

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

# **THE CRIMINALISATION OF BRIBERY**

## **IN ASIA AND THE PACIFIC**

**Proceedings of the 10th Regional Seminar for Asia and the Pacific**

**Held in Kuala Lumpur, Malaysia, 23-24 September 2010, and hosted by the Malaysian Anti-Corruption Commission**



ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

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Asian Development Bank

Organisation for Economic Co-operation and Development

#### Publications of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

- The Criminalisation of Bribery in Asia and the Pacific: Frameworks and Practices in 28 Jurisdictions. Paris, ADB/OECD 2010.
- Criminalisation of Bribery: Proceedings of the 10<sup>th</sup> Regional Seminar for Asia and the Pacific. Paris, ADB/OECD 2010.
- Strategies for Business, Government and Civil Society to Fight Corruption in Asia and the Pacific. Paris, ADB/OECD, 2009.
- Supporting the Fight against Corruption in Asia and the Pacific: ADB/OECD Anti-Corruption Initiative Annual Report 2007. Paris, ADB/OECD, 2008.
- Fighting Bribery in Public Procurement in Asia and the Pacific. Proceedings of the 7th Regional Technical Seminar. Paris: ADB/OECD, 2008.
- Asset Recovery and Mutual Legal Assistance in Asia and the Pacific. Proceedings of the 6th Regional Technical Seminar. Paris: ADB/OECD, 2008.
- Managing Conflict of Interest: Frameworks, Tools, and Instruments for Preventing, Detecting, and Managing Conflict of Interest. Proceedings of the 5th Regional Technical Seminar. Manila: ADB/OECD, 2008.
- Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific: Frameworks and Practices in 27 Asian and Pacific Jurisdictions, Paris: ADB/OECD, 2008.
- Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries, Manila: ADB/OECD, 2006.
- Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Enhancing Asia-Pacific Co-operation on Mutual Legal Assistance, Extradition, and Return of the Proceeds of Corruption. Proceedings of the 4th Master Training Seminar. Manila: ADB/OECD, 2006.
- Knowledge-Commitment-Action against Corruption in Asia and the Pacific: Proceedings of the 5th Regional Anti-Corruption Conference. Manila: ADB/OECD, 2006.
- Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Reform in 25 Countries. Manila: ADB/OECD, 2006.
- Anti-Corruption Action Plan for Asia and the Pacific with country endorsing statements. Manila: ADB/OECD (2002; reprinted 2005).
- Curbing Corruption in Tsunami Relief Operations. Manila: ADB/OECD/TI, 2005 (available in English, Bahasa, Sinhala, and Tamil languages).
- Controlling Corruption in Asia and the Pacific: Proceedings of the 4th Regional Anti-Corruption Conference. Manila: ADB/OECD, 2005.
- Anti-Corruption Policies in Asia and the Pacific: The Legal and Institutional Frameworks. Manila: ADB/OECD, 2004.
- Effective Prosecution of Corruption. Proceedings of the 1st Regional Training Seminar. Manila: ADB/OECD, 2003.
- Taking Action against Corruption in Asia and the Pacific: Proceedings of the 3rd Regional Anti-Corruption Conference. Manila: ADB/OECD, 2002.
- Progress in the Fight against Corruption in Asia and the Pacific: Proceedings of the 2nd Regional Anti-Corruption Conference. Manila: ADB/OECD, 2001.
- Combating Corruption in Asia and the Pacific: Proceedings of the Manila workshop held in 1999. Manila: ADB/OECD, 2000.

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#### ISBN TBC

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# Contents

<b>Foreword</b> .....	<b>5</b>
<b>Main Abbreviations and Acronyms</b> .....	<b>7</b>
<b>Introduction</b> .....	<b>9</b>
<b>Acknowledgments and Editorial Remarks</b> .....	<b>11</b>
<b>Opening Ceremony</b> .....	<b>13</b>
Keynote Address by The Hon. Tan Sri Dato'Haji Muhyiddin bin Mohammed, Deputy Prime Minister of Malaysia .....	15
Opening Statement by Mr. Dato' Sri Haji Abu Kassim Bin Mohamed, Chief Commissioner, Malaysian Anti-Corruption Commission .....	19
Opening Statement by Mr. Kunio Senga, Director General for Southeast Asia, Asian Development Bank .....	23
Opening Statement by Mr. Mario Amano, Deputy Secretary-General, OECD .....	27
<b>Session 1 International Instruments on the Criminalisation of Bribery</b> .....	<b>31</b>
Criminalisation of Bribery under the UNCAC and the Use of the UNCAC Legislative and Technical Guides (Tanja Santucci) .....	33
Criminalisation of Bribery under the OECD Anti-Bribery Convention and Annex I of the 2009 Recommendation on Further Combating Foreign Bribery (Melissa Khemani) .....	43
<b>Session 2 Challenges in Establishing and Applying Domestic and Foreign Bribery Offences</b> .....	<b>47</b>
The United Kingdom's Old and New Approaches to the Criminalisation of Corruption (Arvinder Sambei) .....	49
Bribery through Intermediaries (William Loo).....	57
Challenges in Establishing and Applying Domestic and Foreign Bribery Offences in Malaysia (Han Chee Rull).....	61
Foreign Bribery Offences under the Korean Legal System (Chang Soo Lee).....	65

How Jurisprudence in Hong Kong, China has Interpreted and Complemented Statutory Bribery Offences (Alex Lee) .....	69
<b>Session 3 Corporate Liability for Bribery.....</b>	<b>73</b>
Theories of Corporate Criminal Liability (Professor Celia Wells) .....	75
Good Practice Guidance on Establishing Corporate Liability, and Good Practice Guidance on Internal Controls, Ethics and Compliance (Christine Uriarte) .....	93
Fighting Commercial Bribery in China (Dr. Fei Sun) .....	97
<b>Session 4 Investigative Techniques .....</b>	<b>101</b>
The MACC's Use of Special Investigative Techniques in the Investigation of Bribery Cases (Mustafar bin Ali) .....	103
The KPK's Use of Special Investigative Techniques in the Investigation of Bribery Cases (Mochammad Jasin) .....	107
The Use of Forensic Auditing to Uncover Corruption (Ashwani Kumar) .....	111
<b>Session 5 Sanctions and Confiscation .....</b>	<b>113</b>
Confiscating and Quantifying Proceeds of Bribery (Alan Bacarese) .....	115
Cross-Debarment and Other Recent Anti-Corruption Efforts in the Asian Development Bank (Clare Wee) .....	119
Bans from Receiving Public Subsidies and Contracts on Conviction of Corruption in Pakistan (Umer Zaman) .....	123
Evidence-based Approach to Assessing Corruption: Two Recent Examples and Future Work (Tanja Santucci) .....	127
<b>Annexes .....</b>	<b>129</b>
List of Participants .....	131
Seminar Agenda .....	147
<b>ADB/OECD Anti-Corruption Initiative for Asia-Pacific Secretariat Contacts .....</b>	<b>151</b>

# Foreword

Created in 1999, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific supports its members in strengthening their policies, legislation, institutions and practices to fight corruption. The Initiative offers experts in Asia and the Pacific opportunities to work with colleagues from around the globe to address emerging challenges in the fight against corruption, and to seek solutions.

The criminalisation of bribery is a key component of all international anti-corruption instruments. However, international experience shows that criminalisation can be a very challenging task. The members of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific thus dedicated the 10th Regional Anti-Corruption Seminar for Asia and the Pacific on 23 – 24 September 2010 to the *Criminalisation of Bribery in Asia and the Pacific*.

The Seminar, generously hosted by the Government of Malaysia and the Malaysian Anti-Corruption Commission, provided participants with an understanding of the key issues for the effective criminalisation of bribery. The Seminar covered not only statutory bribery offences, but also effective means for the investigation and enforcement of these offences. The Seminar also helped identify cross-cutting issues for further work, and to facilitate effective technical assistance on UNCAC implementation. Expert speakers from over fifteen countries and organisations presented on international standards and national approaches to these issues.



# Main Abbreviations and Acronyms

ADB	Asian Development Bank
APEC	Asia-Pacific Economic Cooperation
CBI	Central Bureau of Investigation (India)
CEO	Chief Executive Officer
CMCH	Corporate Manslaughter and Corporate Homicide Act 2007 (United Kingdom)
CPC	Communist Party of China
DPP	Director of Public Prosecutions
EBRD	European Bank for Reconstruction and Development
EU	European Union
EUR	Euro
FPO	Foreign Public Official
ICAC	Independent Commission against Corruption (Hong Kong, China)
IDR	Indonesian rupee
IMF	International Monetary Fund
KPK	Komisi Pemberantasan Korupsi—Corruption Eradication Commission (Indonesia)
MACC	Malaysian Anti-Corruption Commission
MDBs	Multilateral Development Banks
MDIT	Multi-Disciplinary Investigation Team (India)
MLA	mutual legal assistance
MOU	memorandum of understanding
NAB	National Accountability Bureau (Pakistan)
NAO	National Accountability Ordinance (Pakistan)
NCB	Non-conviction based (forfeiture)
NGO	non-government organization
NKPA	national key results areas (Malaysia)
OAI	Office of Anti-Corruption and Integrity (Asian Development Bank)
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development

## 8 Criminalisation of Bribery

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POBO	Prevention of Bribery Ordinance (Hong Kong, China)
PPRR	project procurement related review (Asian Development Bank)
SCPO	Serious Crime Prevention Orders (United Kingdom)
SFO	Serious Fraud Office (United Kingdom)
StAR	Stolen Asset Recovery Initiative
StG	Steering Group (of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific)
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
US	United States
USAID	United States Agency for International Development
USD	United States dollar
WGB	Working Group on Bribery in International Business Transactions

# Introduction

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

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

However, implementing an effective regime of criminalisation can be a challenging task. Effective bribery offences need to address the different means in which the crime can be committed. These offences must be supported with investigative tools. The offences must also be implemented and enforced. Deficiencies in these areas are not always obvious. With this in mind, the members of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific dedicated the 10th Regional Anti-Corruption Seminar for Asia and the Pacific on 23 – 24 September 2010 to the *Criminalisation of Bribery in Asia and the Pacific*.

The Seminar, generously hosted by the Government of Malaysia and the Malaysian Anti-Corruption Commission, provided participants with an understanding of the key issues for the effective criminalisation of bribery. The Seminar covered not only statutory bribery offences, but also effective means for the investigation and enforcement of these offences, and included specific sessions addressing international instruments on the criminalisation of bribery; challenges in establishing and applying domestic and foreign bribery offences; corporate liability for bribery; investigative techniques, and; sanctions and confiscation. Expert speakers from over fifteen countries and organizations presented on international standards and national approaches to these issues. Most presentations were reproduced in this publication, in hopes that the ideas and knowledge contained therein would be disseminated to a wider audience.



# Acknowledgments and Editorial Remarks

The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific sincerely thanks the Government of Malaysia and the Malaysian Anti-Corruption Commission (MACC), hosts of the 10th Regional Anti-Corruption Seminar for Asia and the Pacific, for their gracious hospitality and excellent preparation. Special thanks also go to the conference participants, particularly the expert speakers whose insights and experiences enriched the meeting discussions and informed its outcomes.

The conference was co-organised by the MACC: Abdul Razak bin Hamzah who managed the event on the part of the MACC, and the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific Secretariat: Sandra Nicoll, Director, Public Management, Governance and Participation Division, ADB; Surya Shrestha, Governance and Capacity-Building Specialist, Public Management, Governance and Participation Division, ADB; Marilyn Pizarro, Consultant, Public Management, Governance and Participation Division ADB; William Loo, Senior Legal Analyst, OECD Anti-Corruption Division; Christine Uriarte, General Counsel, OECD Anti-Corruption Division, and; Melissa Khemani, Anti-Corruption Analyst/Legal Expert, OECD Anti-Corruption Division.

The Initiative is also grateful to its partners for their financial and intellectual support: the German Federal Ministry for Economic Cooperation and Development, German Technical Development Cooperation, Swedish International Development Cooperation Agency, Asia-Pacific Group on Money Laundering, the American Bar Association/Rule of Law Initiative, Pacific Basin Economic Council, Transparency International, United Nations Development Programme, and the World Bank.

The Initiative would also like to thank the Swedish International Development Cooperation Agency and the Japanese Ministry of Foreign Affairs for their generous financial support, without which this seminar would not have been possible.

The term “country” in this publication also refers to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever concerning the legal status of any country or territory on the part of ADB’s Board and members or the OECD and its member countries. Every effort has been made to verify the information in this publication. However, ADB, OECD, and the authors disclaim any responsibility for the accuracy of the information. ADB’s Board and members and the OECD and its member countries cannot accept responsibility for the consequences of its use for other purposes or in other contexts.



# Opening Ceremony

- Keynote Address, *The Hon. Tan Sri Dato' Haji Muhyiddin bin Mohammed, Deputy Prime Minister of Malaysia*
- Opening Statement, *Mr. Dato'Sri Haji Abu Kassim Bin Mohamed, Malaysian Anti-Corruption Commission*
- Opening Statement, *Mr. Kunio Senga, Asian Development Bank*
- Opening Statement, *Mr. Mario Amano, OECD*



# Keynote Address

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The Hon. Tan Sri Dato'Haji Muhyiddin bin Mohammed  
Deputy Prime Minister of Malaysia

Foremost, I would like to thank the MALAYSIAN ANTI-CORRUPTION COMMISSION, ADB and OECD for kindly inviting me to officiate the 10th Regional Seminar of the ADB/OECD Anti Corruption Initiative for Asia and the Pacific. I would also like to thank the Secretariat of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific for choosing Malaysia as the venue for this seminar.

On behalf of the Government of Malaysia, I would like to welcome all participants and speakers to Malaysia. I am heartened to see so many participants from Asia and the Pacific countries attending this important seminar. It clearly reflects the commitment of member countries in fighting corruption. I believe the objectives of this Initiative will eventually be achieved, should all of you continue to demonstrate the commitment that you have shown, so far.

Since her independence in 1957, Malaysia has been very serious about combating corruption. Our founding fathers had the foresight even then, to realize that combating corruption was not only a moral imperative but a prerequisite for national survival. At the outset we have put in place the necessary though embryonic legal and institutional infrastructure to weed out this scourge. Three different and disparate organizations were involved in fighting this menace, the Royal Malaysian Police was charged with investigating the crime, the Attorney General's Chamber prosecuted while the Prime Minister's Department was entrusted with crafting the preventive eco system.

Since then, periodic reforms have been made in order to cope with its increasing sophistication, trans-boundary nature and our domestic and international obligations. Building upon these commitments and Malaysia's entry as a state party to the United Nations Convention against Corruption in 2008 the government had initiated major structural and legislative reforms to better meet this threat against our national security fabric.

As a result the Malaysian Anti-Corruption Commission was set up and its capacity and capability strengthened while a host of new measures and offences were established in the governing legislation. These changes were introduced with the objective to effectively enhance the investigative and prosecuting processes while increasing transparency and participation by civil society.

Since the introduction of the Malaysian Anti-Corruption Commission Act, statistics have shown a manifold increase in the volume of information received from the public, in the number of investigations initiated, arrests made and prosecutions conducted. This marked increase in the level of public involvement is indicative of their increasing trust

and confidence in the efforts of the Government through the Malaysian Anti-Corruption Commission in combating corruption.

I trust the Malaysian Anti-Corruption Commission, under the present stewardship of Dato' Sri Abu Kassim is able to realize the vision of the Government and the expectations of the "rakyat".

The Government has set up the Malaysian Integrity Institute in 2004. The purpose of this institute is to inculcate the values of integrity and ethics in all aspects of national life. It is the Government's belief that prevention and education should be given equal attention alongside enforcement in the fight against corruption. Malaysia has also collaborated with international organizations in setting up of the Malaysian Anti-Corruption Academy, which serves as a regional training centre for or the Asia and Pacific region. This centre provides courses for capacity and capability building for personnel in combating corruption.

Today, when one speaks of the criminalization of corrupt acts, it is not merely criminalizing the offence of giving and taking of bribes or the abuse of position. It includes criminalizing the proceeds of the crime of corruption and bringing to book corruptors, swiftly. Studies reveal that corruptors tend to hide themselves or their ill-gotten gains in foreign jurisdiction. The denial of safe haven for corruptors and their proceeds of crime are vital in any strategy to combat corruption. Herein, lays the importance of international cooperation. Legislation or international initiatives on mutual legal assistance, extradition and anti-money laundering will only be effective if countries come together to mutually help. One must bear in mind that corruptors thrive on the lacuna in international cooperation to protect themselves and their ill-gotten gains. Seminars like this would be useful venue to address differences in legal and evidential requirements of countries in the areas of mutual legal assistance, extradition and anti-money laundering in order to reduce bureaucracy and red tape.

As part of our commitment, the Government in 2009 introduced a new approach in transforming the performance of the Government. It focused on the 6 National Key Results Areas (or NKRAs), identified as being the most important areas for the benefit of the people and progress of the country, namely:

1. reducing crime
2. corruption
3. student outcomes
4. living standards of low-income households
5. rural basic infrastructure; and
6. urban public transport

The GTP (Government Transformation Programme) Roadmap sets out in detail the specific commitments we have made to fight corruption as well as key initiatives

designed to enable us to deliver on these commitments. These initiatives were borne out after deliberations, involving about 250 top civil servants and representatives from the private and social sectors. The Cabinet and top leaders of the civil service have since spent a significant amount of time monitoring progress and challenges faced in the running of the programme.

Under this programme, 3 key areas have been identified for NKRA Corruption where actions need to be taken:

a) Regain the public's confidence in regulatory and enforcement agencies

In order to improve the perception and confidence of the public regulatory and enforcement agencies, each of these agencies has now set up compliance units. The compliance unit will ensure that officers are monitored and adhere to procedures in the conduct of their duties, reducing opportunities for abuse of power. In addition, other initiatives such as job rotation for "hot spot" positions is gradually being implemented, to reduce the build-up of entrenched relationships and hence the opportunity for corruption.

In addition, a public database of convicted corruption offenders, on the Malaysian Anti-Corruption Commission website, has been up and running since 4 March 2010. The database currently lists [192] offenders that have been convicted since the beginning of the year. This enables potential business partners, employers or other members of the public to have an easy reference base for those who have committed bribery and corruption while acting as a strong deterrent, by adopting a "name and shame" approach.

b) Reduce leakages in government procurement

Transparency is a key weapon in combating corruption and the Government has come that there was a lack of transparency in the area of Government procurement to that end, the MyProcurement information portal, was launched on 1st April 2010, to provide stakeholders easy access to information on certain procurement processes and decisions. This portal discloses certain details of Government contracts awarded on open tender, such as the type and value of the contract, and the successful vendor.

Initially Integrity Pact between Government and vendors regarded as an important measure to enhance transparency and to ensure clarity within all parties involved, Ministry of Finance has issued directives on Integrity Pact on the 1st April 2010. The elements of Integrity Pact directive comprises of official invitation to participate in tender or quotations, declaration of abstention from bribery, formulation of code of conduct and contractual provision to abstain from bribery.

c) Tackle grand corruption

Here the Government has issued directives instructing public officers how to treat "support letters", or any attempts to influence the decision making process, in areas ranging from procurement to licensing or permit approvals. All decisions must proceed on the basis of merits and in the public interest. This will hopefully reduce the ability of persons to abuse their position for private benefit.

In 2007, the Government established a high-powered task force to address bureaucracy in business-government dealings. This initiative was needed to effect greater improvement in the way the government regulates businesses. One of the terms of reference of this initiative was to review and enhance the public services delivery system in terms of processes, procedures, legislation and human resource. An inefficient public delivery system is conducive to corruption.

The Attorney General's Chambers has also worked tirelessly to augment the Malaysian legislative framework by introducing the Whistleblower Protection Act. This Act is particularly pertinent to the effective investigation of the Malaysian Anti-Corruption Commission, as it is an Act designed to encourage and facilitate disclosures of improper conduct in the public and private sector and more importantly to protect persons making such disclosures from detrimental action.

Corruption as we all know is a 'crime without boundaries.' International cooperation is imperative in any country's strategy towards combating corruption. To that end, the presence and unfailing commitment of international bodies like the ADB/OECD Anti-Corruption Initiative cannot be underplayed in helping a country achieve zero – tolerance towards corruption. On behalf of the Government of Malaysia, I wish to express my sincere gratitude to the ADB/OECD Anti-Corruption Initiative and other international organizations who have lent their time, zeal and effort in assisting Malaysia in her quest to combat corruption

This seminar is a good platform to exchange knowledge, network and share experiences in combating corruption. I hope all participants will take this opportunity to enhance the level of knowledge and experience for the betterment of our work in combating corruption. I wish you all success in your endeavours.

Lastly, do take some time from your busy schedules to enjoy the spirit of Eid Mubarak that we are presently celebrating. With praise to the Almighty Allah, I declare the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific's 10<sup>th</sup> Regional Seminar on the Criminalisation of Bribery open. Thank you.

# Opening Statement

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Mr. Dato' Sri Haji Abu Kassim Bin Mohamed  
Chief Commissioner  
Malaysian Anti-Corruption Commission

Assalamualaikum and a very good morning to all distinguished delegates, members of the advisory group and observers of the 15th Steering Group (StG) Meeting of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

On behalf of Malaysian Anti-Corruption Commission (MACC) and the Government of Malaysia, I welcome you all to Malaysia for this very important meeting. Indeed, it is an honor for me and the officers of MACC to host this prestigious meeting of this august body. MACC was delighted when the Secretariat from OECD visited me in February requesting Malaysia to host this meeting. At that point of time, all that I could do was to assure Mr. Moulette and Ms. Uriarte that MACC on its part, had no objections to hosting this meeting, subject of course to the approval of the Government of Malaysia. Subsequently, on June 18th, we received the approval from the Government for us to host this event. Therefore we had only about 3 months to organize all the necessary preparations for this meeting.

I hope that delegates are adequately satisfied with our preparations and will continue to do so until the conclusion of this seminar. We apologize for any setbacks that may have arisen during this period of time. Malaysia has been a member to this Steering Group since 2001 when we signed the Plan of Action of this Initiative. MACC has been actively involved in activities organized by the Initiative. We find this Initiative a useful tool, as it pools together professional practitioners from the anti-corruption field and other areas of expertise to discuss, deliberate and offer solutions to matters relating to anti-corruption measures and related areas.

The efforts of the ADB/OECD in devising this Initiative, has benefited us immensely in this region. The exchange of information, experience and the sharing of best practices have enabled us to expand our horizons and broaden our knowledge base in this area of anti-corruption measures. The Malaysian Anti-Corruption Commission was established on January 1st 2009. Under the present structure, 5 independent committees have been set up that comprise a cross-section of civil society and eminent personalities from the private and public sector. These respective committees ensure that the Commission and its personnel stay the course in the eradication of corruption and do so in an independent, professional and transparent manner. To date, these Committees have played their respective roles effectively and contribute to the smooth running of the Commission.

Since the setting up of the Commission with its beefed up personnel and increased powers of investigation, we have witnessed a marked increase in the information received from the public, which has subsequently resulted in the investigation, arrest and prosecution of individuals. These individuals are from both the private and public sector.

Support from the public is imperative to the success of the Commission. Unlike other forms of crime, corruption is often regarded as a silent crime, where there is a willing giver and a willing taker of a bribe. In order to halt such unhealthy practices, the Commission depends on the public to lodge complaints of such malpractices. In order to encourage public participation without fear of repercussions, protection is provided for within the scope of the Malaysian Anti-Corruption Commission Act, to protect informants and their identity. The government has also introduced the Whistleblower Protection Act 2010 that encourages and facilitates disclosure of improper conduct in the public and private sector by protecting persons making those disclosures from detrimental action.

In order to enlist public support, the Commission has gone on a media blitz and has had periodic road campaigns to educate the public on the role of the Commission against corruption and to foster their support against corruption. A division has been set up within the Commission that is responsible for promoting education and public support in the eradication of corruption. In respect of the willing giver and taker of bribes, the law provides that there should be equal culpability in respect of both parties. Having said this, we recognize that there may be occasions where a giver is 'forced' or pays a bribe under 'duress'. Here, the giver is often regarded as a 'victim of circumstances'. In this respect, there is provision in the laws that provides for 'givers' in such instances to be given, immunity. They are then allowed to testify on behalf of the Crown and their evidence is regarded as that of an independent witness.

There have been occasions where the Commission has been forced to rely on the testimony of givers or takers of bribe or those who are concerned with the crime or have knowledge of it, in order to secure the conviction of the other. This is inevitable, because corrupt practices are done stealthy where there may be no independent witnesses to the offence. The testimony of such witnesses, who would normally be regarded as 'accomplices', is given a different form of treatment under the Act. They are not to be regarded as 'accomplices' in the true legal sense of the word.

There is also within the provisions of the current Act, powers for the Commission to request public servants who are being investigated to furnish information on how they were able to own, possess, control or hold wealth in excess of their emoluments, present and past. Failure on the part of the public servant to do so satisfactorily is an offence that carries a term of imprisonment and fine. 'Relatives' and 'associates' of persons under investigation for corruption are bound to provide information on properties that they hold on behalf of the suspect or which they hold in their own capacity and the value and manner in which the said properties were acquired. This information is invaluable when it comes to asset tracing of the proceeds of corruption.

One must bear in mind that the Commission's approach towards corruption does not lie in the mere detection, investigation and prosecution of corrupt offences. We have adopted a holistic approach towards combating corruption, where prevention is also considered a viable strategy. Here, apart from fostering and educating the public, the Commission has powers to examine the practices, systems and procedures of public bodies and to secure the revision of such practices, systems and procedures if the Commission finds that such practices, systems and procedures are conducive to corruption. This service is also extended to the private practice, on request.

Distinguished delegates, members of the advisory group and observers of the 15th Steering Group (StG) Meeting of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. I hope all of us will take an active part in this meeting to resolve matters aired at the previous meeting, be generous with your knowledge and views and eventually return to our respective countries energized from the discussions we have had. Finally, I hope you will take the opportunity to visit places of interest in Kuala Lumpur and sample our fine cuisine. Thank you.



# Opening Statement

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Mr. Kunio Senga  
Director General for Southeast Asia  
Asian Development Bank

Honorable Tan Sri Mohd Muhyiddin Yassin, Deputy Prime Minister of Malaysia  
Honorable Ministers of the Government of Malaysia  
Mr. Dato Sri Haji Abu Kassim Bin Mohamed, Chief Commissioner, Malaysian Anti-Corruption Commission,  
Mr. Mario Amano, Deputy Secretary General, Organization for Economic Cooperation and Development  
Distinguished Guests, Colleagues, Ladies and Gentlemen

Good afternoon.

On behalf of the Asian Development Bank, it is my privilege to extend a warm welcome to you all at this regional seminar on 'Criminalisation of Bribery.' I would like to thank the Honorable Tan Sri Mohd Muhyiddin Yassin, the Deputy Prime Minister of Malaysia for his presence during the opening session of this important seminar. As a member of the Asian Development Bank, the Malaysian Government has actively participated in the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific Region since its establishment in 1999. I would like to thank the Honorable Deputy Prime Minister for his government's continued support for the Malaysian Anti-Corruption Commission. I would also like to take this opportunity to thank the Government of Malaysia and the Malaysian Anti-Corruption Commission for hosting this event as well as the partners and donors of the Initiative for their support. We highly value our relationship with Malaysia, and we are privileged to be working as an equal partner towards a country partnership framework anchored on Malaysia's development experience and regional leadership. It goes without saying that good governance and anticorruption measures will be incorporated into all our operations in the partnership framework.

I understand that the past twelve months has been eventful for the ADB/OECD Anti-Corruption Initiative. In an effort to strengthen co-operation with the United Nations Office on Drugs and Crime, the Initiative participated last November as an observer at the 3rd Conference of State Parties to the United Nations Convention Against Corruption in Doha, Qatar. Professor Pakdee Pothisiri, Commissioner of Thailand's National Anti-Corruption Commission, delivered a statement describing the Initiative's activities supporting UNCAC implementation in Asia-Pacific. In June of this year, the Initiative was also represented at the Inaugural Meeting of the Implementation Review Group of the United Nations Convention Against Corruption (UNCAC) in Vienna, Austria.

An important milestone in November 2009 was the completion of the Independent Review of the Initiative. As agreed at the last Steering Group Meeting, a Small Group on

Implementation comprising member countries and advisory group members was formed in early 2010 to determine how best to implement the recommendations of the independent review. I would like to thank the Group for the substantial work that they have done on the preparation of a draft proposal, which I understand was presented and discussed in the Steering Group meeting yesterday. We now look forward to effective implementation of the Review's recommendations.

We at the ADB continue to give very high priority to our association with the ADB/OECD Anti-Corruption Initiative, which has contributed to a productive decade of networking, learning, and collaboration in the fight against corruption. Going forward, the Initiative should strive to be more relevant and more responsive to the changing needs of the member countries. Therefore, we look forward to significant progress on (i) realigning the Initiative's focus on capacity development support to preventive aspects of the United Nations Convention Against Corruption (UNCAC); (ii) encouraging members to increase their ownership and management of the Initiative; and (iii) strengthening countries' reporting on anti-corruption results to better demonstrate the value of the Initiative.

ADB's engagement in the Initiative is an integral part of our overall program on good governance and public sector management. We were the first multilateral development bank to adopt a policy on governance in August 1995. Our Long-Term Strategic Framework for 2008 to 2020 reaffirms ADB's focus on good governance for development across our operations, including anti-corruption efforts linked to broader support for governance and improvement in the quality and capacities of the public sector. In April this year, ADB signed an agreement with four other multilateral development banks to enforce cross-debarment for firms guilty of corruption, fraud and other violations in our projects. We believe that collective efforts of multilateral development banks in combating corruption will strengthen development effectiveness and sustainable economic growth in the long run. ADB actively supports governance reforms and capacity development efforts of our developing member countries. In 2009, we approved \$6.3 billion in loans that support good governance projects either directly or through sector projects and programs. This represents almost half of all loans approved last year.

Poverty reduction and development effectiveness cannot be effectively achieved in our member countries without addressing corruption and governance challenges. Corruption sabotages policies and programs that aim to reduce poverty and promote economic growth and development. The harmful effects of corruption are especially severe on the poor and the vulnerable groups, such as women and minorities, who are unable to pay bribes to corrupt government officials to fulfill basic needs like education and healthcare.

Allow me to further elaborate upon the linkage between good governance and development effectiveness. In 2009, an ADB study examined the critical constraints to investment, economic growth and poverty reduction in one of our member countries by following the growth diagnostic framework. The study identified 'weak investor confidence due to governance concerns, particularly corruption and political instability' as

one of the key constraints. The research concluded that governance constraints and corruption undermine tax collection (due to huge leakage). Political instability hinders investment and growth, and reduces the tax base. Poor governance also results in poor infrastructure, causes leakages and misappropriation of public funds, and hinders the pace of poverty reduction. It is also a major factor contributing to inequalities in access to education, health, infrastructure, and other productive assets. The research concludes that addressing governance concerns will go a long way towards relaxing the critical constraints to growth and poverty reduction. Numerous studies by other development agencies also reveal the detrimental impact of corruption on development. Corruption adversely affects GDP growth and capital accumulation; lowers the quality of education, public infrastructure, and health services; and reduces effectiveness of development aid.

Improving governance will enable development, help in the fight against poverty, and improve living standards of people. A World Bank study concludes that better governance contributes to better development outcomes at the country level; this is referred to as the 'development dividend' of good governance. An improvement in governance (for example, improvement in rule of law or a reduction in corruption) can lead to a two- to four- fold improvement in per capita incomes, a comparable decrease in infant mortality, and about a 20 percent improvement in literacy. IMF economist Paulo Mauro argues that a country that improves its standing on the corruption index from, say, 6 to 8 (where 0 is most corrupt and 10 is least) will see an increase of 4 percentage points of investment, with consequent improvement in employment and economic growth.

Although a great deal of global effort has gone into improving governance in the past decade, corruption challenges remain serious in the Asia and Pacific region. According to Transparency International, the global financial crisis and political transformation in many Asian countries during 2008 exposed fundamental weaknesses in both the financial and political systems and demonstrated failures in policy, regulations, oversight, and enforcement mechanisms. The challenges threatening the rights and livelihoods of populations across the world have increased. Corruption in the form of bribery remains rife in many countries, totaling about \$1 trillion globally every year according to the World Bank Institute. Unfortunately, bribery is simply accepted as the price of doing business in many of the countries in our region. These attitudes must change if we are to successfully fight corruption. Therefore, this seminar on Criminalisation of Bribery is very timely and relevant.

The seminar will benefit from an exchange of country-level experiences in criminalization of bribery among colleagues from the Asia and Pacific region. Reputed academics and researchers will lead the discussion on international standards and practices for criminalisation of bribery. I am confident that the learning achieved during the seminar will assist member countries to implement the provisions on Criminalisation and Law Enforcement under United Nations Convention Against Corruption.

In concluding, I would like to commend the fruitful partnership between the Initiative's member countries and the international development partners in working together to achieve the common goal of fighting corruption. We also look forward to

continuing our work together in the months ahead under the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. Once again, on behalf of the ADB, I would like to thank the Government of Malaysia for their support and for hosting this regional seminar. I wish you very stimulating and productive deliberations. Thank you.

# Opening Statement

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Mr. Mario Amano  
Deputy Secretary-General  
OECD

Distinguished ladies and gentlemen: Good afternoon.

I am pleased to be here with you today in Kuala Lumpur and to share with you the opening of the 10th Regional Anti-Corruption Seminar for Asia and the Pacific. I am sincerely honoured to share this platform with Malaysia's Deputy Prime Minister, the Honourable Hon. Tan Sri Dato' Haji Muhyiddin bin Mohammed. Mr. Deputy Prime Minister, your presence truly demonstrates Malaysia's dedication to fighting corruption and vision of the importance of the Asia-Pacific Region in this global fight.

I would also like to thank the Chief Commissioner of the Malaysian Anti-Corruption Commission, Mr. Dato' Sri Haji Abu Kassim Bin Mohamed, for his opening remarks and for the Commission's generous hosting of this regional seminar. Your law enforcement efforts have helped make Malaysia one of the leaders in the Region in fighting bribery. So it is fitting, therefore, that we hold this discussion on the criminalisation of bribery here in Kuala Lumpur.

In Malaysia, both bribe-receiving and bribe-giving are crimes. What's more, violating these laws carry maximum penalties of up to 20 years in prison and fines for both individuals and companies. The Malaysian Anti-Corruption Commission is also raising awareness. For example, this April, the Chief Commissioner and head of the OECD Anti-Corruption Division jointly published in The Star newspaper an article on the threat bribery poses to international business, and in particular how Malaysia puts emphasis on penalising both the bribe givers and bribe receivers.

The effective criminalisation of bribery must become standard practice in the Asia-Pacific Region. Since the late 1980s, economies in the Region have exploded onto the global market, with their companies exponentially increasing the number of business deals they conduct both within Asia-Pacific and internationally. Today, while we might still feel the effects of the recent global financial and economic crisis, economic growth in Asia-Pacific remains strong and trade and investment flows continue to rise.<sup>1</sup> In fact, according to statistics from our colleagues at the Asian Development Bank, growth in this Region is forecast to rise to over 7 percent in 2010 and 2011, marking a healthy rebound from the 2009 slowdown.<sup>2</sup> Southeast Asia's growing importance in the world economy is why the region is of strategic importance to the OECD. It is also the reason why none of us can afford to let corruption undermine trust in the region's markets and governments.

Today, eleven years after the entry into force of the OECD Anti-Bribery Convention and nearly five years since the entry into force of the UN Convention against

Corruption, this international anti-corruption framework is now solidly on the global policy agenda. Real progress has been made. And from the beginning, the ADB/OECD Anti-Corruption Initiative has played an important role in making this progress happen.

The Initiative's 28 member governments have taken a hard look at what needs to be done to step up efforts against bribery and corruption. Under the Anti-Corruption Action Plan for Asia and the Pacific, you have taken stock of your legal and institutional frameworks to fight corruption and worked to find solutions for problem areas, such as corruption in public procurement, mutual legal assistance, extradition and recovery of proceeds of corruption.

You have also identified as a priority area the criminalisation of bribery offences according to international standards -- the theme of this seminar. Members of the Steering Group have just adopted the report for a Thematic Review on the Criminalisation of Bribery Offences. This is a significant achievement for the Initiative, for the region and, more broadly, for all countries seeking technical assistance on how to effectively implement their obligations under the UN Convention to outlaw domestic and foreign bribery.

As a representative of the OECD, home to the Anti-Bribery Convention, with its focus on the supply-side of the bribery of foreign public officials in international business transactions, I am very pleased to see that you are including in your discussions the criminalisation of such bribery. As your companies engage in international business, they become increasingly exposed to the risks of foreign bribery. I hope that this Seminar will provide an impetus for more of you to enact specific foreign bribery offences. Those members that have already done so can provide important leadership and experience. Indeed, some of you are Parties to the Anti-Bribery Convention, while others already working closely with the OECD Working Group on Bribery on fighting transnational bribery, and we look forward to co-operating with even more of you.

I am also pleased that your discussions include a session on corporate liability for bribery of public officials. International standards, including the UN Convention and the Anti-Bribery Convention, require countries to sanction companies for bribery. However, this is a new and dynamic area of the law globally. I look forward to new ideas on how companies can be held responsible for their role in corruption, and what companies can do to prevent corruption in the first place by establishing effective internal controls, ethics and compliance measures. I believe that you will find the new OECD 'Good Practice Guidance' for companies useful in this regard.

This seminar represents an enormous opportunity to share expertise. The challenges you will discuss on the criminalisation of bribery are difficult, but they are not insurmountable, especially if we work together. I am certain that, over the course of the next day and a half, your shared ideas and experiences will go far to strengthen each members' ability to prevent, detect and investigate bribery at home and abroad.

In closing, I would like to thank you, the members of the ADB/OECD Anti-Corruption Initiative for your steadfast commitment to the international fight against

corruption. I would particularly like to thank the government of Japan for its generous funding of the Thematic Review and of the Initiative's activities. I would also like to thank our partner in the joint Secretariat for this Initiative -- the Asian Development Bank. Thank you very much Mr. Kunio Senga, ADB's Director General for Southeast Asia, for your opening remarks. The OECD believes that this Regional Seminar is an important milestone in our longstanding and successful partnership. Moreover, I would like to reiterate my thanks to the Malaysian Anti-Corruption Commission for hosting this event.

And finally, I would thank you again, Mr. Deputy Prime Minister for honouring us by joining us today, for your leadership on the fight against corruption, and for sharing your insights now with your keynote address to officially open this Regional Seminar. Mr. Prime Minister, on behalf of the OECD, I would like to present you with this token of gratitude. Thank you, and good luck.

#### NOTES

- <sup>1</sup> OECD, *Shaping Policy Reform and Peer Review in Southeast Asia: Integrating Economies Amid Diversity*, 2008 (<http://oecd.org/dataoecd/16/43/42000050.pdf>)
- <sup>2</sup> *Asian Development Outlook 2010: Macroeconomic Management Beyond the Crisis*, 2010 (<http://www.adb.org/Documents/Books/ADO/2010/default.asp>)



# Session 1

## International Instruments on the Criminalisation of Bribery

- Criminalisation of Bribery under the UNCAC and the Use of the UNCAC Legislative and Technical Guides, *Tanja Santucci, UNODC*
- Criminalisation of Bribery under the OECD Anti-Bribery Convention and Annex I of the 2009 OECD Recommendation on Further Combating Foreign Bribery, *Melissa Khemani, OECD*



# Criminalisation of Bribery under the UNCAC and the Use of the UNCAC Legislative and Technical Guides

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## Introduction

The United Nations Convention against Corruption (UNCAC) is the only legally binding universal anti-corruption instrument. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem. UNCAC covers five main areas: prevention, criminalization and law enforcement measures, international cooperation, asset recovery, and technical assistance and information exchange.

The Convention's anti-bribery provisions are contained in three main articles of UNCAC. The two mandatory provisions are article 15 (bribery of national public officials) and article 16, paragraph 1 (active bribery of foreign public officials and officials of public international organizations). In addition, two provisions require States parties to consider criminalizing the passive bribery of foreign public officials and officials of public international organizations (article 16, paragraph 2) and bribery in the private sector (article 21). These three articles are discussed in greater detail below.

## Summary of the Convention's anti-bribery provisions

### Bribery of national public officials (article 15)

Article 15 requires States parties to establish two offences: active and passive bribery of national public officials. The distinction between the active and passive sides of the offence allows to more effectively prosecute corruption attempts and introduces a stronger dissuasive effect. Both are mandatory provisions, and therefore legislation is required to implement these provisions, if these laws do not already exist. States with relevant legislation in place must ensure that the existing provisions conform to the Convention's requirements and amend their laws, if necessary. Attention should also be paid to other provisions (arts. 26-30 and 42) regarding closely related requirements pertaining to offences established under the Convention.

*Active Bribery (subparagraph (a))*

Under article 15, subparagraph (a), States parties must establish as a criminal offence, when committed intentionally, 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.

Key elements of the offence of active bribery are that the undue advantage may be tangible or intangible, whether pecuniary or not, and can include, for example, a gift, concession or advantage given to some other person, such as a relative or political organization. However, the undue advantage or bribe must be linked to the official's duties. It is reiterated that for purposes of UNCAC, with the exception of some measures under chapter II, "public official" is defined in article 2, subparagraph (a).

Some national legislation may cover the promise and offer of an undue advantage under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker).

The required mental or subjective element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties, such as an intent to influence the conduct of the recipient, regardless of whether this actually took place.

*Passive Bribery (subparagraph (b))*

States parties must also to establish as a criminal offence, when committed intentionally, 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 (art.15, subpara. (b)). Legislation is required to implement this provision, which mirrors the elements of active bribery discussed above.

The required elements are soliciting or accepting the bribe. The link with the influence on official conduct must also be established. As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly. The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.

Bribery of foreign public officials and officials of public international organizations (article 16)

*Active bribery of foreign public officials and officials of public international organizations (paragraph 1)*

Under article 16, paragraph 1, States parties must establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

As noted in chapter I of UNCAC, “foreign public official” is defined as “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise” (art. 2, subpara. (b)). The “foreign country” can be any country, that is, it does not have to be a State party. State parties’ domestic legislation must cover the definition of “foreign public official” given in article 2, subparagraph (b) of UNCAC, as it would not be adequate to consider that foreign public officials are public officials as defined under the legislation of the foreign country concerned. Article 16 does not require that bribery of foreign public officials constitute an offence under the domestic law of the concerned foreign country. An official of a public international organization is defined as “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization” (art. 2, subpara. (c)).

This offence mirrors the active bribery offence discussed above. One difference is that it applies to foreign public officials or officials of a public international organization, instead of national public officials. The other difference is that the undue advantage or bribe must be linked to the conduct of international business, which includes the provision of international aid.<sup>1</sup> Otherwise, all required elements of the offence (promising, offering or giving), the nature of the undue advantage and the required mental or subjective element remain the same as described above.

States with only territorial jurisdiction will have to make an exception to this principle in order to cover this particular offence, which will usually be committed by nationals abroad. Furthermore, the provisions of article 16 do not affect any immunities that foreign public officials or officials of public international organizations may enjoy under international law.

It is important to note that the criminalization of bribery of foreign public officials and officials of public international organizations is mandatory under UNCAC, whereas it is not mandatory under the Organized Crime Convention. Consequently, national drafters should pay close attention to all of the provisions of UNCAC, even if their current legal system covers some of the same ground following the implementation of the Organized Crime Convention or other conventions and instruments.

*Passive bribery of foreign public officials and officials of public international organizations (paragraph 2)*

Article 16, paragraph 2, requires that States parties consider establishing as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, 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.

This is the mirror provision of article 15, subparagraph (b), which mandates the criminalization of passive bribery of national public officials; the discussion above of article 15, subparagraph (b) therefore applies to article 16, paragraph 2, *mutatis mutandis*.

Unlike the offence of active bribery of foreign public officials and officials of public international organizations, which is mandatory, article 16, paragraph 2 requires only that States parties “consider” criminalizing the solicitation or acceptance of bribes by foreign officials. The interpretive notes state that “This is not because any delegation condoned or was prepared to tolerate the solicitation or acceptance of such bribes. Rather, the difference in degree of obligation between the two paragraphs is due to the fact that the core conduct addressed by paragraph 2 is already covered by article 15, which requires that States parties criminalize the solicitation and acceptance of bribes by their own officials” (A/58/422/Add.1, para. 28).

The negotiating delegations considered it quite important that any State party that has not established the offence defined in paragraph 2 of article 16 should, insofar as its laws permit, provide assistance and cooperation with respect to the investigation and prosecution of the offence by a State party that has established it in accordance with the Convention and should avoid, if at all possible, allowing technical obstacles such as lack of dual criminality to prevent the exchange of information needed to bring corrupt officials to justice (A/58/422/Add.1, para. 26). Attention should also be paid to other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Active and passive bribery in the private sector (article 21)

UNCAC also introduces active and passive bribery in the private sector, an important innovation compared to the Organized Crime Convention and other international instruments. Article 21 thus brings out the importance of requiring integrity and honesty in economic, financial or commercial activities. Specifically, article 21 requires that States parties consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the

person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

As the above provisions mirror those of article 15, the discussion regarding article 15 applies here, *mutatis mutandis*.

*Active bribery in the private sector*

The required elements of this offence are those of promising, offering or giving something to a person who directs or works for a private sector entity. The undue advantage may be tangible or intangible, whether pecuniary or not, and does not have to be given immediately or directly to a person who directs or works for a private sector entity. It may be promised, offered or given directly or indirectly. The gift, concession or other advantage may be given to some other person, such as a relative or a political organization.

Some national laws may cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the person's duties.

The required mental or subjective element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the person who directs or works for a private sector entity to act or refrain from acting in breach of his or her duties in the course of economic, financial or commercial activities. Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.

*Passive bribery in the private sector*

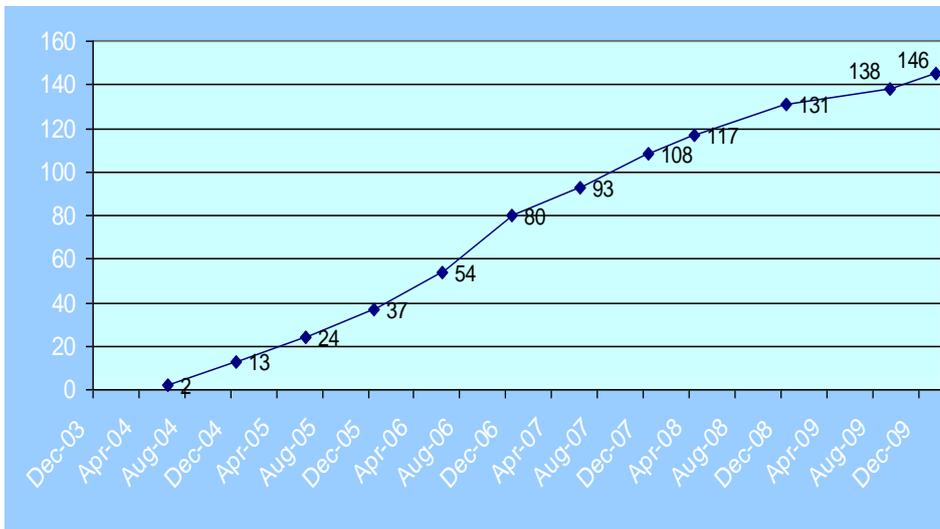
This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence over the conduct of the person who directs or works in any capacity for a private sector entity must also be established. As with the previous offence, the undue advantage may be for the person who directs or works in any capacity for a private sector entity or some other person or entity. The solicitation or acceptance must be by that person or through an intermediary, that is, directly or indirectly.

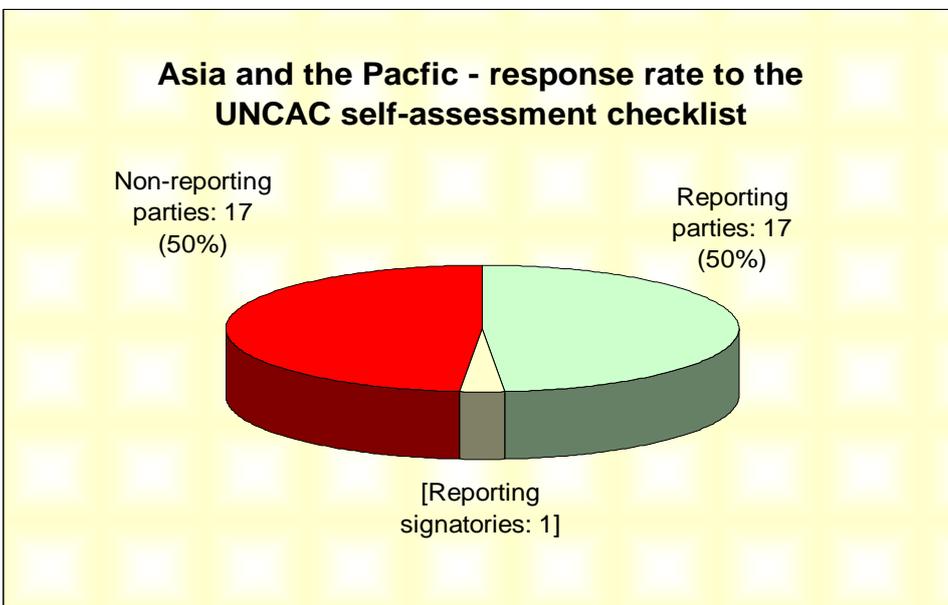
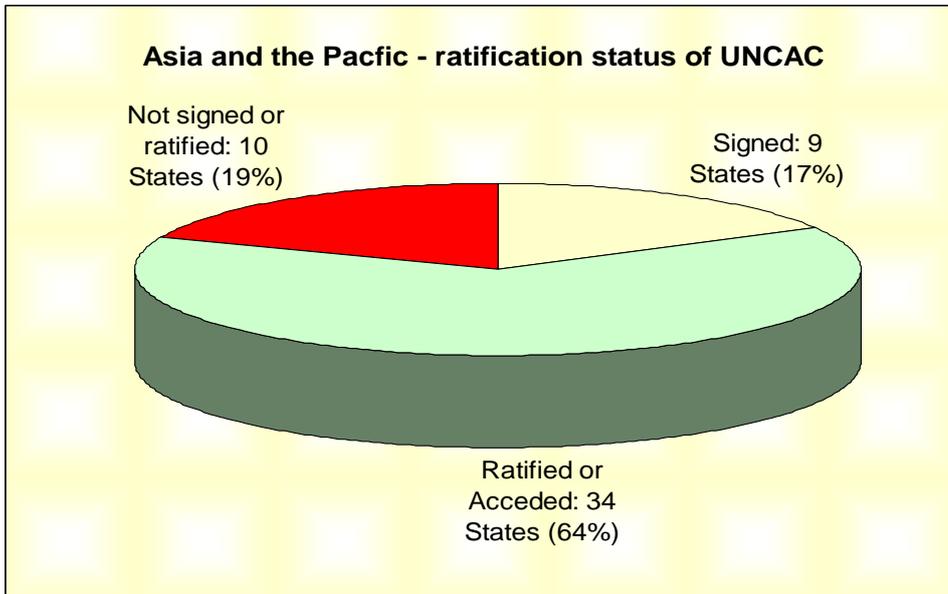
The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in breach of his or her duties,

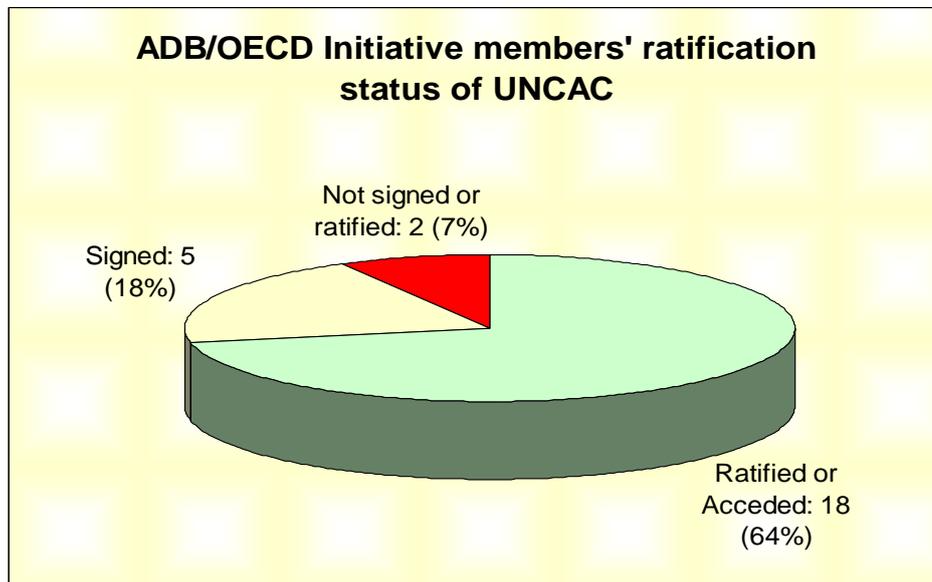
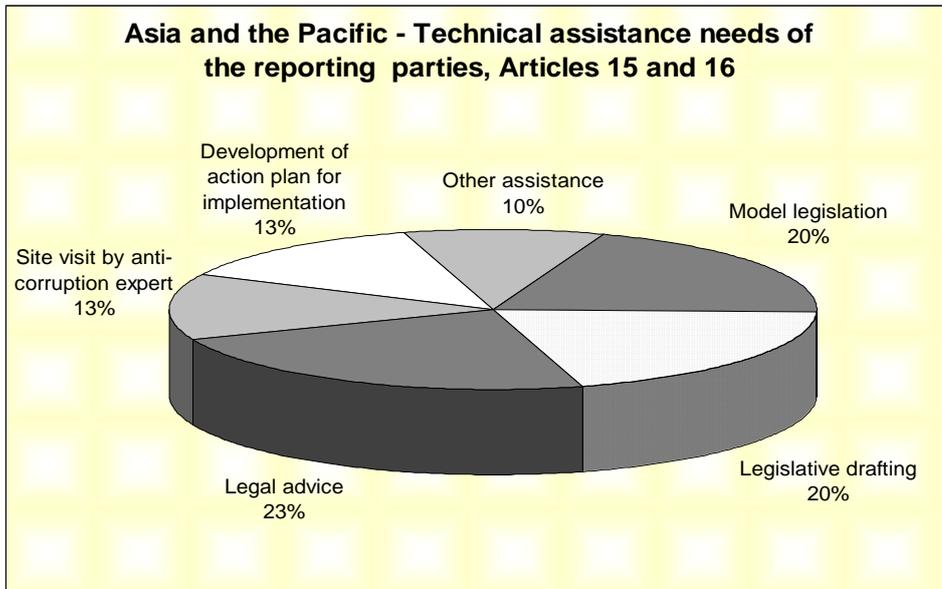
in the course of economic, financial or commercial activities. Article 21 is intended to cover conduct confined entirely to the private sector, where there is no contact with the public sector at all. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

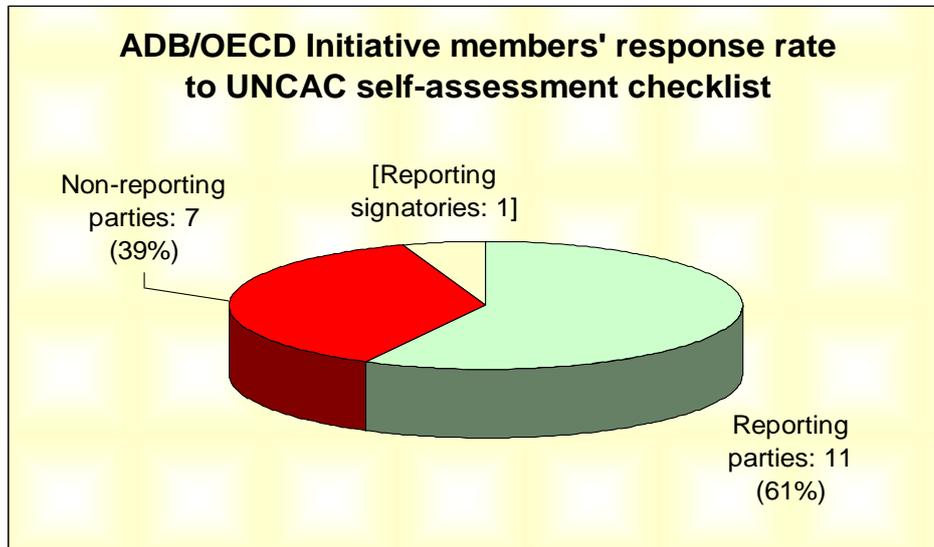
*UNCAC ratification status and technical assistance needs in the Asia-Pacific region and within the membership of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific*

The rapidly growing number of States parties since UNCAC opened for signature on 9 December 2003 in Merida, Mexico is proof of the universal nature and reach of the Convention. At present, 146 of the 192 United Nations Member States have become States parties. However, the rate of ratification is not uniform. Of the five regional groups into which the United Nations system commonly divides the world, the Asia-Pacific region is among those with the lowest rate of ratification. For example, of 13 Pacific Island nations, so far only 3 have ratified and 10 States are yet to accede. As a result, UNODC organized a pre-ratification seminar in Samoa in July 2010 to address challenges and provide solutions. Other major states in region have also yet to ratify, though there have been notable recent efforts in promoting anti-corruption in the region. Further detail is provided in the graphics below.









### UNCAC Legislative Guide

The UNCAC Legislative Guide is a useful tool for legislators and policymakers as they draft the necessary legislation to implement the Convention. It is intended primarily to assist States seeking to ratify and implement the Convention by identifying legislative requirements and options available to States. The Legislative Guide has been drafted to accommodate different legal traditions and varying levels of institutional development, but is not authoritative. It recognizes that there is no single solution and that legal traditions and levels of institutional development among States vary. The Legislative Guide promotes flexibility in implementation while still resulting in consistency among States parties.

Each chapter of the Legislative Guide contains the text of and an introduction to the relevant article or articles of UNCAC, a summary of the main requirements, and a discussion of the distinction between mandatory requirements, optional requirements, which impose an obligation on States to consider a certain measure, and optional measures, which States parties may wish to consider. The Legislative Guide contains references to related provisions in other regional and international instruments, as well as examples of national implementing legislation and textual notes. These features can provide useful information for States to identify common practices and compare proposed legislation to that of others in their same region or with a similar socio-economic, political or legal background. The examples are not to be considered as models for drafting legislation and States are encouraged to pay attention to the often significant differences among jurisdictions. UNODC is presently working on an updated version of the Legislative Guide, which is expected to be available on the UNODC website in the near future.

NOTES

<sup>1</sup> See Interpretive Note, A/58/422/Add.1, para. 25.

# Criminalisation of Bribery under the OECD Anti-Bribery Convention and Annex I of the 2009 Recommendation on Further Combating Foreign Bribery

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## Introduction

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Anti-Bribery Convention') is an international criminal law treaty where State Parties are required to criminalise the bribery of foreign public officials in international business transactions. There are currently 38 State Parties to the Convention – the 33 OECD countries and 5 non-member countries (Argentina, Brazil, Bulgaria, Estonia and South Africa). It is the only multilateral instrument that specifically focuses on foreign bribery, and has been in force for more than ten years. The 38 State Parties to the Convention form the OECD Working Group on Bribery in International Business Transactions ('WGB'), whose main task is monitoring the implementation of the Convention through an on-going programme of rigorous peer review.

The importance of fighting foreign bribery cannot be overstated – it is a serious crime with serious consequences. Foreign bribery distorts competitive markets by undermining a level playing field in international business. As a result, companies that engage in bribery obtain business not on the basis of merit and quality of products or services, but on the basis of having deep pockets. Those companies have to somehow re-coup the costs of paying bribes and this can only be done by the delivery of poor goods and sub-standard products. This means that roads vital for economic development are not built, bridges collapse, hospitals and schools are inadequately funded and supplied, and that citizens lose confidence in their government, as bribe-paying companies or individuals undermine the integrity of the public service in the receiving-end country.

The OECD focuses on this narrow aspect of corruption because its members comprise most of the major exporting countries and foreign investors, which accounted for roughly two-thirds of world exports in 2009 and nearly 90 percent of global outward

flows of foreign investment. Accordingly, there is a serious potential for companies from these countries to bribe foreign public officials in international business transactions.

## Criminalisation of Bribery under the OECD Anti-Bribery Convention

The OECD Anti-Bribery Convention addresses the “supply-side of bribery” – the offering, promising or giving of a bribe to a foreign public official. More specifically, **Article 1 of the OECD Anti-Bribery Convention** states:

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

Active foreign bribery is also criminalised under **Article 16.1 of the UNCAC**, which applies almost verbatim language as Article 1 of the OECD Anti-Bribery Convention:

*“Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.”*

## Breakdown of the Elements of the Foreign Bribery Offence under the OECD Anti-Bribery Convention

*“...any person...”*

- Includes natural and legal persons (when combined with Article 2 of the Convention).

*“...to offer, promise or give...”*

- If a bribe is offered or promised, it does not need to be “paid” for an offence to have been committed.

*“...any undue pecuniary or other advantage...”*

- The bribe covers any form of advantage, whether pecuniary or non-pecuniary, given to the foreign public official or third party.

- The value of the advantage is irrelevant, as are perceptions of local custom, the tolerance or expectation of such payments by local authorities, or the alleged necessity of the payment.

*“... whether directly or through intermediaries...”*

- Article 1 includes bribery committed through an intermediary, subsidiary or other agent

*“...to a foreign public official... for that official or for a third party...”*

- The offence covers bribes that benefit a foreign public official's family, political party, or another third party.

*“...in order that the official act or refrain from acting in relation to the performance of official duties...”*

- Article 1(4)(c) of the Convention clarifies that this includes any use of the public official's position, whether or not within the official's authorized competence.

*“...in order to obtain or retain business or other advantage...”*

- Foreign bribery is a crime under the Convention even if the desired results are not achieved, and even if the company would have achieved the desired results without giving the bribe (e.g. even if the company was the best qualified for a tender).

The OECD Anti-Bribery Convention also makes provisions for corporate liability for foreign bribery (Article 2); sanctions for foreign bribery (Article 3); extra-territoriality (Article 4); foreign bribery as a predicate offence to money laundering legislation (Article 7); accounting offences (Article 8), and; mutual legal assistance (Article 9).

## Annex I of the 2009 Recommendation on Further Combating Foreign Bribery

In 2009, the OECD Council adopted a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions. The instruments contained therein supplement the existing framework of the OECD Anti-Bribery Convention by recommending in further detail courses of action on issues such as small facilitation payments, corporate liability, the use of intermediaries, and reporting mechanisms.

Annex I of the 2009 Recommendation *Good Practice Guidance on Implementing Specific Articles on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* is the result of horizontal, cross-cutting issues across member countries that were identified by the WGB as needing strengthening. Accordingly, Annex I provides detailed guidance on the implementation of specific articles of the OECD Anti-Bribery Convention to ensure thorough implementation

and that there are no loopholes in the law. On the foreign bribery offence, Paragraph A. of Annex I states the following:

*“Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe.*

*Member countries should undertake public awareness-raising actions and provide specific written guidance to the public on their laws implementing the OECD Anti-Bribery Convention and the Commentaries to the Convention.*

*Member countries should provide information and training as appropriate to their public officials posted abroad on their laws implementing the OECD Anti-Bribery Convention, so that such personnel can provide basic information to their companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations.”*

## Concluding Remarks

Due to instruments like the OECD Anti-Bribery Convention, and now the UNCAC, the fight against foreign bribery has increased momentum. To date there have been 225 convictions of companies and individuals for foreign bribery, with the highest fine imposed of EUR 1.24bn on a single company, and there are currently 280 active foreign bribery investigations underway among the State Parties to the OECD Anti-Bribery Convention. However, foreign bribery is a concealed and complex crime, and its transnational nature adds another challenging layer to its detection, investigation and prosecution. Against this background, comprehensive and effective criminalisation provisions are all the more important. This is a critical time to increase our efforts to combat corruption and to shed light on the bribery of foreign public officials. As the global economy inches its way out of a worldwide recession, many businesses will be doing all they can to get back on track – at whatever cost. It is crucial that we take this opportunity to remind the world that bribery is wrong, that it is punished, that there are real victims who suffer, and that it is never the right solution.

## Session 2

# Challenges in Establishing and Applying Domestic and Foreign Bribery Offences

- Lessons from the United Kingdom's Old and New Approaches to the Criminalisation of Corruption, *Arvinder Sambei, Amicus Legal Consultants, Ltd.*
- Bribery through Intermediaries, *William Loo, OECD*
- Challenges in Establishing and Applying Domestic and Foreign Bribery Offences in Malaysia, *Han Chee Rull, Malaysian Anti-Corruption Commission*
- Foreign Bribery Offences under the Korean Legal System, *Chang Soo Lee, Supreme Prosecutors' Office, Korea*
- How Jurisprudence in Hong Kong, China has Interpreted and Complemented Statutory Bribery Offences, *Alex Lee, Department of Justice, Hong Kong, China*



# The United Kingdom's Old and New Approaches to the Criminalisation of Corruption

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## Aim

I want to look at approaches to criminalisation that have followed the United Kingdom's Prevention of Corruption Acts 1889-1916. Let me say immediately that I recognise that some States have drawn selectively from parts of the UK's legislative framework, whilst others have followed it in large part. Rather than attempt a narrative survey, I would like to highlight those parts of the UK's law that cause recurring or potential difficulties and to demonstrate how the UK has sought to address these in the Bribery Act 2010.

## The UK's Criminalisation before the Bribery Act 2010 (which comes into force in April 2011)

First of all, bribery and attempted bribery of a public office holder is a common law offence punishable by imprisonment or a fine, or both. Soliciting or receiving a bribe by a public office holder is, similarly, an offence at common law. In addition, and until the coming into force of the new Act, the main statutes dealing with corruption are the Public Bodies Corrupt Practices Act 1889; the Prevention of Corruption Act 1906; and the Prevention of Corruption Act 1916.

Section 1(1) of the Public Bodies Corrupt Practices Act 1889 makes it an offence for any person alone, or in conjunction with others, to corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned. Section 1(2) of the Act creates a similar offence to that of section 1(1), in respect of anyone who gives the bribe.

Section 1 of the *Prevention of Corruption Act 1906* creates offences relating to corrupt transactions by and with agents in relation to their principal's activities. Crown servants are within the definition of agents of this Act. The consent of the Attorney General is required for prosecutions under these Acts. There are also other, specific, statutory offences involving corruption, include those under the *Honours (Prevention of*

*Abuses) Act 1925*. There is also the very useful common law offence of misconduct in public office. An offence that I know has provided invaluable to Hong Kong SAR in its fight against corruption in public life.

There has been long standing interest in overhauling what is an antiquated criminalisation framework. The need for reform and rationalisation has been in large part driven by the international obligations imposed by those instruments with which we are all familiar, in particular UNCAC and the OECD Convention. What then are the weaknesses of the current UK law?

- A lack of consistency and comprehensiveness of the existing law on corruption. A 'patchwork quilt' of offences.
- A lack of a statutory definition of the term "corruptly", which has been open to different interpretations and in respect of which there has been no settled judicial definition.
- Criminalisation partly reliant on the agent/principal relationship.
- The dependence of the existing law on the distinction between public and non-public bodies. No specific foreign bribery offence and a less than complete definition of 'foreign public official'.
- Difficulty in prosecuting legal persons because of the common law attribution test.
- Requirement of Attorney-General's consent for the statutory offences.

#### Offering, Promising, Giving

The offering, promising or giving of a bribe to a foreign public official must be criminalised. Legislators should, therefore, consider incorporating those three key words of 'offering', 'promising', or 'giving', into the foreign bribery offence. However, such an approach will not be appropriate in every jurisdiction. For instance, as any 'promise' must surely involve an 'offer', it may be that the word 'promise' need not appear within the offence created. Thus, section 1 of the Prevention of Corruption Act 1906 refers to any person who 'Corruptly gives or agrees to give or offers', and would seem to cover all aspects even though 'promise' is not specifically mentioned. However, in both the Phase 1 and Phase 1 *bis* reviews of the UK by the OECD WGB, a recommendation was made that any future amendment to the UK corruption law should cover the notions of 'offering', 'promising', or 'giving' specifically.

#### Definition of 'public official' and 'foreign public official'

There are advantages in adopting an autonomous definition which follows these provisions and which, importantly, will not require a prosecuting authority to obtain proof of how a foreign country actually defines a particular individual's role. When UK corruption law was extended in 2001 to criminalise explicitly the bribery of foreign public officials (on the basis of nationality jurisdiction), the new legislation, in effect, simply

added what might be described as a 'foreign' element to existing definitions of 'public office', 'public body', and 'public authorities', as well as 'agent' and 'principal'.

International experts, including the OECD WGB queried whether in fact all the categories of officials set out in the OECD Convention and Commentary (and, indeed subsequently, in UNCAC) as being required to be covered within the definition are in fact provided for.

#### Bribery through an intermediary

The offer, promise, or giving must be criminalised, whether made directly to a public official or through an intermediary or intermediaries. The message, internationally, is that enforcement and implementation may be problematic if the wording of a bribery offence is couched in terms which do not reflect explicitly 'directly or through intermediaries', or, alternatively, in the words of the UNCAC, 'directly or indirectly'. Thus, both the Phase 1 and Phase 2 reviews of the UK drew attention to what appeared to the lead examiners to be a shortcoming in the Prevention of Corruption Act 1906. Certainly the provisions of the 1906 Act, and indeed the body of case law creating the common law offence, do not expressly refer to an offer, etc being made through an intermediary. Nevertheless, common law practitioners will no doubt argue that the 1906 Act does in fact criminalise bribery through an intermediary on two bases: first, that Section 1 talks of 'gives or agrees to give or offers any gift or consideration to *any agent*...'; secondly, in respect of both the statutory and common law offence, a bribe passing through an intermediary, or indeed an offer of a bribe, is likely to be caught since, on general principles, the use of an agent (whether innocent or a knowing accomplice) will not allow the principal offender to escape criminal liability. Further, it is worthy of note that, under the 1906 Act, any agent who corruptly accepts, or obtains, a gift or consideration, etc 'from any person' will fall prey to the passive bribery offence.

#### Undue, Improper, Corruptly

Each of the above presents difficulties! Within the UK, the term 'undue' has an imprecise meaning. The same difficulty is experienced in other parts of the English-speaking world to a greater or lesser extent. There certainly seems to be no definition of either word in English which has sufficient precision. The dictionary definition and general understanding (bearing in mind that a jury would be considering the issue) of either word ranges from 'incorrect', 'unsuitable', 'unbecoming', 'unlawful' (civil or criminal), or 'criminal'.

The risk is not simply one of arriving at a definition which is equivocal, rather it is that the use of 'undue', or indeed 'improper' might result in a position where any form of agreement or contract between corrupt parties precludes a corruption charge (on the premise that there was in existence a legal basis for the advantage). Within the UK, at least, the difficulty does not stop there, since no true definition of what is meant by 'corruptly' has evolved; therefore, 'corrupt advantage' is probably not the smoothest path to UNCAC compliance by an English-speaking party in the absence of an ability to define what 'corrupt' actually is. The common law has been better at saying what corruption is

not (for instance, it does not have to involve an element of dishonesty), than at saying what it actually is!

## The Chosen Basis for Criminalisation

Most jurisdictions will seek to define corruption by adopting a transactional approach; in other words, providing for a criminal offence which is made out when, in broad terms, the offering or giving of an advantage in return for a gain takes place. However, should the definition of the corruption offence be further limited by reference to the agent/principal relationship (as in the UK Prevention of Corruption Act 1906) or by the notion of breach of trust? For instance, Australia, Canada, and Ireland, in addition to UK, have each adopted an agent/principal approach to some of their corruption offences, whilst several other countries, including Germany and Austria, have a concept of private sector corruption based on breach of duty which is conceptually very similar to agent/principal. Certainly breach of duty lies at the heart of the approach to private sector corruption found in international instruments.

Criminalisation on the basis of agent/principal is acceptable, but presents real problems: for instance, a defence of principal's consent might work for the private sector, but not for the public. The rigours and the breadth of anti-corruption evaluations under international instruments have engendered wider debates: Is criminalisation best served by a generic offence, (like the one traditionally favoured by the United Kingdom), or by a number of different corruption offences reflecting different types of corrupt transactions and relationships (as, for instance, adopted by South Africa)? Perhaps even more fundamentally, should a State seek to formulate a free standing definition of what amounts to corruption or should one avoid a definition of what amounts to the term 'corruptly' and simply define the offence in relation to a breach of the agent/principal relationship or, at least, the notion of breach of trust? In the sphere of corrupt activity with which we are particularly concerned, such considerations arise from a very basic difficulty: how to differentiate a corrupt act from the various kinds of legitimate giving and receiving of advantages that make up ordinary transactions of both business and social life.

What is the nature of corruption? Should criminalisation be confined to activity which is essentially the subversion of loyalty to a principal, such as an employer or, indeed, the public at large? Is the essence of corrupt activity 'cheating' on the person or entity that you should be safeguarding or is it the wider notion of criminalising those activities within business/commerce and government which are morally reprehensible and which are not perhaps presently capable of being reflected by other existing offences?

## The Bribery Act 2010

The four offences under the Act are:

1. Bribing another person (the 'active offence'): where a financial or other advantage is offered to another person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity.

2. Being bribed (the 'passive offence'): where a person receives or accepts a financial or other advantage to perform a function or activity improperly.

3. Bribery of a Foreign Public Official (FPO): where a person directly or through a third party offers, promises or gives any financial or other advantage to an FPO in an attempt to influence them in their capacity as a FPO and to obtain or retain business, or an advantage in the conduct of business.

4. Corporate offence: failure to prevent bribery: a UK commercial organisation (incorporated or acting as a partnership in the UK or carrying on business in the UK) can be found guilty of bribery where someone associated with the organisation is found to have bribed another person with the intention of obtaining or retaining business or an advantage in the conduct of business. Such persons 'associated' with the organisation could include employees, agents, sub-contractors and joint-venture arrangements (amongst others). The bribery could take place anywhere in the world.

The consent is now that of the DPP (non-political), not the Attorney General. The new law means that companies, in particular, now have to ensure that bribery and corruption does not take place or they face prosecution. To offer or receive money or preferential treatment in exchange for a lucrative contract is not a new offence here but it is much more likely to be prosecuted following the new Act. The Act creates a new strict liability offence of "failing to prevent bribery" even if there was no corrupt intent. This is designed to make companies, whether they are large or small, culpable for bribery committed on their behalf, be it by their directors, senior managers or anyone else in a position to make or receive a bribe in exchange for an advantage to that business.

It has transformed the corporate landscape and has real implications for business big or small. The only defence will be for a company to show that it had in place "adequate procedures" to prevent bribery and corruption. The Government has pledged to issue the first set of guidelines before the new law comes into force so that businesses know what is expected of them. This is likely to happen within the next six months with the Act becoming effective by October 2010. It is unlikely that basic or generic procedures will present a company with a complete defence to the new offence. A prosecutor would say that if a company had adequate procedures in place it would not have allowed its staff or directors to commit bribery offences. It is interesting to note that an enhanced individual liability has been included within the new Act. Section 14 is aimed at individuals who are senior officers of a body corporate and who consent or connive in a substantive bribery offence committed by the legal person (i.e. the body corporate itself). This would, for instance, catch the company director whose involvement is not sufficient to render him/her liable under ordinary principles of liability, but who has, by action or inaction, facilitated the commission of the substantive offence.

What must business do?

Training those in management and contracts positions and developing an employee workforce that understands the meanings of ethics are two key examples of best practice. From now on directors of companies will be expected to take responsibility for anti-corruption programmes and appoint a senior officer accountable for its oversight. Assessing risk specific to the company including the nature or location of the organisation's activities is also a key part of a company's new responsibilities. In addition there will be a duty to police their own business and hand the company in to the authorities if they uncover any malpractice. The Serious Fraud Office has already issued guidelines on self-reporting by businesses who uncover bribery. Anti-bribery and corruption is now a critical corporate governance issue: the risks to businesses of not taking the new legislation seriously and of not complying equate to them ignoring the risks of a huge fine, damage to reputation, exclusion from contracting with government agencies and criminal convictions. The message is that bribery is not only illegal, but it is bad for business.

From an organisation's perspective, there are some clear requirements: A defence against charges of bribery will occur if the company can show that it has a process of training and instruction which should ensure that bribery will not take place. The Government has promised to issue guidelines on best practice to help companies set up processes that will minimise bribery taking place and therefore any charges being applicable. These guidelines may take some time to develop, during which time industry will be asked to comment and best practice processes will be considered. This provides for a period after enactment when guidelines may not exist and when companies are at risk or when prosecutions may be delayed. It should not be assumed that the latter will be the case

Processes have to be employed that (a) prevent bribery and corruption and (b) show clearly that the whole organisation has such processes in place should any take place as it is a defence to prove that the organisation had 'adequate procedures' in place to prevent the act taking place.

The Secretary of State has to issue 'guidance about procedures that relevant commercial organisations' can put in place to prevent such acts. There is no timeframe for this or for organisations to implement changes or introduce new procedures. Some companies, this will be unlikely to be a problem. For others, there is a need to evaluate risks and processes. For those involved in high risk industries such as defence and aerospace, extractive industries and construction and/or operating in countries low down on the corruption index, this is a time for real reflection. As risk of falling foul of the law has now increased materially, business cannot be 'as usual' for any organisation operating in the UK.

It is anticipated that the government will produce guidance on the adequate procedures defence in January 2011. Such procedures are likely to include:

- Ensuring that the company has an anti-bribery policy which effectively deals with the avoidance of bribery within the organisation

- A company's board of directors (or similar body) should take responsibility for establishing an anti-corruption culture and programme.
- A senior officer should be responsible for overseeing the anti-corruption programme.
- There should be a clear and unambiguous code of conduct including an anti corruption element, and procedures should be established to assess the likely risks of corruption arising in a company's business.
- Employment contracts should expressly state penalties relating to corruption.
- There should be a gifts and hospitality policy to monitor receipt of gifts and entertainment.
- Anti-corruption training should be provided on preventing and recognizing bribery.
- There should be financial controls to minimise the scope for corrupt acts to be committed.
- There should be appropriate whistleblowing procedures to enable employees to report corruption in a safe and confidential manner.
- Ensuring that any contracts with sub contractors providing a service to the company provide for a mechanism for termination in the event that bribery is suspected.

Misconduct in public office

This has been retained. I would say, sensibly so. The offence enables:

- A single course of prolonged criminal conduct to be reflected in a single charge
- Corrupt behaviour and other intertwined criminality (as is often the case) to be set out in a single charge
- A wide sentencing discretion (maximum of life imprisonment).



# Bribery through Intermediaries

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## Introduction

In recent years, there has been mounting anecdotal evidence that bribery of public officials is very often committed through third parties such as consultants, agents, subsidiaries and contractors. This has prompted the OECD Working Group on Bribery to conduct a typologies exercise to look at this issue.<sup>1</sup> The purpose of this presentation is to highlight some of the main findings of the typologies exercise. It is hoped that this could assist policymakers in Asia-Pacific to ensure that the bribery offences in their jurisdictions adequately address bribery through intermediaries.

## International Standards on Bribery through Intermediaries

It is widely accepted that international standards on the criminalisation of corruption require bribery offences to cover bribery through intermediaries. This issue is expressly addressed in Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention):

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

Article 15 of the UN Convention against Corruption (UNCAC) takes a similar approach:<sup>2</sup>

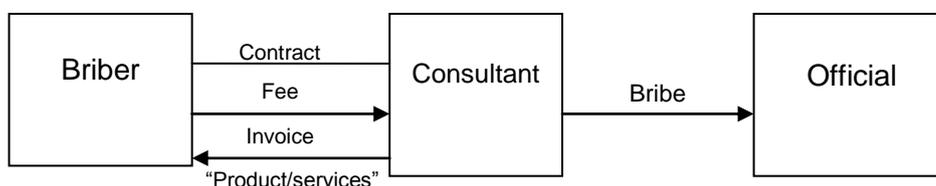
*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving, to a public official, **directly or indirectly**, of an undue advantage, for the official himself or herself or another 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.*

These international instruments, however, do not define who may be an intermediary. Any individual or entity – including both natural and legal persons – could thus qualify as an intermediary, so long as this individual or entity acts as a conduit for transmitting a bribe from the briber to the official.

## The Prevalence of Intermediaries

Business enterprises use intermediaries very frequently for legitimate purposes. Many companies, especially when they expand overseas, hire agents for their knowledge of the local market. They may also hire lawyers or accountants who are more familiar with the legal and accounting rules in that jurisdiction. Others employ local sales agent based in the foreign country. Certain countries may also mandate that foreign companies deal with (sometimes designated) agents while doing business in the local market.

Unfortunately, criminals have usurped the use of intermediaries for illegitimate purposes such as bribery. One of the most common methods is to hire a “business consultant” to channel a bribe. The briber and the consultant enter into a consultancy agreement. The terms of the agreement are often very vague, such as requiring the consultant to “support the company’s business in country XYZ” or “conduct market research”. The consultant in turn issues invoices to the briber using similarly vague language. In reality, the consultant does not provide any identifiable or economically justifiable service. His/her sole role is to channel his/her retainer to an official as a bribe (less a fee for his/her services).



This basic scheme can be modified to increase complexity and opacity. For instance, bribers often use multiple layers (i.e. a chain) of intermediaries, or different intermediaries for bribing different officials. Bribers also employ intermediaries located in a foreign jurisdiction, often in offshore financial centres with strong corporate and bank secrecy rules. Corporate vehicles are also frequently used as intermediaries. For instance, a parent company may establish a foreign subsidiary or joint venture abroad through which bribes are transmitted. The employees of the subsidiary or joint venture could also hire a local agent or intermediary to pass the bribe on to an official.

## Challenges to Policymakers and Law Enforcement

The use of intermediaries to commit bribery presents several challenges. At the legislative level, criminal offences must adequately cover bribery through intermediaries. As noted in the Initiative's Thematic Review on Criminalisation, bribery offences should ideally do so through express language similar to those found in international instruments such as the OECD Anti-Bribery Convention and UNCAC. Certain jurisdictions, however, continue to rely on liability for parties to an offence. For instance, some jurisdictions consider an intermediary who gives a bribe to an official to be the principal offender, while the briber who hires the intermediary is only guilty of complicity or aiding the intermediary to commit bribery. This arrangement arguably does not adequately reflect the criminality of the briber, especially if the penal legislation provides for lighter penalties against a party to an offence than against the principal.

The *mens rea* requirement of bribery offences must also be sufficiently broad. By hiring an intermediary to bribe an official, the briber often shields him/herself from the details of the offence. For example, the briber may not know the identity of the official receiving the bribe, where and how the bribe is paid, or the amount of the bribe. The briber could then argue that he/she should not be held liable since he/she does not have the subjective intent to commit the crime or subjective knowledge of the crime. This defence should be rejected when, for instance, a company pays consultancy fees to an intermediary that are out of proportion with the services or goods provided by the intermediary. The briber should be held liable on the basis that he/she was reckless or willfully blind as to whether the intermediary will bribe an official.

Bribery through intermediaries can also raise issues concerning rules on corporate liability. As noted above, companies may use corporate vehicles (such as a subsidiary) as an intermediary to commit bribery. In many jurisdictions, liability would accrue only to the subsidiary but not the parent because the parent and the subsidiary are separate legal persons. The parent, as a mere shareholder in the subsidiary, is generally protected by the so-called "corporate veil" and is thus not liable for the acts of the subsidiary. The ease with which this corporate veil can be pierced will greatly affect whether the parent can be held accountable for the acts of its subsidiary. Some jurisdictions now address this issue by requiring a company to take adequate procedures to prevent a subsidiary or an intermediary from committing bribery.

The use of intermediaries also poses challenges for investigators. Every intermediary that is added to a bribery scheme requires investigators to gather more evidence, such as bank and corporate information about the intermediary and additional wire transfer documentation. If intermediaries and bank accounts are located abroad, mutual legal assistance is necessary to gather the evidence. This is time-consuming and sometimes even impossible, especially when such information is located in offshore financial centres, as is often the case. Without efficient and workable means of gathering domestic and foreign evidence, bribery through intermediaries could thus pose a daunting challenge to investigators.

## Conclusion

The use of intermediaries is now a common *modus operandi* for committing bribery. Increasingly complex bribery schemes using multiple, offshore and sometimes corporate intermediaries are difficult to detect and investigate. The current bribery offences and rules on corporate liability in many jurisdictions may be inadequate for dealing with this situation. Policymakers and legislators may thus need to respond in order to address this important issue.

## NOTES

- <sup>1</sup> The Working Group's typologies report is available at [www.oecd.org/dataoecd/40/17/43879503.pdf](http://www.oecd.org/dataoecd/40/17/43879503.pdf).
- <sup>2</sup> Article 16 of the Convention on bribery of foreign public officials uses identical language.

# Challenges in Establishing and Applying Domestic and Foreign Bribery Offences in Malaysia

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## What are Domestic Bribery and Foreign Bribery Offences?

Domestic bribery offences: Normally relates to bribery offences within a jurisdiction the payoff can be done from overseas or even takes place overseas. Foreign bribery offences: Relates to offences of bribery of foreign officials in a foreign country. The term “domestic bribery offences” or “foreign bribery offences” is not defined or distinguished in Malaysian laws. Under the Malaysian Anti Corruption Commission Act 2009, we criminalize are offences of corruption committed by local public officials and any person, and offences of bribery of foreign public officials. The provisions of our law dealt with both domestic bribery and foreign bribery offences and meet the requirements of UNCAC. Our definition of Foreign Public Official is very broad/ in accordance to UNCAC.

## What is the Offence of Bribery of Foreign Public Officials (FPO) under Malaysia’s Law?

It is an offence by any person of bribing of foreign public officials either directly or through an intermediary

- Section 3 of Malaysia Interpretation Acts of 1948 and 1967 provides that “person” includes a body of persons, corporate or unincorporated.
- It covers cases where a bribe is offered, promised or given to a FPO for “the benefit of that official or of another person” i.e. bribes that benefit 3rd parties.
- The briber cannot avoid liability for an offence of giving bribes by transferring the benefit directly to a third party rather than the FPO .This can mean a political party, party official, a charity, spouse, friend, business partner or a company which the FPO holds a beneficial interest.

Under our law, the briber is liable:

- If the offence of bribery takes place locally, i.e. domestic bribery offence

- If the briber being a citizen or permanent resident of Malaysia, commits the offence of bribery overseas. Section 66 of the Malaysian Anti Corruption Commission Act 2009 provides for the liability of offences outside Malaysia; foreign bribery offence even if the purpose for which the bribe was paid was not carried out or the FPO did not have the power, right or opportunity to perform the official duties or act for which the payment was made.

Our law focuses on both:

- The “supply side” side of the bribery transaction”
- Also on the solicitation, receipt of bribes (demand-side) by a foreign public official on Malaysia soil.

From the perspective of law enforcement, for MACC to act, what is important is whether jurisdiction can be established over the offences committed. Classification of the offence as domestic or foreign bribery is secondary. Illustration: A local businessman who bribes a foreign public official in a foreign country for his assistance to be rendered in respect of business done overseas - commits a foreign bribery offence. Under our law, he is liable for the foreign bribery offence, and can be prosecuted as if the act is committed locally. But he may also be liable under anti corruption laws of the foreign country concerned.

### Who can Investigate?

This depends on where the complaint is filed, the nationality of the offender or place of the offence:

- If the complaint is made in the foreign country by the FPO or the local businessman himself, obviously the foreign authorities will exercise jurisdiction over the case; they will conduct the investigations and charge the offender.
- If the complaint is filed by the local businessmen in Malaysia in respect of an offence committed by the FPO in the foreign country, the case will be referred to relevant authority of the country concerned as we have no jurisdiction or extra territorial powers of investigation.
- If the complaint is filed locally/or information received from a third party on the corrupt activities of the local businessmen overseas, MACC can investigate the case with assistance of the foreign counterparts (even if he has left the country)

What happens if on-going proceedings or investigation is carried out in both states concerning the same offence?

- The end result may be concurrent proceedings against the briber locally and overseas. This may delay or prevent extradition or MLA as “it may prejudice the criminal matter”

- A logical conclusion is one party should investigate the matter depending upon the facts and circumstances of the case while the other state assists the former.

### The Challenge of Cross-Border Investigations – Involving Witnesses and Institutions from Foreign Jurisdictions

In 1996, the MACC investigated a case involving transfer of funds amounting to RM 76.4 million by a Malaysian Company to the account of a company with an overseas Bank in Hong Kong, Special Region of the Administration of China, allegedly for the payment of technical assistance in connection with a project in Malaysia, wherein the main contractor for the project claimed the assistance was provided free of charge. The monies were later transferred to jurisdiction of Hong Kong, Japan and Switzerland. Key problems identified in the investigations relates to:

- The need to know the likely testimony of witnesses outside jurisdiction, before MLA can be resorted; Covert meetings or interview with witnesses raises the question of infringement of sovereignty of the jurisdiction concerned if done without their consent of the local authorities. On the other hand, overseas witnesses may be intimidated when they are interviewed with the concurrence/knowledge or in the presence of their enforcement bodies.
- The need to comply with threshold requirements of foreign states for MLA requests particularly for requests for intrusive measures. Assistance may not be forthcoming if the requesting state cannot show the elements or prove the commission of an offence, but at the same time the requesting States can only do so if assistance is given or requests for intrusive measures are acceded to in the first place by the requested country.
- Non compellability of witnesses to provide testimony in a foreign jurisdiction. Our law requires live witnesses/ and little weight is given to evidence not subject to the process of cross-examination and reexamination. Evidence of witnesses has to be gathered overseas, and subject to the process of examination in chief/cross and reexamination in accordance with our summary trial procedure. The different legal system and process of the requested state can affects admissibility of evidence gathered. Witnesses who come to testify in a requesting country cannot be expected to bring original documentation. Video conferencing is an option, but again there is a need to show that efforts have been made to secure the attendance of witnesses for trial purposes in the first place.



# Foreign Bribery Offences under the Korean Legal System

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## Introduction

- An obstacle to sustainable economic development and social stability
- Beyond the reach of national government alone, requiring international cooperation
- In Korea, some accomplishment was made but still an important problem to solve

## UNCAC, OECD Anti-Bribery Convention and Implementation of the Convention

- 1996. 3. 29.: Inter-American Convention against Corruption (adopted by the OAS)
- 1997. 5. 26.: Convention on Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union
- 1997. 11. 21.: OECD Anti-Bribery Convention
- 1998. 12. 28.: Implementation of the OECD Anti-Bribery Convention by enacting Act
- 2003. 7. 12.: African Union Convention on Preventing and Combating Corruption (Adopted by African Union)
- 2003. 10. 31.: United Nations Convention against Corruption
- 2010. 3. 24.: Amendment of the Act

## Korean “Act on Preventing Bribery of Foreign Officials in International Business Transactions”

Purpose of the Act:

- Responsibility of all countries to combat bribery in international business transactions (Preamble of the OECD Anti-Bribery Convention)
- Establishment of sound practices in international business transaction (Article 1)
- Implement the OECD Anti-Bribery Convention by means of criminalizing (Article 1)
- Follows the concept of “Active Corruption” and “Active Bribery”: Penalizing offenders who promise or give the bribe

### Scope of the Act - Definition of “Foreign Official”

- Appointed/elected officials holding a legislative/administrative/judicial office for a foreign government, from national to local (Article 2-1)
- Exercising public function for a foreign government (Article 2-2)
- Working for a public international organization (Article 2-3)
- Specified Article 1 of the OECD Anti-Bribery Convention

### Criminalisation - Criminal Responsibility of Briber

- Any person promising, giving or offering a bribe to a foreign public official
- To obtain improper advantage in the conduct of international business transactions
- Maximum of 5 years imprisonment or a fine of up to KRW 20,000,000 (\$17,000)
- If the profit obtained exceeds a total of KRW 10,000,000 (\$7,500), maximum of 5 years’ imprisonment or a fine up to twice the amount of the profit (Article 3-1)
- Imprisonment and fine shall be concurrently imposed (Article 3-3)
- Specified Article 3 of the OECD Anti-Bribery Convention

### Other Clauses of the Act

- Responsibility of Legal Person: In the event that a representative, agent, employee or other individual working for legal person committed bribery against a foreign public official, legal person shall be subject to a fine up to KRW 1,000,000,000 (\$750,000) (Article 4)

- Confiscation: Criminal proceeds (bribes) under the possession of offender, and other than the offender (third party) with knowledge of the offence, shall be confiscated (Article 5)

### Limits and Criticisms of the Act

- No provisions to punish complicity in, including incitement, aiding and abetting or authorization of an act of bribery (Article 1 of the OECD Anti-Bribery Convention)
- There is a general provision in the Criminal Code for abetting and incitement but more clarification is needed
- The possibility that the whistleblower protection does not apply to foreign bribery (No explicit provision)
- Further amendment of the act is required

### Korean Cases

#### Samsung Rental Co. Case (2008)

- Defendants were Samsung Rental Co., a renowned telecommunication company and the CEO of the company
- They were indicted for alleged offences of:
  1. Offering bribes (which amount \$110,000 and \$76,000 respectively) to
  2. American army officers in relation to their official business of bidding for the army telecommunication service
  3. To obtain improper advantage in providing telecommunication service worth around \$200,000,000
- Both of the defendants (CEOs) were found guilty and Samsung Rental Co was fined KRW 20,000,000 (\$17,000) and KRW 10,000,000 (\$7,500) respectively

#### U.S. Army Bribery Case (2006)

- Defendants were operating a private security company
- They were indicted for alleged offences of:
  1. Offering a bribe of KRW 200,000,000 (\$170,000)
  2. To American army officers in relation to their official business of bidding for the home and business security service
  3. To obtain improper advantage while trying to provide security service

- Defendants were found guilty and respectively imprisoned for 1 year and 2 months and 8 months respectively and were also fined for the offences

### Other Cases

- There have been 2 cases in 2002, 4 cases (7 defendants) in 2004, 1 case in 2006, 1 case in 2007, 3 cases in 2008 (5 defendants) and 1 case in 2009 respectively.
- Majority of other Cases also involve bribery to U.S. army officials.
- It is also been reported that there have been cases of domestic bribery by foreign companies:
  1. US Department of Justice brought charges against Control Components Inc. for bribery in over 30 countries including Korea
  2. 4 officials were convicted of receiving foreign bribes from foreign persons

### Future Challenge in dealing with Foreign Bribery Offences

- Establish efficient domestic criminal and administrative mechanisms
- Reform consciousness of the public through adequate policies and publicizing
- Promote UNCAC and OECD Anti-Bribery Conventions
- Strengthen international networking- Bilateral and Multilateral (Information Sharing)
- Develop regional cooperation within the Asia-Pacific such as OAS and EU (Following 2009. 11. 26. Recommendation for Further Combating Foreign Bribery).

## How Jurisprudence in Hong Kong, China has Interpreted and Complemented Statutory Bribery Offences

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The Prevention of Bribery Ordinance (“POBO”), which was enacted in May 1971, is the legislation in Hong Kong, China which provides for statutory bribery offences. The POBO is a comprehensive piece of legislation. One High Court Judge describes the legislative intention in enacting the ordinance as:

“first to prevent bribery and corruption if possible, possibly by deterrence, secondly to detect it by investigation and to ensure that the people who indulged in bribery and corruption were caught, convicted and punished, and thirdly that a person who indulged in bribery and corruption should not be allowed to keep for himself the proceeds of his ill-gotten gains.”<sup>1</sup>

The POBO regulates corrupt dealings with and by “agents”. An “agent” is defined in the POBO as including a person “employed by or act for” another. There are two special categories of agents, namely “prescribed officers”<sup>2</sup> and “public officers”<sup>3</sup> who are specifically defined in the POBO and are subject to stricter regimes because their special relationship with Hong Kong and the high level of integrity the public legitimately expect of them.

Hong Kong, China has become subject to the United Nations Convention Against Corruption (“UNCAC”) by reason of its ratification by the People’s Republic of China in February 2006. In order to fulfill the obligations under the UNCAC, Hong Kong, China has introduced legislative amendments in the areas of extradition and mutual legal assistance. However, no amendments have been made to the POBO. This is because Hong Kong, China considers that the provisions of the POBO have sufficiently complied with the requirements of the UNCAC. As regards Article 16 of the UNCAC, which requires State Parties to criminalize bribery of foreign public officials, the position of Hong Kong, China is that foreign public officials are “agents” and therefore bribery offences in Hong Kong involving foreign public officials are governed by section 9, which criminalizes bribery of agents generally. The above interpretation of s.9 of the POBO is supported and confirmed by a series of recent judicial decisions:

In *Ng Siu Chau v HKSAR* (2000) 3 HKCFAR 62, the Court of Final Appeal says that a person can be “employed by” another if he is engaged to provide services to that other, without the necessity of a service agreement.

In *HKSAR v Fung Hok Cheung* [2008] 6 HKC 69, the Court of Appeal stresses that in construing the meaning of “agent” in the POBO, a purposive approach of statutory interpretation should be adopted. A narrow, civil law style interpretation of the concept of agency is of no or little application.

In *B v The Commissioner of the ICAC*, FACC 6/2009, the Court of Final Appeal says that on an ordinary reading, a public official of a place outside Hong Kong, China comes within the definition of “agent” provided by the POBO; that on an ordinary reading, his public duties in that place come within the phrase “in relation to his principal’s affairs” to be found in s.9 of the POBO.

Apart from clarifying the meaning of “agent” in the POBO, the case of *B v The Commissioner of the ICAC* is also important to issues regarding the territorial jurisdiction of the courts. The Court of Final Appeal confirms that the offence of offering is complete on the offeror’s making of the offer (the *actus reus*) accompanied by his intention that it should provide an inducement for the agent’s desired corrupt conduct (the *mens rea*). The fact that the desired corrupt conduct was intended eventually to take place abroad does not affect the location of the offence. As a result of the judgment, it is now clear that an offer of advantage to or a solicitation or acceptance of advantage by a foreign public official in Hong Kong will be caught by s.9 of the POBO.

The terms “offer” and “accept” are widely defined in the POBO, which cover an agreement made between the offeror and the agent to give or to accept, as the case may be.<sup>4</sup> Therefore, if an agreement was made in Hong Kong, China for the offer or acceptance of bribes, the courts will have jurisdiction over the matter, even if no bribes had actually been paid there.<sup>5</sup>

In cases where the bribery offence cannot be tried in Hong Kong because of the problem of territorial jurisdiction, a charge of money laundering may be considered if the proceeds of the corrupt were brought into Hong Kong, China.<sup>6</sup> The courts have held that for a charge of money laundering, it is not necessary to prove that the offer or acceptance of bribes, as the case may be, was a criminal offence in the country where it occurred. In one case, the court agrees that the policy behind the anti-money laundering legislation of Hong Kong, China is encapsulated in the saying that, “Hong Kong doesn’t like dirty money, don’t bring it here.”<sup>7</sup>

## NOTES

<sup>1</sup> *Lui Lok v Commissioner of the ICAC*, HCMP 317/1980.

<sup>2</sup> “Prescribed officer” includes all civil servants, principal officials, the Monetary Authority, judicial officers and ICAC officers: see s.2, POBO.

- <sup>3</sup> “Public officer” includes “prescribed officer” and those employed by public bodies: see s.2, POBO.
- <sup>4</sup> See s.2 of the POBO.
- <sup>5</sup> HKSAR v Loi Hong Quan [2004] 3 HKC 497.
- <sup>6</sup> SJ v Wong Kok Keung, David, HCMA 133/2007.
- <sup>7</sup> HKSAR v Lok Kar Win & Ors [2000] 1 HKLRD 733 , see also Lok Kar Win & Ors, v HKSAR, FAMC 27/1999



## Session 3

# Corporate Liability for Bribery

- Theories of Corporate Criminal Liability, *Professor Celia Wells, University of Bristol, U.K.*
- Good Practice Guidance on Establishing Corporate Liability, and Good Practice Guidance on Internal Controls, Ethics and Compliance, *Christine Uriarte, OECD*
- Fighting Commercial Bribery in China, *Dr. Fei Sun, Ministry of Supervision, P.R. China*



# Theories of Corporate Criminal Liability

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## Introduction

Corporations are slippery subjects.<sup>1</sup> At one level, the argument in respect of corporate criminal liability is about the metaphysical, at another about the functions, purposes, and complexity of legal responses, and at yet another about variations in procedure and enforcement mechanisms. Criminal law has some distinctive characteristics: it is pre-eminently concerned with standards of behaviour, backed by a system of state punishment, and usually requires proof of fault such as intention, knowledge, or recklessness. Corporations are legal, not human, persons, it is said, and together they are the linchpin of prosperity, the driving force behind modern life. How can it make sense to bring them kicking and screaming before a criminal court, when they can only kick and scream through their human agents?

There are many mechanisms from which to select in seeking to control and influence corporate behaviour ranging from criminal law through to specialised regulation either with criminal law enforcement or administrative or 'civil' penalties. In most common law jurisdictions, health and safety, financial, and other regulatory on health and safety laws (and other regulation) have been tacked onto criminal law, rather like an ill-fitting and unwelcome extension. These regulatory schemes share some characteristics of mainstream criminal law – not least that they use criminal procedures and impose criminal penalties – but in other ways they are quite different from, and are certainly perceived by the specialist enforcement agencies and those they regulate as quite distinct from, criminal law. There is often a close relationship between the regulators and the regulated: standards are set, warnings are issued, and formal enforcement employed as a last resort.<sup>2</sup> Although regulatory schemes are a clear response to industrialization and globalization, they do not generally distinguish between the individual entrepreneur and the incorporated company; they address “employers,” or “sellers,” and it is left to the courts to interpret these terms to include corporations and to devise rules of attribution, as appropriate.

In some jurisdictions, specialised regulation occupies a formal position outside criminal law, attracting administrative penalties, which to some extent sidestep the problem of corporate criminal liability. Somewhat ironically, given that administrative or “civil” penalties emerged in jurisdictions that did not have the option of corporate criminal liability, regulatory agencies in England and Wales have begun to use negotiated “civil” penalties.<sup>3</sup> On the one hand this appears to be a tougher stance, enabling large fines to be administered (and administered seems the right word rather than imposed) but on the

other the negotiation that this process allows appears to give the targeted corporation considerable bargaining power. The reputational and legal or transaction costs may vary considerably between regulatory and criminal law procedures.<sup>4</sup> As well as variety in institutional structure, there is also a range of penalties, pre-emptive and post event orders. The bottom line is generally a fine but these are often accompanied by some form of operating restriction or incapacitation - suspension or removal of a licence to practice in the relevant area.<sup>5</sup> A further hybrid civil/criminal development is the pre-emptive order. In the area of financial crime, Serious Crime Prevention Orders (SCPOs) can be imposed for up to 5 years either on conviction of a serious crime or on proof of involvement in such a crime in civil proceedings.<sup>6</sup> Civil recovery of proceeds of crime is another significant weapon in the fraud and corruption field. Powers introduced in 2008 give the Serious Fraud Office power to recover property without the need to establish a specific offence against any particular company or individual merely that the property sought is the proceeds of unlawful conduct. Combined with the use of negotiated settlements, these civil sanctions are on the rise, and arguably supplanting formal criminal law enforcement.<sup>7</sup>

## Theoretical Background

Even in jurisdictions that have long recognized corporate criminal responsibility, this concept has been treated as something of an outcast, to be tolerated rather than encouraged. That is partly because criminal law had already absorbed ideas of individualist rationality and moral autonomy by the time that corporations became significant social actors. Thus, criminal law was endowed a limited conceptual vocabulary with which to adapt to the developing dominance of business corporations. It described corporations through a dualist anthropomorphic metaphor, namely the “brains” of management and the “hands” of workers. Three key features recur in any discussion of corporate criminal liability: corporate personality, corporate responsibility, and corporate culture.

### *a. Corporate personality*

Corporate liability proceeds from the assumption that a corporation is a separate legal entity, in other words that it is a legal person, a term that can include states, local authorities, and universities. We should clarify what it means to say that an entity is a legal person. As Hart observed the word “corporation” does not correspond with a known fact or possess a useful synonym.<sup>8</sup> Lying behind the question, “What is a corporation?” is often the question “Should they be recognized in law?” It is the context in which we use words that matters. Thus, Hart suggested the better question is not “What is a corporation?” but “Under what conditions do we refer to numbers and sequences of men as aggregates of individuals and under what conditions do we adopt instead unifying phrases extended by analogy from individuals?”<sup>9</sup>

This then leads to the conclusion that we cannot deduce whether, why, or how to hold a corporation liable for criminal conduct by defining what a company is. If we state

that it is a mere fiction or that it has no mind and therefore cannot intend, we “confuse the issue.”<sup>10</sup> Nor does it help to decide whether a corporation is either a person or a thing. A corporation is neither exclusively a “person” nor a “thing.”<sup>11</sup> As Iwai argues, the corporation is both a subject holder of a property right – its assets – and an object of property rights – the interests of its shareholders, its owners. It is the “person/thing duality” that accounts for most of the confusion about the essence of a corporation.<sup>12</sup>

Organizations usually begin with a single instrumental purpose; they are a means to an end.<sup>13</sup> But they often become more like an end in themselves, preserving their existence in order to survive and, importantly, acquiring an autonomous character or, as some have put it, taking on a social reality. This is important because it shows us the error in seeing all corporations or organizations in the same light. It does not help to say that a corporation is “only” a shell, a nominalism, any more than to say the opposite, that a corporation is necessarily “real.” Sometimes they are one, sometimes the other.

#### *b. Responsibility*

Harding reminds us that responsibility means accountability or answerability,<sup>14</sup> it is “the allocating device which attaches such obligations to particular persons or subjects of the order in question.”<sup>15</sup> It is helpful to draw out two particular aspects of responsibility.<sup>16</sup> “Role Responsibility” responsibility is an umbrella term under which shelter four different senses or meanings: role-responsibility, capacity-responsibility, causal-responsibility, and liability-responsibility. Role responsibility is a useful concept in the context of corporate liability. There are two sides to this. One aspect is that individuals within organizations have specific roles or duties or individuals “take responsibility” for the actions or mistakes of others. A second aspect is that individuals and organizations themselves may bear responsibility for an activity. An example here would be the owner of a ship or of an aeroplane. Owners of ships, planes, and trains have responsibilities.<sup>17</sup> Employers have responsibilities.

Capacity responsibility refers to the attributes, rationality, and awareness, necessary to qualify someone as a responsible agent. This is often seen as the stumbling block to corporate or organizational liability for it appears to assume human cognition and volition. If we are to accept the idea of corporate responsibility, we must necessarily find a different way of expressing capacity than one that immediately precludes anything other than an individual human. While this is an argument that has underpinned the work of the increasing number of scholars in the field,<sup>18</sup> it is raised here in headline terms in order that it can be seen for what it is – an argument about one sort of thing (human individuals) applied to another thing (corporate “persons”). For a corporate person to be liable, a form of capacity that is relevant to the corporate person is required. The fact that the capacities relevant to humans are inappropriate is neither here nor there.

#### *c. Corporate Actors and Corporate Culture*

The third key feature is that of the organization as an autonomous actor, one that “transcends specific individual contributions.”<sup>19</sup> Theories of organizations tend to confirm that it is right to think of the corporation as a real entity; they tell us something about how

decisions are made and the relationship between the individual, the organization, and wider social structures.<sup>20</sup>

Acceptance of the corporation as an organizational actor in its own right is similar to that of the state in international law.<sup>21</sup> Harding suggests four conditions for autonomous action: an organizational rationality (decision-making); an irrelevance of persons (that human actors occupy roles and can be replaced in those roles); a structure and capacity for autonomous action (physical infrastructure and a recognisable identity); and a representative role (that it exists for a purpose, the pursuit of common goals).<sup>22</sup>

## Common Law Principles

I will use the UK as my main anchor point since this is the jurisdiction with which I have most familiarity. Other common law derivative jurisdictions have sailed on somewhat different winds and tides as I will explain later.

Criminal offenses in England and Wales first developed through the common law (in the sense of decided cases), although many have since been part or wholly defined by statute and yet more are creatures of statute (especially those developed in response to the industrialization and urbanization in the 19th century and of course to globalization in the late 20th and early part of this century. Under successive Interpretation Acts the word “person” in a statute includes corporations.<sup>23</sup> The general principles of criminal law are also a mixture of common law and statute. This creates the possibility – as has occurred with corporate liability – of a complex and not necessarily consistent set of rules. The general principles in relation to corporate liability are not in statutory form. They apply to all criminal offenses unless a statute specifically provides otherwise, as is the case with corporate manslaughter and bribery. Two main types of corporate liability evolved applying to different groups of offenses. The history has been patchy, subject to the ebbs and flows of ideological and judicial preferences, and any attempt to see it as in any way logical or incremental is likely to be unrewarding. Very roughly, we can say that agency or vicarious liability applies only to regulatory offenses, many of which are offences of strict liability and do not require proof of fault, and identification liability applies only to non-regulatory offenses, most of which require proof of fault. Where the vicarious route applies, the corporate entity will be liable for any offenses committed by its employees or agents. The company could be summonsed and fined if, for example, one of its employees sold food that was unfit for consumption. The reasoning was that the company/employer was the contracting party in the transaction, the employee merely the means through which the sale was concluded. This also fitted with a reluctant acceptance of the need for regulation; as these were not “really” criminal offenses in the true sense, the defendant corporations were not “really” criminal.

The idea that corporations might be able to commit “proper” offenses, ones that required proof of intention or knowledge, or subjective recklessness, was resisted until the mid-twentieth century. The perceived difficulty of attributing *mens rea* to a soul-less body was overcome by the invention of the doctrine of identification (or controlling mind).

Applied to fault-based offenses, this attributes to the corporation only the acts and *mens rea* of the top echelon senior officers of the company. As the so-called mind or “brain” of the company, the directors and other senior officers are “identified” with it. More significantly, of course, a company is then not liable for offenses carried out by any managers or groups of employees lower down the chain. While radical in extending corporate liability to serious offenses, this development later served a sceptical judiciary with a perfect alibi in their distaste for criminal liability applied to businesses. In the third quarter of the twentieth century the mood was pro business; financial fraud was one thing, holding businesses criminally liable beyond that was another.

Prosecution of non-regulatory criminal offenses is undertaken by the Crown Prosecution Service. There is an evidential threshold (a realistic prospect of conviction) and a public interest threshold.<sup>24</sup> Specific guidance on corporate prosecutions states that prosecution of a company should not be a substitute for individual liability.<sup>25</sup> In assessing the public interest, prosecutors should take in to account the value of gain or loss, the risk of harm to the public and unidentified victims, to shareholders, employees and creditors, and the stability of financial markets and international trade: “A prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution.”<sup>26</sup> Factors in favour of prosecution include the existence of previous criminal, civil, and regulatory enforcement actions against the company; evidence that the alleged conduct is part of the established business practices of the company; the ineffectiveness of any corporate compliance programs; the issuance of previous warnings to the company; and the company’s failure to self-report within a reasonable time of its learning of the wrongdoing. Factors against prosecution include: proactive responses by the company, such as self-reporting and remedial actions; a clean record; the existence of a good compliance program; and “the availability of civil or regulatory remedies that are likely to be effective and more proportionate.” This last factor suggests that, where there is an alternative regulatory offense, suspected corporate offenders continue to attract a hands off, or rather kid glove protective hand.

## Liability Models

The models are routes to liability for offences – they are not the offences themselves. Corporate liability does not create offences where there were none before; it provides tracks that enable legal actors that are not human beings to be answerable for criminal offences.

The Allens Arthur Robinson Report<sup>27</sup> identifies a number of ‘design issues’ that any scheme should address. These include: Is liability generic or specific? On whose fault is corporate liability based – the attribution question? What is the relationship between the physical actor and the corporation? What is the relationship between the prosecution of corporation and the/any individual?

a. *General or specific?*

The following schemes can be identified: General liability (generic- applies to all offences or different models apply to different offence types) and offence specific schemes. Most jurisdictions adopt a general liability scheme. Many have a generic – one size fits all – model that applies to all types of offence. So for example the USA, Austria, Belgium, France, and South Africa apply the same model whatever the type of offence. Australia (C'th) and Canada on the other hand have a general liability scheme but apply different models according to the fault element of the offence.<sup>28</sup> It is thus possible to develop a relatively simple scheme which caters for the full range of types of offences within it (as in Australia and Canada). This has the advantage that the jurisprudence in relation to corporate liability can develop independently of other principles of criminal liability. England and Wales has a complex scheme combining both different liability models applying to types of offence together with some exempt offences to which specific rules apply.<sup>29</sup> Examples of offences exempt from the general rules are the stand alone offence of corporate manslaughter and the corporate offence in the Bribery Act 2010.

*b. Fault Attribution*

Vicarious route

The main stumbling block to corporate liability has been the perceived difficulty in releasing the fault element from its individualistic anchor. Developed from the master's civil responsibility for his servant (respondeat superior), vicarious liability imputes to the corporation the wrongs committed by employees in the course of their employment and for the intended benefit of the employer. As a matter of statutory interpretation in England and Wales, strict liability offences generally give rise to the application of this principle, including those that have a reverse burden defence. It has in rare cases been held to include offences requiring proof of knowledge.

The Health and Safety at Work Act 1974 provides an interesting example. Section 3 imposes a duty 'to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. It is an offence under s 33 'to fail to discharge' this duty.<sup>30</sup> In *R v British Steel*<sup>31</sup> the Court of Appeal held that section 3 imposed a strict, or vicarious, liability. The company could not escape liability by showing that, at a senior level, it had taken steps to ensure safety if, at the operating level, all reasonably practicable steps had not been taken. The company, in other words, falls to be judged not on its words but its actions, including the actions of all its employees. As recently explained in the House of Lords, the duty to ensure health and safety of employees is not absolute. It describes 'a result which the employer must achieve or prevent...If that result is not achieved the employer will be in breach of his statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it.'<sup>32</sup> A number of other cases have taken a similar line.<sup>33</sup>

Although the vicarious/agency principle is usually confined to strict liability or hybrid offences, exceptions are found. In particular, following the Privy Council decision in *Meridian*, analysis of the language of the provisions, their content and policy, should

be undertaken to establish the persons whose state of mind can be attributed to the corporation in statutory offences requiring proof of knowledge.<sup>34</sup> This echoes a long line of 19th and early 20th century cases saying much the same thing.<sup>35</sup>

#### Identification route

This assumes a layer of senior officers within the company who are seen as its 'brains' and whose acts are identified as those of the company; the corporation both acts and thinks only through their human agency.<sup>36</sup>

Identification generally applies to offences needing proof of a mental element, but those regulatory offences with fault elements are sometimes treated differently. The doctrine has been described as 'highly unsatisfactory, mainly because it fails to reflect corporate blameworthiness. To prove fault on the part of one managerial representative of a company is not to show that the company was at fault as a company but merely that one representative was at fault'.<sup>37</sup>

In many large organisations, task specialisation means that, even amongst officers senior enough to count for alter ego purposes, one individual director will not have access to all the information on which to base a finding of knowledge or negligence.

The continued application of this flawed doctrine to manslaughter led to the introduction of a separate, stand alone offence of corporate manslaughter. The Corporate Manslaughter and Corporate Homicide Act 2007 introduces a broader form of liability than identification. How broad, and how distinct from identification is open to debate. The CMCH Act specifically precludes individual liability. If the only way that a corporation can be liable is when those who manifestly direct its affairs have the role, capacity and causal responsibility for the offence, then their individual liability is as useful as that of the corporation.

Although the drawbacks have been well rehearsed in Law Commission and other reports,<sup>38</sup> the identification doctrine continues to have a firm hold on non-regulatory offences requiring proof of fault (including negligence) in the UK<sup>39</sup> and has been a major influence in common law and civil law developments.<sup>40</sup>

#### Organisational model

The recognition that corporations are autonomous actors, albeit operating through human interaction, has led to the search for organisational models of liability. We need now to put some flesh on these ideas.

The Australian federal Criminal Code Act 1995 is both the best known but also the most comprehensive example. It is described by the OECD Bribery Group as 'ambitious and progressive ..... in particular liability based on a corporate culture conducive to the criminal conduct in question. The lead examiners regard section 12 as a commendable development, and well-suited to prosecutions for foreign bribery.'<sup>41</sup> This should not be taken to mean that it is unsuitable for other offences, the comment merely reflects the terms of reference of the Bribery group.

For offences requiring proof of intention, knowledge or recklessness, the Criminal Code Act provides that “bodies corporate” are liable for offences committed by “an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority” where the body corporate “expressly, tacitly, or impliedly authorised or permitted the commission of the offence”. Section 12 is generally detailed enough to enable companies to know with adequate precision what conduct is prohibited.<sup>42</sup>

The headline principle in the Australian scheme is ‘authorisation or permission’. This can be express or tacit. Authorisation or permission by the body corporate may be established in four different ways. The first two modes (the board of directors intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;<sup>43</sup> or a high managerial agent intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur)<sup>44</sup> build on the identification principle including both its narrow (UK) and its broader form (the term ‘high managerial agent’ echoes, inter alia, those US States that have adopted the Model Penal Code,<sup>45</sup> and the Canadian Criminal Code Act).<sup>46</sup>

It is in the third and fourth modes of proving authorisation or permission that the ambition of the Code is realised:

iii. ‘proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision’;<sup>47</sup> or

iv. ‘proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision’.<sup>48</sup>

‘Corporate culture’ means an attitude, policy, rule, course of conduct or practice.<sup>49</sup> The factors relevant to the application of corporate culture include:

‘(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.’<sup>50</sup>

Where route ii) (proof of fault in a high managerial agent) is relied upon there is a reverse burden defence of due diligence.<sup>51</sup>

### *c. Conduct attribution*

The third design issue drawn from the Allens Arthur Robinson Report - the relationship between the physical actor and the corporation - highlights the importance of establishing a link between the corporation and the physical element of any offence.<sup>52</sup> Depending on the offence definition the physical element can be an act or an omission. Large organisations, including corporations, implement their activities through individual

employees. In anticipation of the potential difficulties in showing how an organisation causes a result the Law Commission in its proposals for corporate manslaughter included an explanatory provision that a management failure 'may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act of omission of an individual.'<sup>53</sup>

The government argued during the scrutiny of the draft Corporate Manslaughter Bill in 2005 that causation is no longer a difficult issue in criminal law. However, both in civil and in criminal law causation is fraught with problems. The House of Lords, in quashing a conviction for manslaughter, recently commented that 'Causation is not a single unvarying concept to be mechanically applied without regard to the context in which the question arises.'<sup>54</sup>

Similarly, for offences that are conduct rather than result based, the person whose physical act or conduct led to the commission of an offence may be quite different from the person, or persons, at fault. The person at fault may indeed be the legal person. That is the question that liability models seek to answer- should the route be derived from individuals or is there an organisational or corporate culture?

The solution to this is both simple and uncontroversial. It is simple because a provision such as that proposed by the Law Commission for causation can be provided. A more general provision, as in the Australian Criminal Code Act 1995 would cover all situations:

'If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his employment, or within his or her actual or apparent authority, the physical act must also be attributed to the body corporate.'<sup>55</sup>

The Canadian Criminal Code incorporates equivalent provisions in the sections dealing with, respectively, negligence and fault offences by corporations.<sup>56</sup> It is uncontroversial because it was implicit in the early vicarious/agency cases that the physical act was attributed to the corporation. It was also implicit in the anthropomorphic metaphor that underlay the identification doctrine which saw the 'directing mind and will' as the brains of the company and the workers as the body and hands.<sup>57</sup>

## The Bribery Act 2010 (UK)

The Bribery Act 2010 renders a company liable for bribery offenses committed by its employees and agents unless it can show that it has adequate procedures.<sup>58</sup> The importance of this concession for the development of corporate liability in England and Wales cannot be over emphasised. Bribery is the first "proper" offense (one that requires proof of intention or knowledge) to have a strict form of corporate liability.

In considering the reform of bribery offenses, the Law Commission (England and Wales) was initially unwilling to introduce a new corporate provision ahead of its general review of corporate liability. A stand-alone corporate offense of negligently failing to

prevent bribery was bolted on to the government's draft Bribery Bill in 2009.<sup>59</sup> This was rejected by the parliamentary scrutiny committee<sup>60</sup> and the eventual Bribery Act 2010 renders a company liable for bribery offenses committed by its employees and agents unless it can show that it has adequate procedures.<sup>61</sup> The importance of this concession for the development of corporate liability in England and Wales cannot be over emphasized. From the frying pan of identification – and the curdled sauce of the Corporate Manslaughter and Corporate Homicide Act – we were in danger of consigning corporate accountability for bribery to the fire of negligent failure. Bribery is the first “proper” offense (one that requires proof of intention or knowledge) to have a strict form of corporate liability, an approach, which is consistent with employers’ liability for breaches of health and safety duties under regulatory HSW Act. This may not mean that corporate liability for all offenses will follow the Bribery Act model in the future. It is more likely that both bribery and health and safety offenses will be treated as *sui generis*.

## Concluding Comments

Dissatisfaction with both the vicarious and identification routes has led to an emerging principle based on company culture that exploits instead the dissimilarities between individual human beings and group entities. Vicarious liability is regarded as too rough and ready for the delicate task of attributing blame for serious harms. It has been criticized for including too little by demanding that liability flow through an individual, however great the fault of the corporation, and for including too much by blaming the corporation whenever the individual employee is at fault, even in the absence of corporate fault. This of course begs the question of how to conceptualize ‘corporate’ fault. The company-culture principle owes its philosophical heritage to Peter A. French who identified three elements in company decision-making structure: a responsibility flowchart, procedural rules, and policies.<sup>62</sup> A legislative example of this approach can be found in the Australian Criminal Code Act 1995.<sup>63</sup> The UK CMHA Act 2007 adopts a flawed version of it occupying an uneasy no man's land between the identification and culture (or system) approaches.

As an aside, it is worth considering the perceived conceptual gulf between on the one hand identification and vicarious liability models and on the other the idea of corporate culture. It is useful to distinguish between derivative models that require proof of an individual's wrongful conduct and those which are ‘corporate’ or holistic. But whether the corporation is liable through a doctrine of vicarious agency, or failure to supervise, or identification with senior officers or a corporate culture, it is the corporation that is being held liable. All organisational liability presupposes an organisational agent or actor. Holding a corporation liable is separate and distinguishable from any liability for the human actions that have contributed to the realisation of the organisational liability.

Corporate criminal liability in England and Wales is volatile, unpredictable, and disorderly. With the exception of the Bribery Act 2010, the “bark” of corporate liability has generally been much worse than its “bite” (because of reluctance to prosecute, limitations of the identification doctrine, relatively low level of fines and so on). The

question of how criminal law can accommodate the corporation has been taxing lawyers for well over a century. When it was first asked the business corporation was a much less sophisticated instrument than now and played a less central role in national and global economies. Nonetheless, the legal adaptation has not kept pace. There remains, in the UK at least, a patchwork of answers, in fact more of a collection of cut out pieces waiting to be sorted before being sewn together to make a coherent structure, than a joined-up article. In respect of full-blown criminal liability, the vicarious model assumes that all employees contribute to the corporate goal. This is a good starting point but a blunt instrument in terms of encouraging or rewarding the development of effective compliance policies. It is better combined with a due diligence defense. The identification model is not appropriate as a single model. On their own, neither of these models is a solution. They are better conceived as part of a broader organizational model that is responsive to different forms of criminal offenses. At the same time, we have a box-set of mechanisms in the form of regulatory/civil and criminal penalties enforceable against the corporation itself and/or against its directors, the use of which reveals contradictory messages from different prosecution and regulatory agencies.

We tend to talk quite loosely about regulation and crime, with the result that techniques developed for moulding behaviour through regulatory standards have been applied in the pursuit of serious white collar and corporate crime such as fraud and bribery. The distinctions between the different types and forms of control are perhaps more apparent than real – again much enforcement of crime against individuals deploys negotiation, discretion, and selectivity.<sup>64</sup> There is increased recognition that regulatory offenses are concerned to prevent harms just as, often more, threatening to health and welfare than many so-called “real” crimes. An unsafe mine or steelworks can damage employees and the public, a corrupt corporation can similarly wreak damage to the economy that places a professional shoplifter in the shade. There remains, however, a serious lack of clarity about the harm or culpability inherent in what might be broadly called economic offenses. The opposing forces of regulatory and crime rhetoric have produced some interesting micro climates in which corporate crime enforcement has grown at different rates and in different forms.

TABLE 1 Liability Models

MODEL	JURISDICTION	VARIANTS
Vicarious/agency	UK strict liability offences.	UK Regulatory reverse burden offences Reas. practicable/other due diligence defences
		US federal- all offences due diligence applied at sentencing stage

	South Africa – all offences	
		Austria- due diligence
Identification	UK Fault based offences except manslaughter	US - some states
		US some states (Model Penal Code)
		Canada – senior officers
		France - organs and representatives
Organisational	Australia (C'th) 'authorisation or permission'	due diligence defence relevant where high managerial agent responsible for authorisation/permission
Failure to prevent	England and Wales Bribery Act 2010 Switzerland-specified offences	With due diligence defence

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## NOTES

<sup>1</sup> Friedman 2000 likens them to poltergeists. See generally, Wells 2001.

<sup>2</sup> See generally, Hawkins 2002.

<sup>3</sup> The Regulatory Enforcement and Sanctions Act 2008 (RESA) introduced a wider range of sanctions for regulators, notably: Fixed monetary penalties; Stop notices; Enforcement undertakings with discretionary requirements such as variable monetary penalties, compliance notices, restoration notices, variable monetary penalties with voluntary undertakings.

<sup>4</sup> Wells 2010a. The Law Commission favours this move, CP 195, 2010.

<sup>5</sup> Eg. Sections 66 and 123 Financial Services and Markets Act 2000 empower the FSA to impose financial penalties on corporations guilty of market abuse.

<sup>6</sup> Serious Crime Act 2007, s 1 (under Sched 1, the serious crimes for which SCPOs can be given include money laundering, fraud, corruption and bribery).

<sup>7</sup> Eg. FSMA 2000, settlements can be negotiated at any stage, appealable to Financial Services and Markets Tribunal, see:

<http://www.fsa.gov.uk/pages/About/Who/Accountability/FSAMT/index.shtml>

<sup>8</sup> Hart 1954. See also Hoffmann 2003, xiv.

<sup>9</sup> Hart 1954, 56.

- <sup>10</sup> Hart 1954, 57.
- <sup>11</sup> Iwai 1999. See also Note (2001) observing the categories of human person, human nonperson and nonhuman person.
- <sup>12</sup> Iwai 1999, 593.
- <sup>13</sup> Harding 2007, ch. 2 distinguishes organizations of governance and representation from organizations of enterprise, although the categories may overlap. Here I am talking more of organizations of enterprise.
- <sup>14</sup> Harding 2007, ch. 5, quoting Hart 1968, 265.
- <sup>15</sup> Harding 2007, 103.
- <sup>16</sup> Hart identified four meanings: role, capacity, causal and liability responsibility, 1968, ch. IX. The discussion here is taken from Harding 2007, ch. 5.
- <sup>17</sup> Much of the jurisprudence on the “directing mind” of the company derives from civil maritime liability cases, see cases cited in *Meridian Global Funds Management Asia Ltd v. The Securities Commission* [1995] 3 WLR 413.
- <sup>18</sup> Fisse and Braithwaite 1993; Gobert and Punch 2003; Leigh 1969; Wells 2001.
- <sup>19</sup> See Harding 2007, 226-7; Wells 2001, ch. 4.
- <sup>20</sup> Wells 2001, 151.
- <sup>21</sup> Wells and Elias 2005, 155.
- <sup>22</sup> Harding 2007, ch. 9.
- <sup>23</sup> Interpretation Acts have since 1827 stated that, in the absence of contrary intention, the word “person” includes corporations, see now Interpretation Act 1978 c. 30. Courts in fact were generous in finding contrary intention and rarely did so when the offense required proof of fault.
- <sup>24</sup> Crown Prosecution Service 2010a, para. 4.1 et seq.
- <sup>25</sup> Crown Prosecution Service 2010b, para. 8.
- <sup>26</sup> Crown Prosecution Service 2010b, para. 30.
- <sup>27</sup> Allens Arthur Robinson 2008, p 62.
- <sup>28</sup> Switzerland is also an example: Penal Code Art 1 covers all offences, while Art 2 addresses specified offences- criminal organisation, financing terrorism, money laundering, and corruption. See Heine 2008, 303.
- <sup>29</sup> It could be argued that this is so in Australia too since the Australian Criminal Code Act’s application has been exempted from a number of key federal statutes which have their own models of liability, see above n. However, the Australian Code does provide a broad unifying starting point for non exempt federal offences.
- <sup>30</sup> Section 40 provides that the onus is on the employer to show that all reasonably practicable steps have been taken.
- <sup>31</sup> [1995] 1 WLR 1356.
- <sup>32</sup> *R v Chagot* [2008] UKHL 73, per Lord Hope, para 17.
- <sup>33</sup> *R v Associated Octel* [1996] 1 WLR 1543; *R v Gateway Foodmarkets* [1997] IRLR 189) (a case under Health and Safety at Work Act 1974, s 2).
- <sup>34</sup> *Meridian Global Funds Management Asia Ltd v Security Commission* [1995] 2 AC 500. See also *Lebon and another v Acqua Salt Co Ltd* [2009] UKPC 2
- <sup>35</sup> Wells 2001, p.90.
- <sup>36</sup> *Tesco Supermarkets v Natrass* [1972] AC 153, *Attorney-General’s Reference (no 2 of 1999)* [2000] QB 796.
- <sup>37</sup> Fisse and Braithwaite 1993, p 47.
- <sup>38</sup> Law Commission 1996; Law Commission 2010.

- <sup>39</sup> Scotland and Northern Ireland adopt the same approach as England and Wales. Canada captures a wider range of personnel using the term 'senior officers'. Criminal Code 2003 s. 2.
- <sup>40</sup> Pieth 2007.
- <sup>41</sup> See : <<http://www.oecd.org/dataoecd/57/42/35937659.pdf>>, para 148.
- <sup>42</sup> Ibid.
- <sup>43</sup> s. 12.3 (2) (a).
- <sup>44</sup> s. 12.3 (2) (b).
- <sup>45</sup> A.L.I. Model Penal Code, para. 2.07 (Proposed Official Draft 1962), see Coffee 1999, p 21.
- <sup>46</sup> Although this latter uses 'senior officer' rather than 'high managerial agent', Criminal Code S 22.
- <sup>47</sup> s. 12.3 (2) (c).
- <sup>48</sup> s. 12.3 (2) (d).
- <sup>49</sup> s. 12.3.(6).
- <sup>50</sup> s. 12.(3) 4.
- <sup>51</sup> s.12.3.(3).
- <sup>52</sup> The Report is ambiguous here between the physical (i.e. human) *actor* and the physical *act*. Here my emphasis is on the latter.
- <sup>53</sup> LC Report 237 *Involuntary Manslaughter* 1996, para 8.39.
- <sup>54</sup> *R v Kennedy* [2007] UKHL 38.
- <sup>55</sup> Part 2.5, s 12.2.
- <sup>56</sup> S. 22. 1 (a) and s. 22.2.
- <sup>57</sup> HL Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd [1957] 1 QB 159 at 172, per Lord Denning, MR
- <sup>58</sup> Bribery Act 2010, s. 7. The commercial organization is liable for the actions of those associated with it, including those who perform services for it, employees, agents, and subsidiaries (s. 8).
- <sup>59</sup> See Wells 2009.
- <sup>60</sup> Parliament 2009.
- <sup>61</sup> Bribery Act 2010, s. 7. The commercial organization is liable for the actions of those associated with it, including those who perform services for it, employees, agents, and subsidiaries (s. 8).
- <sup>62</sup> French 1984, 1, et seq.
- <sup>63</sup> Criminal Code Act 1995 (Commonwealth). The Australian Capital Territory has incorporated it in the Criminal Code Act 2002, including workplace manslaughter in Part 2A of the Crimes Act 1900 (ACT).
- <sup>64</sup> Bussman and Werle 2006.



# Good Practice Guidance on Establishing Corporate Liability, and Good Practice Guidance on Internal Controls, Ethics and Compliance

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## Introduction

Corporate liability for bribery offences, as well as criminal offences in general, has been evolving globally in recent years. The fast pace of change reflects the need to make sure that organisations cannot hide behind the ‘corporate veil’ and commit offences with impunity. As companies’ decision-making structures become less centralised, countries find that their legal systems are ill-equipped to address corporate wrongdoing.

The OECD has been at the forefront of the global trend to broaden the scope of corporate liability for the bribery of foreign public officials. Cross-border bribery transactions are often very complex, involving different layers of corporate decision-making, intermediaries, and foreign subsidiaries. To capture these kinds of transactions, corporate liability must be flexible.

However, the concept of corporate liability for criminal offences is relatively new in Asia-Pacific. As a result, as shown by the newly adopted Thematic Review on Criminalisation of Bribery in Asia and the Pacific,<sup>1</sup> a number of countries in the Region do not have this form of liability in their legal systems, and many of those that do find it difficult to apply in practice. These jurisdictions are struggling to update their laws on corporate liability due to new international standards in the United Nations against Corruption (UNCAC) and the OECD Anti-Bribery Convention.<sup>2</sup> Two new tools recently developed by the OECD could be an important resource to those jurisdictions – Good Practice Guidance on Implementing Specific Articles of the OECD Anti-Bribery Convention, and Good Practice Guidance on Internal Controls, Ethics and Compliance.<sup>3</sup>

## Good Practice Guidance on Establishing Corporate Liability

In order to assist the Parties to the OECD Anti-Bribery Convention strengthen their systems for corporate liability for the bribery of foreign public officials, the OECD developed concise good practice guidance on what such liability should cover.<sup>4</sup> The main principle is that the liability must be flexible enough to reflect the wide variety of

corporate decision-making systems. Countries can achieve this in different ways, according to what is possible and appropriate in their legal systems. However, as a minimum standard, for corporate liability to be effective, it should cover the following three situations:

- A person with the highest level managerial authority in an organization bribes,
- A person with the highest level managerial authority in an organization directs or authorizes a lower level person to bribe,
- A person with the highest level managerial authority fails to stop a lower level person from bribing, including through inadequate supervision, or a failure to implement adequate internal controls, ethics and compliance measures.

The OECD Good Practice Guidance also recommends that corporate liability apply even in cases where the person who actually perpetrated the bribery is not prosecuted or convicted.

## Good Practice Guidance on Internal Controls, Ethics and Compliance

A strong system of corporate liability for bribery offences puts companies at greater risk of detection and prosecution. In order to stop bribery from happening, they need to adopt effective measures for preventing this kind of conduct.

The OECD Good Practice Guidance on Internal Controls, Ethics and Compliance is addressed to companies directly. It is meant to be flexible so that it can be adapted to companies of different sizes, including SMEs, and according to the different levels of corruption risk that they face in their operations.

The Good Practice Guidance underlines the need for a proper risk assessment, to ensure that measures for preventing corruption are effective. It is also essential that the risks are regularly monitored, re-assessed and adapted to ensure their continuing relevance. In addition, there are several good practices that companies should consider including in their system of corporate compliance, such as:

- Strong and visible support by senior management,
- Independent oversight controls,
- Application of measures to all entities that a company effectively controls and third parties, including agents, consultants, suppliers, and joint venture partners,
- Rules on gifts, hospitality and entertainment expenses, and political contributions,

- Appropriate incentives for complying with the measures and disciplinary procedures for violations,
- Effective guidance and training measures for all staff,
- Safe and confidential channels for reporting wrongdoing, and
- Periodic reviews of the measures.

Moreover, recognising that SMEs have limited resources for developing adequate controls, the Good Practice Guidance encourages business organisations and professional associations to assist them by disseminating relevant information, providing training, and providing advice on carrying out due diligence and resisting extortion and solicitation for bribes.

## Concluding Remarks

Both OECD Good Practice Guidance tools were developed through a comprehensive consultation process, involving the private sector, civil society and multi-lateral organisations, such as the ADB, UNODC, IMF and WTO. They also draw on information obtained through monitoring implementation of the OECD Anti-Bribery Convention, which has identified cross-cutting challenges in combating bribery similar to those faced by the Asia-Pacific countries and jurisdictions. As a result, jurisdictions in Asia-Pacific should find these tools relevant and easy to adapt to their legal systems. They should also find that they are an essential resource for implementing the relevant provisions in the UNCAC.

## NOTES

- <sup>1</sup> The Thematic Review on Criminalisation of Bribery under the UNCAC was published by the ADB/OECD Anti-Corruption Initiative in November 2010, and is available on the following webpage: <http://www.oecd.org/dataoecd/2/27/46485272.pdf>. It provides an in-depth analysis of the frameworks and practices in 28 Asian Pacific jurisdictions for criminalising the principal bribery offences in the United Nations Convention against Corruption.
- <sup>2</sup> The official name of the 'OECD Anti-Bribery Convention' is the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
- <sup>3</sup> The first instrument is formally called: Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Both instruments comprise Annex I and Annex II respectively of the 2009 Recommendation for Further Combating Foreign Bribery, which is available on the following webpage: <http://www.oecd.org/dataoecd/11/40/44176910.pdf>
- <sup>4</sup> The specific guidance is contained in Paragraph B) of Annex I of the 2009 Recommendation, cited in footnote 3.



# Fighting Commercial Bribery in China

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The Communist Party of China (CPC) and the Chinese Government attach great importance to the fight against commercial bribery. In February 2006, the Opinions on Carrying out the Special Task of Combating Commercial Bribery was promulgated as an overall plan for this work. A Leading Group for Combating Commercial Bribery was established at the central level and similar offices were also set up in different departments and local governments. This work includes such three measures as self-correction of malpractice, investigation of bribery cases and the perfecting of long-term prevention mechanisms. It has six key areas of construction projects, transfer of land, transactions in property ownership, purchase and sale of medicine, government procurement, development and sale of resources, and nine disciplines of bank credit, bills and futures, business insurance, publication and distribution, sports, telecommunications, electric power, quality supervision and environmental protection. The leading Group for Combating Commercial Bribery has also published a series of regulations to guide and promote the work of anti-commercial bribery. Balance were made between punishment and prevention, comprehensive promotion of the work and prioritizing key areas, concentrated efforts and continuous input, and deepened reform and strict administration. The special task of combating commercial bribery has been deepened toward healthy and orderly development with gradual achievements. The main measures taken are:

a. Seriously conducting self-checking and self-redressing of malpractice. About 2.6 million enterprises and government institutions, and 49 supervisory departments and subordinates have carried out self-checking and self-redressing, to redress the malpractice found out. Guidance was provided to strengthen the corporate internal management. The functions of the Supervision Board, Labor Union and Workers' Congress are brought into full play, corporate affairs made public, and regulations on the decision-making system of state-owned enterprises promulgated, so as to regulate the decision-making process. For foreign and non-public enterprises, guidance is given to formulate codes of conduct; and the Chamber of Commerce and the Industrial Association are encouraged to strengthen restraint of member enterprises.

b. Severely investigating and dealing with cases of commercial bribery. Statistics show that from January 2008 to September 2009, 30245 cases of commercial bribery in China were investigated and dealt with the amount of RMB 6.66 billion Yuan involved. Among these cases, 5702 were related to public servants at the national level and 6195 public servants punished. The law enforcement and judicial agencies are dealing with commercial bribery of not only Chinese enterprises, but also transnational enterprises;

their range of jurisdiction covers not only Chinese enterprises conducting business abroad, but also foreign economic organizations conducting business in China. At the same time, according to the UNCAC and relevant international conventions, the Chinese law enforcement agencies are establishing and perfecting international cooperation mechanisms on law enforcement cooperation, mutual legal assistance, extradition and asset recovery, to severely punish bribers from transnational enterprises who offer bribes to Chinese officials and Chinese offenders of commercial bribery who fled to foreign countries.

c. Vigorously pushing forward the building of market credit system. The building of market credit system is a priority of the long-term prevention system of commercial bribery. For example, the governments of Beijing, Tianjin and Hebei Province have signed the Agreement on Cooperation of Construction Market to explore to establish construction market credit in the three places; the provinces of Jiangsu, Guangdong, Sichuan and the municipal city Chongqing have improved their system of corporate credit checking; the departments of Industry and Information Technology, Land and Resources, Commerce, Finance, Agriculture, and related agencies have compiled records of businessmen in their respective areas, and some also make public the irregularities of enterprises. The Supreme People's Procuratorate has extended the scope of file inquiry of bribe-giving cases from five areas to all areas, as an alert to bribers in business transactions.

d. Establishing law and regulations. In November 2008, the Supreme People's Court and the Supreme People's Procuratorate jointly published the Opinions on Application of Law When Dealing with Criminal Cases of Commercial Bribery, which explicitly explain the application of law for commercial bribery cases. In February 2009, the Standing Committee of the 11th National People's Congress passed the Seventh Amendment of the Criminal Law, making it a criminal offence for immediate relatives and intimate persons of public officials to accept bribes by making use of the rank or position of the public officials. In October last year, the Supreme People's Court and the Supreme People's Procuratorate issued the judicial explanation to define a new offence called accepting bribes by use of influence. Besides, the Law against Unfair Competition was amended to reinforce the restraint on offenders of commercial bribery and relevant subjects.

e. Earnestly enhancing education and publicity of combating commercial bribery. The Leading Group helps enterprises understand the domestic regulations and policies, UNCAC, APEC Code of Conduct, rules of international trade union, the OECD Convention against Business Bribery and other documents, to prevent commercial bribery in any forms. Many local governments and departments have combined the education and publicity of commercial bribery with the education of integrity, honesty and law, and introduced the achievements in combating commercial bribery through press conference, newspaper, videos, handouts and visits. This has achieved encouraging effects.

Next, we will concentrate on the following steps:

First, to investigate more cases and while dealing with bribe-accepting, focus more on bribe-giving;

Second, to establish systems of market credit records, information transparency and sharing, information supply and demand, to promulgate regulations on credit checking, to improve the system of appraisal for credit and punishment for discredit with emphasis on punishment;

Third, to improve law and regulations, to strengthen the work of legislation and judicial explanation, and convert policies into state law and regulations timely, to establish and improve codes of conduct for enterprises and public institutions, to restrict people working in these agencies, to improve self-discipline of enterprises, and to guide the enterprises to abide law in business.



## Session 4

# Investigative Techniques

- The MACC's Use of Special Investigative Techniques in the Investigation of Bribery Cases, *Mustafar bin Ali, Malaysian Anti-Corruption Commission, Malaysia*
- The KPK's Use of Special Investigative Techniques in the Investigation of Bribery Cases, *Mochammad Jasin, Corruption Eradication Commission (KPK), Indonesia*
- The Use of Forensic Auditing to Uncover Corruption, *Ashwani Kumar, Central Bureau of Investigation, India*



# The MACC's Use of Special Investigative Techniques in the Investigation of Bribery Cases

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Mustafar bin Ali  
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Malaysia

## Introduction

Information gathering is the starting point of investigative activities for which an on-the-spot assessment of the reliability and true nature of allegations is required. The Malaysian Anti-Corruption Commission (MACC) hopes to adopt the "Intelligence-Based Investigations" approach with the aim of being more effective in the criminal justice system. To do this, the MACC has to go beyond the normal or current method of investigation and adopt this new approach, where the information is gathered and placed in a systematic manner.<sup>1</sup>

## Background

"The crooks are getting cleverer and better, aided and abetted by technology and advancement in all areas where the law enforcers are not as quick. The crooks upgrade their skills as their freedom is at stake; if they get caught, they will be incarcerated. But for the law enforcers, if they make a mistake, the criminal just goes free and there is no further loss to self or the profession."<sup>2</sup>

What are the setbacks if we do not "buck-up"?

- The distinction lies why the crooks are one step ahead and to certain extent, skilful all the time.
- They have all the initiatives and perhaps all "incentives" they need.
- Many of the high-profile and syndicated type of corruption cases undetected.
- The crooks go scot free and enriching themselves with illegal proceeds of crime.
- The enforcement agency looks in despair.

What do we need to do?

- Business is not as usual.
- Extra effort, well planned and proactive in nature.

Methods of Investigation

- Conventional Approach
- Intelligence Based Investigation

Conventional Approach

- Complainant to come forward and lodge a report.
- An investigation paper is subsequently opened and probes would follow.
- The Investigators will work to gather evidence and information from complainants.
- Conduct forensics probes, seizing exhibits, interrogations etc.
- Investigators obviously face limitations - inadequate background information to study the case.

Intelligence Based Investigation

- Techniques of surveillance
- Evidence gathering
- Investigative interviewing
- Note-taking
- Investigative photography
- Report writing
- Forensic applications and trace evidence
- Questioned documents
- Rendering courtroom testimony and much more...

## Intelligence-based Investigation: Case Study on Illegal Sand Mining in Malaysia

### What has been uncovered:

- Corrupt money demanded and paid to Land and District Office officer for approval of sand application permit;
- District enforcement officer asked and received bribe to protect the activities of illegal sand mining and to ease the transportation of sand in their district;
- Public officers demand and received bribe to protect the sand mining business and falsified reports and documentations; and\
- Enforcement on strict regulation on transportation of sand to neighbouring country was not done properly.

### What has been done:

- Intelligence gathering
- Full analysis on information gathered
- Setting up a company
- Deploying undercover
- Using of high tech equipment

## Lessons Learned

- A significant spike in the volume of investigations.
- Increased number of people arrested.
- Increased number of people being prosecuted.
- Increased in the conviction rate.
- Gain and improved public confidence, especially in the high profile and public interest cases.
- Uncovered more illegal activities and corruption related crime.
- Deterrence and give message that crime doesn't pay!

## Conclusion

In our proactive pursuit of cases of corruption, the MACC also conducted impact analysis of the cases towards the public and the country. Impact analysis is very significant since it not only provide the opportunity to rectify the system and procedures which open-up rooms for corruption, but to find the root causes and the remedies in combating corruption. As the saying goes, “Corruption is worse than prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country.”<sup>3</sup>

“Let’s Make A Difference, FIGHT CORRUPTION”

## NOTES

- <sup>1</sup> Statement by Hon. Dato’ Sri Abu Kassim Mohamed, Chief Commissioner of the Malaysian Anti-Corruption Commission.
- <sup>2</sup> Article from the media, “Time to Upgrade Skills”, The New Straits Times, 16 September 2010.
- <sup>3</sup> Karl Kraus, Austrian Journalist (1874-1936)

# The KPK's Use of Special Investigative Techniques in the Investigation of Bribery Cases

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Mochammad Jasin  
Commissioner, Corruption Eradication Commission (KPK)  
Indonesia

The war against corruption is never ending. This phrase is apt in describing Indonesia's spirit in combating corruption. Beginning with massive efforts for the institutional reform in 1998, Indonesia has made impressive strides such as: the holding of direct and clean elections for the president, for provincial and local officials, and for national and local parliaments; strengthening the role of these parliaments; removal of the military from government; decentralisation of power from Jakarta to local governments; and the setting up of an array of new institutions aimed at reducing corruption and political patronage especially the establishment of the Corruption Eradication Commission of Indonesia or KPK in 2003.

Based on Indonesian Law, KPK has mandate to lead and to coordinate corruption eradication in Indonesia. As an independent body, KPK only responsible to the public, neither to the President nor the Parliament, with responsibilities and duties of:

- Corruption prevention
- Government Administrative System Review and Monitoring
- To investigate and prosecute corruption
- To coordinate and supervise other law enforcement agencies (Police, Prosecutor Office) and oversight bodies in handling corruption case

Since the ratification of the UNCAC in 2006, it is expected to provide Indonesia with a better platform in developing a more progressive anti-corruption effort in Indonesia. KPK lead the process of planning and implementation of the National Plan of Anti-Corruption 2005-2010 and the National Strategy on Anti Corruption 2010-2025. These strategies are intended to be the guidance for expediting the process of being an anti-corrupt nation, including promoting good governance, transparency and comprehensive prevention program nationwide.

KPK's strategy is cross-cutting and not only focused on punitive actions through legal enforcement mechanisms, but also on preventive measures and education. The implementation of those measures is carried out through the following steps:

- Improve the legal and judicial systems in Indonesia. Since 1999, a number of laws targeting corruption have been enacted.

- Strengthen capacity building and build more effective institutions and anti corruption bodies involving a wide-range of state auxiliary bodies.
- Manage public perceptions and expectations in combating corrupt practices to maintain wishes for a more rapid progress of corruption eradication. Awareness of corrupt practices has increased and free media are constantly reporting on corruption or suspected corruption.

KPK strategy is intended to produce swift result and deterrence impact by investigating and prosecuting "big fish" corruption cases which are considered as the untouchable and above the law. This strategy has produced very successful results with 100% conviction rate since the beginning of the establishment of the Commission until today. KPK successfully investigated and prosecuted high rank officials as follows:

- 42 members of Parliaments
- 7 Ministers/Head of Ministerial level
- 7 Provincial Governors
- 1 Governor of central bank, 4 Deputy Governor
- 20 Mayors and Head of Regents/District
- 8 Commissioners of General Election, Judicial, Business Competition Commission
- 4 Ambassadors and 4 General Counsel, including Former Chief National Police
- Senior Prosecutor, KPK's investigator, high rank government officials echelon I & II
- High ranking CEO from the private sector involved in public corruption

One of the best indicators of KPK's success in performing its repressive law enforcement activities are the return of stolen state assets. During its early days, KPK was criticized for not being able to recover assets exceeding the cost of running KPK. Recently, this figure has drastically been overturned. KPK has successfully recovered around USD120 million from 2005 to Sep 2010 from the above cases.

Pursuant to the Law No 30/2002, KPK is authorized to:

- Intercept any communication (phone, sms, email, fax, etc.);
- Request information from banks or other financial institutions about the financial details of a suspect or defendant;
- Order banks or other financial institutions to block accounts suspected to harbor the gains of corrupt activities of a suspect, defendant, or other connected parties;

- Request data on the wealth and tax details of a suspect or defendant from the relevant institutions, both national or international;
- Temporarily halt financial transactions, trade transactions, and other forms of contract, or to temporarily annul permits, licenses, and concessions owned by suspects or defendants, assuming that preliminary evidence points to connections to a corruption case currently being investigated;
- Investigate high profile public/law enforcement officers without any clearance/permission from any authority/president;
- Other authority as mentioned in Criminal Code.

KPK also has extensive monitoring and investigation techniques, as follows:

- Monitor wealth of government executive
- KPK can check bank account information
- Monitoring gratuities accepted by surveillance reports
- To request data on the wealth and tax details
- To request data from banks and other financial institutions
- Temporarily halt financial transactions
- To order banks (or other financial institutions) to block accounts
- To intercept communications
- To conduct investigative audit, surveillance, undercover operation, computer and audit forensics
- To issue a travel ban
- Interview and interrogation
- Search and seizure
- Informant handling

KPK and other law enforcement bodies have the ability and success story in such operations, including sting operation and controlled deliveries, along with technical equipments for the investigation process. The criminal justice system in Indonesia, apparently, does not accommodate the plea negotiations, immunity and sentence, and reduction mechanisms. However, as part of the pre-investigation and investigation, KPK could use co-operative informants and other sources which is more to a technical concern. In addition, the Criminal Procedure Law, defendant's good cooperation and attitude could possibly used to reduce the sentence.

The Commission has been actively engaged in the international sphere and commitment to support both prevention and repression activities such as the development of bilateral and multilateral networks, international treaties, multilateral conventions, participation in international forums, capacity building, technical assistance, advocacy and coalitions. Presently, KPK has established a formal partnership in the form of MoU with 21 international institutions from 16 countries. KPK may also seek international assistance through the mechanism of MLA and other informal joint cooperation in order to assist the disclosure of corruption cases in Indonesia. KPK has involved in numerous international treaty and convention, namely the UNCAC, OECD, Co-Chair of the G-20 Working Group on Anti-Corruption and other international organizations.

KPK's achievement and performance was supported by success factor as follows:

- KPK has the full power to pre-investigate, investigate and prosecute corruption cases (KPK cannot stop any investigation mid-way)
- Comprehensive technology support for intelligent and investigation operation (interception, computer forensic, database and tactical technology)
- KPK's achievement in prosecuting corruption cases (with full attention to asset recovery)
- Involvement of investigator and prosecutor since in the beginning of pre investigation
- Worldwide and accessible Complaint handling system (KPK Whistle Blowers System-KWS)
- Immediate action in response handled by Rapid Movement Unit (caught in act case/red-handed)
- Certainty of time frame in the process of indictment, prosecution and court process by law
- Support both from Indonesian civil society and international communities
- Put in extra efforts to gather evidence more than 'normal' threshold evidence
- Admissible electronic evidence support during court proceeding
- Public's involvement to inform corruption/fraud to KPK through KPK's whistle blower system

# The Use of Forensic Auditing to Uncover Corruption

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Ashwani Kumar  
Director, Central Bureau of Investigation  
India

## History of the CBI

The Central Bureau of Investigation (CBI) traces its origin to the Special Police Establishment (SPE) which was set up in 1941 by the Government of India. The Delhi Special Police Establishment Act was brought into force in 1946. The DSPE acquired its popular current name, Central Bureau of Investigation (CBI), through a Home Ministry resolution dated 1.4.1963. With the setting up of a large number of public sector undertakings, the employees of these undertakings were also brought under CBI purview.

## Emergence as a National Investigative Agency

From 1965 onwards, the CBI has also been entrusted with the investigation of Economic Offences and important conventional crimes such as murders, kidnapping, terrorist crimes, etc., on a selective basis. The two wings were the General Offences Wing (GOW) and Economic Offences Wing (EOW). The GOW dealt with cases of bribery and corruption involving the employees of Central Government and Public Sector Undertakings. The EOW dealt with cases of violation of various economic/fiscal laws.

## Widening Role

As the CBI, over the years, established a reputation for impartiality and competence, demands were made on it to take up investigation of more cases of conventional crime such as murder, kidnapping, terrorist crime, etc. Taking into account the fact that several cases falling under this category were being taken up for investigation by the CBI, it was found expedient to entrust such cases to the branches having local jurisdiction.

### Motto:

Industry, Impartiality, and Integrity.

Mission:

To uphold the Constitution of India and Law of the Land through in depth investigation and successful prosecution of offences. CBI acts as the nodal agency for enhancing inter- state and international cooperation in law enforcement.

Vision:

To combat corruption in public life, curb economic and violent crimes through meticulous investigation and prosecution. It also helps fights cyber and high tech crimes.

## Forensic Auditing - Definition

Forensic auditing could be defined as the application of auditing skills to situations that have legal consequences. It involves studying and interpreting the accounting and auditing procedures to discover, analyze, organize, present evidence of financial nature for use in legal, administrative or other official proceedings.

## Forensic Auditing - Applications

An obvious example of forensic auditing is the investigation of a fraud or presumptive fraud with a view to gathering evidence that could be presented in a court of law. However, there is an increasing use of auditing skills to prevent fraud by identifying and rectifying situations which could lead to frauds being perpetrated (i.e. risks).

## Financial Statement Fraud - Case Study

A publicly- traded company engaged in sham transactions for more than seven years by using several shell companies. The CEO of the company conspired with a former employee to sell a building to a company owned by the CEO's employer. The company has majority owner of public relations firm. Lowest bidder has been awarded to contract to pave parking lot.

Satyam computers

The company was incorporated in 1987. Its business model is comparable with other companies like Infosys, HCL, and Wipro. The average performance of the company during the last 6 years of the IT majors has been 25% to 30%. M/s Satyam offers solutions in 5 sectors; Banking, Financial Services & Insurance (BFSI).

Proactive action

A Multi Disciplinary Investigation Team (MDIT) with 16 CBI officers deputed to investigate. Personal gain to the accused is dividend to the tune of Rs. 115 Crores. The Computers and servers, on which this fraud was committed, were identified by the CBI Team. It has been found that Auditing Standards were not followed by the Company.

## Session 5

# Sanctions and Confiscation

- Confiscating and Quantifying the Proceeds of Bribery, *Alan Bacarese, Basel Institute on Governance*
- Cross-Debarment and Other Recent Anti-Corruption Efforts in the Asian Development Bank, *Clare Wee, Asian Development Bank*
- Bans from Receiving Public Subsidies and Contracts on Conviction of Corruption in Pakistan, *Umer Zaman, National Accountability Bureau, Pakistan*
- Evidence-based Approach to Assessing Corruption: Two Recent Examples and Future Work, *Tanja Santucci, UNODC*



# Confiscating and Quantifying Proceeds of Bribery

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Alan Bacarese  
Head of Legal and Case Consultancy  
International Centre on Asset Recovery  
Basel Institute on Governance

## Confiscation

According to article 2(g) of UNCAC the term confiscation means the permanent deprivation of property by order of a court or other competent authority. All international instruments require their signatories to be able to confiscate the bribe and the proceeds of bribery. 'Proceeds' include any economic advantage as well as any savings by means of reduced expenditure derived from such offence. They may be a physical object, such as an asset that the briber purchased as a result of a contract awarded by the bribed official. They may also be intangible, such as shares in a company. To the extent possible under their legal systems, signatories should take measures to enable confiscation of property, equipment or other instrumentalities that were used or were intended to be used in the commission of an offence. This concept is very broad and may cover a wide range of property. In many cases, the bribe and the proceeds of bribery may not be available for confiscation, e.g. because they have been hidden away or spent, or are in the possession of a bona fide third party.

The OECD Convention and Council of Europe Convention therefore require that parties either confiscate the bribe and the proceeds of bribery, or property of an equivalent value. The OECD Convention provides the further option of monetary sanctions of a comparable effect. Strengthening the ability of countries to recover assets that have been stolen and hidden in foreign jurisdictions is now a key part of the worldwide campaign against corruption. The OECD Convention on Foreign Bribery and UNCAC has promised a new era of cooperation among nation states in asset recovery. Many countries are taking important steps to facilitate rightful recoveries. The field of asset recovery encompasses all of the steps necessary for a successful recovery, including asset tracing, satisfying legal requirements, freezing, confiscation, resolving competing claims, invoking mutual legal assistance and the mechanics of quantification and repatriation. In terms of the processes available for successful confiscation of the proceeds of crime they are as follows:

## Criminal Prosecution

The standard view is that it is the criminal law that should deal with offenders, as crimes are wrongs against the public. Successful prosecutions ensure that criminals are

brought to justice and are punished, which has the effect of deterring potential offenders from committing crimes and enhancing the public's trust in law enforcement agencies and the criminal justice system as a whole. This is also true of the process of recovering the proceeds of their criminality. In criminal proceedings as the punishments are usually imposed by criminal courts, legal systems provide greater procedural protections than those available to a respondent in a civil case e.g. criminal proceedings require a higher standard of proof than that applied in civil proceedings. This means that law enforcement must obtain sufficient admissible evidence for there to be a realistic prospect of a conviction before a prosecution can be brought. This has the benefit of improving the expertise of law enforcers, the development of new techniques in investigations and how evidence is presented by prosecutors and ensures that criminal laws are updated to deal with the increasing sophistication of organized crime.

Wherever there is sufficient available evidence a prosecution should ensue, so as to deter criminals and professional money launderers, to make it harder for criminals to legitimize the proceeds of their crimes, to improve public confidence in the criminal justice system and to protect the integrity of professional and financial institutions. The confiscation of the proceeds of the crime should follow as a result of conviction.

## Non Conviction Based (NCB) Forfeiture

It is not always possible to prosecute offenders. Sometimes it might even be for unforeseeable reasons, such as when the culprit is deceased or has absconded. Yet, in some cases it is possible to identify assets that are the proceeds of crime. Consequently a response strategy that relies upon alternative measures has been developed. Although relatively few jurisdictions allow for civil forfeiture there is an increasing trend to civil forfeiture which has been prompted by the tendency of organized criminal groups to use their resources to distance themselves from the criminal activity and to hide the illicit origin of their assets. When it is difficult to obtain the conviction of such individuals, these proceeds derived from crime are often effectively out of the reach of the law, and the criminals are able to peacefully enjoy their ill-gotten gains. Non conviction based forfeiture enables States to recover illegally obtained assets from an offender via a direct action against his or her property without the requirement of a criminal conviction. The State will still have to prove within the balance of probabilities that the offender's assets are either the proceeds of crime or represent property used to commit a crime i.e. instrumentalities. A Good Practices Guide for Non-Conviction Based Asset Forfeiture has been completed by the World Bank/UNODC Stolen Asset Recovery Initiative (StAR).

## Civil Lawsuits

Where a criminal prosecution is not possible or practicable and civil asset recovery unavailable, then the victim or a State may have to resort to civil litigation. This aims to provide a remedy either by requiring the respondent to pay compensation or for the return of the assets to the plaintiff. Advantages to the taking of civil proceedings are

that the claimant retains greater control over the case, the burden of proof is lower than in criminal cases, that usually more inferences can be drawn, that the absence of the respondent is not usually a bar to the action and that there are far ranging powers to seize and freeze documents and assets. Disadvantages admittedly include the cost of bringing a civil action, the fact that often undertakings have to be given regarding costs and possible compensation to a respondent in the event of a case being unsuccessful and that sometimes evidence obtained through mutual legal assistance cannot be used in civil litigation.

### Quantification of Bribery

The quantification of bribery is causing problems in many jurisdictions. Unless the details and the impact of the bribe are explicitly known then there is a complicated equation that prosecutors and/or judges must undertake. But what is to be taken into account? The value of the bribe alone, the commercial advantage obtained as a result of a successful bribe, the commercial impact upon the government of the country where it was paid, the social impact upon the population? All might be relevant. This emerging issue will be discussed in greater length in the session.



# Cross-Debarment and Other Recent Anti-Corruption Efforts in the Asian Development Bank

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Clare Wee  
Director, Office of Anti-Corruption and Integrity  
Asian Development Bank

## Introduction

The Office of Anticorruption and Integrity (OAI) is the designated focal point of contact for allegations of fraud or corruption pertaining to ADB-financed activities or staff members. It is responsible for all matters related to allegations of fraud and corruption and for ensuring that those participating in ADB-funded activities meet the highest standards of integrity. It also advances awareness of the anticorruption policy in collaboration with other ADB departments and conducts project procurement-related reviews of ADB-financed activities, to help prevent and detect fraud, corruption or abuse.

OAI was established as an independent unit (formerly a unit under the Office of the Auditor General, OAGI) in October 2009. OAI's head reports directly to the President and through the President to the Audit Committee of the Board of Directors on OAI's activities and outcomes. The principal responsibilities of OAI include:

- Conduct independent and objective investigations of fraud and corruption, collusive practice, coercive practice, conflict of interest and abuse pursuant to the ADB's anticorruption policy known to or identified by OAI.
- Conduct project procurement-related reviews (PPRR) of ADB-financed activities, to help prevent and detect fraud, corruption or abuse.
- To investigate allegations of misconduct by staff members involving violations of ADB's Anticorruption Policy.
- Advance awareness of ADB's anticorruption policy.
- Propose and review appropriate procedures under the anticorruption policy to ensure that all staff members and projects maintain integrity against corruption.

In the last two years, several initiatives were taken to strengthen ADB's efforts to combat fraud and corruption.

## Whistleblower and Witness Protection

ADB adopted its whistleblower and witness protection provisions in December 2009 (AO 2.10), which provide that ADB will pursue all reasonable steps to protect these individuals acting in good faith and to ensure that they are not subject to retaliation. Protection is extended to both ADB staff and external whistleblowers and witnesses. The Director General, BPMSD, in coordination with the Head, OAI, is responsible for the overall implementation of this AO. A key component of whistleblower and witness protection, as it relates to ADB's Anticorruption Policy, is ADB's firm position that the source of any allegation or evidence is to be treated with utmost confidentiality. OAI has reinforced that policy through its operating principles, which emphasize that OAI will:

- Make its best effort to encourage and protect whistleblowers and witnesses
- Limit the circulation of any information regarding an investigation strictly to those with a need to know
- Engage appropriate officials to identify actions that will prevent retaliation from taking effect or otherwise causing harm to the individual or firm concerning, where a witness may suffer or has suffered retaliation because of assistance in an investigation
- Protect from unauthorized disclosure throughout and following an investigation the identity of an individual who reports in good faith to OAI
- Refer concerns of unauthorized disclosures by ADB staff of the identity of a whistleblower or witness related to OAI's inquiries to ADB officials responsible for disciplinary procedures.

## Disclosure of Sanctions List

As a general rule, ADB does not publicize the names of firms and individuals that have been debarred, as doing so might limit OAI's ability to fairly and consistently implement its responsibilities under the Anticorruption Policy. Publicly labeling parties in terms that could classify as slander or libel may have serious legal implications in some jurisdictions, against which ADB might not be protected by immunity as provided in ADB's Charter or its HQ agreement.

Acknowledging that there is some deterrent effect to publicizing its debarment list, ADB now publishes and makes publicly available on its website the names of entities and individuals that have been:

- Debarred by ADB for second or subsequent integrity violations;
- Debarred by ADB for sanctions violation (i.e. attempting to participate in an ADB-financed activity while ineligible)

- Debarred by ADB, but whom ADB has found impossible to notify (process avoiders);
- Cross-debarred by ADB, pursuant to Agreement for Mutual Enforcement of Debarment Decisions (Cross-Debarment Agreement), entered into in April 2010 and presently declared in force by World Bank Group, ADB and EBRD.

The list of firms and individuals sanctioned by ADB as first-time violators is published on ADB's intranet to ADB staff and ADB's Board of Directors. Currently, ADB shares this debarment list via email with international organizations, government agencies that implement ADB projects, bilaterals, and others with a demonstrated need to know. This list is available on a password-enabled website.

## Cross-Debarment

On 9 April 2010, ADB, African Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank signed an "Agreement on Mutual Enforcement of Debarment Decisions" (the "Agreement") to mutually enforce each other's debarment actions on a prospective basis, with respect to the four prohibited practices, i.e. corruption, fraud, coercion and collusion. This is known as cross-debarment.

Upon entry into force of the Agreement, entities or individuals debarred by one MDB for more than one year risk similar treatment by the other MDBs. For example, if a firm or individual is debarred and publicized by ADB, the other participating MDBs will cross-debar the same firm or individual, and it will not be able to participate in projects or activities financed by those MDBs for the applicable sanction period. Cross debarment applies when a firm or individual has been:

- Sanctioned for one of the agreed prohibited practices by one of the MDBs
- Sanctioned within a period of 10 years after the alleged violation was committed,
- Debarred for more than one year, and
- Publicized on the MDB's website as "sanctioned". For ADB, this means that only firms or individuals that have breached their sanctions or cannot be contacted by ADB or that have failed to respond to ADB are covered by cross debarment.

In principle, all participating MDBs aim to apply cross-debarment when all criteria for compliance have been met. However, there is an opt-out clause (Section 7 of the Agreement) that states that a participating MDB may decide not to cross-debar if cross-debarment would be "inconsistent with its legal or other institutional considerations [...]." The MDB that decides not to cross-debar must give prompt notice of its decision to the

other participating MDBs. A cross-debarment website will be fully operational in early 2011.

# Bans from Receiving Public Subsidies and Contracts on Conviction of Corruption in Pakistan

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Umer Zaman  
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National Accountability Bureau, Pakistan

## Introduction

Pakistan ratified the UN Convention against Corruption in August 2007. The legal system in Pakistan is primarily based on English common law with some elements of Islamic Law. Pakistan's main bribery offences are found in the Penal Code 1860 and the National Accountability Ordinance (NAO), 1999. The provision of active bribery is covered under Section 165-A of Penal Code and Section 9(a)(i) of NAO 1999, while passive bribery is covered under Sections 161 and 165 of the Penal Code and Section 9(a)(i)-(ii) and (iv) of the National Accountability Ordinance (NAO).

Under Sections 161, 165 and 165A of the Penal Code, bribery offences are punishable by imprisonment of up to three years and/or a fine. Section 9 of NAO covers the offence of corruption being punishable by imprisonment up to 14 years and/or a fine. There is no maximum limit to the fine that may be imposed, as long as the fine is not excessive. Under Section 11 of the NAO, a fine must also be not less than the gain derived by the offender from the offence. Upon conviction for corruption under the NAO, a court may confiscate the "pecuniary resources" of the official that is "disproportionate to the known sources of his income or which are acquired by money obtained through corruption and corrupt practices, whether in his name or in the name of any of his dependents. Under Section 517 of the Pakistan Penal Code, the court may confiscate any property "regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

The National Accountability Ordinance under Section 15 also imposes some administrative sanctions in addition to criminal sanctions. A person convicted of corruption under the NAO, shall cease to hold public office and is disqualified from holding a public office for 10 years. He is also prohibited from seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or statutory or local authority. Persons convicted of corruption are also barred from receiving any "loans, advances or other financial accommodation" by any state-owned or controlled bank or financial institution for 10 years.

## International Standards (Sanctions and Confiscation; Bans from Receiving Public Subsidies and Contracts on Conviction of Corruption)

### OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (December 1997)

#### Article 3. Sanctions:

Paragraph 22: The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

Paragraph 24: Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are:

- Exclusion from entitlement to public benefits or aid
- Temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities
- Placing under judicial supervision; and
- A judicial winding-up order

### Second Protocol to the Convention on the Protection of the European Communities' Financial Interests

#### Article 4: Sanctions for legal persons

Paragraph 1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- Exclusion from entitlement to public benefits or aid;
- Temporary or permanent disqualification from the practice of commercial activities;
- Placing under judicial supervision;
- A judicial winding-up order.

### Economic Community of West African States Protocol on the Fight against Corruption

#### Article 11: Liability of legal persons

Paragraph 4: Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, disqualification from

commercial activities, judicial winding-up orders, and placements under judicial supervision.

Revised Recommendation of the Council of the Organisation for Economic Cooperation and Development on Combating Bribery in International Business Transactions

Public procurement Recommendation no 2:

Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.

United Nations Convention against Corruption (UNCAC)

Article 26. Liability of legal persons

Paragraph 4: Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

United Nations Convention against Transnational Organized Crime (UNTOC)

Article 10. Liability of legal persons

Paragraph 4: Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Criminal Law Convention on Corruption (adopted by the Committee of Ministers of the Council of Europe on 27 January 1999)

Article 19 – Sanctions and Measures

Paragraph 1: Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

Paragraph 2: Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Paragraph 3: Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities

and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.

#### European Commission's Public Procurement Directives

The European Commission's new public procurement directives were adopted on 3rd February 2004 by the European Union's Council of Ministers and the European Parliament. Article 45 contains a new provision for the mandatory exclusion of candidates for participation in a criminal organisation, corruption, fraud or money laundering. Contracting authorities must exclude candidates 'if they are aware' of such convictions. It requires Member States to assign 'competent authorities' to supply contracting authorities with the relevant information about such convictions.

#### World Bank - Case Example

In 1998, the World Bank placed procedures for World Bank financed projects, for contractors convicted of corruption. July 2004, World Bank Sanctioned 'Acres International' (Canadian leading Construction Management and Engineering Consultancy) following its conviction in WB financed Lesotho Highlands Water Projects. Acres International was debarred to participate in WB financed projects.

#### Domestic Laws / Regulations in Pakistan

Before the enactment of the Public Procurement Regulatory Authority (PPRA) Ordinance (2002), the authorities in Pakistan had to generally rely on the General Financial Rules, which were quite inadequate in addressing the linkages to corruption. However, the PPRA Ordinance (2002) mandated the Public Procurement Regulatory Authority to devise Public Procurement Rules (2004) in the light of international standards and case examples of the World Bank. Under Public Procurement Rules (2004), every public sector entity is required to prepare a procurement manual bearing comprehensive procedures for procurement based on these rules.

#### Public Procurement Rules (2004), Pakistan

Rule 18: Disqualification of suppliers and contractors; the procuring agency shall disqualify a supplier or contractor if it finds, at any time, that the information submitted by him concerning his qualification as supplier or contractor was false and materially inaccurate or incomplete.

Rule 19: Blacklisting of suppliers and contractors-

The procuring agencies shall specify a mechanism and manner to permanently or temporarily bar, from participating in their respective procurement proceedings, suppliers and contractors who either consistently fail to provide satisfactory performances or are found to be indulging in corrupt or fraudulent practices. Such barring action shall be duly publicized and communicated to the Authority. Provided that any supplier or contractor who is to be blacklisted shall be accorded adequate opportunity of being heard.

# Evidence-based Approach to Assessing Corruption: Two Recent Examples and Future Work

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Tanja Santucci  
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## Summary<sup>1</sup>

There is broad consensus that evidence-based assessments of corruption should be encouraged in order to better develop and implement anti-corruption measures.

The use of statistical methods to describe and qualify corruption poses a number of methodological challenges. Since data based on reported cases of corruption usually do not reflect the real extent of corruption, a number of alternative approaches have been developed. Examples of such methods are represented by expert's assessments and composite indicators. Such methodologies present advantages and drawbacks.

Also, it is perceived that such methods can play an important role at an initial phase, when there is a need to provide some baseline indications. At a later stage, when awareness about corruption issues has grown, there is often stronger demand for objective and policy-relevant indicators.

A promising approach is represented by assessments based on representative sample surveys of a given population, as for example households or businesses. The conduct of sample surveys allows the direct collection of data on experience of corruption. Several aspects of corruption episodes can be fully investigated, with the view to better understand modalities, purposes and actors involved. Various typologies of surveys can be implemented, which target different groups such as households, businesses or civil servants.

In the field of corruption assessments, reliability of the data producer is also an important requirement. The involvement of government agencies in the production of evidence-based assessments of corruption is important to show country long-term commitment to formulate and monitor anti-corruption policies. At the same time, assessments conducted by governmental agencies may be perceived as not being fully independent.

In this context, the use of solid and transparent methodologies, better if tested and promoted at international level, represents a good practice to produce valuable results and, at the same time, to address possible doubts about reliability of data. The involvement of national statistical authorities can represent an additional element to guarantee data quality.

The conduct of assessments to measure and “characterize” corruption represents an extremely complex task, due to methodological challenges and its political sensitivity. Where requested, UNODC is ready to provide its technical support to produce national assessments using the most up-to-date methodologies. A context of nationally owned process and international technical support is probably conducive to evidence-based assessments that can be valuable to a large range of stakeholders and produce high quality data that can impact on strategies and policies to fight corruption.

#### NOTES

- <sup>1</sup> For the full version of this study, see: “Quantitative Approaches to Assess and Describe Corruption and the Role of the UNODC in Supporting Countries in Performing such Assessments”, UNODC, CAC/COSP/2009/CRP.2, November 2009.

## Annexes

List of Participants  
Conference Agenda



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# Seminar Agenda

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Thursday, 23 September 2010

<b>2:45 – 3:30:</b>	<b><u>Opening Ceremony</u></b> <b>Mr. Dato' Sri Haji Abu Kassim Bin Mohamed, Chief Commissioner, Malaysian Anti-Corruption Commission</b> <b>Mr. Kunio Senga, Director General for Southeast Asia, Asian Development Bank</b> <b>Mr. Mario Amano, Deputy Secretary-General, OECD</b> <b>Keynote Address by the Hon. Tan Sri Dato' Haji Muhyiddin bin Mohammed, Deputy Prime Minister of Malaysia</b>
<b>3:30 – 4:45:</b>	<b><u>1. International Instruments on the Criminalisation of Bribery</u></b> This session will look at the main international instruments relevant to the criminalisation of bribery in the Region. Speakers will discuss these instruments' key elements and standards, and steps taken so far by members to implement them. <b>Chair: Ms. Misako Takahashi, Counsellor Embassy of Japan in Malaysia</b> <b>Ms. Tanja Santucci, UNODC</b> Criminalisation of Bribery in the United Nations Convention against Corruption, and the use of the UNCAC Legislative and Technical Guides <b>Ms. Melissa Khemani, Anti-Corruption Division, OECD</b> Criminalisation of Bribery under the OECD Anti-Bribery Convention and Annex I (on criminalisation) of the 2009 OECD Recommendation on Further Combating Foreign Bribery <b>Mr. Anwarul Islam Khandker, Cabinet Division, Government of Bangladesh</b> Mr. Islam will discuss Bangladesh's process for reviewing and amending its anti-bribery legislation to meet the standards in the United Nations Convention against Corruption
<b>4:45 – 5:00</b>	Break
<b>5:00 – 6:15:</b>	<b><u>2. Challenges in Establishing and Applying Domestic and Foreign Bribery Offences</u></b> This session will canvass common challenges in establishing and applying bribery offences, including the bribery of foreign public officials, that meet key international standards, including overlapping offences, bribery through intermediaries, bribes that benefit third parties, sufficiently broad definition of public official, and extraterritorial or nationality jurisdiction. <b>Chair: Dato' Sri Haji Abu Kassim Bin Mohamed, Chief</b>

**Commissioner, Malaysian Anti-Corruption Commission**

**Ms. Arvinder Sambei, Amicus Legal Consultants Ltd.**

Ms. Sambei is a former Head of the Criminal Law Section, Legal & Constitutional Affairs Division at the Commonwealth Secretariat. She will provide a presentation of the approaches to criminalisation taken by countries in the Region that inherited United Kingdom Prevention of Corruption Acts 1889-1916

**Mr. William Loo, Anti-Corruption Division, OECD**

Mr. Loo will provide an overview of some essential aspects of effective domestic and foreign bribery offences

**Mr. Han Chee Rull, Deputy Director of Investigation Division, Malaysian Anti-Corruption Commission**

Mr. Han Chee Rull will discuss Malaysia's experience in establishing and applying domestic and foreign bribery offences.

**Mr. Chang Soo Lee, Deputy Chief, International Cooperation Center, Supreme Prosecutors' Office, Korea**

Korea is one of the few members of the Initiative with an offence of bribery of foreign public officials. Mr. Chang Soo Lee will provide describe the relevant legislation in Korea and its application in several prosecutions.

**Mr. Alex Lee, Senior Assistant Director of Public Prosecutions, Department of Justice, Hong Kong, China**

Mr. Lee will discuss how jurisprudence in Hong Kong, China has interpreted and complemented statutory bribery offences

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Friday, 24 September 2010

**9:00 – 10:15**

**3. Corporate Liability for Bribery**

This session will consider the importance of holding companies liable for bribery, different legislative schemes establishing liability, the challenges posed by corporate investigations and prosecutions, and the importance of effective internal company controls and compliance measures.

**Chair: Mr. Charles Caruso, Regional Anti-Corruption Advisor, American Bar Association**

**Prof. Celia Wells, University of Bristol, United Kingdom**

As a leading scholar in this area, Prof. Wells will describe several theories of corporate liability for bribery offences.

**Ms. Christine Uriarte, Anti-Corruption Division, OECD**

Good Practice Guidance on establishing corporate liability, and Good Practice Guidance on Internal Controls, Ethics and Compliance (Annexes I and II respectively to 2009 OECD Recommendation for Further Combating Bribery).

**Mr. Fei SUN, Deputy Director General, Department of Research,**

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	<p><b>Ministry of Supervision, P.R. China</b></p> <p><b>Mr. Nick van Benschoten, Anti-Corruption Unit, Department for Business, Innovation &amp; Skills, United Kingdom</b></p> <p>Mr. van Benschoten will discuss provisions within the new U.K. Bribery Act, the guidance being prepared for companies under the Act, and some examples of U.K. corporate prosecutions.</p>
10:15 – 10:30	Break
10:30 – 12:00	<p><b><u>4. Investigative Techniques</u></b></p> <p>This session will focus on the investigative techniques commonly used for investigating bribery cases. Speakers will present their experience in using different techniques.</p> <p><b>Chair: Prof. Pakdee Pothisiri, Commissioner, National Anti-Corruption Commission, Thailand</b></p> <p><b>Mr. Mustafar bin Ali, Director, Investigations Division, Malaysian Anti-Corruption Commission</b></p> <p>Mr. Mustafar bin Ali will discuss the MACC's investigative techniques for the investigation of bribery cases.</p> <p><b>Mr. Mochammad Jasin, Commissioner, Corruption Eradication Commission, Indonesia</b></p> <p>Mr. Jasin will discuss the use of special techniques, such as undercover operations.</p> <p><b>Mr. Ashwani Kumar, Director, Central Bureau of Investigation, India</b></p> <p>Mr. Kumar will discuss the use of forensic auditing to uncover corruption.</p>
12:00 – 2:45	Lunch and Break
2:45 – 4:00	<p><b><u>Case Study</u></b></p> <p>Participants will be divided into small groups to work on a case study that touches upon the criminalisation topics discussed so far in the seminar. The case study will incorporate various elements of the major challenges identified in the presentations, so that the participants have a chance to brainstorm in a group setting on overcoming those challenges.</p> <p>A facilitator will be assigned to each group to motivate the discussions. Each group will also choose a rapporteur to summarise the group's discussions in the following session.</p>
4:00 – 4:15	Break
4:15 – 5:00	<p><b><u>Case Study (continued)</u></b></p> <p><b>Chair: Ms. Arvinder Sambei, Amicus Legal Consultants, Ltd.</b></p> <p>The participants will reconvene in plenary to hear rapporteurs from each small group report their solutions to the criminalisation</p>

	challenges in the case study.
<b>5:00 – 6:15</b>	<p><b><u>5. Sanctions and Confiscation</u></b></p> <p>This session will look at different components of an effective regime for sanctioning bribery.</p> <p><b>Chair: Mr. Sar Sambath, Anti-Corruption Unit, Cambodia</b></p> <p><b>Mr. Alan Bacarese, Basel Institute of Governance</b> Confiscating and quantifying the proceeds of bribery.</p> <p><b>Ms. Clare Wee, Director, Office of Anti-Corruption and Integrity, Asian Development Bank</b> Debarment, cross-debarment, and other recent anti-corruption efforts within the ADB.</p> <p><b>Ms. Ravneet Kaur, Deputy Public Prosecutor, Attorney General’s Chambers, Singapore</b> Ms. Kaur will speak on Singapore’s regime for sanctions and confiscation in bribery cases.</p> <p><b>Mr. Umer Zaman, Assistant Director, International Cooperation Desk, Overseas Wing, National Accountability Bureau, Pakistan</b> Bans from receiving public subsidies and contracts on conviction of corruption.</p> <p><b>Ms. Tanja Santucci, UNODC</b> Compiling statistics on bribery offences</p>
<b>6:15 – 6:30</b>	<p><b><u>Summary and Conclusions</u></b></p> <p><b>Mr. Abdul Razak Hamzah, Assistant Commissioner, MACC, Malaysia</b></p> <p><b>Mr. Surya Shrestha, Public Management, Governance and Participation Division, Regional and Sustainable Development Department, ADB and Mr. William Loo, Anti-Corruption Division, OECD, on behalf of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.</b></p>

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# BACKCOVER BLURB

## **The Criminalisation of Bribery in Asia and the Pacific**

Criminalisation is a key component of a comprehensive anti-corruption strategy. It deters individuals and officials from engaging in corrupt behaviour. It can also disgorge the profits of the crime and recompense the victim and the state. Criminalisation is thus a vital complement to other anti-corruption efforts such as prevention and detection. However, implementing an effective regime of criminalisation can be a challenging task. Effective bribery offences need to address the different means in which the crime can be committed. These offences must be supported with investigative tools, and must also be implemented and enforced. Deficiencies in these areas are not always obvious. With this in mind, the members of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific dedicated the 10th Regional Anti-Corruption Seminar for Asia and the Pacific on 23 – 24 September 2010 to the Criminalisation of Bribery in Asia and the Pacific.

The Seminar brought together experts from countries and jurisdictions of Asia and the Pacific, OECD member countries, international organisations, civil society and development partners to share their experiences and expertise on the criminalisation of bribery. The seminar explored key issues such as (i) international instruments on the criminalization of bribery; (ii) challenges in establishing and applying domestic and foreign bribery offences; (iii) corporate liability for bribery; (iv) investigative techniques for uncovering bribery, and; (v) sanctions and confiscation.

The Asian Development Bank (ADB)/Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative for Asia and the Pacific supports its 28 member countries and jurisdictions in their efforts to establish sustainable safeguards against corruption as set out in the Anti-Corruption Action Plan for Asia and the Pacific. For more information, please visit [www.oecd.org/corruption/asiapacific](http://www.oecd.org/corruption/asiapacific)