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TACKLING CORRUPTION AND STRENGTHENING LEGAL FRAMEWORKS IN DEVELOPING COUNTRIES

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OVERVIEW

Developing States face a range of challenges in combating what is often endemic and insidious corruption. Although, of course, the difficulties will vary from State to State, the principal obstacles are:

- Lack of political will;
- Vested interests;
- Absence of specialist skills (in civil service, law enforcement and criminal justice system);
- Lack of resources;
- Acceptance/acquiescence by the population (usually as a result of the presence of the other obstacles listed here).

An effective anti-corruption programme needs both legal and institutional frameworks that are fit for purpose and appropriately contextual. Of course, the legal and institutional are co-dependent: effective institutions will only be created if the necessary legal framework is in place, whilst, in turn, legal provisions will only be capable of effective implementation if there are institutions to put them into effect.

The key to strengthening legal frameworks in order to tackle corruption is implementation of the international standard, the UN Convention Against Corruption (UNCAC). However, it should also be noted that one of the criticisms that may be levelled at UNCAC is that it has afforded individual States too much discretion as to what is to be put in place at the national level.

UNCAC was adopted by the General Assembly on 31 October 2003, was opened for signing on 9 December that year, and entered into force on 14th December 2005[1]. The first truly global anti-corruption instrument, UNCAC addresses a wide range of preventive, detection and enforcement provisions and, for the first time internationally, sets out comprehensive provisions on asset recovery.

UNCAC owes a great deal to a number of regional instruments that preceded it:

- Inter-American Convention against Corruption, 1996

[1] As at February 2015, there are 140 Signatories and 178 States Parties

- Convention on the Fight against Corruption involving Officials of the European Communities or Officials of member States of the European Union, 1997
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997
- Council of Europe Criminal Law Convention on Corruption, 1999
- Council of Europe Civil Law Convention on Corruption, 1999
- African Union Convention on Preventing and Combating Corruption, 2003.

UN CONVENTION AGAINST CORRUPTION (UNCAC)

UNCAC has three purposes:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery; and

(c) To promote integrity, accountability and proper management of public affairs and public property (Article 1). 'Corruption' is not defined in UNCAC.

UNCAC may be divided into the following 'pillars'[2]:

- Prevention (including education) (Chapter II, Articles 5-14);
- Criminalisation and law enforcement (Chapter III, Articles 15-42);
- International co-operation (Chapter IV, Articles 43-49) and
- Asset recovery (Chapter V Articles 51-62).

Each State Party undertakes to put in place necessary measures, including the legislative and administrative, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under the Convention (Article 65(1)). However, as those State representatives negotiating the text of UNCAC were unable to agree on a complete set of mandatory requirements, the instrument is a mixture of both mandatory and discretionary (non-binding) provisions. This is, perhaps, unfortunate, and a missed opportunity, in that it might be said to inhibit the development of consistent international rules and run the risk of producing a patchwork of differing laws and regulations.

In addition, UNCAC is a curious mixture of approaches with some Articles providing a detailed set of provisions (e.g. on the measures needed to prevent corruption in the private sector and the provisions relating to mutual legal assistance), whilst others receive minimal comment (e.g. measures to counter- corruption in the prosecution service).

[2] It also sets out mechanisms for its implementation in Chapter VII

PREVENTION

One of the three key aims of UNCAC, as set out in Article 1, is 'to promote and strengthen measures to prevent and combat corruption more efficiently and effectively'.

Chapter II (Articles 5 – 14) has as its main focus the need to maintain integrity in public service. It creates a mixture of mandatory and discretionary provisions for States Parties when developing preventive strategies, for example, to 'develop and implement or maintain effective, co-ordinated policies', but gives each State sufficient discretion to adapt them to its particular need.

Any focus on measures for the public service should have in mind the so-called 'Seven Principles of Public Life':

- Selflessness;
- Integrity;
- Objectivity;
- Accountability;
- Openness;
- Honesty;
- Leadership.

As part of the preventive measures, States Parties are required to develop national preventive anti-corruption policies, which include a regular review of the laws and administrative measures to ensure they are fit for purpose (Article 5).

Article 6 addresses the role of anti-corruption bodies and the need for such bodies to operate independently and 'free from undue influence'.

The public sector is addressed in Article 7, and requires States Parties to put in place a number of measures to ensure its integrity. For example, it requires States to 'maintain and strengthen systems for the recruitment, hiring, retention and promotion' of civil servants and other non-elected public officials'. In respect of elected public office and the funding of political parties, Article 7 encourages States Parties to adopt appropriate legislative and administrative measures to enhance transparency. A significant challenge for those in public office is to recognise and address any conflicts of interest. Often, the public official may not even be aware that their actions amount to a conflict of interest, and to prevent such a situation from arising, States should put in place codes of conduct that specifically deal with conflicts of interest, in addition to those envisaged in Article 8.

Transparency in public administration, procurement and management of public finance is addressed in Articles 9 and 10.

The law enforcement measures, set out in Chapter III, will only be effective if the integrity of the judiciary and prosecutors can be assured. Article 11 recognises the dangers of judicial and prosecutorial corruption, and requires States Parties to address this.

Article 12 focuses on preventive measures in the private sector, which include the need to enhance accounting and auditing standards, books and records and financial Statement disclosures; where corporates fall short, there must be in place 'effective, proportionate and dissuasive civil, administrative or criminal penalties'

Article 13 specifically preserves the role and participation of civil society (this includes individuals, NGOs, industry and business community etc.) in addressing corruption.

The realisation of financial or other gain is the end product of most corrupt transactions; a national preventive strategy would, therefore be incomplete if it is unable to stem the flow of the proceeds or instrumentalities of bribery and corruption. Article 14 requires States Parties to take a number of measures to prevent money laundering, such as the establishment of financial intelligence units (FIU), the monitoring the movement of cash across borders (a particular problem with cash-based economies) and the enhancing of co-operation amongst law enforcement agencies and financial institutions, nationally and internationally.

CRIMINALISATION & LAW ENFORCEMENT

Criminalisation is a key part of all the international and regional initiatives, and UNCAC has created a criminalisation regime through a combination of mandatory and discretionary provisions.

The mandatory provisions on criminalisation are contained in Articles 15 – 17 and require States to criminalise bribery of domestic (active and passive) and foreign public official, including officials of public international organisations (active), 'embezzlement, misappropriation or other diversion of property by a public official'. In most jurisdictions, embezzlement will probably be covered under existing criminal law provisions relating to offences of dishonesty.

Articles 18 to 22 set out a range of discretionary offences: trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, and embezzlement of property in the private sector.

Articles 23 and 24 address the criminalisation of money laundering and, as a minimum measure, the inclusion of the UNCAC offences as predicate offences.

Article 26 requires States to 'establish the liability of a legal person for participation' in the Convention offences. The issue of the liability of the legal person is a crucial, yet vexed, one. In all jurisdictions, the criminal law evolved as society's response to the actions of individuals. In the modern world it is very often the legal person (typically the company or corporation) which drives, and benefits from, corrupt activity. With that in mind, jurisdictions which traditionally have criminal liability for legal persons have had to consider how to implement that liability and, in particular, how to attribute corrupt acts to the legal entity. Meanwhile, those with no liability for legal persons, or with only administrative or civil liability available, have had to consider whether to go down the path of criminalisation. Whichever basis of liability is chosen, no anti-corruption strategy will have a real chance of success unless there is effective liability of legal persons.

Article 29 is procedural and requires those States that have a statute of limitations (most common law States do not have a statutory bar, save for minor offences) to provide for a 'long statute of limitations period', so as to allow for the commencement of proceedings, and where a suspect has absconded, to provide for a suspension of the limitation period.

Article 30 addresses prosecution, adjudication and sanctions. One of the main bars to prosecution is the grant of immunities or jurisdictional privileges afforded in national constitutions to Heads of State, Ministers and high ranking public officials. The effect of such a bar is obvious and has had the effect of frustrating investigations and any subsequent prosecution of those that are often most responsible for corruption. Article 30(2) requires State Parties to take necessary measures to ensure an appropriate balance between any immunities or jurisdictional privileges accorded to public officials and the need for the effective investigation and prosecution of corruption offences either through a removal of such broad immunities or putting in place procedures to lift such immunities or jurisdictional privileges.

Article 30 also requires States to impose sanctions that are proportionate, but dissuasive, such as the removal of a public official and, in appropriate cases, disqualification from holding public office.

As part of the sentencing process, Article 31 mandates States to freeze and confiscate the proceeds of UNCAC crimes. It is important that States put in place an effective confiscation regime to allow not just for domestic cases, but also to freeze/confiscate looted assets located in their jurisdiction and are the subject of an order in a foreign State.

Of course, for an effective prosecution and confiscation regime to work, it requires States under Article 42 to extend their criminal jurisdiction provisions so as to give effect to the intent of the international community and to provide a truly international response through the denial of safe havens. When investigating corruption offences, consideration must be given to where and how these offences will be prosecuted as well as where the offender(s) are located. Given the ease of travel and the swift movement of finances, investigators must be aware of and understand the mechanisms of international co-operation.

The traditional approach of States was that 'all crime is local' has been the subject of revision over the centuries with the rise in transnational crime; a trend that is recognised in all the main anti-corruption instruments.

Chapter III also addresses the need for heightened co-operation between law enforcement agencies (Article 38 and 39), a theme that further echoed in Chapter IV, when addressing international co-operation.

The challenges in investigating allegations of corruption are well recognised; in particular, the vulnerabilities of those that come forward to report acts of wrongdoing. UNCAC addresses this concern through Article 32 – 37, and requires each State Party to take appropriate measures `within its means' to provide effective protection from potential retaliation or intimidation of witnesses and experts who give testimony and, as appropriate, for their relatives and other persons close to them

INTERNATIONAL CO-OPERATION

International co-operation, which includes mutual legal assistance, mutual assistance and extradition, is a key imperative if States are to work together to investigate, prosecute and deny the enjoyment of the proceeds of bribery and corruption. The Chapter acts as a legal basis for co-operation where States do not have in place an existing arrangement for mutual legal assistance and extradition, or where treaties are in place, but the UNCAC crimes are not included. The Chapter also provides for enhanced co-operation between law enforcement agencies where special investigative techniques are to be deployed.

ASSET RECOVERY

Chapter V (Articles 51 – 59) is the cornerstone of the convention, and was regarded by the drafters as a '*fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard'*. The measures contained in earlier parts of the convention, anti-money laundering (preventive and criminalisation), freezing and confiscation regimes, and international co-operation are all weaved into Chapter V to put in place a strengthened framework for the return of assets.

MONITORING MECHANISM

For the convention to meet its aim of preventing and combating corruption there was need to ensure that implementation followed the ratification process. Chapter VII of UNCAC achieves this through the Conference of the States Parties (COSP), to which the UNODC acts as the Secretariat. The main aim of the Conference of States Parties is to seek ways to 'improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation'.

At the first COSP[3], States agreed to set up an Open-Ended Intergovernmental Expert Working Group to consider ways in which the implementation process would be reviewed and this led, in 2009, to the adoption of State evaluations on a thematic basis through a system of self-assessment by the State concerned. UNCAC is, of course, deliberately silent on any review mechanism as no agreement could be reached during the convention negotiations on whether a review mechanism was necessary or desirable. It was, therefore, an interesting development at the first COSP, no doubt reflected the strong opposing views of the States during the convention negotiations, that a system on self-assessment was considered to be a good compromise, given that some States were insistent that the process should be 'non-intrusive'.

As the central plank of the review process is to develop assistance programmes, the UNODC initially did not publish the reports, leaving it within the discretion of a particular State whether it wished to make the report available on its own portals. This was in contrast to the practice of other international organisations, such as the Council of Europe, OECD and IMF, where reports are published.

However, at the third session of the COSP, held in Doha (2009), it was decided that country review reports would be published once they had been finalised by the Implementation Review Group. The focus would still remain on self-assessment but a level of a peer review mechanism was also introduced. In addition, States agreed that the reviews would take place in two cycles: cycle 1 would look at criminalisation and law enforcement, whilst cycle 2 would focus on preventive measures and asset recovery.

Since the coming into force of the Convention, there have been six COSP sessions, the last of which was held in Russia in November 2015. Each of the COSP sessions address aspects of the convention which it achieves through the intergovernmental expert working groups, and mandates the work of the UNODC through its resolutions.

[3] Held in Amman, Jordan from 10 – 14 December 2006: http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session1-resolutions.html#resolution11

WAYS FORWARD

The overriding challenge faced by many States is not creating a legal framework, but implementing it. Taking into account the principal obstacles identified above, a State seeking to build and to put into effect a legal framework to combat corruption should have in place most, if not all, of the following:

- Commitment at the highest political level (even if the motive is pragmatism or expediency);
- A high level 'driver' of the anti-corruption agenda (ideally an individual and an institution);
- A strategy or plan that is workable, dynamic, cross-disciplinary and contains deadlines;
- The capability to 'scope' the nature of the corruption risks being faced;
- Awareness-raising/education (at all levels);
- Activities to build specialisation and skills (particularly in vulnerable sectors and in criminal justice);
- Receipt of international best practices (through, for instance, technical assistance and mentoring);
- Meaningful engagement of the private sector and of civil society.

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