants to get the matters to which he/she is legally entitled handled properly, he/she has to bribe. Out of 12 employment groups, there were five in which a greater proportion felt this statement to be true in 2003 than in 2000. Suspicions of requesting bribes or extra payments have grown in the following five areas: medicine, private sector, customs offices, Members of Parliament, and ministry officials. No increase was perceived among police officers, the tax authority, excise office officials and judiciary members. The proportion of people believing that special payments are required has increased within the margin of error for municipality representatives and officials and has decreased within the margin of error for supervisors and teachers. The growth of mistrust against the various groups differs from the change in the perceived corruption situation.

4. It cannot be stated that the rate of corruption has changed between 1999 and 2002. In 2000, nine per cent and in 2003 ten per cent of those questioned said that in the previous year a public official or public servant had asked or expected bribes from him/her for services to which he/she was entitled. We do not know whether corruption actually occurred in these cases or not. The one percentage point difference falls within the statistical margin of error.

5. There were two areas of employment where a relatively large proportion of the population has experienced or sensed a corrupt situation in both 2003 and 2000: in the case of police officials and in medicine. Because of the low number of cases we cannot determine whether there was any change in tendencies.

6. Of the 29 public office and public service areas there was only one area, the hospitals, where a larger proportion of the clients felt that extra payments were expected of them for services to which they were legally entitled in 2003. This growth was within the statistical margin of error so we cannot declare that the expectation of extra payments has increased.

7. Not counting medical gratuities, of the 640 clients (or clients' relatives) of 10 public office and public service areas 25, or four per cent, said they gave bribes or extra payments; this is four per cent of all families having any contact with the institutions (but not of all client contacts!) This means that in the non-medical part of the public sphere every 25th person who (or whose relatives) was a client of a public institution actually took part in corruption at least once last year (but the proportion of corruption cases must be much lower when compared to the total number of client contacts.)

8. Less than half of the population (43 per cent) would know where to go to report an experience of corruption. The remaining 57 per cent of the population do not know where to go

9. Nearly two thirds of the population (62 per cent) would be ready to report corruption if they experienced it. Some 37 per cent of the population would also provide their name while 25 per cent would report it anonymously. Just over every fifth person (22 per cent) would not report corruption and 16 per cent do not know what they would do. The proportion of the population claiming to be ready to report corruption is larger than the proportion knowing to go to report it.

10. The population reports only an insignificant part of all corruption cases. Of the 1016 persons asked, 101 claimed to have perceived a situation of corruption but only four of them have reported it: three to the police and one to the chief public prosecutor's office. The number of reports is very much lower than the number of cases and also than the number that might be expected on the basis of the proportion of the population claiming to be ready to report corruption or even knowing where to go to report it.

11. Most of the persons not reporting the corruption they have experienced claim that "it was not worth making a report." The other most frequent explanations were, in descending order: because the bribed party was the police; because they are afraid of retaliation of the bribed party; and because bribery was a way of solving their problems.
During its surveys Gallup considers as corruption those cases where a citizen offers or is requested to offer money or payments during the procedure so that he or she can use a service that he or she is legally entitled to use or so that he or she can get help.

SUMMARY

- The proportion of persons presuming corruption in certain areas has increased in the past three years but no increase can be demonstrated in the number of perceived situations of corruption.

- The population does not perceive more situations of corruption than they did three years ago. Some nine to ten per cent of the population perceived a situation of corruption in the last year.

- The population did not perceive a comprehensive increase in expectation of extra payments by public officials and public servants. (The proportion of those saying that it is now harder to get an official to do a favour is three percentage points higher.)

- There are two areas where a relatively large proportion of the population has experienced or perceived a situation of corruption both in 2003 and in 2000: in the police and in the medical sphere.

- In spite of the foregoing, there are five areas where a somewhat higher proportion of the population presumes that there is a tendency towards corruption than they did three years ago. Mistrust has increased against people working in medicine, in the private sector, in the customs offices and among Members of Parliament and ministry officials.

- More than two per cent of the population admitted that he/she or a relative has actually given extra payment lays year in the public sphere for taking measures, starting procedures or the provision of services (excluding medicine).

- Only a very small number of all cases of corruption are reported by the population. A lower percentage of the population knows where to report cases of corruption than claims to be prepared to report. However, the proportion of those who actually report corruption is much smaller than of those who know where to report it.

Methodology

Between February 6th and 9th, 2003 the Hungarian Gallup Institute asked 1016 Budapest residents (at least 16 years of age) by telephone about certain corruption-related matters. Between February 6th and 13th, 2003 the Institute asked 1009 adult (at least 18 years of age) persons living in 67 different Hungarian communities about certain other corruption-related matters. The statistical sampling error for such sample sizes is less than +/– 3.2 per cent of the whole of the sample.

In March 2000 we conducted a phone survey among 1513 Budapest residents (at least 16 years of age) and in April 2000 we conducted a survey on a nationwide representative sample of 1839 adults (at least 18 years of age). The statistical sampling error for such sample sizes is less than +/– 2.3 percent of the whole of the sample.

The composition of the samples was in accordance with the national gender, age-group and type of community distribution. The smaller deviations from the properties of the total population due to the sampling process were corrected by using a multi-aspect weighting.

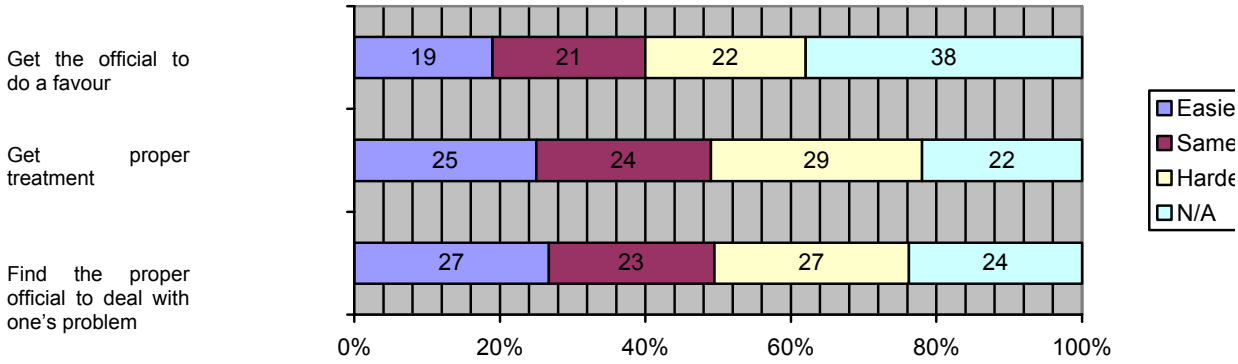
Cases considered as corruption[487]

Percentage of population considering the given situation as obvious corruption

[487] Nationwide research, 2000; N=1839

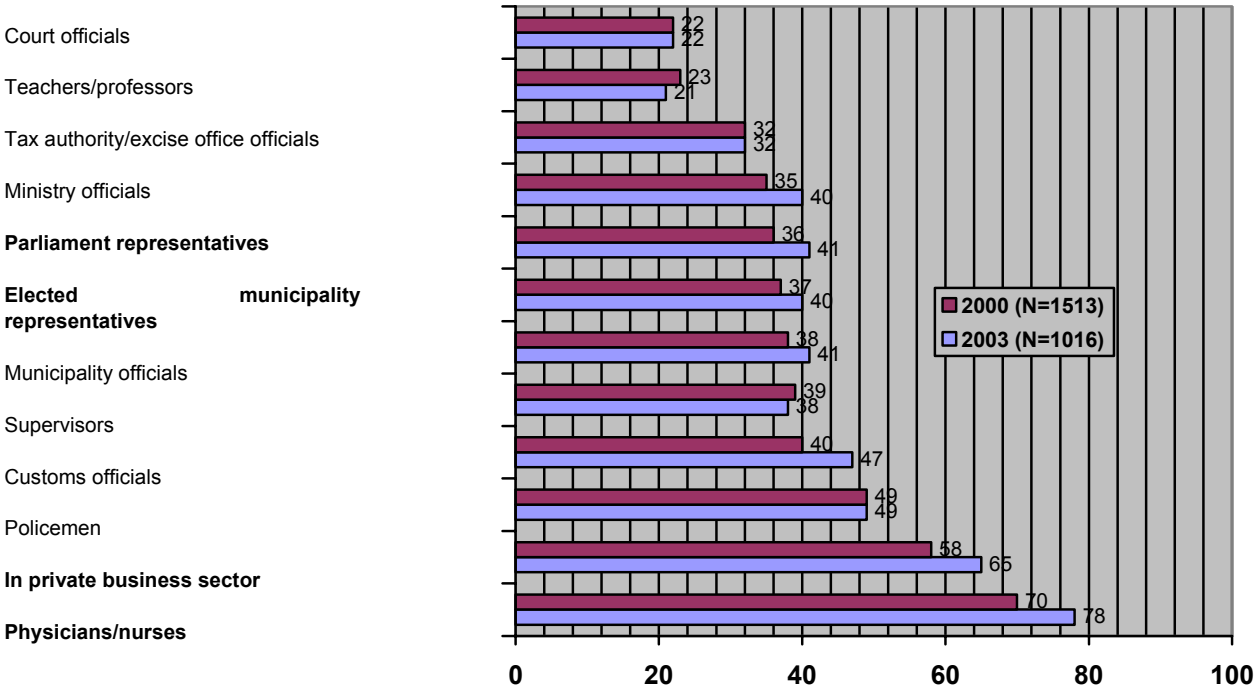
- If public officials or politicians tolerate the operation of organized crime for a fee: 94 per cent
- If during the filling of posts, the awarding of State or municipality orders or contracts those who bribe the decision-makers win: 93 per cent
- If an official deals with a case only for a gratuity or bribe: 92 per cent
- If instead of paying a fine a sum is handed over to the traffic policeman without a receipt being given: 82 per cent
- If during the filling of posts, the awarding of State or municipality orders or contracts nepotistic considerations prevail: 81 per cent
- If people use acquaintances or “godfathers” when they want to have their cases dealt with: 75 per cent
- If a public official or public servant violates small rules for the benefit of his or her relatives: 63 per cent
- If a public official or public servant accepts small gifts from his/her clients: 45%
- Physician’s gratuity: 28 per cent
- Tipping: 20 per cent

Compared with ten years ago is it now easier or harder to:



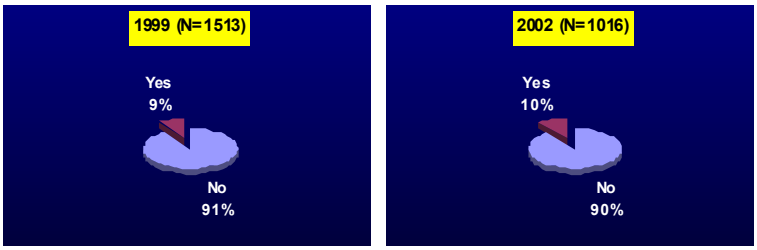
Budapest research 2003… N=1016

Presumption of corruption
It is likely that one will have to offer gifts or favours to...



Budapest research, 2000-2003

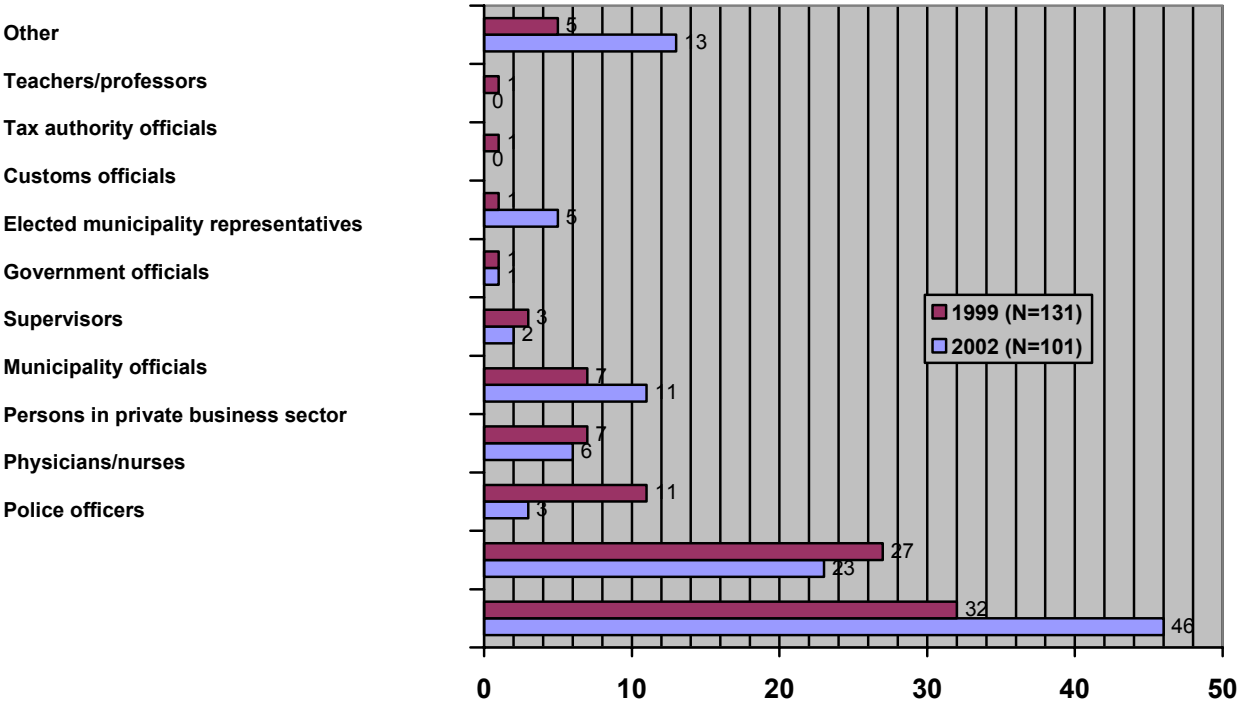
"Perceived" situation of corruption



We do not know whether there was ACTUAL corruption or not

Budapest research, 2000-2003

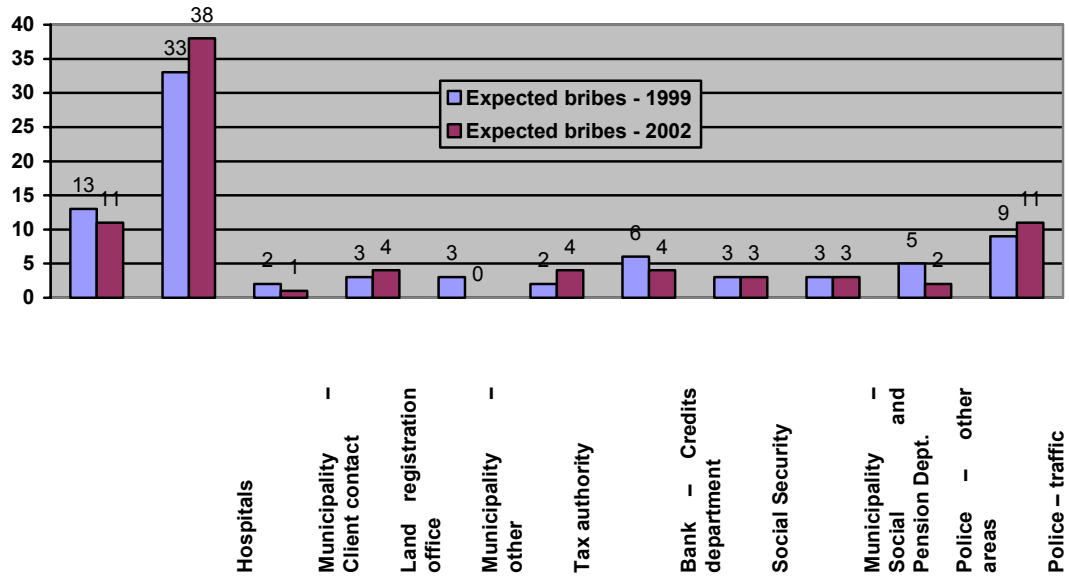
Officials expecting extra payments
As a percentage of those who have perceived the situation of corruption



Budapest research, 2000-2003

Perception of situations of corruption
as percentage of the clients

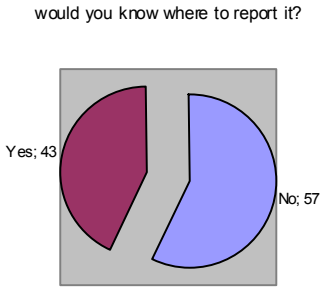
National research, 2000-2003

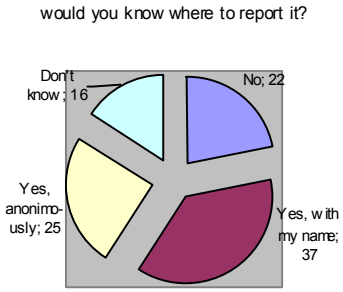


Cases that were uncovered only in the course of the survey

	Number of clients in sample	*Number of those who felt that bribes were expected*	*Number of those who said they gave bribes*
Police – traffic	**99**	**11**	**5**
Tax authority	**152**	**6**	**4**
Traffic Inspectorate/Chief Inspectorate	**36**	**2**	**4**
Municipality – Technical Department	**42**	**5**	**2**
Social Security	**132**	**4**	**2**
Public Areas Inspectorate	**27**	**4**	**2**
National Public Health Office	**42**	**2**	**2**
Police – other areas	**73**	**1**	**1**
Municipality – Assets Department	**36**	**0**	**1**
Market Inspectorate	**3**	**1**	**1**

If you were faced with corruption... ***(Budapest research 2003; N=1016)***





Why did you not report the corruption to the police?

As percentage of the unreported cases

It was not worth it	**35%**
The police was the bribed party	**16%**
I did not dare because I was afraid of retaliation by the bribed official	**14%**
Because it helped me solve my problem	**12%**
The police would not have done anything/would not have been interested	**7%**
I could not make thing work any other way	**5%**
I did not want the public to learn about the matter	**5%**
I could not prove it	**4%**
I did not know where to go	**2%**
In my opinion it makes no sense	**2%**
I was afraid/I did not want to get the police involved	**2%**
I had no time/I did not want to take the trouble	**1%**

Budapest research 2003; N=1016

Gallup Monitor – http://monitor.gallup.hu

After the four decades of the single-party regime it became gradually clearer and clearer that a multi-party system in itself does not ensure democracy. A key question is the quality of the public sphere, the public offices and the public services: do these serve the interests of the public, of each and every man or just that of certain people or groups of people. How do the public persons, the participants of public life, the public officials and the public servants use the power entrusted on them, how do they use their entitlements and decision-making rights? Are their actions governed by the public interest – even by pushing into the background their own interests – or do they subordinate the public interest – violating moral and/or legal rules – to their own interests?

From this consideration the Hungarian Gallup Institute has started an online periodical publication in the fall of 2000 as a part of its public service quality control activities. With its informing activities the Gallup Monitor should serve the cleanliness and transparency of public life and public services, the accountability of the decision-makers and the observance of law. At the current status of the development of the public services its chief theme is anti-corruption work and in this it keeps contact with UN's Global Programme Against Corruption.

CASE STUDY #38

MIRROR STATISTICS: SURVEY INSTRUMENT

A1. AS YOU SEE IT, WHICH ARE THE THREE KEY PROBLEMS YOUR COUNTRY IS FACING TODAY?

Show card A1. Mark up to three answers.

A1A	1	Political instability
A1B	1	Ethnic problems
A1C	1	Corruption
A1D	1	Low incomes
A1E	1	Crime
A1F	1	Unemployment
A1G	1	Health care
A1H	1	High prices
A1I	1	Education
A1J	1	Poverty
A1K	1	Donor's approach to development
A1L	1	Other, please indicate
A1M	1	Don't know/no answer

A2. TO WHAT EXTENT HAVE YOU SEEN PUBLIC OFFICIAL MISUSE THEIR PUBLIC POWERS FOR PRIVATE GAIN ?

One answer only.

1. Almost all officials are involved
2. Most officials are involved
3. Few officials are involved
4. Scarcely anyone of the officials is involved
5. Do not know/no answer

A3. WHEN DEALING WITH A PUBLIC OFFICIAL, HOW LIKELY IS IT THAT A CITIZEN HAS TO DO ONE OF THE FOLLOWING IN ORDER TO BE SUCCESSFULLY SERVED?

1. Very likely
2. Rather likely
3. Rather unlikely
4. Not likely at all
9. Do not know/no answer

A3A	To give cash to an official	1	2	3	4	9
A3B	To give a gift to an official	1	2	3	4	9
A3C	To do a favour for an official	1	2	3	4	9

A4. IN YOUR VIEW, TO WHAT EXTENT WOULD YOU EXPECT TO FIND THE MISUSE OF PUBLIC POWERS FOR PRIVATE GAIN AMONG THE FOLLOWING GROUPS:
One answer per line
1. Almost everybody is involved
2. Most are involved
3. Few are involved
4. Scarcely anyone is involved
9. Do not know/no answer

A4A	Journalists	1	2	3	4	9
A4B	Teachers	1	2	3	4	9
A4C	University professors or officials	1	2	3	4	9
A4D	Officials at ministries	1	2	3	4	9
A4E	Municipal officials	1	2	3	4	9
A4F	Administration officials in the judicial system	1	2	3	4	9
A4G	Judges	1	2	3	4	9
A4H	Public prosecutors	1	2	3	4	9
A4I	Investigating officers	1	2	3	4	9
A4J	Lawyers	1	2	3	4	9
A4K	Police officers	1	2	3	4	9
A4L	Customs officers	1	2	3	4	9
A4M	Tax officials	1	2	3	4	9
A4N	Members of the legislature	1	2	3	4	9
A4O	Ministers	1	2	3	4	9
A4P	Municipal councillors	1	2	3	4	9
A4Q	Business people	1	2	3	4	9
A4R	Doctors	1	2	3	4	9
A4S	Political party and coalition leaders	1	2	3	4	9
A4T	Local political leaders	1	2	3	4	9
A4U	Representative of non-governmental organizations	1	2	3	4	9
A4V	Representatives of international donor agencies	1	2	3	4	9
A4W	Representatives of international business	1	2	3	4	9
A4X	Bankers	1	2	3	4	9

A5. BASED ON WHAT DID YOU COME UP WITH YOUR ASSESSMENT REGARDING LEVELS OF CORRUPTION IN THE COUNTRY?
One answer only.
1. Personal experience (you have had to provide cash, gifts or favours)
2. Talks with relatives and people you know
3. Media information
4. Officials' living standard differs from what they receive as personal incomes
5. Other (Please indicate).....
9. Do not know/no answer

A6. AS YOU SEE IT, WHICH OF THE ACTIVITES LISTED BELOW FALLS UNDER YOUR DEFINITION OF CORRUPTION

One answer per line.

		Yes	No	DK/ NA
A6A	Gift to a doctor to take special care of you	1	2	9
A6B	Extending a favour to be allowed to take sabbatical	1	2	9
A6C	Unsing connections to exempt somebody close to you from military service	1	2	9
A6D	Interceding before a high-ranking official to employ a relative of yours	1	2	9
A6E	Personal request before a municipal councillor to obtain contruction permit	1	2	9
A6F	Giving cash to police man not to revoke your driving licence	1	2	9
A6G	Abuse of official position for private business purposes	1	2	9
A6H	Providing official information to people you know for purpose of private benefit	1	2	9
A6I	Accepting of cash by officials for purposes of tax concealment or reduction	1	2	9
A6J	Pre-election grants for political parties	1	2	9
A6K	Additional reimbursement for a lawyer who assists a suspect in terminating his case	1	2	9

A7. IMAGINE SOMEONE WHO HAS EXTENDED CASH OR A GI AN OFFICIAL AND HAS OBTAINED WHAT THEY WANTED. HOW, IN YOUR VIEW, IS THIS CITIZEN MOST LIKELY TO FEEL?

One answer only.

1. Angry
2. Indignant
3. Embarrassed
4. Content
9. Do not know/No answer

A8. IMAGINE YOURSELF IN AN OFFICIAL LOW-PAID POSITION. YOU ARE APPROACHED BY SOMEONE OFFERING CASH, GIFT OR FAVOUR TO SOLVE THEIR PROBLEM. WHAT WOULD YOU DO?

One answer only.

1. I would accept it if everyone is doing it
2. I would accept, if I can solve their problem
3. I would not accept it, if the solution to the problem involves law-breaking
4. I would not accept as I do not approve of such acts
9. Don't know/no answer

A9. IN YOUR VIEW, HOW ACCEPTABLE ARE THE FOLLOWING IF DONE BY A PARLIAMENTARIAN OR MEMBER OF CIVIL SERVICE?

One answer only.
1. Acceptable
2. Somewhat acceptable
3. Somewhat unacceptable
4. Unacceptable
9. Do not know/no answer

A9A	To accept an invitation for a free lunch/dinner to solve a personal problem	1	2	3	4	9
A9B	To resolve a personal problem and accept a favour in exchange	1	2	3	4	9
A9C	To accept gifts for the solution of personal problems	1	2	3	4	9
A9D	To accept cash for the solution of personal problems	1	2	3	4	9

A10. AS YOU SEE IT, TO WHAT EXTENT ARE THE FOLLOWING ACCEPTABLE DONE BY OFFICIALS AT MINISTRIES, MUNICIPALITIES AND MAYORALTIES?

One answer only.
1. Acceptable
2. Somewhat acceptable
3. Somewhat unacceptable
4. Unacceptable
9. Do not know/no answer

A11. IF, IN THE LAST YEAR YOU HAVE BEEN EXPECTED TO PROVIDE SOMETHING (CASH, GIFT OR FAVOUR) IN EXCHANGE FOR A PUBLIC SERVICE, IT WAS BY A(N):
One answer per line:

A11A	Doctor	1	2	9
A11B	Teacher	1	2	9
A11C	University professors or officials	1	2	9
A11D	Officials at ministry	1	2	9
A11E	Municipal official	1	2	9
A11F	Administration official in the judicial system	1	2	9
A11G	Judge	1	2	9
A11H	Public prosecutor	1	2	9
A11I	Investigating officer	1	2	9
A11J	Police officers	1	2	9
A11K	Customs officer	1	2	9
A11L	Tax official	1	2	9
A11M	Member of the legislature	1	2	9
A11N	Municipal councillor	1	2	9
A11O	Business people	1	2	9
A11P	Banker	1	2	9
A11Q	Other, please indicate	1	2	9

A12. WHENEVER YOU HAVE CONTACTED OFFICIALS IN THE PUBLIC SECTOR, HOW OFTEN IN THE LAST 3 YEARS DID THEY

One answer per line.
1. In all cases
2. In most cases
3. In isolated cases
4. In no cases
5. Do not know/no answer

A12A	Directly demand cash, gift or favour	1	2	3	4	9
A12B	Did not demand directly but showed that they expected cash, gift or favour	1	2	3	4	9

A13. IN THE LAST YEAR, WHEN YOU HAVE CONTACTED OFFICIALS IN THE PUBLIC SECTOR, HOW OFTEN DID YOU

One answer per line.

1. In all cases
2. In most cases
3. In isolated cases
4. In no cases
5. Do not know/no answer

A13A	Give cash to an official	1	2	3	4	9
A13B	Give gift to an official	1	2	3	4	9
A13C	Do official a favour	1	2	3	4	9

A14. IF YOU HAD AN URGENT NEED FOR A SERVICE AND AN OFFICIAL DEMANDED CASH, WHAT WOULD YOU DO?

One answer only

1. I would pay
2. I would pay if I could afford it
3. I would not pay if I had another way of solving the problem.
4. I would not pay at all
5. Do not know/ no answer

A15 IN YOUR OPINION, TO WHAT EXTENT IS THE GOVERNMENT PUTTING SERIOUS EFFORTS INTO FIGHTING CORRUPTION AMONG:

One answer per line

		Yes	No	DK/ NA
A15A	Influential business people	1	2	9
A15B	High-ranking public sector officials	1	2	9
A15C	Lower-ranking officials in direct contact with ordinary people	1	2	9

A16. IN YOUR OPINION, WHICH ARE THE THREE MOST IMPORTANT FACTORS INCREASING CORRUPTION IN YOUR COUNTRY

Show Card A16. Mark up to three answers.

A16A	**1**	**Low salaries of officials in the public sector**
A16B	**1**	**Crisis of morale in the period of transition**
A16C	**1**	**Imperfect legislation**
A16D	**1**	**Communist past legacy**
A16E	**1**	**Inefficiency of the judicial system**
A16F	**1**	**Those in power trying to make "a quick buck"**
A16G	**1**	**Lack of strict administrative control**
A16H	**1**	**Peculiarities of our national culture**
A16I	**1**	**Office duties interfering with personal interests of officials**
A16J	**1**	**Other (please indicate)**
A16K	**1**	**Badly designed donor projects n(privatization)**
A16L	**1**	**International business**
A16M	**1**	**Do not know/no answer**

One answer per line.

1. Fully agree
2. Rather agree
3. Neither agree, nor disagree
4. Rather disagree
5. Fully disagree
9. Do not know/no answer

A18. REGARDING CORRUPTION IN YOUR COUNTRY; WHICH OF THE FOLLOWING STATEMENTS IS CLOSEST TO WHAT YOU THINK?

One answer only.

1. Corruption cannot be curbed
2. There will always be corruption in our country, yet it can be limited to a degree
3. Corruption in our country can be substantially reduced
4. Corruption in our country can be eradicated
9. Do not know/No answer

A19. IN YOUR OPINION, WHAT IS EXTENT OF CORRUPTION IN THE FOLLOWING INSTITUTIONS

Not proliferated at all				Proliferated to the highest degree
1	2	3	4	5

9 = Do not know/no answer
One answer for each line in column A19 of the table opposite
Show card 19

A20. IN YOUR OPINION, WHICH OF THE LISTED INSTITUTIONS ARE MOST CORRUPT; One answer only. Put answer in column A21 of the table opposite. Show card A20.

A21. IN YOUR OPINION, WHICH OF THE LISTED INSTITUTIONS ARE LEAST CORRUPT One answer only. Put answer in column A22 of the table opposite. Show card A21.

		A19						A20	A21
A19A	Presidency	1	2	3	4	5	9	1	1
A19B	Legislature	1	2	3	4	5	9	2	2
A19C	Government	1	2	3	4	5	9	3	3
A19D	Industry line ministries	1	2	3	4	5	9	4	4
A19E	Municipal government	1	2	3	4	5	9	5	5
A19F	Municipal Administration	1	2	3	4	5	9	6	6
A19G	Army	1	2	3	4	5	9	7	7
A19H	Customs	1	2	3	4	5	9	8	8
A19I	Tax offices	1	2	3	4	5	9	9	9
A19J	Judiciary	1	2	3	4	5	9	10	10
A19K	Police	1	2	3	4	5	9	11	11
A19L	Committee on Posts and Telecommunications	1	2	3	4	5	9	12	12
A19M	Committee on Energy	1	2	3	4	5	9	13	13
A19N	Privatization Agency	1	2	3	4	5	9	14	14
A19O	Agency for Foreign Investment	1	2	3	4	5	9	15	15
A19P	Commission for the Protection of Competition	1	2	3	4	5	9	16	16
A19Q	Securities and Stoxk Exchange Commission	1	2	3	4	5	9	17	17
A19R	Audit Office	1	2	3	4	5	9	18	18
A19S	National Bank	1	2	3	4	5	9	19	19
A19T	National Institute of Statistics	1	2	3	4	5	9	20	20
	Do not know/no answer							99	99

A23. IN YOUR OPINION, WHAT IS EXTENT OF CORRUPTION IN

THE FOLLOWING INSTITUTIONS

1. **In all cases**
2. **In most cases**
3. **In isolated cases**
4. **In no cases**
9. **Do not know/no answer**

A23A	I am willing to report corruption	1	2	3	4	9
A23A	I am willing to report corruption without giving my name	1	2	3	4	9
A23A	I am not willing to report corruption	1	2	3	4	9
A23A	Do not know/no answer					

A24. TO WHAT EXTENT DO YOU TRUST THE FOLLOWING INSTITUTION WITH INFORMATION ABOUT CORRUPTION

A24A	Police	1	2	3	4	9
A24B	The Government in general	1	2	3	4	9
A24C	The media	1	2	3	4	9
A24D	The courts	1	2	3	4	9
A24E	Municipal government	1	2	3	4	9
A24F	Anti-corruption agencies	1	2	3	4	9
A24G	International donors (ombudsmen)	1	2	3	4	9
A24H	International NGOs (Transparency International)	1	2	3	4	9
A24I	Do not know/no answer					

CASE STUDY # 39
CORRUPTION SELF ASSESSMENT

What types of corruption would you expect to find in the country?
(1) virtually none ← → large extent (5)

Q1a: Grand Corruption (large bribes to decision makers)

1	2	3	4	5	Don't Know

Q1b: Petty Corruption (small payments to junior officials)

1	2	3	4	5	Don't Know

Q1c: Active Corruption (extortion, i.e. demanding a bribe)

1	2	3	4	5	Don't Know

Q1d: Active Corruption (offering a bribe)

1	2	3	4	5	Don't Know

Q1e: Offering or receiving improper gifts

1	2	3	4	5	Don't Know

Q1f: Private sector bribery

1	2	3	4	5	Don't Know

Q1g: Abuse of power

1	2	3	4	5	Don't Know

Q1h: Abuse of Discretion

1	2	3	4	5	Don't Know

Q1j: Conflict of Interest

1	2	3	4	5	Don't Know

Q1k: Self-enrichment

1	2	3	4	5	Don't Know

Q1l: Nepotism

1	2	3	4	5	Don't Know

Q1m: Clientelism

1	2	3	4	5	Don't Know

Q1n: Improper political contributions

1	2	3	4	5	Don't Know

Public Trust in Anti-Corruption Institutions

(1) always yes ← → always no (5)

Q2: Is failure to report corruption an offence in the country ?

1	2	3	4	5	Don't Know

Q3a: If witnessing corruption to what extent is the public willing to report corruption giving their names?

1	2	3	4	5	Don't Know

Q3b: If witnessing corruption to what extent is the public willing to report corruption anonymously?

1	2	3	4	5	Don't Know

The level of integrity of the following institutions

(1) low level of corruption ← → high level of corruption (5)

Q4a: Presidency

1	2	3	4	5	Don't Know

Q4b: National or State Assembly

1	2	3	4	5	Don't Know

Q4c: Judiciary

1	2	3	4	5	Don't Know

Q4c: Customs

1	2	3	4	5	Don't Know

Q4d: Police

1	2	3	4	5	Don't Know

Q4e: Prisons

1	2	3	4	5	Don't Know

Q4f: Media

q1	2	3	4	5	Don't Know

Q4g: Health System

1	2	3	4	5	Don't Know

Q4h: Education

1	2	3	4	5	Don't Know

Q6an: Ministry of public works

1	2	3	4	5	Don't Know

Q6an: Local Administrations

1	2	3	4	5	Don't Know

Q8d: Grade the integrity of the overall domestic institutions

1	2	3	4	5	Don't Know

International Institutions

Q6ba: World Bank

1	2	3	4	5	Don't Know

Q6bb: United Nations (UN)

1	2	3	4	5	Don't Know

Q6bc: International Monetary Fund IMF

1	2	3	4	5	Don't Know

Q6bd: European Union (EU)

1	2	3	4	5	Don't Know

Q8d: Grade the integrity of the overall international institutions

1	2	3	4	5	Don't Know

Effectiveness of the following institutions

(1) no need to improve, very effecdtive ← → high need to improve, very ineffective (5

Q6aa: Presidency

1	2	3	4	5	Don't Know

Q6ab: National or State Assembly

1	2	3	4	5	Don't Know

Q6ac: Judiciary

1	2	3	4	5	Don't Know

Q6ac: Customs

1	2	3	4	5	Don't Know

Q6ad: Police

1	2	3	4	5	Don't Know

Q6ad: Prisons

1	2	3	4	5	Don't Know

Q6ae: Media

1	2	3	4	5	Don't Know

Q6ag: Health System

1	2	3	4	5	Don't Know

Q6ah: Education

1	2	3	4	5	Don't Know

Q6aj: Electricity Provider

1	2	3	4	5	Don't Know

Q6an: Ministry of public works

1	2	3	4	5	Don't Know

Q6an: Local Administrations

1	2	3	4	5	Don't Know

Q8d: Grade the effectiveness of the overall domestic institutions

1	2	3	4	5	Don't Know

International Institutions

Q6ba: World Bank

1	2	3	4	5	Don't Know

Q6bb: United Nations (UN)

1	2	3	4	5	Don't Know

Q6bc: International Monetary Fund IMF

1	2	3	4	5	Don't Know

Q6bd: European Union (EU)

1	2	3	4	5	Don't Know

Q8d: Grade the effectiveness of the overall international institutions

1	2	3	4	5	Don't Know

What types of corruption would you expect to find in the country?

(1) virtually none ← → large extent (5)

Q11a: Grand Corruption (large bribes to decision makers)

1	2	3	4	5	Don't Know

Q11b: Petty Corruption (small payments to junior officials)

1	2	3	4	5	Don't Know

Q11c: Active Corruption (extortion, i.e. demanding a bribe)

1	2	3	4	5	Don't Know

Q11d: Active Corruption (offering a bribe)

1	2	3	4	5	Don't Know

Q11fb: Offering or receiving improper gifts

1	2	3	4	5	Don't Know

Q11fg: Private sector bribery

1	2	3	4	5	Don't Know

Q11h: Abuse of power

1	2	3	4	5	Don't Know

Q11i: Abuse of Discretion

1	2	3	4	5	Don't Know

Q11j: Conflict of Interest

1	2	3	4	5	Don't Know

Q11ja: Self-enrichment

1	2	3	4	5	Don't Know

Q11jb: Nepotism

1	2	3	4	5	Don't Know

Q11jc: Clientelism

1	2	3	4	5	Don't Know

Q11a: Improper political contributions

1	2	3	4	5	Don't Know

Experiences

Q13aa: Have you ever been asked of paying bribes to access health services?

Yes	*No*

Q13ab: Bribes necessary to access education services

Yes	*No*

Q13ac: Bribes necessary to get access to justice

Yes	*No*

Q13ad: Bribes necessary to get a drivers license, or other documents

Yes	*No*

Q13af: Bribes necessary to get through a police roadblock

Yes	*No*

Q13ag: Bribes necessary to get through customs

Yes	*No*

Q13ai: Bribes necessary to get electricity

Yes	*No*

Q13aj: Bribes necessary to get a telephone

Yes	*No*

Just for Business community

Q13ba: Bribes necessary to get a business license

Yes	*No*

Q13bb: Bribes necessary to avoid inspection

Yes	*No*

Q13bc: Bribes necessary for government contracts

Yes	*No*

Q13bd: Bribes necessary to get a building permit

Yes	*No*

Q13be: Bribes necessary to get an honest tax assessment

Yes	*No*

Q13ca: Contract rigging

Yes	*No*

Q13cb: Procurement

Yes	*No*

Q13cc: Influence peddling in Legislature

Yes	*No*

Q13cd: Embezzlement/abuse of power by political leaders

Yes	*No*

Q13ce: Embezzlement from the Central Bank into banks abroad

Yes	*No*

Q13cf: Corruption in connection with military procurement

Yes	*No*

Q13cg: Kickbacks on large aid donor projects

Yes	*No*

This part for Qualified categories (Judges, Lawyers, Prosecutors, Academics)
Areas which would rate as a priority:
(1) low priority ← → high priority (5)

Q10b: Improved court infrastructures

1	2	3	4	5	Don't Know

Q10c: Prompt treatment of bail applications

1	2	3	4	5	Don't Know

Q10d: Increase coordination between various criminal justice institutions

1	2	3	4	5	Don't Know

Q10e: Reducing delays / increasing timeliness in the courts

1	2	3	4	5	Don't Know

Q10f: Reducing prison population awaiting trial

1	2	3	4	5	Don't Know

Q10g: Increase consistency in sentencing

1	2	3	4	5	Don't Know

Q10h: Establishing and monitoring performance indicators for the criminal justice system

1	2	3	4	5	Don't Know

Q10i: Abuse of civil process – ex parte orders

1	2	3	4	5	Don't Know

Q10j: Increase public's confidence in the CJS

1	2	3	4	5	Don't Know

Q10m: Inadequate funding of the Criminal Justice System

1	2	3	4	5	Don't Know

Q10o: External monitoring of the courts (court user committee)

1	2	3	4	5	Don't Know

Q10p: Establishing a credible and effective Complaints mechanism

1	2	3	4	5	Don't Know

Q10q: Enforcement of the Code of Conduct

1	2	3	4	5	Don't Know

Q10r: Training in judicial ethics

1	2	3	4	5	Don't Know

This part for Qualified categories (Judges, Lawyers, Prosecutors, Academics)
Are adequate measures in place in the following areas:
(1) Extremely adequate ← → Extremely NOT adequate(5)

Q14i: Anti Corruption Legislation

1	2	3	4	5	Don't Know

Q14ea: the judiciary

1	2	3	4	5	Don't Know

Q14eb: the police

1	2	3	4	5	Don't Know

Q14ec: corrections

1	2	3	4	5	Don't Know

Q14ed: prosecutors

1	2	3	4	5	Don't Know

Q14d: Empowerment of civil society

1	2	3	4	5	Don't Know

Q14g: Public and Professional Education and Awareness

1	2	3	4	5	Don't Know

Q14j: Reform Oversight: Monitoring and evaluation

1	2	3	4	5	Don't Know

Q14k: International cooperation

1	2	3	4	5	Don't Know

Q19: State what in your opinion are the three most important improvements/interventions needed to fight corruption in the country

1._____

2._____

3._____

Information on the Respondent, please write in the box:

Age:

Gender:

M	*F*

Your Profession:

Businessmen
Private sector
Finance&Banking
Public Sector
International Organization
Student
Unemployed

Years of Experience in your current job:

CASE STUDY #40

ARGENTINA: THE USE OF DATA IN EFFORTS AGAINST CORRUPTION

INTRODUCTION

The Department of Transparency Policies of the Anti-Corruption Office of Argentina has carried out a preliminary study of transparency within the Argentine public administration. The objective of the survey was to inquire about the factors enabling and encouraging irregular practices within the national public administration. The study did not aim to look into existing cases of corruption. Instead, it attempted to "map" the practices and routines by which irregular behaviours are brought about. In short, it was intended to look into the causes, and not the symptoms, of corrupt behaviour.

In the case of Argentina, as well as in other emerging democracies, a particular institutional framework provides corruption with windows of opportunity. In Argentina, the institutional design has been imported from societies where public and private relations are organized in different and more complex cultural and economic patterns. Thus, the rewards (incentives) and punishment mechanisms that usually discourage irregular behaviour do not work in Argentina.

If one assumes that institutions shape individual behaviour, then regular and/or irregular behaviour must be a consequence of particular institutional design. Corruption should therefore be approached through an institutional point of view and should adopt a systemic perspective.

Such a conceptual framework was chosen because the Department of Transparency Policies considers corruption to be "a set of practices that diverts the behaviour of public organisations and social actors from their ultimate goal" (organizational perspective). From the individual perspective, corruption is the misuse of institutional resources for private benefit, or for the benefit of third parties.

In deciding upon such a strategy for the study, due attention was paid to other existing initiatives in the same field. The experience developed by the World Bank Institute (WBI) was used as general input. The WBI team successfully carried out similar studies and exchanged information with officials of the United Nations Interregional Crime and Justice Research Institute (UNICRI) during the preliminary stage of the study. The study carried out by the Department of Transparency Policies focused on the organizational perspective of the public administration, as a facilitating condition for individual behaviour. Generally speaking, behaviour was found to be a consequence of the following institutional failures:

- Absence of controls, including absence of proper control agencies, and of precise role definitions and norms; vague regulations; norms and regulations that were created on an ad hoc basis to cover up irregular practices.

- Discretion, understood as the capacity to dispose of or solicit public resources without an adequate framework of rules or control; and
- Absence of transparency and visibility defined as the non-application and/ or absence of a system allowing general and timely access to public information at given stages.

The study was concerned with certain specific institutional functions (stages) of the public management process. Such stages were:

- **Demand detection and definition**, including defining the quantities, conditions, qualifications, quality for contract goods, services and personnel;
- **Elaboration of patterns/criteria to satisfy demand,** including the production of rules and norms promoting certain criteria/qualities that deviate from the needs of the organization, possibly for personal or third party benefit;
- The level of **publicity and access to information** regarding the actions described in the previous two points;
- The **selection of suppliers** that will satisfy the requirements; and
- **Effective contract compliance**.

The chosen strategy and methodology attempted to achieve the following goals:

- To analyse, from an organizational perspective, the conditions that facilitate certain practices generally termed as corruption;
- To carry out the first experience of this kind within the national public administration. Several studies currently exist in Argentina on transparency, corruption, fraud, business environment. None, however, has been conducted by the national administration itself;
- To produce a report that can be used by political actors, particularly the president and ministers, as useful information for defining public policies to increase transparency;
- To avoid the negative effects that some studies on the subject can produce, by focusing on individual behaviour; and
- To develop future methodologies for research on transparency in the public sector.

DESCRIPTION OF THE STUDY

The study was carried out in the executive branch: in the Presidency, in the office of the Chief Cabinet Minister, and in nine ministries. It was divided into two components. The first comprised a set of personal interviews with high-ranking public officials. The second was a self-administered questionnaire for a group of public employees, intended to check the information provided from the upper echelons of the organization.

The study focused on the analysis of two basic functions of the public administration management process: human resources management and budget management, including procurement. Those particular functions were selected because they are common to every area of the administration covered by the study; and because they are particularly sensitive in terms of corrupt practices.

In terms of the hierarchical levels of the study, the following public officials were selected for the interviews:

- 10 under-secretaries of management; and
- 34 of the 48 principal directors of the departments of human resources, financial administration and legal administration.

The above persons were given semi-structured interviews, the results which were used to design a closed self-administered questionnaire that was administered to some 158 lower ranking officers.

The specific objectives of the survey were to:

- Search for current perceptions, recognition and information about the occurrence of irregular practices in the management of the two functions identified above; and
- Search for perceptions and opinions about the factors that enable/are more sensitive to increasing and encouraging irregular practices in the public administration management process.

The Interviews

The interviews were conducted using a guide containing questions about the public administration management process. The instrument was tested among agents who shared similar characteristics to those selected for the sample. During the analysis, problems such as the overflow of information and the difficulty in comparing one interview with another were encountered.

Adjustments had to be introduced in order to obtain a homogeneous approach to information from the subsequent interviews. The new instrument allowed a codification of the answers for a quantitative type of analysis.

The Questionnaire

The questionnaire was closed and structured, and divided into two parts. The first part defined different scenarios where irregular behaviour is described. The variable under analysis was unidimensional. The basis for the analysis was to test whether a certain practice was deemed irregular or not by the respondent. For example, the use of the official car for personal needs might not be considered irregular. The questionnaire also tried to evaluate the level of acceptance of such practices.

The second part measured the frequency of certain behaviour corresponding to each stage of the public administration production process. The respondent was also asked to choose factors promoting irregular conduct irrespective of whether it occurred at their place of work.

The instrument was tested and adjusted by Gallup Argentina, prior to fieldwork. Personnel from Gallup Argentina collected the information and guaranteed the its confidentiality. To gather the information, the Ministry of Justice and Human Rights convoked 304 public officials (the universe of the study). Over 50 per cent of the interviewed people agreed to be interviewed (158 cases: 95 persons from financial administration and 63 from human resources management areas).

CASE STUDY #41[488]

MONITORING INTERNATIONAL ANTI CORRUPTION MEASURES[489]

INTRODUCTION

The corruption of one person by another is as old as human nature itself, and efforts to regulate its perpetration by individuals, governments and industry, span the centuries. In very recent years the fight against its deleterious effects have taken on a dynamism hardly credible a decade ago. This accomplishment is particularly apparent in the OECD initiative against bribery in international business transactions which culminated in the Recommendation and Convention of 1997. The path leading to these instruments became something of a high speed track during its evolution with several interesting – and unique – features en route to the final instruments. The first part of this case study will describe this journey and examine how this Convention has developed bite. The second part outlines the latest developments that complement international law with a review of recent initiatives taken by key industries in their efforts to take a proactive stance on the issue of bribery and corruption within their particular spheres of influence.

THE OECD REVISED RECOMMENDATION AND CONVENTION

The OECD initiative against bribery in international business transactions developed out of the pledge by industrialised nations (representing around 70% of world exports and 90% of foreign direct investment world-wide) to combat the *supply side* of bribery. The approach is aimed at reducing the influx of corrupt payments into relevant markets by sanctioning the active bribers and their accomplices as well as by providing for a preventive framework. It is dependent upon other action being taken from the demand side and it is in a sense a *narrow approach* and unilateral - even if collectively unilateral: The concepts also apply to the bribery of officials of non-participatory countries. One of the motivational aspects of the OECD approach is the recognition – in the Preamble to the Convention - that bribery distorts international competitive conditions. The aim of creating a *level playing field for commerce* backed by tough supervision, may in its turn, wreak a significant change on the situation of a 'victim country', obliging it to prosecute the recipients of bribes.

Comprising two main documents, the OECD Revised Recommendation of May 1997[490]contains a list of agreed preventive and repressive measures that are

[488] The OECD Recommendation and Convention on Bribery as an example of a new horizon in international law

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[490] *Revised Recommendation of the Council on Bribery in International Business Transactions,* 23 May 1997

both criminal and non criminal in nature. The Convention of December 1997[491] focuses on the criminalisation issue and puts it into legally binding form. The history of these documents is summarised as follows.

In the aftermath of the Watergate scandal the Carter administration passed legislation to combat 'illicit payments in international business transactions'[492] this development was followed a few years later by a UN attempt to move the agenda forwards, but these efforts failed due to political problems. In 1989 the catalyst for the preparatory work leading up to the Convention was the US suggestion that the OECD work on an anti-corruption instrument that would tackle the criminalisation of foreign corrupt practices world wide. Up until that time the private sector in the US had felt it was at a trade disadvantage and was pressing for change. In addition the political developments in eastern Europe and galloping globalisation increased the prospects for a successful collective approach which hitherto had eluded other international attempts to combat bribery. The result of the OECD deliberations was embodied in the 1994 Recommendation, a 'soft law' document that mapped out the issues for the future.[493] The ensuing years involved the participants in a detailed examination of the items contained in the Recommendation and marked the transition from unilateral to collective action. Once again the result was another 'soft law' instrument but this time the growing confidence of the actors was perceptible with language couched in more prescriptive terms. This Revised Recommendation of May 1997 provided for a follow-up procedure for monitoring progress in implementing the Recommendation by Member States. Hard on its heels came the Convention itself, signed by Ministers in December 1997, and entering into force in February 1999 through ratification by six of the major economic powers. As of October 2001, 34 countries have signed and ratified,[494] and 29 countries have had their implementing legislation evaluated. The rapidity with which the Convention has been ratified and implemented is unprecedented in international law.

THE METHODOLOGY OF 'FUNCTIONAL EQUIVALENCE'

This rapid implementation was facilitated by the specific methodology of the Convention in its use of 'functional equivalence'. This principle relates to the measures taken by the Parties to sanction bribery of foreign public officials. Functional equivalence is not unlike the Directive in EC law in that it does not require countries to unify their laws but rather seeks harmonisation through defining goals and offering a choice of means tailored to local legal traditions and fundamental concepts. Functional equivalence also draws and expands on a

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[491] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* 21 November 1997, signed on 19 December 1997, in force since 15 February 1999

[492] Foreign Corrupt Practices Act 1977, as amended in 1988.

[493] Recommendation of the Council on Bribery in International Business Transactions, 27 May 1994.

[494] In addition to the 30 OECD Members, four non-OECD states are Parties to the anti-bribery initiative, namely Argentina, Brazil, Bulgaria, Chile.

technique developed in comparative law and demands a holistic approach to the examination of a law or legal concept within an individual legal system. In practice this means that the on-site visits - that are an obligatory part of the monitoring system for all countries that are party to the Convention - take on an even greater significance as they present the opportunity for country examiners to get to grips with the nuances of a judicial system through discussions with a broad cross-section of participants on the ground.[495]

Looking at some examples of functional equivalence drawn from the 1997 Bribery Convention may help to illustrate the flexibility of its application. On the issue of corporate liability the 1997 Bribery Convention gives Parties a degree of latitude on how to deal with sanctions against an offending company. Article 2 requires countries to introduce the 'responsibility of legal persons', whilst Article 3 paragraph 2 goes on to say however, that non-criminal sanctions against a corporation are also acceptable, provided that they include monetary sanctions and that they are when taken together, 'effective, proportionate and dissuasive'. The question of criminal as against administrative sanctions is of less relevance here than the more contentious issue of the scope of responsibility as it relates to a corporate entity. The question of strict or vicarious liability is raised - and is responsibility attributable to employees or compliance structures. Among the many questions that need to be considered in this context is the adequacy of sanctions and specifically whether forfeiture of profits should be an available sanction.[496]

Article 3, paragraph 3 of the Convention requires Parties to take appropriate measures to ensure that bribery and the proceeds of bribes as defined in the Treaty, or their value be subject to seizure and confiscation '...*or that monetary sanctions of comparable effect are applicable'*. Following the requirements of the Council of Europe Convention 141 on Money Laundering, Search, Seizure and Confiscation[497] and the Vienna Convention of 1988[498] on illicit trafficking in drugs, European countries have introduced sweeping confiscation laws, the Unites States and Korea would seek to realise a comparable result through a substantial fine. Considering that confiscation depends on the source of the funds and a fine is related to the gravity of the offence and the culpability of the offender, the two options ostensibly have no correlation in legal terms. However in the context of the OECD both approaches are viable if their effects are comparable, which will be the case if a straightforward, objective proportionality to earnings is used as the criterion. Where judges have a greater margin of discretion in lieu of confiscation, the level of comparability will have to be reviewed. And this sort of

[495] In addition to the 30 OECD Members, four non-OECD states are Parties to the anti-bribery initiative, namely Argentina, Brazil, Bulgaria, Chile

[496] For details see Albin Eser/Günter Heine/Barbara Huber (editors) , Criminal Responsibiltity of Legal and Collective Entities, Freiburg 1998.

[497] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990.

[498] United Nations Convention Against Illict Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1998.

evaluation may occur in the second phase review of the OECD procedure which is described below.

Whilst 'functional equivalence' is an essential tool in the assessment of a countries' approach to implementing the Recommendation and Convention, it is not without its problems. Its main disadvantage in the monitoring process is - of course - the lack of uniformity of implementing legislation, making a straightforward review or comparison between countries well nigh impossible. Another temptation is to a tendency to compare what -superficially at least – appears instantly comparable, such as maximum penalties or statutes of limitations. Thus the challenge facing commentators and country examiners is to avoid an over simplistic application of functional equivalence and instead to understand it to demand a holistic perspective of legal systems using an appropriate comparative approach combined with a sensitivity to the legal culture and attitudes to sanctioning in the country they are evaluating.[499] In addressing the adequacy of laws in a particular country the level of an applicable standard may also be problematic, the goal cannot be to set minimum levels nor should a law necessarily be considered replete only when it contains the minutiae which some countries take for granted. A balance has to be struck so that the process continues to develop and move forward, with effective implementation as the goal. Overall, functional equivalence is both an inclusive, flexible principle essential to the evaluation process, as well as a pragmatic concession that respects special circumstances, differing legal traditions and constitutions.

HOW PEER REVIEW WORKS IN PRACTICE

The country evaluations, already briefly touched upon, are one of the crucial elements of monitoring the implementation of the Recommendation and Convention. These peer reviews are formal, systematic, detailed appraisals and judgements by the entire Membership of the Convention (including the non-OECD member states that are party to the Convention) of aspects of each Members country's policies and their implementation. The OECD Working Group has developed its own procedural rules to apply this technique, drawing on experiences gained through OECD accession procedures, UN human rights audits and Financial Action Task Force mutual evaluation procedures in relation to anti-money laundering efforts.

In terms of procedure, the country evaluations are conducted by experts from two different examining countries chosen from a rotational list who in the first phase of monitoring examine the legal implementation of the 1997 Bribery Convention and the Recommendation. The examiners use descriptive texts drafted by the OECD Secretariat that are based on the countries' answers to a questionnaire as well as on legal materials submitted by the countries. The examiners give the Group (namely the participants in the Working Group) their opinion on the standard of implementation. Before the actual hearing in the Group the

[499] See Pieth, Mark ''*Funktionale Aequivalenz': Praktische Rechtsvergleichung und internationale Harmonisierung von Wirtschaftsstrafrecht*, Zeitschrift für Schweizerisches Recht, Band 119, 2000, pp.477-489.

procedures ensure a thorough exchange between the examiners and the examined: Written representations by the country evaluated and a pre-meeting of examiners and country experts to answer questions, to clarify misunderstandings and develop a focus for the Group's discussion of specific topics takes place. The phase one evaluations of countries that have implemented the international standards completed to date have been published as reports on Internet.[500] In a follow up phase termed 'phase 1 plus' adaptation of laws based on the critique of the group are evaluated and the phase 1 reports supplemented (such amendments have been signalled to the Group so far by Bulgaria, Iceland, the Czech republic, Italy and Japan).

The second phase of evaluations differs from the first in that it concentrates on the application in practice of the implementing legislation, this involves looking at the structures in place capable of dealing with this type of case, the level of resources deployed, personnel training and so on. Questionnaires are sent out as a preliminary to an on-site visit. Whilst in the country itself the evaluating teams will look at decided cases, meet with industry, trade unions, civil society as well as government officials and practitioners. The aim of phase two review is to be fact based and evaluative, identifying potential problems in the effective prevention, detection and prosecution of foreign bribery cases. The examiners may also look at the efficiency of sanctions but this may be difficult at the current stage of developments in this area and given the cultural diversity on this issue.

THE OECD PROCEDURES

With regard to both phases of peer review the OECD Working Group holds two hearings per country on two consecutive days. In the first, the Group discusses question raised by the examiners and the answers given by the country. During the evening of the first day, the examiners in phase 1 draft a short evaluative text to be attached to the report itself, in phase 2 they re-examine the suggested conclusions and recommendations. They immediately test the text with the examined country on the same evening. The second hearing, on the following day, concentrates on the text parts carrying a value judgement which may be modified if necessary then adopted word for word by the Group. Whereas the text is adopted by unanimity by the Group, the Country under examination is requested to abstain from voting. To ensure fair treatment, unanimity of the rest of the group is called for, and the examined country has the right to express a dissenting opinion in the report. The evaluation in phase 1 is appended to the descriptive part of the report, which is itself amended on the basis of the discussions and adopted in a written procedure. The procedure is open to participation by members of civil society who can, and have, contributed written comments. There is an appellate procedure 'that gives the Ministers of the OECD Council a final decision', which so far has not been resorted to. The publication of the reports is mandatory and they will also be available on the Internet.[501]

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[500] See www.oecd.org

[501] See Procedural Order for Phase 1 DAFFE/IME/BR (98)8/REV 1 and Procedural Order for Phase 2 DAFFE/IME/BR (99)33

Finland is the first country to have undergone both phase one and two evaluations. The phase two review was conducted by experts from the Czech Republic and Korea as well as OECD Secretariat members. What emerges from the Finland review may well turn up as a phenomenon in other jurisdictions too. Finland has been named by Transparency International (TI) as the least corrupt country out of about 90 countries studied for two years in a row (2000 and 2001) according to the TI 'Corruption Perceptions Index'.[502] This Index measures the level of perceived corruption in the public service of each particular country. However, it does not measure the extent to which a country's businesses are prone to bribing foreign public officials. If the review in phase one was to ensure that laws were enacted or amended to conform to the Convention, then phase two could be said to ensure that the substance of those laws are also realised. Thus taking a critical view of how businesses conduct themselves abroad - as oppose to domestically, especially when operating in neighbouring states or other regions where certain environments are known to be corrupt, will require prosecutors to take a fresh look at the behaviour of their highly respected local companies when operating outside their home market. And this will involve a reappraisal of investigative techniques, in particular with regard to the collection of evidence from abroad. In addition, governments and industry will have to increase efforts to inform and educate their business communities regarding culpability under new or revised legislation relating to the bribery of foreign officials. At the very latest, business will take cognisance of such changes to the law when criminal prosecutions are undertaken by the authorities.

OTHER MEASURES TO EFFECT CHANGE

To continue with Finland as an example, the Finnish authorities have not as yet handled a criminal case concerning the bribery of a foreign public official, and it will clearly take some time for law enforcement practice to have an impact, in Finland as well as everywhere else. However, at this stage of developments in the international arena much depends on rapid change taking effect, not least to sustain the credibility of the industrialised countries on this issue in the eyes of their counterparts in the less developed countries of the South and eastern Europe.

Thus the need for additional action within key industry sectors is of paramount importance to sustain and enhance the impetus of change. In practice this will entail the protagonists having to change *internally* which again will be a development that will occur over time. But for change to be effective and visible a co-ordinated approach within specific industry sectors is required - especially where competition is fierce.

[502] See 'Global Corruption Report 2001', Transparency International, pp 232-236.

DEVELOPING INDUSTRY STANDARDS

The development of the Wolfsberg Principles on Anti-Money Laundering[503] stand out as an example of what can be achieved by major players (in this instance the eleven largest banks in terms of private clients) who are normally rivals in a highly competitive market. These Principles were developed by the banks together with civil society over a relatively short period of time. They are continuing to develop the details of best practice and also to respond to unforeseeable challenges such as how to deal with the identification of terrorist funds. Since their implementation by these eleven banks, it is apparent that these Principles have been adopted by other banks who are not formally members of the Wolfsberg Group and that they are also used for compliance training purposes. Although the Wolfsberg Principles do not deal with the issues of bribery and corruption directly, the analogy of what can be achieved through intra industry co-operation on sensitive issues is patently clear. To take another example, the integrity standards developed by the International Federation of Consulting Engineers (FIDIC)[504] aimed at reducing corruption in aid-funded public procurement from the private sector side are a similarly dynamic set of principles that commit the industry to a standard of behaviour from which there is no going back.

The concept of industry standards is gradually gaining ground with new efforts discernible in various sectors; such as the oil and gas industry and its supply chain industries, the power sector, the mining industry and contract engineers.[505] All are either contemplating the idea of getting together or are in the process of discussing the issues involved and the consequences of revealing their innermost secrets regarding the issue of bribery as it relates to their international business transactions. Dealing for instance with such touchy areas as agents contracts and comparing their approaches and possibly even developing a common solution to prevent the use of agents as a conduit for bribery. The motivation for these industries is, on the one hand, the changing international legal framework and, on the other, growing concerns about the costs of competitive advantage obtained through corruption and not least the attendant risks to reputation that can arise if a company rides roughshod in its business practices over its customers or the countries in which it conducts business. The prospects for self-regulation through industry standards lend themselves to this risk scenario and will be increasingly deployed by a variety of industries in the future.

METHODOLOGY OF INDUSTRY STANDARDS

The obstacles to bringing together rival companies to address these issues are by no means insignificant. The whole process is very delicate if there are serious issues of subsisting bribery within the particular industry. In order for there to be an impact on the problem by industry it is essential that the composition of the group that comes together is of the right balance. This means major companies

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[503] See www.wolfsberg-principles.com

[504] See www.fidic.org

[505] See Pieth, Mark, *Staatliche Intervention und Selbstregulierung der Wirtschaft* in 'Festschrift für Lüderssen', Baden-Baden, 2002 (forthcoming)

in the sector in question having a significant world market share, who are active internationally and for whom the importance of a level playing field in competitive terms is of economic significance and for whom the risk to reputation is of overriding importance. Timing is also of the essence, bringing the right people together at the right time; this requires recognising and seizing the moment when an individual company has taken - or is well on the way to taking -the decision to confront the problem of corruption head on.

Once a group of companies wants to tackle the risks facing their business, the way forward is best achieved through a frank and forthright approach. The optimal size of a group of companies to attain the goal of a comprehensive pact is in the region of ten to twelve companies who are represented by the top echelons of each participating company so that the decision making capacity of the group is maximised. This lends momentum and weight to the whole process and is of crucial importance to the procedure. This whole process is undoubtedly a novel experience for most of the participants and may be outside their usual business experience, in these circumstances the use of external facilitators playing a positive role in nurturing the process can be invaluable. In the longer term, the issues of how to control and monitor the implementation of the standards need to be considered, either by adapting the peer review principle in an appropriate fashion or through external agencies. After having achieved an industry standard the participants might either want to keep the whole process 'secret' and monitor each other or they may want to make their document public and promote its implementation and encourage the participation of others. This alternative may include the involvement of other companies either directly (by 'subscription' as the Wolfsberg process was in the initial phase) or indirectly via regulators (the current state of the Wolfsberg Group). The question of when and how other companies within the industry can join the 'club' must also therefore be considered by the Group.

The advantages of industry standards are the speed and flexibility with which they can be brought into being and the fact that they can be adapted to address specific aspects of corruption facing any given sector of industry. The acknowledgement by major companies that they are confronting issues related to bribery will, in turn, bolster government efforts to tackle the issues, making it harder for anyone to shy away from their responsibilities, judicial, legislative or legal. The down side of industry standards relates to the question of monitoring and how best to achieve it. So far the Wolfsberg group, for example, have not pursued the option of monitoring each other. A possible risk in the long term for the participating banks may be a diminishing of their credibility externally; the lack of transparency in the verification of how the banks have actually implemented the Principles may negate the public relations effect of the exercise and dilute the prestige of being a founding member of the Group. Instead the issue falls to external regulators to pick up[506] with the possibility of developing monitoring mechanisms internally and this variation is currently under

[506] cf. Basel Committee for Banking Supervision and for example, the new 'Customer Due Diligence' standard of October 4, 2001, with reference to Wolfsberg.

examination. The development of industry standards is of course subject to all the advantages and pitfalls of self-regulation. At its best it can act as a dynamic spur to policy makers and achieve a complementary status to existing legislation.

How does all this fit together?

Where do international and national laws and industry standards converge? The focal point here must be on companies: Whilst the Convention criminalizes bribery when committed by a natural person it leaves the issue of criminal liability as it pertains to companies open and only requires that monetary sanctions be 'effective, proportionate and dissuasive'. Whether the profits of a company can be forfeited is an unresolved question in many jurisdictions and not one that is likely to be determined in a uniform way in the near future.[507] As for non-criminal sanctions against an offending company there is for example the risk of disbarment from public contracts under World Bank regulations.[508]
Criminal law has always been selectively applied and it does not need a large number of cases to promote a deterrent effect, at the same time the drive to change behaviour can also be influenced in the future by the hands-on efforts of companies involved in developing industry standards by taking things a step further and building a grid-like structure of action. This rather abstract notion would in practice entail key industrial sectors coming together to develop an intra industry standard - this would constitute the horizontal axis (such as oil, defence, pharmaceuticals industries) whilst the vertical axis would comprise the supply chain of each sector and cut across industries and include suppliers, sales agents and joint venture partners for example. In the longer term this sort of approach may even lead to comprehensive integrity pacts.

Looking at the results so far, it is apparent that change is possible and entrenched behaviour in this area can be altered, political and economic factors as well as risks to reputation all combine to create a climate of change. It may well be that once 20% of multi-national enterprises are involved in agreements relating to industry standards a swing around world-wide can be expected to occur.

[507] Even though Article 3, sec. 3 of the 1997 Convention does require the confiscation of profits also with regard to companies.
[508] See Para.1.15 of the World Bank's Procurement Guidelines.

CASE STUDY #42

AVOIDING INVOLVEMENT IN BRIBERY AND RELATED PRACTICES: DEVELOPING INDUSTRY STANDARDS

BACKGROUND

Over the past decade the environment in which international business is conducted has changed dramatically. Many parts of the private sector have been particularly affected in that challenges, as well as opportunities, have grown considerably as a consequence of the opening up of eastern Europe. New, unconsolidated government structures are constituting themselves as trading partners and the temptations for politicians, government officials and local businessmen to «cut corners» are considerable. In an already competitive industry, operating sometimes in conditions of extortion, representatives of multi-national enterprises have been involved in questionable payments. In so doing they not only create legal risks but also – and above all – jeopardise the reputation of the company. In response to this new environment, international organisations in the 1990's developed harmonised standards for governments that are aimed at combating corruption. The OECD in particular has attempted to ban foreign corrupt practices world-wide with a series of instruments (the Revised Recommendation of 1997, and the Convention of 1997). Regional organisations have followed suit (especially the COE, EU, OAS etc.). The international financial institutions have adopted their own anti-corruption policies, including the disbarment of companies caught bribing in the context of aid-funded contracts. The private sector, notably through the ICC, has developed corresponding standards for companies. Currently the intergovernmental organisations are struggling to enforce the implementation and application of the standards in their Member States. Since 1997, 34 out of 35 members of the OECD initiative have ratified the Convention, 34 have implemented corresponding laws and 33 legislations have so far been evaluated by the Working Group on Bribery. Currently, practice of law enforcement agencies in these predominantly industrialised countries is under detailed scrutiny in a second phase of evaluation (so far 4 countries evaluated). Although the discrepancy between international obligations and the reality of the business environment in many regions of the world may seem immense, there is no question that the private sector has to deal with the new situation. The following sketch explores ways of developing an industry-wide answer to this challenge. It is based on the experience of auto-regulation in specific sectors (most notably the banking sector, confronting the risks of money laundering).

Towards an Industry-Wide Standard

Managers and companies are confronted with local officials who have expectations regarding bribes and for the use of which they will not be held accountable. Faced with the increased risk of criminal, administrative and civil sanctions against managers and companies, the need for clear and unambiguous in-house policies becomes evident. The hesitation to tackle these

issues in a straightforward way, may however, be fuelled by the suspicion that competitors are continuing to effect covert payments. Therefore, it would be beneficial for such in-house rules to be implemented within the same timeframe and industry wide and possibly with an option for monitoring. There are several reasons why this is a difficult endeavour. Apart from the natural doubts about whether all employees of a competitor will play straight if pushed hard enough, many issues are by no means as clear cut as they may seem and need to be studied in greater detail (take such touchy topics as «social payments » or agents contracts and fees). In addition, companies adhere to differing management styles and ways of organising compliance to in-house rules and they may be reluctant to part with them. Experiences gained in other sectors and related topics have however, proved that the harmonisation of industry standards is possible and beneficial to the business environment: The «Wolfsberg AML Principles» (cf.www.Wolfsberg-Principles.com) may be cited as a success story in this respect: The 12 largest «private banks» in the world have – with the help of facilitators – joined efforts to unify their money laundering prevention strategies on a corporate level, thereby surmounting national regulatory differences and motivating other competitors to join, be it explicitly or implicitly. There is the potential for a similar «rapprochement», in my view, in the other sectors, even though the specific needs have of course to be analysed and the approach to such a goal should be tailor-made to the circumstances of the sector and pre-existing structures.

Developing the Process

It would be most appropriate to use a «top-down» approach to develop industry wide standards, this would comprise a risk analysis as the first step, after which an exchange of external compliance rules of the participating companies could be used as a basis for developing a joint denominator. It is foreseeable that some participants would be hesitant to share this sensitive information with their competitors. However, experience has shown that there are ways of respecting diverging corporate cultures and still reach a common goal (use of the principle «functional equivalence» applied in harmonising rules amongst countries to company rules). A further – and particularly sensitive – issue to be considered would be the topic of a possible monitoring mechanism amongst members of the Group. This is an issue that in my experience arises very far down the road and needs to be approached with due care.

Role for Facilitators

As Chairman of the OECD Working Group on Bribery a facilitator[509] has the role of «referee» between countries in making sure the standards are implemented. However, the «swing around» will not be achieved quickly through law enforcement alone, therefore key industries have come together to change the «rules of the game» through positive action. To date the facilitator has acted as facilitator to various initiatives, such as the Wolfsberg process, mentioned above, and in the development, of integrity standards for FIDIC, the Worldwide Organisation of Consulting Engineers. In many instances a fruitful co-operation in

[509] Professor Mark Pieth has played the role as a facilitator

the facilitation process has been established with the NGO Transparency International. Several of the initiatives mentioned have been facilitated jointly. For the purposes of secretariat services the facilitator has in the past used the BASEL INSTITUTE ON GOVERNANCE, an independent institution with which the facilitator is involved. This Institute could provide services to facilitate the meetings of the Group as well as deploying its experience in nurturing the process through to a successful outcome. At the very least it could serve as a resource centre. Regardless of the approach adopted, the ownership of the process needs to lie with the industry.

CASE STUDY 43

THE PRIVATE SECTOR BECOMES ACTIVE: THE WOLFSBERG PROCESS[510]

'There is a tide in the affairs of men, which taken at the flood leads on to fortune. Omitted, all the voyage of their life is bound in the shallows and in miseries. And we must take the current when it serves or lose our ventures.'

(Wm. Shakespeare, Julius Caesar)

INTRODUCTION

This Case Study examines how the Wolfsberg Anti-Money Laundering Principles[511] came into being, charts their subsequent development and also looks at what the Group may tackle in the future. The prospects for the expansion of the Group itself are also addressed and some of the possible implications this might have on its workings are posed. But before looking ahead, the first part of this section deals with the placing of this industry lead initiative into its recent historical context. The background to these developments is therefore sketched, as well as the interaction that has emerged between the various legislative and 'soft-law' initiatives that continue to contribute to the growing body of anti-money laundering rules.

THE PRIVATE SECTOR GETS ACTIVE - BUT WHY NOW ?

One aspect of the critical discourse on multi-national enterprises has long maintained that conglomerates, major industrial groupings and the financial services industry may have larger turnovers than the GDP of many a small state and wield even greater power, not only within the countries where they operate, but also on the world stage. At the national level the clout of MNE's has traditionally been channelled through lobbyists with the aim of influencing legislative initiatives that impact their businesses. But the question of taking a more proactive approach in influencing regulations and defining their own rules would, given the dynamism of globalisation, certainly be a logical undertaking for the private sector and particularly at the international level. In the context of the development of anti-money laundering initiatives this question however is even more acute: Why did companies only get active in the last couple of years and why, for more than a decade, did they leave the definition of the rules against money laundering entirely to regulators?

It is surprising because in 1988 it was the banks themselves that had requested the movers of G7 countries and others to clamp down on illegal drug markets.

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[510] Professor Mark Pieth and Gemma Aiolfi, Juristische Fakultät Universität Basel

[511] See www.Wolfsberg-Principles.com for the full text of the Wolfsberg Principles and the Wolfsberg Statement on the Financing of Terrorism. The original Principles were made public on October 30 2000 in Zurich, Switzerland.

US banks in particular had already learned to live with routine cash reporting (CTR)[512] which dated back to the provisions of the Bank Secrecy Act of 1970, and were regarded as the acceptable price to pay for being involved in the fight against organised crime. Although 'know your customer' (KYC) policies were not unknown to US securities firms from the New York Stock Exchange Rules, banks were not however, prepared to engage in serious KYC policies and customer due diligence (CDD). These concepts were regarded as both intrusive, costly and over burdensome and also because they were perhaps looked upon more as European notions that did not fit the American banking tradition. It is appropriate to recall in this context, that the original US delegation to the Financial Action Task Force in the Autumn of 1989, had no desire to promote KYC policies or suspicious transaction reporting. At that time their primary interest was focused on creating world-wide control mechanisms over money flows, both in cash and - insofar as it was possible - over electronically transferred funds. And there is nothing to suggest that banks themselves held different opinions to their regulators at this time. By focusing on the transfer of cash the emphasis was placed on the so-called placement stage of money laundering, namely the initial depositing of currency into the financial system. The complexities of the subsequent layering and integration stages were thus not tackled directly. This approach may have been adopted for various reasons, perhaps because measures to counter money laundering in the latter stages were regarded as too costly, or because the tracking of cash would, theoretically at least, solve the problem at source, thereby rendering any further controls at later stages redundant.

The developments in the late 1980s appear to have caught the banking world unawares not least because the supervisors of the UK, France and Switzerland teamed up and managed to strike a deal with the US regulators in the context of developing the FATF 40 Recommendations[513] and into which the Europeans introduced their own concepts, which included attaching to the process one of the most rigorous enforcement mechanisms known thus far in international law. The CDD rules in the FATF 40 Recommendations were created by taking a combination of national strategies and an early international Recommendation of the Basel Committee, (the Basle Statement of Principles (BSP) of 1988[514]). The KYC provisions in the Recommendations drew on Swiss law and the BSP's increased diligence in unusual circumstances, reporting obligations had their roots in UK guidance notes. In return, the US essentially obtained in the FATF Recommendations, the endorsement of what had been achieved in the Vienna Convention of 1988[515], namely the commitment of the international community to criminalise money laundering, to forfeit ill-gotten gains and the agreement to

[512] In the period 1987-1996 US banks filed 77 million CTR 's leading to 3000 money laundering cases with 7,300 people charged; of which 2,875 were found guilty.
[513] http://www.1.oecd.org/fatf/
[514] Bank for International Settlements: Basel Committee on Banking Supervision: Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering, Statement of Principles, December 1988.
[515] UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 concluded in Vienna on 20 December 1988.

share information, even though at that time it was still restricted to the topic of drugs.

Throughout the following decade bank supervisors at the national level struggled with their banking communities (and later on also the non-banks) to implement these regulations. The outcome was the creation of a patchwork of rather diverse rules which had the effect of immediately increasing both regulatory competition and regulatory arbitrage, thus enabling the money launderer to profit from these discrepancies between the various financial centres. The 1990s saw the progressive extension of anti-money laundering legislation to the transfer of proceeds of other serious crimes but in relation to CDD at the international level things quietened down and nothing happened for nearly a decade on this area (almost up to 1999). This was particularly disquieting for internationally active banks because they had to apply all these diverse standards concurrently - and at the same time they constantly risked losing clients to competitors operating under a more flexible regulatory framework elsewhere.

The need for greater harmonisation became ever more apparent, yet banks waited for regulators to make the next move. However, eventually the banks realised that this move would probably not be made for the foreseeable future not least because between 1996 and 2000 the FATF had developed other priorities, and was focusing on offshore centres and specifically on the so called non-co-operative countries and territories (NCCT's) rather than further refining its own standards and its own performance.

It was again the Basel Committee of Banking Supervisors and also to some extent the Working Group on Bribery of the OECD, both of which - independently of the other - increasingly took the view that more work on CDD should be done. Supervisors and central bankers world-wide had become increasingly concerned about the risks offshore havens posed to global financial stability, although concrete evidence for these concerns is difficult to ascertain let alone quantify. The issues were addressed on a macro-level by a specialised group in the Financial Stability Forum (FSF)[516]. The BCBS picked up the direction given by the FSF but pursued its analysis on a micro-level in that they looked at the need for the regulated banking area to fend off risky clients. In a sense this initiative mirrors the efforts of the FATF in relation to NCCT's, but gives it a different thrust - cleaning up one's own house and controlling the entry points rather than picking on the non compliant with the aim of getting them to toe the line.

The OECD's Working Group on Bribery - which had just concluded a far reaching Convention on combating bribery in business transactions[517] - had started to expand its scope of work by looking at the abuse of financial centres for bribery. This development proved to be important because in the same context the non-governmental organisation specialised in combating corruption, Transparency

[516] Financial Stability Forum, Working Group on Offshore Financial Centres Report, April 2000.
[517] Convention on combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, signed on 19 December 1997, in force since 15 February 1999.

International launched an initiative with some of the key private banks to recruit their help in preventing the misuse of financial centres for the creation of slush funds, bribe payments and bribe money laundering. The timing seemed particularly apposite as abuses of private banking by corrupt officials had been revealed in the 1990's, with highly placed political officials being found to have laundered large amounts of cash through US and European banks who had displayed a lax attitude to AML. The damage to the reputations of the banks involved was serious as is apparent in the report by the US sub-committee on private banking[518] which levied criticism by pointing to specific failings and weaknesses not only with respect to the banks involved but also with regard to the nature of global private banking. These developments contributed to the creation of a climate of change - with the notable difference that this time the affected banks themselves decided to grapple with the issues.

DEVELOPING THE INDUSTRY STANDARD

At an early stage in the Wolfsberg process, facilitators talked to key US and European banks to convince them that getting together and defining a common AML standard could be beneficial both for the banks as well as wider society. It was also clear that such a development could help to create a level playing field for banks in competition terms. A common standard could also, if picked up by regulators help reduce the diversity and uncertainties - a net effect of which would be to cut risk management costs. From the perspective of combating corruption and graft as practised by 'potentates' in particular, the banks' effort to review their procedures and internal rules could make it harder for clients to circumvent the new (at that time) anti-corruption laws by engaging in offshore transactions.

The participating banks were very cautious in the early days of the initiative, and after all it was a novel process, the outcome of which was not certain. The criteria for extending invitations to banks to join the group were on the basis of the significance of their private banking activities and also to ensure a geographic spread as far as it was possible. Some banks needed intensive convincing to join the process - especially by their peers. The initiative really took off after the two leading banks at the first meeting in October 1999, decided that as a first step they would exchange their internal corporate AML compliance rules. Working from this basis the Group subsequently decided to extract a common denominator on which to build a standard. The original 'Wolfsberg Principles' are the result of these early efforts. The first revision of the Principles was published in May 2002 and came about partly as a result of the usual internal updating that Group members had undertaken in the intervening period, as well as in response to new developments at the international level such as the Basel Committee's 'Customer Due Diligence for Banks'.[519] This process indicates that the

[518] Minority Staff Report for Permanent Subcommittee on Investigations; Hearings on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities (see www.senate.gov/gov_affairs/110999_report.htm).
[519] Bank for International Settlements: Basel Committee on Banking Supervision Working Group on Cross-border Banking, Customer Due Diligence for Banks, October 2001.

development of the Principles was clearly not an end in itself, and that further evolutions in the Principles are to be expected. The working dynamics of the Group have similarly progressed as the expeditious drafting of the Wolfsberg Statement on the Suppression of the Financing of Terrorism showed: The Statement was published in early 2002. An integral part of the process has also been the Group's efforts to make the Principles accessible and practical to other financial institutions who may want to apply them. To assist these institutions, the Group has tackled some of the details of the Principles in the 'frequently asked questions' section of their web site, these guidance texts and commentaries are formulated by sub-working groups composed of experienced and senior personnel drawn from the participating banks.

To round off the initial process, the Wolfsberg Group held a media conference in October 2000, to publish and publicise the Principles. The international press was intrigued and many journalists as well as regulators not surprisingly asked, 'so what's new? And will these Principles defeat money laundering?' It also raised - and continues to raise - questions about the message this Group is sending to regulators: In taking the initiative are the banks reacting against further regulation in an already highly regulated industry, or is it a move by the private sector to complement the regulatory framework?[520]

What is the reasoning behind this initiative?

As a voluntary code of conduct that focuses on private banking the Principles are specific to this business segment - at the same time however - they are also broadly drawn and in certain areas downright vague. It is also correct that the first version of the standards does not revolutionise CDD, it builds on some advanced but well established concepts of identification, and increased diligence in unusual cases. It addresses the issue of how to identify beneficial owners, remains however hazy on the matter of delegating CDD to third parties, be it to agents or other financial institutions (especially correspondent banks).

Whilst they are not a panacea for combating money laundering, the Principles do have the potential to bridge the 'transatlantic gap', bearing in mind that up until quite recently the US had a hard time toughening up its AML laws: Proposals by President Clinton to tighten the regulatory regime were rebuffed by the republican dominated Congress who were opposed to meaningful change at the time.[521]

The real strength of the Wolfsberg Principles however, lies in the fact that the participant banks commit to apply the rules to all their operations at home and abroad, including in offshore centres. If it may be assumed that the Group members make up more than 60% of the world market in private banking, with

[520] For examples of press comment see; The New York Times, editorial 11.6.2000, American Banker, 11.6.2000, Financial Times, 23.10.2000, The Banker, 01.10.2001, for further references see also the press comments section of the Wolfsberg Principles web site.

[521] See International Counter-Money Laundering and Foreign Anti-Corruption Act 2000, House of Representatives Report 106/2728, Committee on Banking and Financial Services, Chairman Leach.

perhaps 50% of the market share in each key offshore destination - these rules in practical terms - have great potential for becoming the leading principles throughout the industry.

Although it is difficult to second guess the motivation of the individual participants to join this initiative, there can be little doubt that the various risk elements (that are actually described in the Basel CDD paper[522]) must have been uppermost in the minds of the bankers invited to attend the initial sessions. It should moreover, be remembered that the requirements set out in the Basel CDD paper and the FATF Recommendations are aimed at national supervisors and are guidelines for minimum regulatory standards. But the implementation of rules takes time, and any subsequent amendments often even longer. This time lag was perhaps one factor that prompted the banks to get active on their own behalf: The need to counter risk in a comprehensive manner had become a paramount question of credibility for some banks, and they could not wait for piecemeal legislation. It is also the case that although the aforementioned guidelines are essentially aimed at regulators the banks also recognise that influence can be exerted at the national level, because governments will always look at what has been going on in terms of self-regulation. And given that the private sector have adopted best practice whilst drawing on a variety of traditions, the Principles will almost certainly impact any proposed legislation at national level in this area.

It has also been correctly observed by critics that these Principles lack a specific enforcement mechanism. However, monitoring is indirectly provided by Supervisory institutions, with whom the Wolfsberg Group meet on a regular basis: The standards have provoked regulators, if not into action then to be substantially more specific than they had been over the last decade.

PLAYING 'PING-PONG' WITH REGULATORS: ESTABLISHING A 'RISK BASED APPROACH'

Even if the CDD rules prepared by the Basel Committee were already well advanced in their preparation when the Wolfsberg Principles were published, and even though the CDD paper makes only brief mention of Wolfsberg in terms of it being a voluntary code of conduct that may underpin regulatory guidance but is no substitute for it, it is nevertheless virtually certain that these papers mutually influence each other.[523] The Wolfsberg Group is continuing the self-critical process in the light of the Basel Committee text and will make further amendments to the Principles in due course. This reciprocal process could also be ascertained in subsequent meetings between the banks and regulators in the years following the publication of the Principles. And this 'dialogue' is perhaps most apparent in the final paragraph of the Wolfsberg Statement on the Financing of Terrorism. The list of areas for further discussion with governmental agencies is not only a response by the banks indicating what they consider as feasible to assist in the fight against terrorism, it also takes the offensive by

[522] Ibid. Paras. 8-17.
[523] Ibid. P.5 footnote 4.

highlighting areas where regulators themselves should be active and taking responsibility - a role that would normally be associated with rule makers themselves. For example, the requests that regulators ensure that national legislation be in place to permit financial institutions to play their part in the fight against terrorism. There is no question that the banking community is committed to fighting terrorism although this open 'lobbyist' approach may in part also have been a reaction against the apportioning of responsibility in the aftermath of September 11th, and it reveals the level of confidence the Group has developed when it comes to interacting with regulators.

In some areas there are tensions between the views of regulators and bankers: The banks are increasingly uneasy about the extension of rules, which, whilst they may make sense in private banking may not be appropriate to retail banking or other sectors of the industry. To counter this tendency to generalise, the banks are trying to indicate to 'Basel' what is realistic and where a more flexible risk management approach would be more effective. It could be said that one of the main achievements of the banking industry during these last two years has been to win the regulators over to follow a 'risk based approach' when developing their norms, as opposed to one that is rule based. [524]

What though are the differences between these 'risk' and 'rule' approaches? The latter is the preserve of the State acting autonomously at national level, be it in response to international obligations or in self interest. The risk management concept also involves the making of rules and procedures but at the micro-level of the individual company although they too may also be in response to legislation or international recommendations - so thus far there appears to be common ground between the two approaches. But the rule based approach deploys abstract, prescriptive norms and is reactive in the sense that it takes account of past failures in the system. Risk management on the other hand tends to be practice based and is rooted in both past and ongoing business experience. Thus one of the characteristics of risk management is its flexibility: Whilst there are internal compliance procedures to be followed, there are also systems that enable the risk parameters to be altered by the individual company - and this can manifest itself in clashes between those at the business front-line and those responsible for the management of risk, particularly in highly competitive markets. This sort of tension may be the downside of the risk based approach but at the same time it seems that those companies that actively promote and develop their risk management systems are also typically in the top quartile in performance terms and exhibit the best in class governance and control capabilities[525] - perhaps the traditional view of compliance as a costly burden may gradually be revised.

Other characteristics of risk management in this context take into account the components of business risk and certain aspects of operational risks in an inter-linking strategic and policy network. This means that the management of risk has

[524] Ibid. Para. 20.
[525] PA Consulting Global 'IRM'Survey 2001.

fully evolved from a back office function into a CEO concern: The strategy aims to ensure that risk management is embedded in the organisation through a framework that is specifically designed and implemented in which risk is identified, quantified, controlled and reported.[526]

In terms of outcome there are also differences between the two approaches. Following the rules may still leave the onus of the outcome on the State, because those that comply with the law cannot be held responsible for shortcomings that were not envisaged by the regulations. This though is not particularly constructive in the changing environment in which private banking operates. Traditionally risk management has focused on controlling large losses which have historically been associated with credit and market risks. Whereas it is increasingly the case that large losses come from business and operational failures (and private banking is particularly exposed to certain types of operational risk).[527] Thus it is not an adequate response for banks merely to comply with legal obligations; strategies that address the risks have to be adopted - and here the banks take the responsibility upon themselves to meet this challenge.

In practical terms the banks have been given the green light to start monitoring customers with simple (and relatively cheap) means, unless risk indicators are detected. Once risks manifest themselves the financial institutions can activate a highly differentiated and graded approval of further investigation - a system that is far more efficient than the standardised ticking of boxes of the early days of AML compliance. Just as an illustration of this 'risk based approach' are the new procedures applied in cases of so called 'PEPs' (politically exposed persons), identifying officials, legislators members of the government, high ranking military and their entourages and establishing bona fide / legitimacy of the acquisition of their funds.

On the other hand banks need to be ready to do more on the identification of beneficial owners, which would include understanding the structures related to corporate entities that may be used by natural persons to open anonymous accounts.[528] To date banks did enquire and take note of the information they received, rarely did they, however require documentary evidence for the beneficial ownership. As part of the risk based approach - the Basel CDD paper encourages the banks to go beyond their current standard - here Wolfsberg needs to be adapted to the Basel recommendation which states that a banking relationship should only be established once the customer's identity has been satisfactorily verified.[529] Of course as mentioned above, the contents of the Basel paper are not automatically law but are recommendations to supervisors of member states that might still be watered down at a national level. Therefore it is crucial what the Group defines as best practice.

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[526] Ibid.
[527] Tim Shepheard-Walwyn, Operational risk Management in Private Banking, Association of Foreign Banks in Switzerland, Zurich 21 June 2002.
[528] Basel Committee on Banking Supervision, paras. 32-33.
[529] Ibid. Paras. 21-23.

The convergence by regulators and bankers on the risk based approach has resulted in the empowerment of financial institutions to develop far reaching new concepts in areas such as correspondent banking and agents, and these are briefly previewed at the end of this case study.

Recent Developments

Of course the Wolfsberg Group has not been left untouched by the events of September 11th 2001. It was impressive to realise how quickly the Senior Compliance and risk officers of the key banks grasped what the impact of the terrible events could have on their institutions. Already on the evening of the fateful day their systems were in a position such that they were ready to hunt for names. Although searching on the basis of lists of names and organisations is part of the pattern of preventing and tracing the finances of terror, it is not an area that would typically come within the domain of private banking. The focus of terrorists has not usually been comparable to large scale economic crimes - and far smaller sums are involved. Such amounts typically fall in the sphere of retail banking rather than private banking. This has implications for the standards of awareness that banks should maintain - by necessity they have to be lower in routine business - the example of payments to 'students' who perpetrated the attacks in the US, is only one of the most striking to illustrate the difficulty. Therefore expectations that banks may autonomously be in a position to detect funds primarily destined to finance terrorist activities should not be high. This difficulty is accentuated by the unwillingness of many national regulators to define 'terrorism', leaving banks without abstract guidance, rendering it difficult for them to translate such concepts into risk management mechanisms. As has already been mentioned this problem clearly has influenced the Wolfsberg Statement on terrorist financing, and whilst the banks have unequivocally pledged co-operation, they have also requested information - similar to the way in which they are used to dealing with embargo cases.

FUTURE MOVES

Wolfsberg as a key partner in developing the new FATF recommendations
The most significant current text - apart from the Basel paper - is without doubt the Consultation Paper of the FATF.[530] Much of what has already been addressed has been picked up by the FATF review: And the FATF is once again ready to discuss the range of entities covered by its CDD rules. It is also interesting that for the first time it concentrates on actual CDD procedures including such issues as the reliance on third parties to perform identification and verification obligations.

It is to be expected that the Wolfsberg Group will be a valuable contributor in the consultation process since it can credibly argue which measures are practicable. On top of this the Wolfsberg sub-working groups have developed some very original concepts in specific areas, especially on 'correspondent banking' and on 'agents and introducers'. The major contribution lies in its concrete elaboration of what risk based due diligence means in these areas, namely what questions need to be asked about 'respondent banks' in relation to the status of their supervision which may differ greatly according to company domiciles.

WILL WOLFSBERG GROW?

The Wolfsberg Group currently comprises twelve banks, all of which have a significant private banking business segment. There are obvious advantages and attractions of being part of a small group - and to name a few - include the way the decision making processes function, the practicalities of drafting, the development of trust amongst the participants and ensuring active participation in the meetings. The down side of remaining a small group is that accusations of elitism and exclusivity may be levied - although a place in the Group is not a prerequisite for an institution to adopt the Principles and to implement them within their own organisation. Also if the scope of topics that the Group examines in the future overlaps into other areas of business that their banks are engaged in, then this may also have implications both for existing and potential members.

One commentator, in looking at the potential of the Wolfsberg Principles, has picked up on their global application, and has suggested that the disbursement of funds by international financial institutions (such as the World Bank) should be given to financial institutions that are transparent and apply the very highest standards of AML policies and procedures. This 'white listing' of banks that impose standards on their operations world wide would combat the problem of regulatory arbitrage and draw on the best features and practices of the FATF, the Basel Group and the Wolfsberg Principles.[531]

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[530] Financial Action Task Force on Money Laundering : Review of the FATF Forty Recommendations Consultation Paper 30 May 2002.
[531] Jonathan M. Winer, Globalization, Terrorist Finance, and Global Conflict Time for a White List?, EJLR Special Edition on Terrorist Financing, 2002 forthcoming.

The role of facilitators and consultants who played a pivotal role in the early part of the process in getting the initiative up and running will continue to be important - not least to counter anti-competition regulations. Moreover, in a situation where there is no formal monitoring mechanism the presence of civil society does at least provide an external presence that increases the Group's credibility in the wider world. On the question of expansion, the non-governmental organisations that chart the developments of the Group would like to see the Principles as widely adopted as possible and would perhaps therefore prefer to see some sort of expansion plan. On the other hand they may take the view that now that the banks have shown their willingness to confront the risks of money laundering, then why not address other areas of concern as well - and thus regard expanded membership as less of an issue than the fact of having established an entrée into the senior echelons of some of the largest banks.

CHAPTER IX
INTERNATIONAL LEGAL COOPERATION[532]

INTRODUCTION

As concern about corruption has increased, studies of the problem have clearly demonstrated a need for international cooperation. Cooperation and various forms of technical and development assistance are needed because corruption in one country can affect other countries in the region and any other country with which the problem State has significant economic, social, political, immigration or other links. Efforts by developing countries to enhance their economic, social and cultural development are impeded, as are the best efforts of other countries to assist them in these efforts. Corruption, organized crime and related problems also tend to spread from countries where they are endemic along economic or other links to countries where they are not. The globalization of trade, economic and social structures has also increased the prevalence of individual cases of corruption which have transnational elements.

Anti-corruption measures have been developed in an attempt to address the problem in all of these aspects. The United Nations Convention against Corruption, other major multilateral and regional treaties and other materials, including this Tool Kit contain measures to encourage countries to develop and adopt domestic anti-corruption programmes and to suggest individual elements of such programmes which have been proven effective in other countries. The overall effort is intended to ensure that each country has adequate anti-corruption measures in place, and to some degree, taking into account national differences, that all of these programmes are, if not parallel, then at least coherent enough to support international cooperation. These efforts deal with the prevention and control of corruption at the domestic level and cooperation in areas such as development and technical assistance can accomplish the same thing at the international level.

The remaining element is the establishment of measures which will encourage and facilitate cooperation in dealing with specific transnational or multinational cases of corruption. In this area international cooperation is more complex because other fundamental interests come into play. From the perspective of

[532] International judicial cooperation includes the following measures:

- Extradition
- Mutual Legal Assistance (model MLA)
- Transfer of Proceedings
- Transfer of Judgments
- Transfer of Judgments, especially Transfer of Sentenced Persons
- Recovery of illegal funds (tracing, freezing and confiscation)

States, the application of the criminal justice powers which involve the use of force, arrest, detention, prosecution, adjudication, punishment and other measures, represent the most coercive applications of the law, and as such are carefully reserved for sovereign national governments and their institutions. Other important interests also often arise in transnational corruption cases: the recovery of illicitly-transferred assets on so-called "grand corruption" cases has recently emerged as one such issue. From the perspective of individuals, human rights interests also arise.[533] Given the consequences of a criminal conviction, a country's human rights protections are usually the strongest for those in criminal jeopardy, and ensuring that they are adequately protected in all relevant jurisdictions is usually a major concern in transnational cases.

International cooperation in specific cases, usually referred to as legal or judicial cooperation, is usually governed either by some form of treaty or international legal instrument among a group of countries, or some form of specific agreement or arrangement between individual countries. Agreements and arrangements differ in their degree of formality, and may be of a general nature, focused on specific offences or categories of offences, such as corruption or narcotics-related offences, or agreed between countries with respect to a specific request or investigation. In some cases, cooperation may be possible without any formal treaty, agreement or arrangement at all, on the discretion of the competent authorities of the States involved. All of these questions vary depending on the laws of the States concerned, and in some cases depending on the subject-matter involved. The general areas of cooperation recognized in the more formal and structured arrangements include the following.

- **Mutual legal assistance.**[534] The most extensive category, this includes most of the major forms of assistance needed to mount a successful investigation and prosecution. Generally, it includes requests to gather physical evidence, identify witnesses and obtain testimony, produce documents, conduct forensic tests and similar assistance. It frequently involves requests to foreign law-enforcement agencies, *via* diplomatic and executive central authorities, and may involve foreign judicial elements, especially if the assistance requested entails coercive measures such as search and seizure or electronic surveillance that raise human rights issues. In some frameworks it also includes assistance in the tracing, freezing, seizure, forfeiture and disposal or return of proceeds of crime, while in others these are provided for separately (below).
- **Tracing, freezing, seizure, confiscation and return of assets.**[535] Since the advent of measures to prevent and combat money-laundering and to

[533] The protection of individual rights is also, of course, regarded as a fundamental (and in many countries, constitutionally-entrenched) State interest, is the *raison d'etre* for a number of international organizations, and a founding principle of the United Nations.
[534] United Nations Convention against Corruption, Article 44.
[535] United Nations Convention against Corruption, Articles 14 (prevention of money-laundering), 31 (freezing, seizure and confiscation of proceeds and other property), 40 (bank secrecy not an obstacle in domestic investigation), 46 (general mutual legal assistance), and Chapter V (Asset recovery), Articles 51-57. Article 60, subparagraphs 1(e)-(h) also deal with technical assistance

use the forfeiture of proceeds of crime as an added sanction and deterrent, the pursuit of proceeds across international boundaries has spawned another form of cooperation. Many of the actual measures taken are similar to those in mutual legal assistance, and this is sometimes considered as a type of mutual legal assistance. Assets targeted are usually either the proceeds of crime, which includes other property generated or derived from such proceeds, or other property used to commit crimes or in some way connected with crimes or offenders. Forms of assistance include surveillance of transactions and the searching of financial records to trace assets which have usually been transferred many times to frustrate such tracing, the use of legal powers to "freeze" suspect assets to prevent them from being further transferred until their origins and true owners can be identified, use of legal powers to actually seize assets and various forms of property, and to confiscate them by having legal title transferred to the competent authorities.

The final, and in some cases most problematic, stage is to have the confiscated assets transferred back to where they originated. This can be problematic, especially in corruption cases. It may be difficult to establish exactly where the proceeds did originate, and if specific victims are identified, whether they or the requesting State have the better claim. Corruption cases often involve very large numbers of unidentified victims, or the offenders may be former public officials leading to the argument that it is the requesting State and not its individual citizens, which should be paid. The State which has the assets may also not be convinced that the requesting State is now free from corruption, especially in cases where a new government has taken over after a period of institutionalized "grand corruption". States on both sides of this situation face a dilemma. The requesting State is often impoverished by years or even decades of corruption and bad governance, leaving it with courts and other authorities unable to meet the high evidentiary standards of the countries where the assets have been concealed, and with few resources to hire the necessary experts. The requested State is faced with costly and complex investigations and legal proceedings to identify and confiscate the requested assets, evidence from the requesting State that may not meet established judicial standards, and if the entire process is successful, it runs the risk that it may be returning the assets to the corrupt officials of a new regime – whose credibility is usually not yet established – only to face similar requests from its future successors to pursue the same assets all over again.

- **Law enforcement cooperation.**[536] Countries with fairly high demands for cooperation frequently find it necessary to establish direct links at the law enforcement level. The degree of formality and legal structuring varies

in the form of training and other measures in relation to measures to prevent illicit asset transfers and to obtain the return of assets if they are illicitly transferred.

[536] United Nations Convention against Corruption, Articles 48 and 49. Article 50, which deals with special investigative techniques is also included in this segment because special authority is often needed to use techniques such as electronic surveillance on the request of a foreign State.

depending on the countries involved and the extent of the cooperation covered. Specific measures may include such things as arrangements for the establishment of liaison bodies, the posting of liaison officers, or the establishment of joint teams of officers to conduct specific investigations once it becomes apparent that transnational elements are present. Countries where law-enforcement is equipped with modern information and communications technologies are increasingly relying on these to support secure Internet web-sites, electronic mail networks and similar arrangements to identify possible offenders and transnational elements of cases quickly, avoid or link parallel investigations and support ongoing investigations.

- **Extradition.**[537] Extradition is the process whereby a country wishing to prosecute an alleged offender who is in another country formally requests the country in which the offender is found to turn him or her over for trial. Traditionally this has involved the extradition of fugitive offenders from countries to which they had fled after committing a crime, but more recently, globalization, new information and communications technologies and other factors have led to increasing numbers of cases where offences occur in several countries at once and offenders are extradited to jurisdictions where they have never been before. The process of extradition normally involves a number of stages. The requesting State contacts the requested State, identifying the offender and providing sufficient evidence to convince the requested State that there is a criminal (usually *prima facie*) case to meet. If satisfied, the requested State arrests and detains the offender, conducts judicial proceedings in which the offender may challenge the requesting State's case or motives, and if still satisfied, extradites the offender to the requesting State. These proceedings are generally much longer and more elaborate than those for other forms of cooperation because the basic human rights of the accused offender are in issue at every stage. The requesting State need not make out a full criminal case – this would entail prosecuting the offender twice – but it must at each stage produce sufficient evidence to persuade the courts and political authorities of the requested State that the infringements on the accused offender's rights are justified, and that there is no improper motive for the extradition. The cost and complexity of this process means that it is not usually used for minor cases.
- **Other forms of cooperation.** These are limited only by the needs and creativity of the states which set up the arrangements. Common arrangements include the transfer of criminal proceedings,[538] in which an offender charged in one State can be prosecuted in another, possibly because most of the witnesses or other evidence is there, or because a group of countries all affected by an offence decide among them which is the most convenient forum for trial. Offenders who have been convicted

[537] United Nations Convention against Corruption, Article 44.
[538] United Nations Convention against Corruption, Article 47.

and sentenced may also be transferred at some later time, allowing them to serve sentences in their own country.[539]

[539] United Nations Convention against Corruption, Article 45.

TOOL #42

EXTRADITION

Extradition is the surrender by one State, at the request of another, of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting State. Generally extradition is subject to careful judicial proceedings, especially in the requested State, because matters of national sovereignty and the human rights of the person whose extradition is sought require protection. Proceedings are generally conducted within frameworks established by international law in the form of treaties or other agreements or arrangements between the States concerned, and national law, which establishes rules for the making and consideration of requests, review of the validity of the basis for prosecution if the person is extradited, and the application of safeguards to ensure that fundamental substantive and procedural standards can and will be met by the requesting State. In many countries, an element of political discretion is also involved.These frameworks commonly establish a number of limits. Not all of these necessarily apply in every case, and in some areas, the recent trend has been to reduce or remove obstacles as transnational crime, pressure to extradite offenders and case volumes have increased.

- **Offences must be extraditable.** Generally, both international instruments and national law does not provide for extradition for every possible offence. In some cases, lists of specific offences are prescribed and on others categories of offences are prescribed, dealing with corruption, narcotics trafficking, organized crime or other specific subject areas.[540]
- **Offences must be sufficiently serious to warrant extradition.** Extradition is complex and costly for both governments, and most countries apply *de minimus* rules, in which offences which fall below a certain standard of seriousness, measured by the type of conduct or the maximum possible punishment, are not extraditable.[541]
- **Offences must correspond in both countries (dual criminality).** This principle is no longer applied as strictly as it had been by some countries, and it is not always necessary to establish that the actual offences correspond in both countries. In most cases, however, countries will not extradite unless the underlying conduct cited by the requesting State is also an extraditable offence in the requested State.[542]

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[540] The United Nations Convention against Corruption establishes a category of extraditable offences which includes any offence established by the Convention which has been implemented by, or is punishable in, the States Parties concerned. See Article 44, paragraph 1. Paragraph 2 makes it clear that States still may extradite for offences not included in the category if they wish.

[541] See United Nations Convention against Corruption, Article 44, paragraph 8.

[542] See United Nations Convention against Corruption, Article 43, paragraph 2 and Article 44, paragraphs 2 and 8. In Article 44, paragraph 2 makes it clear that dual criminality requirements can be waived if desired, and paragraph 8 preserves extradition conditions set out in domestic law, which in some countries may include dual criminality requirements. Article 43, paragraph 2 states that where dual criminality is a requirement, it is deemed to be satisfied where the conduct

- **There must be a treaty, agreement or arrangement.** Extradition is allowed by some countries without this requirement, but in most cases, domestic laws require some form of international basis, both to ensure reciprocity and establish a basic procedural framework to ensure that basic safeguards are met. Where required at all, the international law basis for extradition may be a general, multilateral treaty such as the United Nations Conventions dealing with narcotic drugs, transnational organized crime or corruption, a bilateral treaty between the States involved, sometimes dealing only with a narrow range of offences, or a specific arrangement negotiated to cover a single case or series of related cases.[543]
- **Extradition must not be sought for an improper reason.** As an additional safeguard both treaties and political discretion may be used to block extradition where, in the view of the requested State, the real purpose is discriminatory or would amount to prosecution for reasons other than criminal behaviour, such as race, religion, ethnicity etc.[544]
- **Offenders can only be prosecuted for the reason they were extradited.** To prevent abuses in which offenders are extradited for an extraditable offence in order to prosecute them for something else which in itself would not have been extraditable, many countries insist on what is known as "specialty", in which the requesting State must undertake not to prosecute for other offences. This restriction is still applied, but has been relaxed to some degree to allow for prosecution for other related offences. Where it becomes apparent after extradition that the accused offender may have committed further offences, a waiver of specialty can also be sought from the State which previously extradited to allow the additional prosecutions to take place.[545]
- **In some countries, offenders cannot be extradited for "political" or "fiscal" offences.** Historically, countries were not willing to extradite offenders where there was a likelihood that the requesting State was pursuing political opponents of the government or attempting to enforce its tax laws extraterritorially. In recent treaties, the trend has been to limit these restrictions, either by suspending them entirely, or more commonly,

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underlying the offence is a crime in both States, even if the actual offences do not correspond exactly.

[543] The United Nations Convention against Corruption and similar treaties cover both possibilities. Article 44 paragraphs 6 and 7 provide that, if a treaty is required, the Convention must either be sufficient in itself or States Parties in this situation must conclude additional treaties to cover extradition for Convention offences. If no treaty is required, States Parties must ensure that all of the offences established in accordance with the Convention are extraditable.

[544] See United Nations Convention against Corruption, Article 44, paragraph 15.

[545] United Nations Convention against Corruption, Article 44, paragraph 3 does not suspend speciality, but allows extradition for a group of offences if any one of those offences is extraditable under the Convention.

by providing that the offences made extraditable under the treaty could not be treated as political or fiscal offences.[546]

- **In some countries, citizens have the right not to be extradited.** In some countries, the right of nationals to enter into and remain in their own country supersedes the powers of the State to extradite them, and is constitutionally entrenched, making it impossible to change when ratifying and implementing an international treaty. To deal with this scenario, modern treaty requirements commonly include requirements that any offender not extradited for this reason must be prosecuted at home, usually with the assistance of the requesting State.[547]
- **In some countries, offenders may not be extradited to face the possibility of unacceptable treatment of punishment.** Increasingly, countries which ban capital punishment at home are also unwilling to, and in some cases constitutionally prohibited from, extraditing an accused offender to another country where the offender may be subject to the death penalty if convicted. In other cases, extradition to places where torture or other cruel or unusual treatment may be inflicted may also be refused. Refusal may be made judicially or through executive discretion, and in some cases extradition to death penalty countries may still be possible if the requesting State provides binding assurances that the death penalty will not be sought by prosecutors or carried out if the accused offender is convicted.

ESTABLISHMENT OF A NATIONAL EXTRADITION CAPABILITY

- Other technical assistance materials cover the establishment of national authorities in detail, and these will not generally be different for corruption-related cases than other cases, so the necessary measures will not be dealt with in detail here.[548] The major elements and requirements of a national system include the following.
- **Reciprocal capability.** Extradition obligations are reciprocal, which means that domestic authorities must be capable of both seeking extradition from other countries and of responding to requests to extradite offenders to other countries.
- **Making extradition requests.** The competent authorities must determine what the requirements of the requested State are, and be able to meet

[546] See United Nations Convention against Corruption, Article 44, paragraph 4, which requires that corruption offences not be treated as political offences, and paragraph 16, which states that State Parties may not refuse to extradite at all on the basis that the offence is seen as a fiscal offence.

[547] See United Nations Convention against Corruption, Article 44, paragraph 11. See also Article 42, paragraph 3, which requires State Parties to establish the necessary extraterritorial jurisdiction so that they can prosecute a citizen accused of committing a Convention offence in another country. These requirements are commonly referred to as "extradite or prosecute" (*aut dedere aut judicare*) requirements and are also found in the United Nations Convention against transnational Organized Crime and some of the anti-terrorism treaties.

[548] *[xxx insert references to Commonwealth and other materials here or list in the text at this pointxxx]*

those requirements. Generally this will involve liaison between the national extradition authority and the local prosecutors and law-enforcement officials seeking the extradition. Evidence to establish the necessary basis must be assembled and formulated (including language translation where necessary) for the requested State.

- **Responding to extradition requests.** Competent authorities must be able to arrest and detain accused offenders, conduct necessary proceedings and extradite the offenders when required to do so. This also usually involves cooperation between a central or national authority and the local law enforcement agency in the place where the accused offender is found.
- **Centralization.** Most treaties speak of "central authorities", the establishment of which simplifies matters by providing a basic point-of-contact for requesting States, and by concentrating expertise on extradition and related matters. Essentially, the requesting State can contact the central authority of the requested State, which will then examine the request, establish that it meets basic legal and treaty requirements, and refer it on to the appropriate national and/or local authorities, who locate and arrest the offender and conduct the necessary judicial proceedings

RELATED TOOLS

International legal instruments covering extradition for general offence categories

- United Nations Convention against Corruption (not in force, corruption and related offences, including money-laundering)
- United Nations Convention against Transnational Organized Crime
- Commonwealth Scheme (Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth, 1966),
- European Convention on Extradition (1957); First Additional Protocol, Second Additional Protocol,
- EU Extradition Convention of 1995 and 1996, 1990 Schengen Agreement
- Benelux Convention on Extradition and Judicial Assistance in Penal Matters of 27 June 1962,
- Nordic States Scheme of 1962,
- Inter-American Conventions,
- The Arab League Extradition Agreement of 14 September 1952,
- Convention on judicial cooperation of the Union Africaine et Malagache of 1961,
- Convention on extradition of the Economic Community of West African States of 6 August 1994

TOOL #43

MUTUAL LEGAL ASSISTANCE (MLA)

Mutual legal assistance is an international cooperation process by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases, and, in tracing, freezing, seizing and ultimately confiscating criminally derived wealth. It covers a wide and ever-expanding range of assistance. They include: search and seizure; production of documents; taking of witness statements by video conference; and temporary transfer of prisoners or other witnesses to give evidence

It differs from traditional cooperation between law enforcement agencies. Law enforcement cooperation enables a wide range of intelligence and information sharing, including from witnesses providing they agree to give information, documents or other evidentiary materials voluntarily. If the witness is unwilling, coercive measures will be needed, usually in the form of a court order from a judicial officer.

It also differs from extradition, although many of the legal principles underlying mutual legal assistance are derived from extradition law and practice. Extradition involves the surrender of a person from one sovereign jurisdiction to another and fundamentally effects the liberty and possibly life of that person. Accordingly, extradition law, practice and procedure typically enable less flexibility and room for discretion in granting a request than mutual legal assistance.

DESCRIPTION

An United Nations expert working group (EWG) brought together in Vienna in December 2001 recommended that States take the following actions in order to facilitate the providing of effective mutual legal assistance:

Action 1. Enhancing the Effectiveness of MLA Treaties and Legislation

An effective legal basis to provide mutual legal assistance is critical to ensuring effective action. States should develop broad mutual legal assistance laws and treaties in order to create such a legal basis. Since mutual legal assistance treaties (MLATs) create a binding obligation to cooperate with respect to a range of mechanisms, States should, wherever possible, expand the number of States with which they have such treaty relationships. States or regions that would have difficulty negotiating an extensive network of bilateral MLATs should consider developing regional MLATs to create a modern legal framework for cooperation or, if that is not possible, ensure that they have an up-to-date domestic legal basis for providing legal assistance. In that context States may wish to consider relevant United Nations or regional model treaties[549]or model legislation[550] and their associated guidelines or commentaries.

[549]Eg, the United Nations Model Treaty on Mutual Assistance in Criminal Matters (Annex to Resolution 45/117 of 14 December 1990, and complementary provisions (Annex I to Resolution 53/112 of 9 December 1998; Model Treaty on Extradition (Annex to Resolution 45/116 of 14 December 1990, and complementary provisions (Annex I to Resolution 52/88 of 12 December 1997.

In developing or reviewing treaties and legislation States should ensure that there is the greatest possible flexibility in the domestic law and practice to enable broad and speedy assistance. It is particularly important to have the capacity to render the assistance in the manner sought by the requesting State.

States should regularly review such treaties and laws and, as needed, supplement them to ensure that they keep pace with useful developments in international mutual legal assistance practice.

Action 2. Strengthening effectiveness of central authorities

Establishment of effective central authorities

The United Nations Conventions on drugs and crime contain extensive and broadly similar provisions relating to mutual legal assistance. Included in their provisions are requirements for each Party to notify the Secretary-General of the United Nations of the central authority designated by it to receive, transmit or execute requests for mutual legal assistance. This is critical information for Requesting States in planning and drawing up requests. It must be accurate, up-to-date and widely available to those who frame or transmit mutual legal assistance requests.

States that have not already done so should establish a central authority that facilitates the making of requests under article 7 of the 1988 Convention for mutual legal assistance to other States Parties, and for speedy execution of requests received from other States Parties. Central authorities should be staffed with practitioners who are legally trained, have developed institutional expertise and continuity in the area of mutual legal assistance.

Designation of authorities with important national drug control capability in other fields (e.g., health ministries), but little if any in international mutual legal assistance should be avoided.

Ensuring the dissemination of up-to-date contact information

Parties to the 1988 Convention should ensure that contact information contained in the United Nations Directory of competent authorities under article 7 of the Convention is kept up to date, and, to the extent possible, provides information for contacting its central authority via phone, fax and Internet.

Ensuring round-the-clock availability

Both with respect to the 1988 Convention and generally, the central authority of a State should, to greatest extent possible, provide for a means of contacting an official of the central authority if necessary for the purposes of executing an emergency request for mutual legal assistance after working hours. If no other reliable means is available, States may consider ensuring that their Interpol

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[550] Eg, UNDCP's model laws: (a) for States of common law legal tradition Model Mutual Assistance in Criminal Matters Bill 2002, Model Foreign Evidence Bill 2002, Model Extradition (Amendment) Bill 2002, Model Witness Protection Bill 2002; (b) for States of the civil or continental legal tradition Model Law on Mutual Legal Assistance 2002.

National Central Bureau or other existing channel is able to reach such an official after working hours, with due consideration given to time zones.

Consistency of central authorities for the purpose

The EWG noted the wide and growing range of international conventions, each requiring parties to afford one another the widest measure mutual legal assistance in relation to the offences covered by the particular convention, and each requiring for that purpose the designation of a central authority.

The EWG noted the potential for fragmentation of effort and inconsistency of approach if different central authorities are designated for different groups of offences. States are therefore urged to ensure that their central authorities under the 1988 Convention and the UN Convention on Transnational Organized Crime of 2000 are a single entity of the kind described in this section, in order to make it easier for other States to contact the appropriate component for all kinds of mutual legal assistance in criminal matters, and to facilitate greater consistency of mutual legal assistance practice for different kinds of criminal offences.

Reducing delay

The EWG noted that significant delay in the execution of request is in part caused by delays in consideration of the request by the receiving central authority and transmission of the request to the appropriate executing authority. States should take appropriate action to ensure that requests are examined and prioritized by central authorities promptly upon receipt and transmitted to executing authorities without delay. States should consider placing time limits upon processing of requests by central authorities. States are encouraged to afford foreign requests the same priority as similar domestic investigations or proceedings. States should also ensure that executing agencies do not unreasonably delay processing of requests. Appropriate coordination arrangements should be in place in federal jurisdictions where constituent States have execution responsibilities to minimize the risk of delayed responses.

Action 3. Ensuring awareness of national legal requirements and best practices

Increasing availability and use of practical guides regarding national mutual legal assistance legal framework and practices (domestic manuals; guides for foreign authorities)

It is important that domestic authorities be aware of the availability of mutual legal assistance and know the procedures to follow to obtain that assistance in relation to an investigation or prosecution. It is also very useful, particularly in larger jurisdictions, where there may be several authorities involved in the making or execution of such requests, to provide for the sharing of information between those authorities.

States should adopt mechanisms to allow for the dissemination of information, regarding the law, practice and procedures for mutual legal assistance and on making requests to other States, to domestic authorities. One possible approach is to develop a procedural manual or guide for distribution to relevant law enforcement, prosecutorial and judicial authorities. Other useful mechanisms can

include the distribution of a regular newsletter and the convening of domestic practitioners meetings to provide updates on cases, legislation and general developments.

The provision of information to foreign authorities was also highlighted as an important measure to facilitate effective cooperation. States should develop guidelines on domestic law and procedures relating to mutual legal assistance to inform foreign authorities on the requirements that must be met to obtain assistance. Any such guidelines should be made available to foreign authorities through a variety of methods, such as, for example, publication on a website, direct transmission to law enforcement partners in other States or distribution through the ODCCP or other international organizations.

Increasing training of personnel involved in the mutual legal assistance process
Effective implementation of mutual legal assistance instruments and legislation is not possible without personnel who are well trained with respect to the applicable laws, principles and practices. States should use a broad range of methods to provide such training, in a manner that will allow for the expertise to be sustained, for example:

- Lectures and presentations by central authorities as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial authorities;
- Special workshops or seminars on a domestic, regional or multi-jurisdictional basis;
- Introducing programmes on mutual legal assistance as part of the curriculum for law schools or continuing legal education programmes; and
- Exchanges of personnel between central authorities of various jurisdictions.

Action 4. Expediting cooperation through use if alternatives, when appropriate

Value of police channels where formal coercive measures are not required…

The EWG wanted to emphasize that, except for coercive measures normally requiring judicial authority, formal mutual legal assistance will not always be necessary to obtain assistance from other States.

Whenever possible, information or intelligence should initially be sought through police-to-police contact, which is faster, cheaper and more flexible than the more formal route of mutual legal assistance. Such contact can be carried out through ICPO/Interpol, Europol, through local crime liaison officers, under any applicable memoranda of understanding, or through any regional arrangements, formal and informal, that are available.

Particularly where evidence is voluntarily given, or publicly available…
While generally police-to-police contact can never be used to obtain coercive measures for the sole use of the requesting State, it may be used to obtain voluntarily given evidence, evidence from public records or other publicly available sources. Again, the method has the advantage of being faster and

more reactive than formal requests. Certain categories of evidence or information may also be obtained directly from abroad without the need for police channels, for example publicly available information stored on the Internet or in other repositories of public records.

Or to help accelerate an effective response to very urgent formal requests…

Many States will also permit very urgent requests to be made orally or by fax between law enforcement officers so that advance preparations can be made or urgent non-coercive assistance given, at the same time as a formal request is routed between central authorities.

But always inform the Central Authority of the prior informal channel contacts…

The formal request should state that a copy has been sent by the informal route to prevent duplication of work. Similarly, where there has been prior police to police contact, the Letter of Request should state this and give brief details.

Use of Joint Investigation Teams

States should use joint investigation teams between officers of two or more States where there is a transnational aspect to the offence, for example in facilitating controlled deliveries of drugs or in cross border surveillance operations.

States should make full use of the benefits of the exchange of financial intelligence (in accordance with appropriate safeguards) between agencies responsible for the collating of financial transaction data and, where necessary, develop or enact the appropriate enabling legislation.

Action 5. Maximizing effectiveness through direct personal contact between central authorities of requesting and requested States

Maintaining direct contact throughout all stages of the request

The 1993 Report[551] had stressed the importance of personal contacts to open communication channels and to develop the familiarity and trust necessary to achieve best results in mutual legal assistance casework.

The EWG reaffirmed that personal contact between members of central authorities, prosecutors and investigators from the requesting and requested States remains critically important at every stage in the mutual assistance process. To facilitate that, contact details, including phone, fax and where available, email addresses, of the responsible officials, should be clearly stated within the request. Sometimes it may be desirable to establish contact with the official in the requested State before sending the request in order to clarify legal requirements or simplify procedures. Such contact can be initiated through the police-to-police means listed above, including through existing police attaché networks, or between prosecutors or staff of central authorities through the UNDCP list of competent authorities, through networks such as the European

[551]UNDCP Expert Working Group on Mutual Legal Assistance and Related Cooperation (E/CN.7/1993/CRP.13). The EWG found that the recommendations in the 1993 Report had stood the test of time and still represented best practice. Some of them were now formally reflected in later instruments, such as Article 18 of the United Nations Against Transnational Organized Crime, 2000.

Justice Network of the European Union, or through less formal structures such as the International Association of Prosecutors or simply personal contacts.

Benefits of Liaison Magistrates, Prosecutors and Police Officers

The EWG also encouraged States to take initiatives such as the exchange of liaison police officers, magistrates or prosecutors with States with which there is significant mutual legal assistance traffic, either by posting a permanent member of staff to the central authority of that country, or by arranging short-term exchanges of staff. Experience shows that such "on-site" initiatives produce faster and more useful mutual legal assistance than usually possible through "distance" dealings.

Action 6. Preparing effective requests for mutual legal assistance

Preparation of a request for assistance involves consideration of a number of requirements, for instance, treaty provisions (where applicable), domestic law, the requirements of the requested State.

Too meticulous attention to detail, however, could result in a request that was unduly lengthy or was so prescriptive that it inhibited the requested State from resorting to alternative methods of securing the desired end result. Those preparing requests should apply these basic principles:

- Be very specific in presentation;
- Link the existing investigation or proceedings to the assistance required;
- Specify the precise assistance sought, and
- Where possible, focus on the end-result and not on the method of securing that end-result (for example, it may be possible for the Requested State to obtain the evidence by means of a production or other court order, rather than by means of a search warrant)
- Assist in the application of the above principles, the EWG developed checklists and tools for use in preparing requests. The checklists set out both the requirements generally expected of requests and additional specific requirements for certain areas of assistance.

Action 7. Eliminating or Reducing impediments to execution of requests in the Requested State

Interpreting legal requirements flexibly.

In general, States should strive to provide extensive cooperation to each other to ensure that national law enforcement authorities are not impeded in pursuing criminals who may seek to shield their actions by scattering evidence and the proceeds of crimes in different States. As described below, States should examine whether their current framework for providing assistance creates unnecessary impediments to cooperation and, where possible, reduce or eliminate them.

In addition, those prerequisites to cooperation that are retained should be interpreted liberally in favour of cooperation; the terms of applicable laws and treaties should not be applied in an unduly rigid way that impedes rather than facilitates the granting of assistance.

Minimizing grounds for refusal and exercising them sparingly

If assistance is to be rendered as extensively as possible between States, the grounds upon which a request may be refused should be minimal, limited to protections that are fundamental to the requested State.

Many of the existing grounds of refusal in mutual legal assistance are a "carry over" from extradition law and practice, where the life or liberty of the target may be more directly and immediately at stake. States should carefully examine such existing grounds of refusal to determine if it is necessary to retain them for mutual legal assistance. An area of particular concern was dual criminality. It was noted that positions were divided, with some States requiring it for all requests, some for compulsory measures only, some having discretion to refuse on that basis and some with neither a requirement nor a discretion to refuse. Because of the problems that can arise from the application of this concept to mutual assistance, the EWG recommended that States consider restricting or eliminating the application of the principle, in particular where it is a mandatory precondition.

Problems can also arise from the application of the *ne bis in idem* principle as a grounds for refusal of assistance. To the greatest extent possible, those States applying this grounds for refusal should use a flexible and creative approach to try to minimize the circumstances where assistance must be refused on this basis. For example, when necessary, they should obtain an undertaking that the requesting State will not prosecute a person who already has been prosecuted in respect of the same conduct in the requested State, to enable information to be provided to assist in investigations in the requesting State. Some States do not apply this grounds for refusal at all and States may wish to consider if it is possible to adopt such an approach.

Any grounds for refusal should be invoked rarely, only when absolutely necessary.

Reducing use limitations

Traditionally, evidence transmitted in response to a request for mutual legal assistance could not be used for purposes not described in the request unless

the requesting State contacted the requested State and asked for express consent to other uses. In order to avoid cumbersome requirements that are often not necessary, however, many States have provided for a more streamlined approach in their mutual legal assistance practice. For example, many modern mutual legal assistance treaties require the requested State to advise that it wishes to impose a specific use limitation; if the advisory is not deemed necessary, there will be no limitation of use .

Such methods provide adequate control to the requested State in important cases while facilitating the efficiency of mutual legal assistance in the many cases that are not sensitive. States should consider adopting such modern approaches to use limitations.

Ensuring confidentiality in appropriate cases

Some States are not in a position to maintain confidentiality of requests and the contents of requests have been disclosed to the subjects of the foreign investigation/proceedings, thereby potentially prejudicing the investigation/proceedings. It was noted that confidentiality of requests was often a critical factor in the execution of requests. It was recommended that where it is specifically requested, requested States should take appropriate measures to ensure that the confidentiality of requests is maintained. In circumstances where it is not possible to maintain confidentiality under the law of the requested State, the requested State should notify the requesting State at the earliest possible opportunity and, in any case, prior to the execution of the request to allow it to decide if it wishes to continue with the request in the absence of confidentiality.

Execution of requests in accordance with procedures specified by the requesting State

It is important to comply with formal evidentiary/admissibility requirements stipulated by the requesting State to ensure the request achieve its purpose. It was noted that failure to comply with such requirements would often make it impossible to use the evidence in the proceedings in the requesting State, or at the least, causes delay, (for example where the requested material has to be returned to the requested State for certification/authentication in accordance with the request). The requested State should make every effort to achieve compliance with specified procedures and formalities to the extent that such procedures/formalities are not contrary to the domestic law of the requested State. States are also encouraged to consider if domestic laws relating to the reception of evidence can be made more flexible to overcome problems with the use of evidence gathered in a foreign State.

Coordination in multijurisdictional cases

Increasingly, there are cases in which more than one State has jurisdiction over some or all of the participants in a crime. In some cases, it will be most effective for the States concerned to choose a single venue for prosecution; in others, it may be best for one State to prosecute some participants while one or more other States pursue the remainder. In general, coordination in such multi-jurisdictional cases will, inter alia, avoid a multiplicity of requests for mutual legal assistance from each State with jurisdiction Where there are multiple requests for assistance in the same case, States are encouraged to closely consult in order to avoid needless confusion and duplication of effort.

Reducing complexity of mutual legal assistance through reform of extradition processes

Traditionally, some States have not extradited their nationals to the State in which a crime took place. At times, such States would instead seek to prosecute their national themselves in lieu of extradition, resulting in lengthy and complex requests for mutual legal assistance to obtain the necessary evidence from the country in which the crime took place.

Recent increases in the number of States that either will extradite their nationals or will temporarily extradite them provided that any sentence can be served in the State of nationality, reduce the need for mutual legal assistance that would otherwise be required.

States that do not extradite nationals should consider whether their approach can be reduced or eliminated. If that is not possible, the States concerned should seek to coordinate efficiently with a view to an effective domestic prosecution in lieu of extradition.

Cooperation with respect to confiscation (enforcement of civil forfeiture, asset sharing)

There are particular impediments to assistance with respect to the freezing/ seizure and confiscation of proceeds of crime. As noted in the report of the EWG on asset forfeiture[552] in relation to freezing/ seizure, it can be difficult to obtain this assistance on the urgent basis required because of some of the inherent delays in the mutual assistance process.

Problems also arise because of the different approaches to the execution of mutual assistance requests and the varying systems for confiscation.

The 1988 Convention permits a State to comply with a request for freezing/ seizure or confiscation by directly enforcing the foreign order or by initiating proceedings in order to obtain a domestic order. As a result the approach taken differs between States.

Further, the States that obtain domestic orders do so on the basis of varying domestic asset confiscation regimes. In some States there is a requirement to provide evidence of a connection between the property sought to be confiscated and an offence. Other States employ a value or benefit system where there need only be evidence that the property is linked to a person who has been accused or convicted of a crime.

Experience in this area clearly demonstrates that the direct enforcement approach is much less resource intensive, avoids duplication and is significantly more effective in affording the assistance sought on a timely basis. Consistent with the conclusions of the EWG on asset forfeiture, the EWG strongly recommended that States that have not done so adopt legislation to permit the direct enforcement of foreign orders for freezing/seizure and confiscation.

In the interim, where a State is seeking assistance by way of freezing/seizing or confiscation of assets, prior consultation will be required to determine which

[552] UNDCP Expert Working Group on Effective Asset Forfeiture Casewqork, Vienna, 3-7 September 2001

system is employed in the requested State in order that the request can be properly formulated.

The EWG also noted that several jurisdictions have adopted or are in the process of adopting regimes for civil forfeiture (i.e. without the need to obtain a criminal conviction as a prerequisite for final confiscation). The EWG supported the use of civil forfeiture as an effective tool for restraint and confiscation. It was, however, recognized that this created new challenges because most current mutual legal assistance regimes are not yet applicable to civil forfeiture. The EWG recommended that States ensure that their mutual assistance regimes will apply to requests for evidentiary assistance or confiscation order enforcement in civil forfeiture cases.

Problems also arise in requests relating to freezing/seizure and confiscation because of insufficient communication about applications for discharge of an order or other legal challenges brought in the requested State. It is critically important that the requesting State be informed of any such application in advance so that it can provide additional evidence or information that may be of relevance to the proceedings. Once again, the importance of communication was emphasized.

The EWG noted the importance of equitable sharing of confiscated assets between the Requesting and Requested State as a means of encouraging cooperation, particularly with States that have very limited resources to execute requests effectively.

Reducing impediments to mutual legal assistance brought about by third parties

Accused or other persons may seek to thwart criminal investigations or proceedings by legal action aimed at delaying or disrupting the mutual legal assistance process. While it may well be fundamental to provide the opportunity for third party participation in certain proceedings arising from the execution of a request for mutual legal assistance, States should ensure that, wherever possible, their legal frameworks do not provide fortuitous opportunities for third parties to unduly delay the providing of assistance or to completely block execution on technical grounds.

In addition, a modern trend in taking witness evidence in the requested State is to defer objections based on the law of the requesting State until after the testimony is transmitted to the requesting State, so that it may decide on the validity of the objection. That avoids the possibility of an erroneous ruling in the requested State and allows the requesting State to decide matters pertaining to its own law.

Consulting before refusing/postponing/conditioning cooperation to determine, if necessary

Where the requested State considers that it is unable to execute the request, formal refusal should not be made before consulting with the requesting State to see if the problems can be overcome, or the request modified to enable assistance to be given. For example, where assistance cannot be given because of an ongoing investigation or prosecution in the requested State, it may be possible to agree to the postponement of the execution of the request until after the domestic proceedings are concluded. In another example, consultation may

lead to the modification of a request for search and seizure that could not be fulfilled under the law of a requested State to a request for a production order, that could. Where, however, it is not possible to resolve the issue, reasons should be given for refusal.

Action 8. Making use of modern technology to expedite transmission of requests

States should make use of modern means of communications to transmit and respond to urgent requests for mutual legal assistance to the greatest extent possible. Where there is a particular need for speed, traditional and much slower methods of transmission of requests (such as the transmission of written, sealed documents through diplomatic pouches or mail delivery systems) can result in cooperation not being provided in time. Where there is a concern that evidence may be lost or that significant harm to persons or property may result if cooperation is not expedited, means such as phone, fax, or Internet should be utilized. The requesting and requested States should determine among themselves how to ensure the authenticity and security of such communications, and whether such communications should be followed up by a written request transmitted through the traditional channel.

Action 9. Making use of most modern mechanisms for providing MLA

The EWG noted the opportunities presented by modern technology to expedite the provision of assistance in criminal matters and to maximize the effectiveness of mutual assistance processes. The EWG also noted developments in international forums such as the European Union (Convention on Mutual Assistance in criminal matters between the member States of the European Union of 22 May 2000) and the Council of Europe (Convention on Cyber Crime) in relation to the taking of evidence via video-link and the interception of electronic communications.

It was recommended that States give consideration to acceding to such Conventions where possible and appropriate, and to developing the ability through their domestic legislation or otherwise to facilitate transnational cooperation in the following areas:

- The taking of evidence via video-link;
- The exchange of financial intelligence between agencies responsible for collating financial transactions data;
- The exchange of DNA material to assist in criminal investigation; and
- Interception of communications;
- The provision of assistance in computer crime investigations, including:
- Expeditious preservation of electronic data;
- Expeditious disclosure of preserved traffic data;
- Allowing interception where telecommunications' gateways are located on the territory of the requested State, but are accessible from the territory of the requesting State; and
- Monitoring electronic communications on a "real-time" basis

Action 10. Maximizing availability and use of resources

Providing central authorities with adequate resources

An effective mutual assistance programme needs to be properly resourced in terms of both central and competent authorities and necessary infrastructure. As an optimum position, States should ensure that appropriate resources are allocated to mutual legal assistance. For developing States with many urgent competing resource priorities, ideal resource levels may not always be attainable.

Obtaining assistance from a requesting State

There may be other creative approaches that can be adopted to deal with resource issues. Importantly, a requested State may wish to "seek assistance from the requesting State in order to provide assistance". Some examples of the types of assistance that can be sought from the requesting State include providing personnel or equipment to be used in execution of the request, paying for the use of private counsel or covering general costs in whole or in part. A number of States have found it useful to lend a staff member to a requesting State to facilitate the preparation and drafting of an effective request.

Asset Sharing

The sharing of confiscated assets between the requesting and requested States is an important way that cooperation can be encouraged and additional resources provided. The EWG noted that asset sharing arrangements between States now find support in multilateral instruments such as the UNTOC Convention (Article 14 par. 3, subparagraph b). The Group encourages States able to do so, to make greater use of asset sharing possibilities for such purposes.

Optimizing language capability

One special resource issue identified was the need for capacity for languages within the central authority. The optimum is the presence of bilingual or multilingual personnel working in the authority which enhances capacity for informal communication as well as with respect to review and presentation of requests. Access to reliable translation services is also of critical importance to ensure that translations of outgoing requests are accurate and properly reflect the original document and to review incoming requests where the accompanying translation is of a poor quality.

At the same time, some States may be unable to employ bilingual or multilingual personnel or have easy access to translation services for geographic or cultural reasons or because of a lack of resources. In such cases, creative solutions need to be found to deal with language problems. Some examples would be seeking assistance from other Government departments and missions abroad or perhaps from the requesting or requested State as the case may be.

Action 11. Role of the United Nations in facilitating effective MLA

UNDCP and CICP have recognized and established roles in assisting requesting States to implement particular international conventions, UNDCP, relating to drug control and CICP relating to transnational organized crime. The work includes legislative drafting assistance, model legislation on, for example, mutual

legal assistance, asset forfeiture, witness protection, and the domestic use of foreign evidence, training of prosecutors and judicial officers, and regional and interregional casework problem-solving workshops for practitioners.

Coordination of Technical Assistance

The EWG also recognized the essential role of UNDCP/CICP in working with its partners, first to help establish effective central authorities and, secondly, to coordinate cooperation and training efforts on a national, subregional and regional basis. In doing so, the EWG stressed the importance of drawing on the expertise of practitioners dealing with mutual legal assistance issues and casework on a daily basis, linking them to States in need of training and by networking their efforts under the scheme of wider partnerships.

Updating of United Nations Directory of Competent Authorities for Mutual Legal Assistance

In calling on States to notify accurate, appropriate and timely information particulars of their central authorities to transmit or execute mutual legal assistance requests for the purposes of Article 7 of the 1988 Convention, the EWG urged UNDCP to work with the States concerned to help ensure that the UNDCP Directory of Central Authorities is as useful as possible for day-to-day international casework cooperation.

Consistency between the 1988 Convention and the United Nations Convention against Transnational Organized Crime (UNTOC)

In noting similar basic mutual assistance requirements of the 1998 Convention and the 2000 UNTOC Convention, and the legal assistance work done by UNDCP and CICP, the EWG urged CICP and UNDCP to work closely together in assisting States to implement their mutual legal assistance obligations under the Conventions.

Development of Training Materials

The EWG noted the compilation, indexing and publication of all drug control legislation, including anti-money laundering legislation by UNDCP. The legislation is also available on the ODCCP website. The EWG recommended that UNDCP collect and compile from States any existing guidelines for foreign requesting authorities and training materials produced in this field of expertise (for example, the Commonwealth University Curriculum on International Cooperation to Combat Crime, coordinated training activities for magistrates from Spain, Portugal and France, etc.). The materials could then be posted on the ODCCP and partner websites with appropriate cross-links, subject to the agreement of the material providers.

The EWG encouraged the organization by UNDCP/CICP, Commonwealth Secretariat, EU, regional organizations and other interested partners, of regular meetings of mutual assistance practitioners to discuss developments in mutual assistance law, policy and practice.

PRECONDITIONS AND RISKS

Preconditions and risks were also discussed during the EWG and are reflected in the Report of the Informal Expert Working Group on Mutual Legal Assistance

Casework Best Practice, Vienna 3-7 December 2001 as well as the Report of the preceding EWG of 15-19 February, 1993.

Main Preconditions

Both countries should be party to the 1988 Convention if article 7 is to be used as the legal basis for the request;

Similarly, with respect to the United Nations Convention against Transnational Organized Crime;

There should be adequate domestic enabling mutual legal assistance legislation and procedures or, if treaties are self-executing in the countries concerned (i.e. the treaty itself becomes the domestic law of the country), the relevant treaty, bilateral or multilateral, enables the request or execution action concerned.

Main Risks

Absence of adequate enabling domestic legislation; lack of political will to implement the treaty or enabling legislation with adequate infrastructure and human/financial resources;

Absence of an effective central authority to request, execute or transmit to others for execution international mutual legal assistance requests;

Delay in executing the request and transmitting the results for use by the requesting State, usually due to lack of central authorities between which regular communication can identify and resolve outstanding request execution problems;

Introspective national focus in the Requested State on sovereignty, the paramount nature of domestic mutual legal assistance law, practice and procedure, particularly procedural law and practice;

Costs of the execution of requests can lead to serious delay and even refusal of requests, unless central offices can communicate to limit excessive requests and solve cost problems for example through cost-sharing arrangements.

RELATED TOOLS

For related tools please be hereby referred to the Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, Vienna 3-7 December 2001.

- The EWG-developed General and supplemental Checklists intended to provide general guidance in the preparation of requests for international mutual legal assistance in criminal matters.
- The General Checklist deals with the basic content of all mutual legal assistance requests. The Supplemental Checklists deal with additional content needed for the effective execution of requests for search and seizure, production of documents, taking witness statements/evidence, temporary transfer of prisoners to give evidence, pre-judgment seizure/freezing, or post-judgement confiscation.

The EWG also reproduced two Forms with permission, including a Cover Note (Request/Acknowledgment) for mutual legal assistance requests and an Authentication Certificate for Foreign Public Documents. Further, the Legal Advisory Programme of UNDCP developed comprehensive drug-related model legislation available for all major legal systems. In the field of mutual legal

assistance, the UNDCP Model Mutual Assistance in Criminal Matters Bill 2000, the Model Foreign Evidence Bill 2000 and the UNDCP Money Laundering and Proceeds of Crime Bill 2000 are available for States with a common law tradition and for States with a civil law system, the UNDCP Model Law on International Cooperation (Extradition and Mutual Legal Assistance) and the UNDCP model Law on Drug Trafficking and Related Offences.

CHAPTER X

RECOVERY AND RETURN OF PROCEEDS OF CORRUPTION

INTRODUCTION

As concern about corruption has increased, many established tools already known to criminal justice systems have been brought to bear against it. These tools include measures to identify and confiscate financial and other proceeds of corruption. In different legal systems this is seen as a form of punishment, a means of ensuring that the incentive to commit corruption in the first place is eliminated, and a means of depriving offenders of financial resources which might well be used to destabilize governments or commit further acts of corruption or other crimes. In major, or "grand" corruption cases, further impetus has recently been added by the fact that, once a corrupt regime has been removed, its successor generally seeks to recover proceeds on the basis that these have, in effect, been stolen from the people, and that they would provide badly-needed resources to the new government and State impoverished by past corruption.[553]

Pressure to develop effective measures for asset recovery was increased by the efforts of some States to recover proceeds during the 1990s, and the obstacles faced by these States in doing so. In "grand" corruption cases, key machinery of the State, and in many cases the very State itself, are controlled by corrupt officials, which makes accurate information about the amounts looted from State treasuries and revenues difficult to obtain, but the sums are clearly very large. In three of the largest cases of the 1990s, those of the Phillipines, Haiti, and Nigeria, estimates range from $500 million to as high as $5 billion.[554] The fact that assets have usually been well-hidden by experts with adequate time and control of State machinery during corrupt regimes usually makes accurate assessment of total proceeds impossible.

Recent experience suggests that countries seeking to recover such proceeds face a number of major obstacles, including the following.

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[553] A series of United Nations reports and other documents deal with Asset Recovery. See in particular General Assembly resolutions 54/206, 55/188 and 56/186 dealing expressly with illicit transfers and recovery of assets, and resolutions 54/128, 55/61 and 56/260 dealing with recovery in the context of more general anti-corruption measures. During the same period Reports to the General Assembly A/55/405, A/56/403 and A/57/158 also deal expressly with this issue, as do a number of reports to the Commission on Crime Prevention and Criminal Justice. Asset recovery was expressly included in the terms of reference for the open-ended intergovernmental Ad Hoc Committee which drafted the United Nations Convention against Corruption in GA/RES/56/260, and to assist delegations unfamiliar with the issues involved a technical workshop was held in conjunction with the second session of the committee, on 21 June 2002. See: A/AC.261/6/Add.1 and A/AC.261/7, Annex I.

[554] Other prominent cases have involved Iran, Peru, Pakistan and theUkraine, most still ongoing. As the second edition of the *Tool Kit* was written, in early 2004, changes of government appeared likely to lead to recovery operations in Iraq and Georgia as well.

- "Grand" corruption usually weakens many of the domestic institutions which are required to successfully seek assistance from other countries. Law enforcement agencies and court systems damaged by corruption may have difficulty assembling evidence and presenting it to a foreign State in a way which satisfies that State's evidentiary requirements. Also, the degree of individual expertise in areas such as financial investigation and litigation, is often absent in such States. If it is absent, it cannot quickly be created, forcing the State to turn to outside experts.
- "Grand" corruption damages domestic institutions to the point where they are not safe as a repository of stolen assets for the offenders. In an environment where assets may be stolen by other corrupt officials or confiscated when a new government takes power, almost all corrupt officials choose to transfer large amounts of corruption proceeds abroad. Often they seek to conceal and defeat tracing by transferring assets to many different jurisdictions, further complicating efforts to trace and seize them.
- "Grand" corruption impoverishes States to the point where they often lack the resources needed to mount an international legal recovery operation. Major costs, such as the retention of foreign legal counsel and the posting of financial securities needed to compensate defendants in the event of an unsuccessful civil action, are difficult for such States to meet.
- During the period when the corruption is occurring and proceeds are being exported, senior corrupt officials control key State agencies and functions, usually including law-enforcement agencies, banks and other financial institutions. Regulation is either non-existent or unenforced. This means that there are usually few records and little or no evidence or information left behind which can be used to trace transferred assets and establish ownership.
- Countries seeking to recover assets often face reluctance in the countries from whom they seek assistance until the *bona fides* of a new regime become clear, which may take some time. Responding States are reluctant to return assets to a new regime if there is a perceived risk that they will simply be looted again by officials of that regime.
- Global financial systems and information technologies have created new opportunities for transferring and concealing proceeds of crime of all kinds using high-speed and complex transfers to elude tracing. Considerable expertise has been developed in money-laundering and the very large amounts involved in grand corruption cases make it possible for offenders to hire skilled money-launderers to conceal their assets.
- The process of requesting and obtaining foreign legal assistance is time-consuming, and in some cases this allows offenders to further transfer assets before a request to seize them can be acted upon. The international community has responded with fast-acting "freeze" measures, which block transfers pending further action, but the basic problem still remains.

- Meeting the legal burdens established by States in whom assets are found can pose a problem. While some countries allow for "*in rem*" forfeiture, many still cannot obtain forfeiture unless someone has been convicted of an offence which generated the original proceeds.[555] In some cases, this may be completely impossible because the person who looted the assets is dead or cannot be located, or because he or she has obtained some guarantee of immunity (often in exchange for relinquishing power). In other cases it may be possible but very difficult for the same reason other tracing, freezing and seizure actions are difficult: there may be little admissible evidence because the agencies which would normally have created and kept records of the transfers or underlying offences were corrupt themselves.
- In some cases, criminal prosecutions may be delayed or dropped pending civil measures to recover the assets. This entails a lower evidentiary standard, but also can trigger other problems. Most legal systems will not allow a foreign State to bring a civil action, if at all, without posting a financial bond which can be sued to compensate defendants if the plaintiff State drops or loses the lawsuit. Also, as a general rule, the legal cooperation which is extended between States in criminal matters is not extended to civil matters.[556] Further, States seeking recovery may be forced to choose between seeking justice and the punishment of corrupt officials and successful recovery of assets.
- In some cases there may be more than one claim against the assets. Generally, new governments of countries previously victimized by grand corruption take the position that the whole country has been victimized *en masse*, and that funds should be paid back to the government for use to the State's benefit. Individual victims may dispute this, however, and seek payment directly to them. Holders of debts incurred by corrupt regimes may also seek to recover from identified proceeds. Further, the legislation of the requested State, if drafted in terms of recovering the proceeds of more conventional types of crime, may not recognize a State as a possible crime victim for purposes of return or compensation.

[555] See United Nations Convention against Corruption, Article 54, subparagraph 1(c) which calls on States Parties to adopt laws allowing forfeiture in cases where a criminal conviction cannot be obtained.

[556] See, however, United Nations Convention against Corruption, Article 43, paragraph 1. This requires mandatory assistance in criminal matters, but also calls upon States to render some assistance in civil and administrative proceedings as well.

TOOL #44

Recovery of illegal funds using The united nations convention against corruption
As noted, laws providing for the confiscation of proceeds of crime have been in effect in many countries for some time. Confiscation was a relatively recent innovation during the 1980's and found its way into the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[557] Following a decade of developments in national law and international agreements and arrangements, a more elaborate scheme was incorporated into the 2000 United Nations Convention against Transnational Organized Crime, which applies to a much wider range of criminal offences, and hence to the proceeds of such offences.[558] Questions of scope aside, however, the 1988 and 2000 confiscation schemes are broadly similar. The experiences of attempts to recover proceeds of "grand" corruption cases, the complexity of the cases, and the dispersion and sheer magnitude of the assets involved generated pressure to develop more powerful tools in the Convention against Corruption, however.

Further pressure was added by the nature of the offences themselves. Where a range of plausible claims from governments and private claimants might be advanced against proceeds of drug-trafficking or organized crime offences, the claim of a replacement government, on behalf of a renewed State and its people, is more difficult to resist in major corruption cases. This is true both for arguments based on title and victimization. States pursuing assets argue that the proceeds are property which the State actually owned or in respect of which it was entitled to claim ownership (e.g., lost fees, royalties and other revenues), and have been deprived of by crimes such as theft, fraud or embezzlement. They also argue that the general interests of the State and its population have been harmed by public maladministration, and should therefore be able to claim the illicit proceeds of that maladministration as compensation for damage and in an attempt to restore quality of life and the State's ability to function.

As a result, the forfeiture provisions of the 2003 Convention against Corruption include a number of further enhancements on the earlier treaty provisions. A change in tone is immediately signalled by the fact that a separate Chapter of the Corruption Convention has been reserved for asset recovery, and that its first provision, Article 51, provides as follows:

> 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.[559]

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[557] See Article 5 of that Convention. See also Commentary on the Convention, E/CN.7/590, paragraphs 5.1-5.3.
[558] Convention against Transnational Organized Crime, Articles 12-14.
[559] The agreed notes for the *travaux préparatoires* specify that this does not have legal consequences for the more specific provisions dealing with recovery. See: A/58/422/Add.1, paragraph 48.

TOOL #44A - PREVENTION OF ILLICIT TRANSFERS

A major lesson of past recovery efforts is that they are difficult, time-consuming, expensive, and all-too-often unsuccessful or only marginally successful. It was recognized by experts and negotiators alike that it was clearly desirable to prevent corrupt officials from exporting their assets in the first place rather than having to pursue them many years later. This was complicated by the fact that, in most "grand" corruption cases, senior corrupt officials are able to co-opt and corrupt elements of State machinery, including financial institutions and law-enforcement agencies, which would normally be used within a country to prevent illicit transfers. The result is a series of measures focused on the role that foreign agencies and institutions, in countries of transit or destination of corruption proceeds, can play in prevention. While the international community may not be able to prevent major corruption within a State, it can take action to make it difficult for corrupt officials to export their proceeds to other countries for safe keeping, and when transfers do occur, it can ensure that accurate records are created and kept to prevent proceeds from being concealed and to make it much easier to trace and locate them and to establish ownership or entitlement later on.

In Chapter, II, which deals with general prevention, most of the measures assume functional institutions within a State to take the prescribed actions and safeguards to protect the institutions and measures from interference. However, the measures in Article 14, which contains general measures to prevent money-laundering, require only functional institutions in the State where the money-laundering, and not the corruption, occurs. The same measures, such as the reporting of suspicious transactions and gathering and retention of information by financial intelligence units[560] or similar bodies, can create important records that prevent successful laundering of grand corruption proceeds and ensure that they can still be traced when the victim State requests this. Moreover, the comprehensive gathering and long-term analysis of information should show patterns indicative of grand corruption because of the enormous proceeds and the large numbers of transactions needed to conceal them and break links that could be used to trace them.

Chapter V, which deals specifically with asset recovery, then adds more specific preventive measures. Article 52, paragraph 1, in particular, calls for basic "know your customer" policies in banks and other financial institutions, but then goes on to call for "…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…" and specifies that such enhanced scrutiny should be reasonably intended to detect suspicious

[560] Regarding financial intelligence units, see Convention against Corruption, Article 58. This only calls on States Parties to "consider" establishing such units because of the difficulty faced by some developing countries in doing so.

transactions.[561] The agreed notes for the *travaux préparatoires* make it clear that this applies to public officials not just of the government(s) of the jurisdiction where the surveillance takes place, but of other countries as well.[562] This means that, while it may not be possible or desirable to report the transactions back to the official's own government, the information would still be gathered and retained for later use. Alternatively, if the official is aware of the surveillance and its implications, he or she is effectively denied a safe location to conceal illicit proceeds.

Article 52, paragraph 2 provides for notification of the financial institutions involved with respect to customers or accounts to be watched, and paragraph 3 requires States Parties to ensure that the institutions maintain adequate records over "..an appropriate period of time…" No guidance is given with respect to the length of time records should be kept, but States Parties implementing this requirement may wish to take into consideration the very long periods over which "grand" corruption has been known to take place, and the long and complex process of tracing the proceeds. Article 52, paragraphs 5 and 6 call for additional financial disclosure requirements for "appropriate public officials", but these assume that the requirements would be imposed by the official's own jurisdiction. This may be a control or deterrent in some high-level corruption cases, but would probably not affect the most serious "grand corruption" cases, since the disclosure would not be required, not be enforced, or any records created would be tampered with before they could be of use to a subsequent government pursuing the assets.

TOOL #44B – DIRECT (CIVIL) RECOVERY OF ASSETS

Another lesson of past recovery efforts has been that civil litigation has some significant advantages in some cases and should be considered as an option. Civil recovery requires some form of legal basis for a civil claim, usually either in property or tort law. In property-based actions, the plaintiff State is effectively claiming that it is either the rightful owner of the assets or in some cases that it claims on behalf of the rightful owners, its population, and that the assets have been taken by theft, fraud or embezzlement. In tort-based actions the claim is that the defendant has caused harm through corruption or maladministration and has profited as a result, and that compensation should be paid as a result.

The major advantages of civil claims are that a lower burden of proof is usually required, and in States which do not allow criminal confiscation *in rem*,[563] a civil case does not require a prosecution or criminal conviction to obtain a remedy. The most common reasons cases cannot be prosecuted, the death or absence of

[561] Regarding the meaning of "close associates", see agreed notes for the *travaux préparatoires*, A/58/422/Add.1, paragraph 50.
[562] A/58/422/Add.1, paragraph 49.
[563] See United Nations Convention against Corruption, Article 54, subparagraph 1(c), calling on States Parties which do not already permit *in rem* confiscation to do so, in cases where the offender cannot be prosecuted "…by reason of death, flight or absence, or in other appropriate cases…"

a criminal accused or defendant, effectively blocks further criminal proceedings in some countries, but it does not usually affect civil litigation, and may even make it easier. In civil proceedings in some countries, default judgments may be issued in cases where the defendant does not appear, and if he or she has fled criminal proceedings, the result is a choice between losing the civil action by default, or appearing to defend it and being arrested and prosecuted for one or more criminal offences. One major disadvantage is that civil actions are costly and complex, with the differences in local law making the retention of local legal counsel essential. In some cases it is also legally impossible for a State to bring a civil action in another country because it would enjoy sovereign immunity from any order judgment issued against it. Further, the assistance and cooperation normally provided by one State to another in criminal cases is generally not provided in civil ones.

The Convention against Corruption seeks to address some of these problems, thereby increasing the utility of civil proceedings as a means of recovery. Article 43, paragraph 1, in the chapter dealing with international cooperation generally, provides that States Parties shall cooperate in criminal matters, but then goes on to call on them also to "…consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption." Article 53, in the chapter dealing with asset recovery in particular then goes on to address some of the other concerns. Article 53, subparagraph (a) requires each state Party to take necessary measures to ensure that other States may make civil claims in its courts to establish ownership of property acquired through an offence established in accordance with the Convention. Subparagraph (b) requires measures to ensure that courts have the power to order the payment of damages to another State Party, and subparagraph (c) requires measures to ensure that courts considering criminal confiscation also take into consideration the civil claims of other countries.

TOOL #44C – RECOVERY THROUGH CRIMINAL CONFISCATION

The Convention also seeks to address at least some of the long-standing concerns with respect to criminal confiscation. As with the 1988 Narcotic Drugs Convention and the 2000 Convention against Transnational Organized Crime,[564] the 2003 Convention against Corruption provides for both the enforcement of a foreign confiscation order and for allowing other States Parties to seek a confiscation order in a domestic court.[565] Parallel provisions deal with foreign and domestic orders for the freezing and seizure of property, an expansion of the freezing and seizure provision of the earlier Convention.[566]

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[564] The relevant provisions, Articles 54-55 of the Convention against Corruption, are substantially similar to Articles 12-13 of the Convention against Transnational Organized Crime.

[565] Article 54, paragraph 1.

[566] Compare Convention against Transnational Organized Crime, Article 12, paragraph 2, and Convention Against Corruption, Article 54, paragraph 2. The latter provides greater detail about how freezing or seizure for the purposes of confiscation should be sought and obtained. Subparagraph 2(c) also introduces the concept of preservation of property for the first time.

While major corruption cases usually involve mostly the pursuit of proceeds or other assets derived from proceeds, both the 2000 and 2003 Conventions also provide for the confiscation of other offence-related property. The 2000 text speaks of "proceeds of crime derived from offences covered by this Convention…" and "…property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention…". The 2003 text is slightly different, extending to "…property acquired through or involved in the commission of an offence established in accordance with this Convention…" The major reason for the differences is that the range of criminal offences in the two instruments is different, with some of the offences in the Convention against Corruption being optional. As worded, the latter Convention only obliges countries to provide for domestic criminal confiscation and assistance to other States Parties seeking domestic criminal confiscation, in respect of those optional offences they actually adopt in domestic law.

As with the earlier Conventions, the Convention against Corruption establishes a basic regime for domestic freezing, seizure and confiscation in one article, and then foes on to create a parallel provision calling for international cooperation in such cases. The cooperation provision, Article 55, calls for cooperation "to the greatest extent possible" within domestic law, either in submitting a foreign confiscation order for enforcement in the requested State Party, or in bringing a foreign application for a domestic order before the competent authorities. In either case, once an order is issued or ratified, the requested State Party must take measures to "…identify, trace and freeze or seize…" targeted proceeds or other property for purposes of confiscation. Other provisions include requirements for the contents of the various applications, a requirement to deposit copies of relevant laws and regulations with the Secretary General,[567] and provisions for the refusal or suspension of orders.

A further addition to the precedents of the 1988 and 2000 Conventions is Article 56, which requires States Parties to endeavour to take measures which would permit the spontaneous or proactive disclosure of information about proceeds, if they consider that such information might be useful to another State Party in any investigation, prosecution, or judicial proceeding, or in preparing a request relating to asset recovery. The principle of spontaneous information-sharing is found in the mutual legal assistance provisions of the 2000 Convention,[568] and has now been extended specifically to asset-recovery.

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[567] In practice these are submitted to the U.N. Office for Treaty Affairs, usually through the Permanent Mission of the State Party in New York. In most such reporting requirements, the obligation takes effect at the time an instrument of ratification, acceptance, approval or accession is deposited, as is the case with notification concerning a new State Party's central authority for mutual legal assistance purposes under Article 46, paragraph 13. In this case, however, no specific time is set, so the obligation would take effect when the treaty becomes applicable to the State Party concerned, in this case either on its initial coming into force or on the 30th day after the State Party files its own instrument, whichever is the later (Article 68, paragraph 2).

[568] Convention against Transnational Organized Crime, Article 18, paragraphs 4 and 5.

TOOL #44D – CLAIMS TO AND DISPOSAL OF RECOVERED ASSETS

While the provisions of the Convention against Corruption governing domestic freezing, seizure and confiscation can be seen as an expansion of those in the 1988 and 2000 Conventions, Article 57, dealing with the return and disposal of assets, represents a major change. Much of the discussion surrounding the disposal of confiscated corruption proceeds involved the question of whether basic ownership rights vested in the confiscating State by virtue of the confiscation itself, or if the assets were actually the property of the State seeking their return, on the basis either of a surviving property right or of compensation for malfeasance or maladministration. The claim of a surviving property right is stronger in some cases than others. A senior official who simply steals money from the national bank or re-directs profits from natural resources, other exports or domestic tax revenues to his own bank account, for example, can be said to have in his possession funds which clearly belong to the State. Proceeds from bribes, extortion, bid-rigging and similar transgressions involve criminal harm caused to the State, but the proceeds are not funds to which the State was ever entitled, and any claim to them is more in the nature of compensation for the harm caused than pre-existing property ownership.

Chapter V of the Convention, and in particular, Articles 51 and 57, deal with this in two ways. Article 51 makes return of assets a "fundamental principle", without any consideration of the legal basis for the return. Article 57, paragraph 3, then sets out a series of provisions governing return of confiscated proceeds and other property which generally prefers return to the requesting State Party, but sets stronger rules in cases where the property interest of that State Party is the strongest. In cases where the property is embezzled funds or laundered embezzled funds, it is to be returned to the requesting State Party from whom the funds were embezzled.[569] In cases where the funds are proceeds or other property related to other Convention offences, they are to be returned to the requesting State Party, but only when it reasonably establishes prior ownership, or the requested State Party recognizes compensation for damage as a basis for the return.[570] In all other cases, property is to be returned to the requesting State Party, but can also be returned to another prior legitimate owner or used to compensate victims of the crimes from which it originated.[571] This breakdown, which will require the return of assets in many corruption-related cases, represents a significant change from the earlier instruments, where the principle that the confiscating State had exclusive property in the proceeds, sometimes referred to as: "he who confiscates, disposes", was dominant.[572] One further consequence of this change, and a lesson learned from some of the more major and costly recovery operations of the previous decade, is Article 57, paragraph 4,

[569] Article 57, subparagraph 3(a).
[570] Article 57, subparagraph 3(b).
[571] Article 57, subparagraph 3(c).
[572] See Convention against Transnational Crime, Article 14, paragraph 1. That provision calls on the confiscating State Party to consider return or other forms of disposal, but any such consideration is entirely discretionary.

which allows the confiscating State Party to deduct “reasonable costs” from the proceeds or other property before it is returned.

PRECONDITIONS AND RISKS

The problems hindering the recovery and return of assets may vary depending on the countries involved. Nevertheless, current and past cases seem to share some similarities. For example, the following factors hinder the successful recovery of assets or render it impossible:

- The absence or weakness of the political will within the victim country as well as within those countries to which the assets have been diverted;
- The lack of an adequate legal framework allowing for necessary actions in an efficient and effective manner; and
- Insufficient technical expertise within the victim country to prepare the groundwork at the national level, such as filing charges against the offenders, and at the international level to prepare the mutual legal assistance request;

Specialized technical expertise is extremely limited and mainly provided by private lawyers whose services are very expensive and who normally do not have any interest in building the necessary capacities at the national level; and

The reluctance of victim States to improve their national institutional and legal anti-corruption framework, a deficiency that may not only lead to the further looting of the country, but also be seriously damaging to the credibility of the country when requesting mutual legal assistance.

LACK OF POLITICAL WILL

A strong and committed political will in both the requesting as well as the requested State or States is essential for the successful outcome of the recovery effort. Direct involvement in the diversion of State funds by high-level Government officials, and all too often the leaders of the country themselves, can impede any action that could be taken. Once a new Government comes into power, its credibility depends largely on how willing and capable it will prove to deal with the "grand corruption" that took place under its predecessor. Successful recovery of what has been looted from a country can be more important to the public than sanctioning and imprisonment of the offenders. The repatriation of stolen funds can not only confirm to the public a return of the rule of law, but can also provide the Government with the necessary resources to implement the reforms promised during the crucial initial phase of coming into power.

Even where a Government decides to embark on a recovery effort, however, internal political conditions may not to allow an unrestricted effort. Such a condition not only affects the credibility of the recovery initiative, but also of the new Government in general. For example, restricting recovery efforts to certain persons or circle of people may lead to difficulties in the process of gathering evidence since such evidence may help uncover assets that have been diverted by people other than those targeted. In some instances, the lack of unconditional political will to recover all funds that have been diverted may hinder the recovery effort and can lead to criticism both at the national and international level. That could eventually lead to the reluctance of some parties involved to provide their full support and collaboration.

Another common feature of many cases is that the victim States often concentrate exclusively on extraterritorial investigations while they neglect the basic preparatory work at the national level. In most jurisdictions, there is little hope of recovering assets unless a conviction is obtained for the crimes committed in the course of the looting and the connection between those crimes and the assets abroad has been established. (185)

A lack of political will on the part of the requested country is also a common barrier to successful recovery of stolen assets. Authorities may be reluctant to move against powerful interest groups, such as banks. That seems particularly obvious where the banks are not only holding the assets but were also involved in facilitating their transfer in the first place .(186) Wherever the political will is weak, there is little chance that the complex legal and factual problems typically occurring in cases of asset recovery will be overcome.

LACK OF A LEGAL FRAMEWORK

Recent examples of recovery efforts show that there is no legal framework providing a sufficiently practicable basis for the recovery of assets diverted through corrupt practices. Multilateral and bilateral mutual legal assistance treaties are too limited in their substantial and geographical scope and are therefore often not applicable except in the context of the specific case from which they originated. As a consequence, no standard procedure is applied. Recovery strategies vary from civil recovery to criminal recovery to a mix of both. Each method has its advantages and disadvantages and the final choice seems to depend exclusively on what is expected to work best in the jurisdiction where the assets are located. Selection of the appropriate strategy, therefore, requires specialized legal expertise that is typically very costly, if available at all. The United Nations Convention against Transnational Organized Crime provides a response to some of the problems but, mainly because of its limited scope, it will be applicable only in some specific cases.

LEGAL PROBLEMS ENCOUNTERED

During the initial phase of a recovery effort, the main challenge lies in the tracing of the assets, the identification of the various players involved in the process of the looting of the assets and the determination of their potential criminal or civil liabilities. Often, the exchange of information between various jurisdictions as well as the public and the private sphere is extremely cumbersome, if impossible.

In such an environment, most efforts fail in the initial phase or are not even undertaken because of the difficulties envisaged. The central legal problems are related to jurisdiction and territoriality. Where legal systems are incompatible, particularly when cases involve cooperation between continental and common law systems, cooperation is difficult. Mutual legal assistance treaties (MLATs) have proven cumbersome and ineffective when the object is to trace and freeze assets as quickly as possible. Overcoming jurisdictional problems slows down investigations, often fatally. By the time investigators get access to documents in another jurisdiction, the funds have moved elsewhere.

Legal problems encountered differ significantly depending on the jurisdiction in which the recovery effort is pursued (common/continental law) and the approach chosen (civil/ criminal recovery). Each approach and jurisdiction has its advantages and disadvantages. Civil law, allowing for confiscation and recovery based on the balance of probabilities, has the clear advantage since the evidentiary threshold is typically lower than with criminal actions. Conversely, access to information as well as investigative powers in the civil process is limited and, apart from some common law countries, the freezing of the assets can be difficult. Civil recovery, however, also opens alternative approaches as far as the civil action against third parties is concerned. For example, in some common law countries where compensation goes beyond simple economic damage and where moral and punitive damage compensation is possible, actions against the facilitators of the looting may be considered. Another advantage of civil recovery consists in the free choice of the jurisdiction in which the recovery of the proceeds of corruption is pursued. In the case of criminal recovery, prosecution must follow preset jurisdictional conditions while civil recovery can be pursued almost anywhere in the world and perhaps even more importantly, in several jurisdictions at once. That can be particularly important where there is the risk that the offender might transfer his or her loot to a "non-freezing-friendly" jurisdiction.

The criminal law approach generally provides the investigators with privileged access to information, both at the national and international level. The investigative powers of a prosecutorial office make it easier to overcome bank secrecy and to obtain freezing orders. At the same time, however, the actual confiscation and refunding to the victim may prove more complex since most legal systems still require that the illicit origin of the proceeds be established beyond any reasonable doubt. In the civil proceedings, the link between the assets and the criminal acts at their origin must be established only on the grounds of balanced probabilities, also known as a preponderance of the evidence.

Another clear advantage of criminal recovery is the cost factor. Criminal recovery requires fewer financial resources on the part of the requesting State since most of the investigative work is undertaken by law enforcement agencies of the requested country. A clear disadvantage of criminal recovery arises from the dependency on the sometimes strict requirements needing to be met under the national law of the requested countries to obtain the collaboration of its authorities. Courts in requested countries often set preconditions to file charges or to bring forfeiture proceedings against individuals prior to agreeing to freeze

assets or to keep them frozen. Repatriation in most cases can be granted only after a final decision is made on criminal prosecution or forfeiture to permit repatriation. Those proceedings must comply with the procedural requirements of due process of the requested State.. The courts might also want to establish that the proceedings in the requesting countries satisfy human rights principles. Many requesting countries have found some or all of these requirements difficult to fulfill.

Other aspects are linked to the legal tradition of the jurisdictions involved. For example, a clear advantage within many continental law jurisdictions is the possibility for the victim to participate in the criminal proceeding as a partie civile. Such status enables the victim to have access to all the data available to the prosecution and reliance on the criminal court to decide on the (civil) compensation to the victim.

In common law systems, the wide discretionary powers of the prosecution to engage in plea-bargaining has proved to be an effective tool in asset recovery cases. In particular, where the main objective is not obtaining conviction for all the single criminal acts involved but to recover the largest amounts of assets possible, offenders may be offered immunity from prosecution in exchange for their fullest collaboration in the location of the diverted assets. The impediments mentioned above, however, touch only upon a few of the most obvious problems involved. A complete inventory of all the possible scenarios is beyond the scope of the Toolkit.

TECHNICAL CAPACITIES

One of the most important obstacles to seeking out illegal funds and securing their repatriation is lack of capacity in the requesting and in the requested country. The recovery of assets that have been diverted through corrupt practices is extremely complex and consequently requires top-level technical capacities. Tasks necessary to successfully mount a repatriation effort include the conducting of financial investigations, forensic accounting, requests for mutual legal assistance and a solid understanding of the legal requirements of the States where the assets have been located. There are few practitioners in either public or private practice with experience in this type of work, and in many jurisdictions, there are none at all.

In States where corruption is rampant, such capacities are often not available and it is probable that a lack of State capacity helped create the conditions that facilitated the corruption in the first place. Shortcomings in judicial, administrative and/or investigative capacity, however, seriously impede the degree to which a country can undertake such a case successfully. Necessary technical expertise is available at very high costs. Countries that have been looted by their former leaders are typically finding themselves in substantial budgetary crisis. Spending money on private lawyers based on the uncertain hope of actually being able to recover the costs may often not be an option. The private sector generally has no interest in educating the national authorities so that they will be able to conduct future recovery efforts without the help from outsiders. Consequently the lack of expertise remains unchanged.

RESOURCES

The recovery of assets can be costly. Much of what can be done in relation to the repatriation of assets depends on the resources available to fund the case. Cases will almost certainly last for several years, and parties to the action are likely to be determined by their ability to fund litigation. In the case of criminal recovery, that might less be an obstacle. Offenders that have been looting their respective countries over a long period of time do not face the same resource problems as the victims trying to recover the assets. They can employ armies of lawyers ready to jeopardize and delay the successful recovery with all legal means available. The issue of justice being done becomes a question of how long offenders and victims are able to sustain the battle.

PREVENTION OF FUTURE VICTIMIZATION

States that have been victimized often do too little to prevent future diversion of assets. That leads not only to repeated victimization, but also negatively affects the repatriation of funds that have already been diverted. It is understandable that some countries may be hesitant to collaborate in the repatriation of assets if they must fear that the assets returned most likely will become prey to corrupt practices again. Therefore, countries embarking on a recovery effort should consider committing a certain percentage of the assets recovered in form of a "Governance Premium" to the strengthening of the national institutional and legal anti-corruption framework.

XI BIBLIOGRAPHICAL REFERENCES

Anderson, Neil. 1996. *Evidenced-based Planning: The Philosophy and Methods of Sentinel Community Surveillance*. EDI.

Beckhard, R. and W. Pritchard. 1992. *Changing the Essence: The Art of Creating and Leading Fundamental Change in Organisation*. San Francisco: Jossey-Bass Publishers.

Bryson, J. 1996. *Creating and implementing your strategic plan: a Workbook for Public and Nonprofit Organisations*. San Francisco: Jossey-Bass Publishers.

Chong Alberto and César Calderón. 1998. *"Institutional Efficiency and Income Inequality: Cross Country Empirical Evidence*" Mimeograph, World Bank, Washington, D.C.

CIETinternational. 1998. *Uganda National Integrity Survey 1998*: Final Report, Washington, D.C.: EDI, World Bank.

CIETinternational. 1995. *Performance and Perceptions of Health and Agricultural Services in Uganda.*

Dalziel, M. 1988. *Changing Ways: A Practical Tool for Implementing Change within Organisations.* New York: American Management Association.

Fink, A. 1995. *The Survey Kit* (9 vols.) Thousand Oaks, Calif.: Sage Publications.

Goerzen, Jean (Ed.). 1996. *Service Delivery Surveys: Applying the Sentinel Community Surveillance Methodology*, Country Overviews. EDI.

Grey, C. 1998. *Corruption and Development*. Finance and Development. Volume 35.

Grindle, Merilee S. 1996. *Challenging the State: Crisis and Innovation in Latin America and Africa.* Cambridge University Press.

IRIS. 1996. *Governance and the Economy in Africa: Tools for Analysis and Reform of Corruption.* University of Maryland at College Park.

Kaufmann, D. 1997. *Corruption: The Facts*. Foreign Policy. Summer.

Keller, L. and Langseth,P.,2003, *National Conference for Cleaner Public Life*, Budapest March 2003

Klitgaard, R. 1988. *Controlling Corruption*. Berkeley, CA: University of California Press.

Kpundeh, S. Langseth, P. (eds.) 1997. *Good Governance for Sustainable Development*: Proceedings of a Workshop for Parliamentarians in Kampala, Uganda. Washington, The World Bank.

BIBLIOGRAPHICAL REFERENCES

Lai A. 1999; *Corruption Prevention: A Hong Kong Perspective,* Proceedings from the 9th SPAC Conference in Milan, 19-20 November 1999.

Lai, A. 2001*; Building Public Confidence; The Hong Kong Approach;* in Forum on Crime and Society

Langseth. P. (Ed.) 2003, *United Nations Guide on Anti Corruption Policy*; Vienna Austria

Langseth P. *Strengthening Judicial Integrity and Capacity through an Integrated Approach,* 2002, in Forum on Crime and Society, Volume 2, Number 1, Dec 2002

Langseth, P. and Oliver Stolpe, 2002, *United Nations' Approach to Helping Countries Help Themselves by Strengthening Judicial Integrity: a Case Study from Nigeria* in Corruption, Integrity and Law Enforcement, edited by Cyrille Fijnhaut and Leo Huberts, Kluwer Law International, den Haag, 2002

Langseth, P. 2002, *Global Dynamics of Corruption, the Role of United Nations, in Strengthen Judicial Integrity and Capacity in Nigeria*; State Integrity Meeting in Lagos, May 2002

Langseth, P. and Mohammed, A. (editors), 2002, *Strengthening Judicial Integrity and Capacity in Nigeria*; published by Nigerian Institute for Advanced Studies (NIALS), Abuja, Nigeria, 2002

Langseth, P. Stolpe, O. 2001. *Strengthen the Judiciary against Corruption.* International Yearbook for Judges, Australia.

Langseth, P. 2000. *International Co-operation: Its Role in Preventing and Combating Corruption*; at Conference of Central and East European Countries on Fighting Corruption; Bucharest, March 30-31, 2000

Langseth, P. 2000. *Prevention: An Effective Tool to Reduce Corruption*, ISPAC 1999 Conference on Responding to the Challenge of Corruption, Milan, 19-20 November.

Langseth, P. et al. 1998. *Building Integrity to Fight Corruption in Uganda*; Fountain Publishing House, Kampala, Uganda.(ISBN 9970 02 058 7)

Langseth, P., Rick Stapenhurst, and Jeremy Pope. 1997. *The Role of a National Integrity System in Fighting Corruption*. Washington, D.C.: EDI Working Papers Series, World Bank.

Langseth, P. 1998. *How to Fight Corruption on the Ground*. Economic Reform Today, Number two 1998.

Langseth and Mugaju, 1996, *Post Conflict Uganda, Towards an Effective Civil Service*, Fountain Publishers, Kampala Uganda (ISBN: 9970 02 120 6)

BIBLIOGRAPHICAL REFERENCES

Langseth P., Katorobo J., Brett T., and Munene J., 1995, *Uganda: Landmarks in Rebuilding a Nation,* Publishers Ltd. Kampala: Fountain . ISBN 9970 02 070 6

Langseth, Petter.,1996, *Civil Service Reform in Uganda; Lessons learned from Uganda* EDI Staff Working Paper. Washington: EDI, No 95-05

Langseth, P., 1995. *Civil Service Reform in Uganda;* in Public Administration and Development; Vol.15,365-390

Lippitt, G, Langseth, P. and Mossop, (1985), *Implementing Organizational Change* (1985), Jossey Bass. San Fransico, 1985 (English and Spanish).

Mauro, P. 1997. *Why Worry about Corruption*? Washington, D.C.: International Monetary Fund.

Nunberg, Barabara (1997) *Re-thinking Civil Service Reform: an Agenda for Smart Government*, Poverty and Social Policy working paper, World Bank, Washington, D.C.: World Bank

Pope; J.. 2000. *Transparency International*, The TI Sourcebook, Berlin: Transparency International, October 2000.

Pope, J., (Ed). 1996. *The TI Source Book. Berlin*: Transparency International.

Pope, J. (Ed.). 1997. *National Integrity Systems: The TI Source Book* (second edition). EDI. Washington, D.C.: World Bank

Presidential Commission of Inquiry Against Corruption. 1996. Report on the Commission on Corruption. Dar-es-Salaam.

Presidential Commission of Inquiry Against Corruption. 1996. Service Delivery Survey: Corruption in the Police, Judiciary, Revenue, and Lands Services. Dar es Salaam.

Rose-Ackerman, S. 1997. *Corruption and Development*. Paper prepared for the Annual World Bank Conference on Development Economics. Washington, D.C., April 30 and May 1.

Selener, D. 1997. *Participatory Action Research and Social Change*. Ithaca, New York: Cornell Participatory Action Research Network, Cornell University.

Smith, S., D. Williams, and N. Johnson. 1997. *Nurtured by Knowledge: Learning to Do Participatory Action-Research.* New York: The Apex Press.

Stevens, Robert .1993. *The Independence of the Judiciary*: The View from the Lord Chancellor's Office. Oxford: Oxford University Press.

Stone, Andrew. 1992. *Listening to Firms: How to Use Firm Level Surveys to Assess Constraints on Private Sector Development*. World Bank Working Paper Series 923,

BIBLIOGRAPHICAL REFERENCES

Urban Institute. 1998. Selected Urban Institute Staff Reports and Publications on Performance Measurement and Program Evaluation. Washington, D.C.: Urban Institute Press.

Wei, S. 1997. How Taxing is International Corruption. NBER Working Papers. No 6030. May.

World Bank. 1997a. Helping Countries Combat Corruption: The Role of the World Bank. Poverty Reduction and Economic Management Network. Washington, D.C.: World Bank.