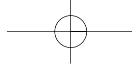
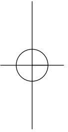
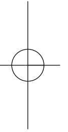
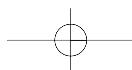


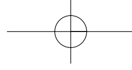
Part two

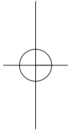
Global, regional and country reports

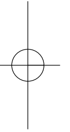


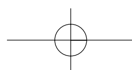


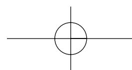












7 Global and regional reports

The major global issue to take shape in the period from July 2002 to June 2003 was the negotiation of the UN Convention against Corruption. Regionally, the African Union adopted a convention that promises to reduce bribery and the EU prepared for the accession of 10 Central and East European countries, with important implications for the ongoing fight against corruption. Debate continues on the possible amendment of the OECD Anti-Bribery Convention, even as it is being implemented. Finally, the US government presented proposals for the Millennium Challenge Account, which will place a country's corruption record centre stage in the decision-making on aid.

The UN Convention against Corruption

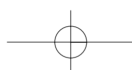
Peter Rooke[1]

Two years of negotiations were coming to an end as this report went to press, with indications that a text would be agreed for the proposed UN Convention against Corruption in time for it to be signed in Mexico in December 2003.

Successful negotiation of the convention will create the first global instrument embracing a comprehensive range of anti-corruption measures to be taken at the national level. It will also enhance international cooperation regarding corruption prevention and enforcement.

In 1996, the UN General Assembly adopted the UN Declaration against Corruption and Bribery in International Commercial Transactions. It later negotiated the UN Convention on Transnational Organized Crime, which came into force in September 2003. Though both address corruption in a specific context, it was recognised that a comprehensive international instrument against corruption was still needed. In December 2000, the UN General Assembly decided to establish an ad hoc committee to negotiate a more general anti-corruption convention.

Delegates at the first negotiating session in January 2002 expressed the view that the convention should be binding, effective, efficient and universal, and that it should be a flexible and balanced instrument taking into account the legal, social, cultural, economic and political differences between countries, as well as their different levels of development. Whether the new UN convention will live up to these expectations remains to be seen – it is expected to enter into force at the end of 2005 at the earliest.



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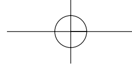


Problems of political corruption

The convention breaks new ground, particularly in relation to the provisions on cross-border recovery of assets, but more is needed if it is to have a significant impact on reducing corruption.

The United States' refusal to countenance any mandatory provision on transparency in political funding has led to a lukewarm and optional provision tucked away in an article entitled 'Public sector'. This was the most dramatic fault line to emerge in the negotiations. As the Russian delegation remarked, if the convention fails to deal adequately with this, 'one third of the subject matter of the convention is missing', a reference to the need to address equally corruption in the public sector, the private sector and politics.

Conversely, the convention represents a welcome breakthrough regarding international cooperation on the return of assets, an issue described in chapter V of the convention as 'a fundamental principle', and one on which state parties shall afford one another the widest possible measure of cooperation and assistance (see 'Repatriation of looted state assets: selected case studies and the UN Convention against Corruption', Chapter 6, page 100).

Preventive measures at the national level

While most articles in this chapter commence with a mandatory general principle, the manner in which it is implemented is left to the discretion of each state party. Nevertheless, the scope of the chapter is broad.

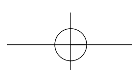
In relation to the public sector, it deals with preventive policies, practices and institutions; the need to promote participation by society; recruitment, training and other conditions applying to non-elected public officials; criteria for candidature and election to public office and transparency of funding of the political process; codes of conduct for public officials; transparency of public procurement and public finances; transparency in public administration; and measures to strengthen judicial integrity.

The need to prevent corruption involving the private sector is clearly stated and elaborated through a range of optional measures. Specifically highlighted are the needs for effective disclosure, improved accounting and auditing standards, and a mandatory provision to disallow the tax deductibility of bribes.

The participation of 'society' in the prevention of, and the fight against, corruption is recognised, as is the need to raise awareness about it, but specific measures are again left to the discretion of individual countries. The importance of encouraging public reporting of possible acts of corruption is emphasised. The chapter also flags the importance of effective measures to deter and detect money laundering.

Criminalisation and related matters

Criminalisation of the taking of bribes by public officials is optional in the convention on the basis that it is mainly the responsibility of the official's home country. This does



not adequately deal with cases involving officials of international public organisations, however, as there is no 'home government' to take responsibility. The General Assembly's draft resolution to adopt the convention text drew attention to this point and it seems likely that a protocol will be proposed to deal with it after consultations with international organisations, which some delegations perceived as too eager to claim immunity for their officials.

Mandatory criminal sanctions in the convention include embezzlement by public officials, liability of legal persons and laundering of proceeds of crime, as well as certain ancillary offences and remedies; the latter include obstruction of justice, participation and attempt, freezing, seizure and confiscation, waiver of bank secrecy and protection of witnesses and victims. Optional offences include trading in influence, concealment, abuse of functions, illicit enrichment and bribery, and embezzlement in the private sector. Unfortunately, the protection of reporting persons (or whistleblowers) is not mandatory.

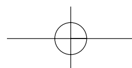
International cooperation in criminal matters

Enhanced international cooperation in extradition and mutual legal assistance, in relation to corruption offences and money laundering, will counter some of the disillusion about the role of Western institutions and laws in providing a safe haven for the billions of dollars allegedly looted by the likes of Abacha, Marcos and Mobutu. Many developed countries also insisted on dual criminality before such assistance is available – meaning that both requesting and requested country must have comparable offences in their criminal law.

From this stance and other evidence, it seems that many developed countries may prefer to continue to use their bilateral and multilateral agreements on extradition and mutual legal assistance, rather than rely on the provisions of the convention. This is particularly so for the United States, which has 110 such agreements. This does not accord with the spirit of the convention, however, which is 'to promote, facilitate and support international cooperation ... in the … fight against corruption, including asset recovery'. On the one hand, developing countries are concerned that developed countries may not do their utmost to facilitate extradition and mutual assistance to developing countries. On the other, some developed countries suspect the legal systems and human rights norms in some developing countries may not be adequate to ensure a fair trial.

Technical assistance and information exchange

Given the extensive prevention and enforcement measures advocated by the convention, many countries will require considerable help to take the necessary steps to implement it. This part of the convention should send a strong signal to the aid community that assistance to curb corruption is a high priority. The need for enhanced information exchange about prevention and enforcement between countries at all levels of development is also flagged.



Mechanisms for implementation

Several delegations presented proposals to provide for effective monitoring of implementation by the signatory countries. Under the finally agreed wording, however, governments will have a large degree of leeway to decide whether, and how far, to incorporate the convention's many optional provisions into their national law. The need to ensure implementation of mandatory provisions, as well as to see how the convention is generally applied by governments, makes effective monitoring essential, including independent monitoring by civil society organisations at the national level. Procedures for this have largely been left for the Conference of States Parties to decide. Its first meeting will be held within a year of the convention coming into force, probably during 2006.

Final provisions

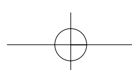
The most important of the final provisions is the threshold for entry into force of the convention. Opposing camps advocated 20 ratifications on the one hand, and 40 on the other. There are precedents for each in UN instruments, but the UN Convention on Transnational Organized Crime, which has influenced the new convention's wording in a number of respects, had a threshold of 40, which took more than two years to achieve. Delegations finally reached a compromise of 30 for the UN Convention on Corruption.

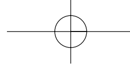
An overview

Throughout two years of negotiations, TI has stressed the importance of making adequate provisions in relation to the private sector, where the Enron scandal, and others that followed, seriously eroded confidence in financial markets; and in the political sphere, where confidence has been dissipated by the impunity of leaders such as former Peruvian president Alberto Fujimori and Prime Minister Silvio Berlusconi of Italy, and by suspicions of influence-buying in the energy and arms sectors.

For the first time a convention provides a framework – albeit not mandatory – for criminalising bribery in the private sector and for measures to improve business integrity. But as mentioned earlier, the convention fails to adequately address the issue of political corruption. It also relies too heavily on non-mandatory wording and, in relation to international cooperation, has tended to replicate the corresponding provisions in the UN Convention on Transnational Organized Crime, rather than to improve on them. Of most concern, however, is that the new convention gives too little guidance to the Conference of States Parties on what forms of monitoring should be adopted.

More positively, the decision of the UN Office of Drugs and Crime – under whose auspices the convention was negotiated – to promote a global campaign of public service announcements on television to raise awareness of corruption, is most welcome. If the convention spurs national governments to do more in this direction, public support for greater efforts to curb corruption will be enhanced, improving the chances for the convention's implementation.





The relationship between the UN Convention and other anti-corruption conventions, such as the OECD convention and regional conventions, is specifically addressed and will no doubt become clearer with experience. It is already apparent, however, that the UN Convention does not supplant these other instruments and there is hope that they will be mutually reinforcing.

Note

1. Peter Rooke is a member of the board of directors for Transparency International and director of projects at Transparency International Australia.

Box 7.1: The UN Global Compact: an opportunity for tackling corruption

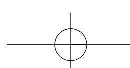
The UN Global Compact, which challenges business leaders to uphold nine universally agreed principles on human rights, labour rights and respect for the environment, has an increasingly important role to play in a world where globalisation blurs borders in international relations and commerce. From its foundation in January 1999, the compact is supported by more than 1,000 companies worldwide, representing a powerful force for improving corporate responsibility.

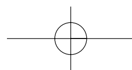
The compact has highlighted the influence business can have in bringing about a more sustainable and inclusive global economy where the rule of law is paramount. To ensure that this important objective is realised, the issue of transparency in the way business is conducted is crucial.

The Global Compact pursues transparency by asking participating companies to publish annual reports on their activities in support of the nine principles. This is important given the lack of robust monitoring and enforcement mechanisms of the principles, which are not legally enforceable standards. Many NGOs are critical of the Global Compact for this reason; they argue that it allows companies to appear committed to sound corporate governance, but does nothing to ensure there are real improvements in business behaviour.

In the absence of an explicit principle on corruption, however, companies do not have to report on how they are working to eliminate the scourge of corruption from their business practices. This major loophole is why the biggest possibilities within the compact still lie ahead. The UN Convention against Corruption, at this writing due for completion in December 2003, gives the issue of corruption more prominence within the UN system and raises the possibility of an explicit principle on corruption and transparency being incorporated within the Global Compact. UN Secretary-General Kofi Annan has indicated that the signing of the convention in Mexico in late 2003 provides an opportunity for a 10th principle to be incorporated into the compact.

The Global Compact office has already started to prepare the ground for a 10th principle on transparency and against corruption, making it the subject of discussion with stakeholders in December 2002, and of its advisory council in July 2003. An evaluation of the possibility of a 10th principle was conducted at the Global Compact Learning Forum meeting in December 2002 in Berlin. Reactions from businesses, unions and governments were mixed: some argued that realisation of all of the principles involved an element of transparency and that a 10th principle was therefore not necessary.





But the fact that corruption hinders the realisation of the rights enshrined in all of the other principles lends more, not less, weight to the claim that an explicit principle on transparency is needed.

The Global Compact is already working on substantive projects related to corruption and transparency. The working group on transparency and corruption has been tackling bribery, antitrust, publishing data and related public policies, issues that are all addressed in the UN Convention against Corruption.

A policy dialogue in 2001 on the 'The role of the private sector in zones of conflict', for instance, produced a set of guidelines with detailed recommendations for civil society, governments, businesses and multilateral institutions, aimed at eliminating corruption in the arms trade.

By centring the issue of transparency and corruption as the focus of a 10th principle, these and similar important efforts can only be strengthened.

Jermyn Brooks (Transparency International)

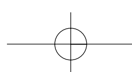
The African Union Convention against Corruption

Akere Muna[1]

The Organisation of African Unity (OAU) was born out of the struggle for independence of the 1950s and the early 1960s. Its short-term goals included abolishing apartheid and assisting African countries in gaining full independence from their colonial rulers. Under the spur of the pan-Africanists, the OAU also sought to realise the dream of a united Africa.

In the post-World War II atmosphere of ideological bipolarisation between East and West, some African leaders took sides while others opted for non-alignment. As African countries were wooed by the superpowers, issues such as human rights, the rule of law and public participation in decision-making were downgraded on the political agenda. The leaders who had been a strong force in the struggle for independence (Kwame Nkrumah in Ghana and Tanzania's Julius Nyerere), the powerful trade unions and the successful multiparty systems were gradually replaced with one-party states and dictatorships. These regimes were mostly tolerated by cold war superpowers that regularly fought wars by proxy throughout the continent, and in southern Africa in particular. Mobutu Sese Seko was one such dictator who plundered the resource-rich Zaire (now Democratic Republic of Congo) for more than 30 years with the tacit approval of some of his backers in Western capitals. Anti-corruption initiatives were on no one's agenda. Moreover, the word 'corruption' was taboo, even within the international financial institutions (IFIs).

With the collapse of the Berlin Wall, the leadership vacuum in many countries became exposed to populations that increasingly demanded democracy, human rights and public participation. Corrupt leaders could no longer hide behind the coat-tails of their foreign sponsors, for whom most of the African continent had become less strategically important. As IFIs and bilateral donors began applying pressure for good



governance and democratisation, African states recognised the need to strike a balance between the state, private sector, civil society and the media.

Together with local pressure groups, international organisations like Amnesty International mounted a continuous campaign against human right violations, but the OAU only reacted in the early 1980s. Indeed, the African Charter on Human and Peoples' Rights came into force in 1986.

The 1990s saw a return to the multiparty system. Pressure from civil society, the media and political parties quickly pushed corruption and governance issues to the fore. The IFIs adopted a good governance agenda as part of structural adjustment programmes (SAPs). This trend produced ambiguous results, since it not only entrenched calls for more accountable governance, but also created mistrust of the good governance agenda among those critical of the ravaging effects of SAPs. It was against this backdrop that the OAU, predecessor of the new African Union (AU), was to seek a continental approach to a problem that had taken on a magnitude similar to that of the human rights issue in the 1980s.

The roots of the African Union convention

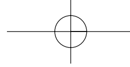
The African Union Convention on Preventing and Combating Corruption and Related Offences is inspired by the African Charter on Human and Peoples' Rights and other declarations, none of which explicitly mentions corruption.[2]

Indeed, the fight against corruption was not specifically introduced at the regional level until June 1998, at a session of the assembly of heads of state and government in Ouagadougou, Burkina Faso. The assembly passed a resolution calling on the secretary general to convene a high-level meeting of experts in cooperation with the African Commission on Human and Peoples' Rights. These experts were to consider ways of removing obstacles to the enjoyment of economic, social and cultural rights – such as through the fight against corruption and impunity – and propose appropriate legislative and other measures for reform. The scene was set for the drafting of a historic convention.

Civil society groups, including Transparency International, actively participated in the writing of the first draft of the AU convention at expert meetings in Addis Ababa in November 2001 and September 2002. Throughout the drafting process, they lobbied for the inclusion of provisions on asset recovery, political party financing, access to information and whistleblower protection.

The 28-article AU document started out as the Convention on Preventing and Combating Corruption, but definitional problems and discrepancies in legal systems led the drafting committee to add the words 'and Related Offences'. The document was designed to be easily applied as a framework for any national anti-corruption strategy.

The convention was adopted in July 2003 at the AU summit in Maputo, Mozambique, and now awaits 15 ratifications before entering into force.[3] Countries that have adopted, but not ratified, the document may spontaneously decide to enact selected provisions of the convention into national law, instead of proceeding with the ratification process (whereby the entire treaty becomes applicable as national law).



Objectives, principles and features

The objectives of the convention emphasise cooperation between signatories, encouraging them to 'promote and strengthen the development … of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in Africa' and to ensure the effectiveness of these measures.[4] Issues of good governance are also highlighted.

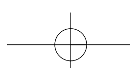
The convention concentrates on four main approaches to combating corruption: prevention, punishment, cooperation and education. In particular, it strengthens the laws on corruption by listing offences that should be punishable by domestic legislation; it outlines measures to be undertaken to enable the detection and investigation of corruption offences; it indicates mechanisms for the confiscation and forfeiture of the proceeds of corruption and related offences; it determines the jurisdiction of state parties; it organises mutual assistance in relation to corruption and related offences; it encourages the education and promotion of public awareness on the evils of corruption; and it establishes a framework for the monitoring and supervision of enforcement of the convention. Provisions for this monitoring process also make reference to the involvement of civil society. Significantly, the convention focuses on both public and private sector corruption and calls for the implementation of specific anti-corruption laws in both sectors.

The convention's scope of application

The convention clearly defines corruption, adopting a now common approach: corruption is no longer an offence in which only the public official can be the principal offender. Although the role of the public official remains central, the convention also includes a requirement to 'adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector'. It also calls for the establishment of 'mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights'.[5]

Furthermore, the convention defines corruption broadly enough to pre-empt conflicts of interpretation involving civil law and common law jurisdictions.[6] Civil law jurisdictions normally distinguish between embezzlement and corruption, partly because the penal code considers them distinct offences and because corruption is construed to mean bribery (as opposed to embezzlement). Furthermore, civil law countries consider embezzlement and corruption offences to involve public officials or public funds. As it reads now, the AU convention – especially with the addition 'and related offences' – captures both civil and common law systems.

Critics of the AU convention see the provision on illicit enrichment as an erosion of the principle of the presumption of innocence in criminal law. In a criminal case of illicit enrichment, which involves unjustified wealth, the prosecution carries the burden of proof and must therefore show beyond reasonable doubt that acquired wealth is not justified by the earnings. Under the convention, the prosecution is not legally obligated



to show beyond a reasonable doubt that wealth exceeds income. Nor does the prosecution necessarily have to show that unjustified earnings are the result of corruption, as it is automatically presumed that unjustified earnings derive from a corrupt source. If implemented, such provisions are likely to face legal challenges, particularly in countries where the presumption of innocence is constitutionally enshrined.

The convention also addresses the confiscation and forfeiture of corrupt proceeds, bank secrecy, cooperation and mutual legal assistance. It calls on signatories to introduce legislation on money laundering and commits them to require designated public officials to declare their assets at the time of assumption of office, as well as during and after their term.[7] A last-minute inclusion in the convention, the provision on political party funding states that each signatory is to 'adopt legislative and other measures to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties' and to 'incorporate the principle of transparency into funding of political parties'.[8]

Monitoring and enforcement of the convention

Modelled on the African Commission on Human and Peoples' Rights, the advisory board is the AU's only formal monitoring measure at the international level and at the level of the AU commission. It is to submit regular reports to the executive council on the progress made by each signatory in compliance with the provisions of the convention.

The board lacks powers of investigation and cannot denounce acts of corruption. The convention provides that its 11 members be elected for two-year terms by the executive council 'from among a list of experts of the highest integrity and recognised competence in matters relating to preventing and combating corruption and related offences'. The document also calls on the executive council to ensure that the board have 'adequate gender representation, and equitable geographical representation'. Board members are to 'serve in their personal capacity', but the fact that they are proposed by signatories does not help to guarantee their independence.

As part of the monitoring process, national anti-corruption authorities are expected to send reports to the advisory board at least once a year, before the regular AU sessions. A drawback of this system is that the AU has no means of sanctioning countries that fail to report, unlike in the reporting process for the African Charter on Human and Peoples' Rights. Within the convention's monitoring framework, national authorities are designated for the purposes of 'cooperation and mutual legal assistance', which foresees that they will communicate with each other directly. In addition, the convention advocates 'necessary independence and autonomy' for the national authorities.

Defining the role of national authorities is an important element of the convention since many African countries do not have an authority dealing exclusively with issues of corruption. In its present form, the convention does not prevent countries from simply establishing complacent national commissions. An amendment to the convention would need to be passed in order to introduce an outline of a desirable structure and operation of such bodies.[9]

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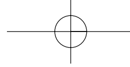


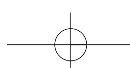
With respect to enforcement, the convention shall operate like an extradition treaty among countries not already bound by them. Until it enters into force, however, extradition is only possible between states that have bilateral or multilateral treaty arrangements.

The convention also lays the groundwork for recognition by signatories of civil society and the media, committing signatories to 'fully engage in the fight against corruption and related offences and the popularisation of this convention with the full participation of the media and civil society at large'. States are to draw up individual legal frameworks that would permit civil society and the media to be integrated into this process. These statutes should take into consideration the role defined for civil society in article 12, namely that civil society and the media should be encouraged to hold governments to the highest levels of transparency and accountability; to participate in the monitoring process and be consulted in the implementation of the AU convention; and to be given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial. Despite these guidelines, and in view of the fact that the present climate tends to brand civil society and the media as opposition groups in many countries, it may be some time before their role becomes entrenched in the statute books. Similar provisions in the sub-regional Southern African Development Community Protocol against Corruption have also proven too 'loose' to provide for a clearly defined oversight function for civil society.

Whistleblowers are also addressed in the convention, which requires signatories to 'adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities' and to 'adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals'. Nonetheless, these efforts to ensure whistleblower protection may be undermined by a provision calling on signatories to 'adopt national legislative measures in order to punish those who make false and malicious reports against innocent persons in corruption and related offences'. Other forms of redress, such as civil action, normally suffice in such situations.

It should be noted that the convention's procedure permits any signatory to opt out of some or all issues. Under article 24, states may announce reservations (based on article 15) on one or more provisions deemed incompatible with the object and purposes of the convention. A state may maintain this reservation until circumstances permit its withdrawal. Under article 26, states are also entitled to denounce the convention in its entirety, by notifying the chairperson of the commission with six months' notice.

Regardless of its apparent imperfections, the convention represents the first universal framework for the fight against corruption for member states of the AU. The challenge now is for African governments to show political will to implement – and enforce – the AU convention against corruption. Active lobbying by African media and civil society organisations can positively influence this process. Additional pressure from international actors could contribute to the impact of what amounts to Africa's first continental structure for combating corruption within each state's sovereign borders.



In addition, the AU convention is likely to benefit from growing national pressure to prevent and punish bribe paying.

For the AU convention to have a measurable impact on corruption, civil society and other pressure groups will have to claim possession of the monitoring process. By joining forces as coalitions, they can help ensure that its signatories successfully implement this new treaty.

Notes

1. Akere Muna is chairman of TI Cameroon.
2. Other sources of inspiration for the drafting of the AU convention are the 1990 Declaration on the Fundamental Changes Taking Place in the World and Their Implications for Africa; the 1994 Cairo Agenda for Action Re-launching Africa's Socio-economic Transformation; and the Plan of Action against Impunity adopted by the 19th ordinary session of the African Commission on Human and Peoples' Rights in 1996 and subsequently endorsed by the 64th ordinary session of the Council of Ministers held in Yaoundé, Cameroon. The most recent impetus for the convention came from the 37th ordinary session of the Assembly of Heads of State and Government of the OAU held in Lusaka, Zambia, in July 2001, as well as the declaration adopted by the first session of the Assembly of the Union held in Durban, South Africa, in July 2002, relating to the New Partnership for Africa's Development, or NEPAD, which calls for the setting up of a coordinated mechanism to combat corruption effectively.
3. The convention was initially approved by the AU's ministerial conference in Addis Ababa on 18–19 September 2002. It was later approved by the executive council in N'djamena, Chad, on 5–6 March 2003.
4. Article 2.
5. Article 11.
6. Article 4 (d).
7. Articles 6 and 7.
8. Article 10 (a) and (b).
9. The procedure for amending the convention is a three-stage process: (1) a signatory must submit a written request to the chairperson of AU commission; (2) the chairperson must circulate the proposed amendment to signatories, granting reviewers a period of at least six months from the circulation date; (3) a two-thirds majority is required for the amendment to enter into force.

Corruption and the EU accession process: who is better prepared?

Quentin Reed[1]

As the day approaches when 10 East European states join the European Union (EU), the question that continues to be asked – by existing members as well as the candidate states themselves – is: 'Are they ready?'[2]

The question is no longer so concerned with technical details of harmonisation with the *acquis communautaire*. From the candidates' point of view, doubts over their ability to compete in a single market are coming to the fore. For the European Commission, corruption represents one of the most urgent items on the agenda. Yet a

closer look reveals that, with respect to corruption, the question of preparedness involves an urgent need for reform within the EU itself.

The Commission has repeatedly identified corruption as a serious problem in at least half of the candidate states of Central and Eastern Europe (CEE). In a speech marking the release of the 2002 Regular Reports on candidates' preparedness for accession, Commission President Romano Prodi labelled corruption an 'extremely serious' problem that must be tackled before accession.[3]

The Commission's unease about corruption in prospective new member states can be traced to two main sources. First, corruption undermines fulfilment by candidate states of the Copenhagen criteria, which were laid down in 1993 by the European Council as the basic conditions for EU membership. The Copenhagen criteria comprise three main categories: political criteria (stable, functioning democratic institutions), economic criteria (a functioning market economy) and the ability of the candidate state to fulfil the obligations of membership (in other words, the capacity to implement the *acquis*).

Second, the Commission is influenced by the perception that corruption is more widespread in candidate countries than in existing member states. This perception is underpinned by arguments explaining why countries in post-communist transition suffer from high levels of corruption; it is also supported by data such as Transparency International's Corruption Perceptions Index, which indicates that these countries do indeed experience higher levels of corruption. Nonetheless, the amount of incontrovertible research that might substantiate these fears is very small.

Irrespective of how post-communist countries compare to Western Europe, a recent report by the EU Accession Monitoring Program of the Open Society Institute (OSI) underlines the serious extent of corruption in most candidate states.[4] According to OSI, corruption flourishes in the majority of the future member states of Central and Eastern Europe. Moreover, in addition to sharing the European Commission's worries about corruption in areas such as public administration, the OSI report emphasises the critical problem of corruption in areas on which the Commission has not often focused.

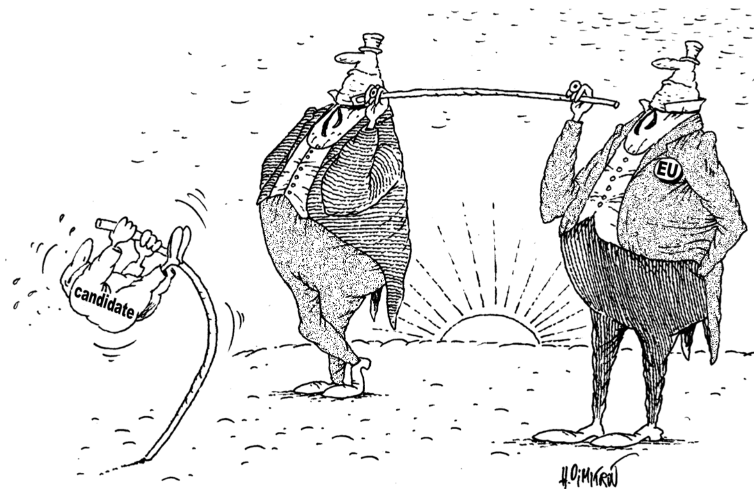
In particular, OSI finds that corruption in the creation of laws and rules – or 'state capture' – is widespread; the European Commission has paid more attention to the speed of legislative processes than to the quality of such processes. OSI points to public procurement, political party financing, patronage networks and conflicts of interest as areas where problems are more serious than the Commission acknowledges.

Further complications stem from a public culture that – although it often condemns corruption and exhibits strong perceptions of corruption – regularly tolerates corrupt behaviour in the pursuit of political or individual interests. A lack of media independence in most countries of the region – and the failure of regulators to regulate TV broadcasting properly – combined with a lack of professionalism and resources in investigative journalism across the region have led the dominant media to provide citizens with inadequate information on the subject of corruption.

Although informed by the above considerations, the Commission has not adopted a clear approach to corruption in candidate countries or formulated a set of assumptions about the roots of corruption or the policies needed to deal with it. Nor has the

Commission provided any indication of what level of corruption might disqualify a country from being eligible for EU membership. For example, though the Commission has repeatedly judged corruption to be 'systemic' in Romania, the Regular Reports find that the country has continued to fulfil the political criteria – rather than the economic or administrative ones – set in Copenhagen.

In fact, in the eyes of the Commission, no candidate country has been found unable to fulfil the Copenhagen criteria as a result of corruption, despite the extensive coverage given to the issue in the Regular Reports, a clear indication that corruption represents a serious caveat to the candidates' fulfilment of the political criteria. Fighting corruption is a 'long-distance run'; moreover, history – whether in Germany after Hitler or Spain after Franco – shows that corruption flourishes in transition situations, and that the fight to bring it under control is better measured in decades than electoral cycles. Such is particularly the case in post-communist countries, which are still in the process of completing massive transfers of assets from the state to the private sector.



Alex Dimitrov, Moldova

The impact of the accession process on policy

As corruption cannot be expected to fade away within the accession timetable, the Commission has resorted to anti-corruption policy as the main accession criterion applied to candidate countries. Eight have developed national anti-corruption strategies, while such strategies are now under preparation in Estonia and Slovenia.

Pressure from the Commission has had a major impact on areas such as the ratification of the main international anti-corruption conventions. Candidate countries have also implemented extensive reforms of the rules and institutions that enforce criminal law, and they are obliged to reform public procurement procedures to fulfil the requirements of the EU procurement directives. Civil service reform – one of the most important

instruments for tackling corruption among public officials – has been an EU priority in candidate countries, as has reform of systems of financial control and audit.

For several reasons, however, the real impact of the EU on anti-corruption policy in the future member states has been less convincing.

First, the Commission has tended to focus on issues of criminal law and enforcement, which elicits the criticism that bribery provisions and post hoc solutions to corruption are only marginally effective and that priority should be given to prevention rather than punishment. This is especially the case in countries with a recent history of one-party control, where establishing the independence of enforcement institutions (the police, investigation offices and courts) is a long-term and difficult process vulnerable to abuse for political ends.

Second, although the Commission has made national anti-corruption strategies a condition for accession, it has provided little guidance as to their contents. In recognition of this shortfall, Brussels recently produced an unofficial list of principles to serve as a model for countries seeking EU assistance in developing anti-corruption strategies, which formed the basis for a recent 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption'.[5]

Third, even in areas where EU regulations and requirements appear to have a clear anti-corruption component, the impact of these instruments is doubtful. For example, though the requirements of EU public procurement directives clearly have anti-corruption implications, their primary objective is to ensure a single market – not to fight corruption.

In the area of financial control and audit, the experience of EU member states clearly demonstrates that EU instruments cannot be relied on to ensure an effective system of control in member countries. A recent report by the British National Audit Office noted a 75 per cent rise in detected fraud involving EU funds from 1999 to 2000.[6] More worrying, most of the increase was accounted for by better detection in the UK, and in a number of countries no cases of fraud were detected at all. The EU's own anti-fraud convention, approved in 1995, was only ratified by the 15 member states in time to come into effect in late 2002. While it provides the EU's first common definition of fraud, the convention imposes minimal requirements.

What these comments reflect is the fact that the EU itself lacks any clear framework for dealing with corruption. Individual member states do not even provide information on corruption in any systematic way. Recent reports by the Council of Europe's Group of States against Corruption (GRECO) – the only organisation monitoring the majority of European states according to broad principles of anti-corruption policy – noted that no overall statistics are available on corruption in Greece or Spain.[7]

The EU has been unable to persuade member states to adopt existing instruments. For example, only three member states had ratified the Council of Europe's Criminal Law Convention on Corruption by the time it came into effect in July 2002.[8] By contrast, all but two of the CEE candidate states had done so by the same date.

There are several reasons why the EU lacks an anti-corruption framework. One is that corruption has not been perceived as a phenomenon that significantly undermines implementation of the *acquis* in existing member states. Even if it were, Brussels would

be unlikely to take the initiative in confronting corruption, which generally falls under the purview of sovereign ministries such as justice and home affairs. As elsewhere, anti-corruption developments in the EU do not come to fruition as speedily as hoped, mostly due to the sensitivity of corruption as an issue, the interest political elites often have in sustaining elements of corruption and the national resistance to external efforts to introduce any legislation or reform. Importantly, unlike the accession candidates, EU members lack incentives for adopting such frameworks.

The interest of political elites should not be regarded as hypothetical. There is substantial evidence that numerous EU members are troubled by entrenched levels of corruption, including the Elf Aquitaine affair and an alleged tradition of corruption in public procurement in France; a spate of party financing scandals in Germany; and recent revelations in Ireland and the Netherlands. Neither Italy, whose corruption problems are well known, nor Austria is a member of GRECO, though all candidate states are. In perception surveys, Greece and Italy are ranked as slightly more corrupt than the least corrupt candidate states, Estonia and Slovenia.[9] The GRECO report on Greece indicates that the most corruption-plagued area is the allocation of EU funds.

The situation so far described involves important risks for the process of EU enlargement. If the findings on post-communist countries cited earlier are reliable, then 2004 will see a large number of countries with serious corruption problems join a Union that lacks any real framework for tackling the problem. Since the Copenhagen mandate ceases to apply to countries once they are admitted into the EU, the Commission will no longer be able to require of the 10 accession states what it could never demand of existing members.

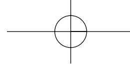
Under these circumstances, the Commission is likely to cease applying the double standards that have required anti-corruption policies of new members that were never required of older members. The result will be an inability to pursue effective anti-corruption policy across the entire enlarged Union. This is a serious cause for concern, especially given the large increase in EU funds that new member states will be required to distribute after 2004.

Policy implications

These worrying developments raise two major policy issues. One applies to the content of anti-corruption policies in candidate countries; the other concerns the EU as a whole and the need to establish a Union-wide approach to corruption.

To ensure effective anti-corruption policy in the CEE future member states, a degree of cross-party consensus needs to be achieved. This process would be facilitated by steps aimed at depoliticising anti-corruption policy as much as possible, for example by restricting the application of the phrase 'anti-corruption policy' to policies whose primary aim is to reduce corruption.

A second and absolutely vital precondition for creating more effective policies is the conduct of more detailed research on corruption. One of the main lessons of the rush of anti-corruption activity over the past 10 years is that anti-corruption policy needs to be based on fact, rather than assumption or imported solutions. Effective anti-



corruption policies are unlikely to emerge without a detailed analysis of what the real roots of corruption are in specific areas: for example, whether corruption is initiated by officials or citizens, and whether it reflects an overall corrupt organisation culture or individual actions of opportunism. Such research needs to go beyond standard surveys to more detailed focus-group studies that incorporate various analytical approaches.

In designing anti-corruption policy, countries should concentrate on making standard institutions and mechanisms work rather than creating new ones, unless there is a very specific rationale for doing so. For instance, a decent internal audit may be far more effective in preventing corruption in public administration than a special anti-corruption body.

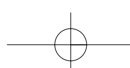
Regarding specific policy areas, future member states should pay particular attention to the reform of legislative processes to make them less vulnerable to corruption. Such reform can range from proper transparent consultation to parliamentary procedures that ensure that each proposed amendment is adequately evaluated, and that voting patterns are subject to public scrutiny.

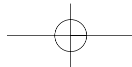
In addition, public administration reform should be buttressed by two important aspects that have not received sufficient attention in CEE countries. First, it is vital to create a functioning system of redress in public administration, both to facilitate whistle-blowing and to allow citizens a means of appealing effectively against administrative decisions and actions. Second, reform of public administration should be based on consensus rather than top-down imposition; for example, a number of countries have imposed codes of ethics on the civil service (one of the criteria by which the Commission assesses anti-corruption policy), though such codes will be ineffective unless they are prepared through an extensive consultation process that allows officials to feel ownership of them.

One area in which CEE countries have often pursued ineffective policies is conflict of interest regulation. Their approach is often based only, or primarily, on declaring certain combinations of functions illegal; however, an equally (if not more) important aspect of such regulation is the duty to disclose potential conflicts of interest and exclude oneself from decision-making in such cases. Such disclosure processes have been developed only to a very limited extent, while enforcement of disclosure requirements is poor across the entire region.

If corruption is to be tackled effectively in the area of public procurement, the region must develop a more holistic approach to reform, one that goes beyond the technical rules for running tenders and allocating bids. Such an approach needs to include much more professional budget planning to ensure that needs are well defined; integrity training for procurement officers on specific codes of conduct; and wider participation in tender proceedings by external professional observers. Moreover, regulatory bodies must be better equipped – with sufficient powers and sanctions – to supervise not only the activities of public administration in procurement, but also the thorny issue of private sector collusion.

Greater attention needs to be paid to creating systems of political party funding that are less vulnerable to corruption. State funding to mitigate reliance of parties on business





for finance should be combined with maximum transparency of party funding and regulation by an independent institution such as an electoral commission.

Last but not least, there is a clear need in many countries of the region to reform the system of broadcasting regulation to increase the objectivity and independence of television news and editorial activities. Such reforms need to be directed at completing the transition from state-controlled to public service broadcasting, with regulators designed to ensure minimum political influence on broadcasting and the maximum enforcement of transparent broadcasting rules.

The European level: the role of GRECO

One of the main problems of the accession process in the area of anti-corruption policy is that the EU itself lacks a coherent anti-corruption framework. In assessing candidate preparedness for accession from the point of view of anti-corruption policy, the Commission has therefore relied to a significant extent on existing international instruments, such as the ratification of conventions. The Commission has been able to insist on such measures due to the Copenhagen criteria, whereas it has no such leverage with respect to member states.

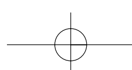
A Europe-based, anti-corruption framework does exist in the form of the Council of Europe's GRECO, however. Founded in 1999, GRECO is based on a set of Twenty Guiding Principles for the Fight against Corruption, covering a wide range of anti-corruption instruments from restriction of immunity provisions to freedom of the media. GRECO also put in place a functioning mechanism for peer evaluation of its member states on the basis of the Guiding Principles and, by the end of 2002, had completed an entire first round of evaluations. The group has been responsible for monitoring member states' fulfilment of the requirements of the Council of Europe Criminal Law Convention since it came into effect in July 2002.

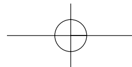
Given the lack of an EU anti-corruption framework, there are strong reasons for advocating that the EU establish much closer ties with GRECO, beginning with the Commission joining the organisation. Since neither the EU nor the Commission can force member states to adopt anti-corruption policies beyond certain narrow provisions, GRECO's voluntary basis combined with the strong moral authority of the Council of Europe is a promising way forward for Europe. A first benefit from the Commission's membership in GRECO might be that Italy and Austria – which have shown a reluctance to join GRECO, unlike the EU candidate states – decide to become members.

Unless such developments are accompanied by genuine political will among member states to fight high-level corruption, however, the risk is that they will remain formal, rather than substantive.

Notes

1. Quentin Reed is a consultant for OSI's EU Accession Monitoring Program.
2. This study focuses on the 10 EU candidates of the former communist bloc. The acceding states of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak





Republic and Slovenia are set to join the EU in May 2004; Bulgaria and Romania do not have fixed dates, although the Commission has announced 2007 as the likely year of accession. The three other candidates are Cyprus, Malta and Turkey.
3. 'Enlargement – the final lap', speech by Romano Prodi to the European Parliament, Brussels, 9 October 2002; europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/463|0|AGED&lg=EN&display=
4. OSI/EU Accession Monitoring Program, *Monitoring the EU Accession Process: Corruption and Anti-corruption Policy*, Budapest, 2002, www.eumap.org/reports/2002/content/50. The OSI website is www.eumap.org
5. Commission of the European Communities, 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption', COM (2003) 317 final, Brussels, 28 May 2003. See europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0317en01.pdf
6. UK National Audit Office, Annual Report of the Court of Auditors for the Year 2000, Report by the Comptroller and Auditor General, HC 859 Session 2001–2002, 8 May 2002.
7. GRECO, First Evaluation Round Evaluation Report on Greece adopted by GRECO at its 9th Plenary Meeting (Strasbourg, 13–17 May 2002); Report on Spain Adopted by the GRECO at its 5th Plenary Meeting (Strasbourg, 11–15 June 2001). See www.greco.coe.int
8. Denmark, the Netherlands and Portugal had ratified the convention by July 2002. Finland is the only other EU country to have ratified it since then, in October 2002.
9. See for example Transparency International's Corruption Perceptions Index 2003 (page 282); www.transparency.org/cpi/2002/cpi2002.en.html

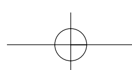
Will the OECD convention stop foreign bribery?

Fritz Heimann[1]

The adoption in December 1997 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter, 'the convention') was widely hailed as the most promising development in the fight against international corruption. Because most major international companies are based in OECD states, the convention raised the hope that the supply side of international bribery would be sharply reduced. However, that promise remains unfulfilled.

While all 35 signatories have passed laws making foreign bribery a crime, there has been little enforcement of the new laws by national governments, other than by the United States. OECD monitoring of enforcement started more slowly than planned. There is insufficient awareness in the business community that foreign bribery has become a crime, and relatively few non-US companies have adopted anti-bribery compliance programmes.

Action is needed on several fronts: governments must prosecute bribe payers; the OECD must accelerate monitoring of enforcement and close loopholes in the convention; public awareness of the convention must be increased; companies must adopt effective compliance programmes; and civil society groups must exert pressure to assure that all these steps are taken.



Overcoming obstacles to enforcement

Active enforcement by national prosecutors is the key to achieving the promise of the convention. It would quickly overcome lack of awareness of the convention in the business community and trigger the wider adoption of corporate compliance programmes.

Most national laws prohibiting foreign bribery were enacted in 1999 and 2000. Enough time to bring cases has now elapsed. The most common explanation for the paucity of prosecutions is that foreign bribery cases are difficult to prepare. Bribe payers go to great lengths to cover their tracks. Investigations must be conducted in the home country of the bribe payer, the country whose officials were bribed and third countries where the bribe money may have been deposited, or through whose banks the funds may have been laundered.

If the lead-time needed to prepare cases were the sole reason for lack of prosecutions, it would only be necessary to wait for investigations to be completed before cases are brought. But it seems likely there are other obstacles to enforcement, and that waiting patiently is not enough.

Prosecutors may be reluctant to bring foreign bribery cases because they lack the professional resources to pursue complex international cases. Procedures for obtaining evidence from abroad are cumbersome and often unproductive. While the OECD convention provides for mutual legal assistance from countries that have signed, it does not provide for assistance for countries in the developing world where foreign bribery is most prevalent.

Responsibility for criminal enforcement is at the state or provincial level in a number of countries, including Germany and Canada, and not the national level. Prosecutors at such levels may have less interest in pursuing foreign bribery cases. In other countries, including Britain, responsibility for conducting investigations is not at the national level and prosecutors cannot proceed until local investigators – over whom they have little control – complete their work.

Political opposition to prosecuting companies that create jobs from exports may be a further obstacle. There have been allegations in some countries that prosecutors are discouraged from bringing foreign bribery cases.

Prosecutors may not be receiving complaints about foreign bribery. That may be explained by a lack of public awareness that foreign bribery has, in fact, become a crime. Companies that lose orders to bribe-paying competitors may be reluctant to complain to prosecutors through fear of losing future orders, lack of hard evidence that bribery actually did take place or concern about defamation suits.

The OECD Working Group on Bribery should conduct a systematic assessment of the obstacles to bringing cases and what can be done to overcome them. Among the issues to be considered are:

- Should governments set up specialised offices to handle foreign bribery cases? Such offices could develop experienced staff capable of investigating and prosecuting complex international cases.

- What steps can be taken to improve mutual legal assistance, particularly with developing countries?
- Can procedures be developed to encourage the bringing of complaints by companies that have lost orders to bribe-paying competitors or by other groups or individuals interested in curbing corruption?
- What can be done to increase public awareness in both OECD countries and in developing countries that foreign bribery is a crime?

Action to identify and overcome obstacles to enforcement should not wait for the completion of the OECD's Phase II reviews. Better understanding of the obstacles would provide useful guidance for those reviews.

Monitoring enforcement

When the convention was adopted it was recognised that follow-up monitoring was necessary, and that governments would be reluctant to prosecute their own companies for foreign bribery unless they were assured that other governments would prosecute their competitors. Peer-group monitoring provides the mutual discipline necessary to ensure enforcement.

The first phase of OECD monitoring – reviewing the adequacy of national laws passed to implement the convention – was successfully conducted between 1999 and 2001. The Working Group on Bribery identified deficiencies in the laws of many countries, notably Japan and the UK. Governments had to return to their legislatures, but most of the deficiencies have been corrected.

Phase II – monitoring national enforcement – began in 2001 with the goal of reviewing all 35 signatories in five years. Because of inadequate funding, only four countries were reviewed by the end of 2002. Increased funds were forthcoming for 2003–04 and 10 more countries are expected to be reviewed by the end of 2004.

TI and its national chapters played an active role in pressing the OECD and its member governments to provide adequate funds for the monitoring process. Because enforcement programmes require continuing political commitment, monitoring enforcement must be organised as a long-term OECD project, with dependable funding. The entire first round of reviews should be completed in 2006.

The first four reviews identified serious shortcomings, even in the United States, which has more than two decades of enforcement expertise. To make up for the slow start, the monitoring programme should focus first on the largest exporting countries. Follow-up reviews are needed to ensure that identified deficiencies are corrected. Governments must not be permitted to think that they will escape further scrutiny after the first round of reviews.

Adequate staffing and preparation are key requirements for conducting effective reviews. The review teams, made up of two countries acting as lead reviewers and of the staff of the OECD Secretariat, must have experience with criminal law enforcement and the capability to evaluate the effectiveness of corporate compliance programmes.

It is essential that OECD review teams meet with representatives of the private sector and civil society – without the presence of representatives from the government under review – in order to facilitate candid exchange. This is particularly important in countries with inadequate enforcement programmes. Sound precedents for participation by NGOs were established during the first four Phase II reviews, in Finland, the United States, Germany and Canada.

Because public opinion is needed to improve inadequate government enforcement, the monitoring process should be as transparent as possible. In particular, government responses to the OECD questionnaire should be publicly disclosed. Reports on country reviews should be published without the lengthy delays that followed the US and German reviews. Deficiencies in national enforcement should be clearly identified, without diplomatic fudging.

Follow-up by civil society, private sector and media is essential. It is not enough to publish the reports on an OECD website. Shortcomings identified in OECD reviews are much more likely to be remedied if TI national chapters and other interested groups take an active role in publicising the results of the review and press for corrective action.

Closing loopholes in the convention

When the convention was adopted, the OECD Council identified a list of unresolved issues for future action. These issues were considered important because they left serious loopholes in the coverage of the convention, but there was insufficient consensus to deal with them in 1997. More than five years have passed and still none has been resolved.

Some influential governments have argued that work on changing the convention would divert attention from the need to achieve effective enforcement. Transparency International believes that enforcement should be the top priority, but it should not be the only one. Bribe payers are resourceful and persistent, and they employ sophisticated lawyers to exploit existing loopholes. Developing solutions will take time because the unresolved issues are still controversial.

Coverage of foreign subsidiaries

There have been widespread allegations that multinational enterprises (MNEs) use their foreign subsidiaries to pay bribes. Such concerns seriously undermine confidence in the convention and must be addressed without further delay.

Objections have been raised, on jurisdictional grounds, to including subsidiaries based in non-OECD states under the convention. There is a simpler solution: parent companies in OECD countries can be required to assure that their controlled foreign subsidiaries adopt anti-bribery compliance policies. MNEs generally have majority ownership in most of their subsidiaries. Therefore, most foreign subsidiaries can be covered by such a requirement without presenting jurisdictional concerns.

Traditional defences against parent company liability, based on the 'corporate separateness' of subsidiaries, have largely been eroded in an age when all components

of MNEs are electronically interconnected and in constant communication with headquarters. This makes it unlikely that subsidiaries can pay substantial bribes without leaving an electronic trail showing sufficient knowledge to implicate the parent company.

Most corporate lawyers recognise that 'corporate separateness' defences are obsolete. However, defence lawyers are reluctant to give up any defence that might be useful.

The foreign subsidiary problem should be at the top of the OECD's loophole-closing agenda, not only because of its importance, but because it can be addressed without amending the convention. The simplest approach would be to adopt a Commentary to the Convention, requiring parent companies based in OECD countries to take steps to assure compliance by their controlled subsidiaries.

Bribery of political party officials

There is worldwide concern about bribes to political parties, party officials and candidates for office. In this important area, unfortunately, the coverage of the convention is a confusing and inadequate patchwork. The convention does not adequately address the bribery of foreign political party officials who are not 'public officials'. In particular, paying a party official to influence government action is not covered at all. Some forms of payment to party officials are covered, for example, when a party official is also a public official, or when a public official directs that a payment should be made to a political party or party official.

That some forms or political bribery may be prohibited is not enough, however, because bribe payers and their lawyers can take advantage of the loopholes to avoid the prohibition. Political party bribery is simply too important a subject to continue with the current inadequate coverage. Because there is widespread concern about political party corruption, there should be broad support for closing this loophole in the convention.

In spring 2001, Transparency International submitted to the OECD the La Pietra Recommendations calling for action prohibiting bribe payments to foreign political parties. They proposed that bribery of political parties and party officials should be covered in the same way that bribery of public officials is covered, that is, by prohibiting payments 'to obtain or retain business or other improper advantage'.

By prohibiting quid pro quo bribery, the convention would focus directly on distortions of international competition without becoming involved with regulation of political campaign financing.

While not on the OECD Council's list of unresolved issues, the following issues also need to be addressed.

Private sector bribery

Four considerations make clear why the convention should cover bribery in the private sector:

- Bribery within the private sector has become transnational, as has bribery of public officials. National laws covering commercial bribery usually do not cover cross-border bribery.
- Privatisation has blurred the dividing line between the public and private sectors, thereby providing opportunities for evading prohibitions that apply only to the bribery of public officials.
- The private sector is substantially larger than the public sector in most countries. By dealing only with bribery of public officials, the convention leaves large areas of foreign bribery uncovered.
- Corruption in the private sector weakens support for privatisation and provides a weapon for opponents of globalisation.

In April 2002, the International Chamber of Commerce (ICC) presented to the OECD Working Group on Bribery a detailed study demonstrating the shortcomings of existing laws dealing with private sector bribery in more than a dozen OECD countries.[2]

Dealing with private sector bribery is likely to require a combination of actions by the OECD to address the transnational aspects; by national governments, to strengthen existing laws against commercial bribery, unfair competition and breach of trust; and by the business community, through improved compliance programmes. The transnational aspects should be addressed by amending the convention. Actions by governments and the business community could be addressed through an OECD Recommendation.

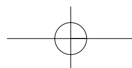
Promoting accounting and auditing reforms

Accurate financial records are a critical requirement for preventing corruption. This was recognised by article 8 of the convention. A detailed review of accounting and auditing requirements in 15 OECD countries, presented by Transparency International to the OECD Working Group on Bribery in April 2001, revealed serious deficiencies and inconsistencies. The adequacy of accounting and auditing requirements forms part of the OECD's Phase II monitoring process.

Recent corporate scandals in the United States and elsewhere make it abundantly clear that major reforms are needed even in countries with extensive regulations. They also provided an opportunity not only for national reforms, such as the Sarbanes-Oxley Act passed in the United States in 2002, but also for the development of stronger international standards. The OECD is well placed to play a major role in promoting the development of consistent international standards. Such standards would benefit the fight against international corruption, as well as addressing other concerns.

Helping companies resist extortion

The convention's principal focus is on the supply side of corruption. However, success in combating corruption will be difficult to achieve without addressing the demand side – extortion by government officials. The OECD and its member governments can take useful steps to help companies to resist extortion. The United States has established



help lines that US companies can use to obtain diplomatic support in dealing with extortion by foreign officials. The OECD Working Group on Bribery should encourage other signatories to establish similar help lines. When they are in place, the OECD should promote the organisation of a network of help lines that can undertake multilateral interventions with governments whose officials engage in extortion. Such multilateral interventions are likely to be more effective than unilateral interventions and should be especially beneficial to companies from smaller countries whose diplomats, acting alone, may not be able to do much to help their companies.

Promoting corporate compliance programmes

Enforcement of anti-bribery laws and corporate compliance programmes play an inter-dependent and mutually reinforcing role. Law enforcement alone will not change business behaviour. Voluntary compliance by companies is needed to establish the moral framework that makes law enforcement effective. More widespread adoption of corporate compliance programmes will not occur until there is more active enforcement of anti-bribery laws. Corporate compliance programmes have a large multiplier effect on law enforcement: for every government prosecutor investigating foreign bribery, there will be hundreds of corporate lawyers and auditors enforcing it.

Linking anti-corruption to corporate governance reforms

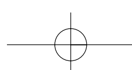
There are clear common interests between combating corruption and strengthening corporate governance. These include the need for independent audit committees, more transparent accounting, increased disclosure, conflict of interest rules and whistle-blower protection. Increased collaboration should take place between groups promoting corporate governance reforms and those concerned with corruption.

Creating greater awareness of the convention

The OECD, working with its member governments and with private sector and civil society groups, including the ICC, TI, OECD's Business and Industry Advisory Committee and its Trade Union Advisory Committee, should actively promote greater awareness of the convention's prohibition on foreign bribery among government officials, the business community and the media in OECD countries, as well as the rest of the world.

Civil society pressure as a means to make the convention work

Corrupt companies and corrupt officials are determined to continue doing business as usual. Government and corporate officials supporting reforms must deal with other priorities for their attention. To make progress Transparency International and other civil society groups must play an active advocacy role. Their chief tasks will be to:



- Increase public awareness of the convention and of national laws criminalising foreign bribery.
- Participate in the OECD monitoring process to provide assessment of government enforcement and corporate compliance, publicise results of OECD reviews and press for action to overcome deficiencies in enforcement programmes.
- Publish annual scorecards of national enforcement based on surveys conducted by TI national chapters.
- Build bridges between prosecutors in developing countries and in OECD countries to promote mutual legal assistance.
- Encourage development of accessible complaint channels for companies that have lost orders and others who have been injured by bribery.
- Work with companies and ICC to encourage the adoption of effective corporate compliance programmes.
- Build support by national governments for closing loopholes in the OECD convention, and press for realistic priorities and timetables.
- Promote cooperative interaction between the OECD convention, the Inter-American convention, the Council of Europe and other regional conventions, and the UN Convention against Corruption.
- Act as catalyst for support from World Bank, IMF and WTO programmes.

Conclusion

The adoption of the OECD convention and the passage of laws prohibiting foreign bribery by all 35 signatories have put in place a legal structure capable of stopping foreign bribery. The challenge now is to put that structure into operation. Because of the high expectations raised by the OECD convention, its future is of transcendent importance. Success in stopping foreign bribery will reinforce support for other anti-corruption initiatives; lack of progress will enable sceptics to argue that international corruption is an insoluble problem.

Notes

1. Fritz Heimann is a founding member of Transparency International and has led TI's work on the OECD Anti-Bribery Convention.
2. Günter Heine, Barbara Huber and Thomas O. Rose (eds), *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures* (Freiburg: ICC Press and the Max Planck Institute, 2003).

Governance, corruption and the Millennium Challenge Account

Steve Radelet[1]

The Millennium Challenge Account (MCA) is a new US foreign assistance programme aimed at providing substantial amounts of additional aid to a select group of countries that are, in the words of President George Bush, 'ruling justly, investing in their people

and encouraging economic freedom'.[2] The programme is striking because of its size: the proposed US $5 billion annual budget (ramped up over three years) would increase the US foreign assistance budget by nearly 50 per cent, and would be equivalent to about 9 per cent of global overseas development assistance. Perhaps more importantly, the programme's design could bring about the most fundamental change to US foreign assistance policy in 40 years.

The basic idea of the MCA is to select a relatively small number of recipient countries based on their demonstrated commitment to sound policies, provide them with large sums of money, give them more say in designing aid-funded programmes and hold them accountable for achieving results. If implemented carefully and effectively, the MCA could fundamentally improve the effectiveness of US foreign assistance.[3]

The administration has proposed creating a new government corporation, called the Millennium Challenge Corporation, to run the programme. The administration envisions funding broad programmes designed by groups in qualifying countries, including the government, NGOs and the private sector. The recipients would set priorities, propose specific activities and establish benchmarks to be used to measure progress. This approach would place responsibility for development programmes where it belongs – with the recipient country. It aims to engender greater commitment and ownership of the proposed activities and stronger results. In return for this flexibility, the administration plans to demand greater accountability. Successful programmes would continue to receive generous funding, while those that fail would lose their funding.

The country selection process

One of the distinguishing characteristics of the MCA is that it will be focused on a small number of countries where the US government believes that aid can be most effective. The programme builds on the theory that aid works best in countries with governments that are committed to implementing sound development policies and building strong institutions. This idea makes intuitive sense: foreign aid should go much further in countries where governments are dedicated to building better schools, creating jobs and rooting out corruption than in countries with dishonest or incompetent governments. Research by Craig Burnside, David Dollar and Paul Collier of the World Bank has provided empirical support for this notion, although other research has questioned the strength of the original results.[4] In any case, this line of research has strongly influenced donors in recent years, including the designers of the MCA.

The first step in the selection process is to determine the group of low-income countries eligible to compete to qualify for the MCA. The administration plans to gradually enlarge the pool of eligible countries over three years. In the first year, all countries with per capita income of less than US $1,435 and that also are eligible for concessional finance from the World Bank's International Development Association (IDA) will be eligible. Seventy-four countries fit these criteria. In the second year the IDA-eligibility criterion will be dropped, expanding the pool to 87 countries. In the third year eligibility will be expanded to include the 28 countries in the world with per capita incomes between US $1,435 and US $2,975.

The administration will select qualifying countries from these groups on the basis of 16 specific quantitative indicators aimed at measuring the extent to which countries are 'ruling justly' (six indicators), 'investing in their people' (four indicators) and 'promoting economic freedom' (six indicators). These 16 indicators and their sources are shown in Table 7.1. To qualify, a country must score in the top half (that is, above the median) of the pool of broadly eligible countries on at least half the indicators in each of the three categories. The corruption indicator is given special significance: a country *must* score above the median on corruption as one of the three 'ruling justly' indicators in order to qualify. None of the other indicators are given this special 'do or die' status. One implication is that, in the extreme, a country that passes 15 of the 16 indicators but fails to score above the median on corruption will not qualify for the MCA.

Table 7.1: Eligibility criteria for the MCA[a]

Indicator	Source
I. Ruling justly	
1. Control of corruption	World Bank Institute
2. Rule of law	World Bank Institute
3. Voice and accountability	World Bank Institute
4. Government effectiveness	World Bank Institute
5. Civil liberties	Freedom House
6. Political rights	Freedom House
II. Investing in people	
7. Immunisation rate: DPT and measles	WHO/World Bank
8. Primary education completion rate	World Bank
9. Public primary education spending/GDP	World Bank
10. Public expenditure on health/GDP	World Bank
III. Economic freedom	
11. Country credit rating	Institutional Investor
12. Inflation	IMF
13. Regulatory quality	World Bank Institute
14. Budget deficit/GDP	IMF/World Bank
15. Trade policy	Heritage Foundation
16. Days to start a business	World Bank

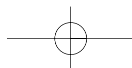
[a] To qualify, countries must be above the median on half of the indicators in each of the three sub-groups. They must also score above the median on the control of corruption indicator.
Source: 'Fact Sheet: Millennium Challenge Account', distributed by the US administration on 25 November 2002, available at www.cgdev.org

The administration has not yet announced the qualifying countries for FY 2004, but Table 7.2 contains a list of possible qualifiers, constructed using a strict interpretation of the administration's procedure. According to this illustrative list, which will change as data are updated before the programme begins, 11 countries would qualify in the first year. In the second year the number of qualifying countries increases slightly to 12, and in the third year perhaps six more would qualify. The table lists nine other countries that fail to qualify during the three years because they fall below the median on corruption, even though they pass sufficient hurdles in other areas.

Table 7.2: Possible qualifying countries using the US administration's criteria

	Year 1: IDA-eligible countries with per capita incomes less than US $1,435	Year 2: All countries with per capita incomes less than US $1,435	Year 3: Countries with per capita incomes between US $1,435 and US $2,975
Qualifying countries			
1.	Armenia	Armenia	Belize
2.	Bhutan	Bhutan	Bulgaria
3.	Bolivia	Bolivia	Jordan
4.	Ghana	Honduras	Namibia
5.	Honduras	Lesotho	South Africa
6.	Lesotho	Mongolia	St Vincent & Gren.
7.	Mongolia	Nicaragua	
8.	Nicaragua	Philippines	
9.	Senegal	Senegal	
10.	Sri Lanka	Sri Lanka	
11.	Vietnam	Swaziland	
12.		Vietnam	
Eliminated by corruption			
1.	Albania	Bangladesh	Romania
2.	Bangladesh	Ecuador	
3.	Malawi	Malawi	
4.	Moldova	Moldova	
5.	Mozambique	Paraguay	
6.		Ukraine	
Missed by one indicator			
1.	Benin	Benin	Maldives
2.	Burkina Faso	Burkina Faso	Thailand
3.	Cape Verde	Cape Verde	Tunisia
4.	Georgia	The Gambia	
5.	Guyana	Ghana	
6.	India	Guyana	
7.	Mali	India	
8.	Mauritania	Mali	
9.	Nepal	Mauritania	
10.	São Tomé and Príncipe	Morocco	
11.	Togo	São Tomé and Príncipe	
Eliminated for statutory reasons			
1.		China	
2.		Syria	

Source: Steven Radelet, *Challenging Foreign Aid: A Policymaker's Guide to the Millennium Challenge Account* (Washington, D.C.: Center for Global Development, 2003).



Bear in mind that these lists are unofficial best estimates and are especially tenuous in the second and third years, since the data will be significantly revised between now and then. The two key points to bear in mind about the selection process are as follows. First, by announcing the precise methodology and using publicly available data, the administration is attempting to depoliticise the selection process to a remarkable extent. Instead of allocating aid to its strongest political allies as in most programmes, the MCA will focus aid on countries with good policies. Second, and related, the number of qualifying countries is small. This is consistent with the administration's intention to keep the programme selective, and its plan to give recipients much more latitude than they have had in the past in how they will use the funds.[5]

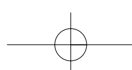
The focus on corruption

There has been extensive debate about the administration's strong focus on corruption as one of the indicators used to select countries. No one is objecting – at least vocally – either to the idea that aid is more effective in countries with less corrupt governments or the notion that the United States should allocate more aid to countries with a demonstrable record of fighting corruption. Rather, the debate has centred around the accuracy of current measures of corruption and the implications for the administration's decision to eliminate all countries with corruption scores below the median, regardless of their scores on other indicators.

The administration draws its 'control of corruption' indicator (and four other indicators) from the governance database compiled by Daniel Kaufmann (World Bank Institute) and Aart Kraay (World Bank). The database has excellent coverage: the 2002 version covers 199 countries, including all the countries potentially eligible for the MCA.

The key issue is that this measure of corruption – like all measures of corruption or of governance more broadly – is measured with significant margins of error. Kaufmann and Kraay explore this issue in two recent papers (see also Chapter 16, 'Governance Matters III: new indicators for 1996–2002 and methodological challenges', page 302).[6] These margins of error are inherent in all survey-based measures, both because respondents provide a range of answers to any particular question and because the survey samples may not be indicative of the broader population. As a result, it is difficult to assign with a high degree of confidence a precise score to a country. That is, for a country with an *observed* score just below the median, we cannot have a high degree of confidence that the *true* level is below the median. Margins of error in the estimation could be the difference between passing the corruption hurdle or not. By contrast, some countries that have an *observed* score above the median may have a *true* level below the median, and thus receive a passing grade when it is not warranted. To be precise, for example, we simply cannot conclude with any degree of confidence that a country with a score in the 51st percentile has better control over corruption than a country in the 49th percentile, although the latter would be immediately eliminated from the MCA.

Corruption indices also may fail to accurately measure the *dynamics* of anti-corruption measures. For example, a strong anti-corruption campaign initially could lead to a



deterioration in perceptions of the level of corruption as transgressions are publicised and punished. The public could respond to a corruption crackdown by first believing that control of corruption was worse than they thought, and only later begin to believe it is improving. Thus, a country that tries to crack down on corruption could find its MCA ranking gets worse before it gets better. Similarly, perceptions of corruption take time to change, so surveys of corruption may track more accurately past, rather than current, levels of corruption. This could be a particular issue when a government is replaced and the new administration is penalised in its potential MCA eligibility because of its predecessor's poor record on corruption.

It is important to note that these kinds of measurement errors are not limited to corruption or even governance indicators. Most economic and social indicators are measured with errors, and even more objective indicators, such as immunisation, enrolment or inflation rates. In other words, all 16 of the MCA indicators are subject to measurement errors. The issue becomes most acute with the corruption indicator since the administration has drawn a clear line at the median – countries above will qualify, those below will not.

The margins of error in the Kaufmann-Kraay indicators are actually smaller than for many other indicators, since they draw on more sources and their aggregation methodology gives more weight to sources with smaller errors. But they are still important for borderline cases. Kaufmann, Kraay and Mastruzzi in their 2003 report examine the 2002 corruption scores for the 74 countries that will compete for the MCA in the first year. For 28 of these countries, there is a 75 per cent or greater probability that the true control of corruption score is above the median, so we can have a high level of confidence that these countries are among the better performers. For 22 countries, there is a 75 per cent or greater probability that the true score is below the median, providing reasonable confidence that these countries are amongst the poorest performers. However, there are 24 intermediate countries that are much more difficult to assign as either above or below the median with any degree of confidence. Fifteen of these countries have estimated scores that fall below the observed median and are therefore eliminated from the MCA, despite this uncertainty.

Possible steps towards improvement

While the focus on corruption in the MCA is welcome, the firm make-or-break requirement is asking a great deal from the data, and may unnecessarily eliminate some countries. There are several ways in which the corruption criteria could be modified slightly to reduce this risk while retaining the clear signal to potential recipients about the importance of fighting corruption.

One alternative would be to fully eliminate only the countries that fall in the bottom quartile of corruption scores, rather then all those in the bottom half. Countries above the 25th percentile would remain eligible for the MCA competition, following the other rules set out by the administration. Thus, if a country were above the 25th percentile but below the median on corruption, it would not get credit for the corruption

hurdle, but could qualify for the MCA so long as it passed half the hurdles in each of the three categories.

A second alternative would be to retain something like the current system, but not automatically eliminate those countries that score below the median on corruption. For those countries that qualify except on this criterion, the administration and host country could initiate a deeper investigation about both the extent and characteristics of corruption. This would involve, as a first step, more in-depth diagnostic surveys of thousands of public servants, business leaders and citizens as described by Kaufmann and Kraay in the 2002 report and currently carried out in some countries. In cases where the in-depth diagnostics revealed that control of corruption was better than the country's original score indicated, the country could be elevated to full MCA qualification status. This could be a particularly important step when governments change, as noted above. For other countries in which the diagnostics confirmed the initial finding that corruption is an important issue, the country could design a specific programme aimed at redressing the key problems as quickly as possible. The US government could help fund the anti-corruption programme with the aim of helping the country to gain full MCA eligibility within one to three years.

Other key issues in the MCA debate

At this writing, the final legislation authorising the MCA has not yet passed the US Congress, so some items are still very much under debate. For example, some legislators would like to modify the selection procedure described above by either adding or deleting particular indicators, or by modifying the passing grades on each indicator. Some members would like the legislation to be very specific about the qualification process, whereas others are willing to provide more discretion to the administration. In the end, the final legislation is unlikely to specify the precise qualification process in detail, but rather leave it to the new Millennium Challenge Corporation to make final decisions and then report regularly to Congress. As a result, the qualification process in the first year should be similar to the procedure announced by the administration and outlined above.

Of course, the debate in Congress about the details of the qualification process is just one part of a larger public debate about the philosophy underlying the MCA. Some critics have decried the entire approach, seeing it as but one more manifestation of the types of conditions placed on aid by the World Bank, the IMF and other donors with only mixed success. Others are more accepting of the broad approach, but question the inclusion of specific indicators that they do not see as necessarily conducive to development, such as trade openness. Still others have argued that the economic indicators should be given primacy, as they see improved health, education and governance as outcomes of the process of economic growth, rather than inputs to growth and development. In the end, however, these voices have been in the minority, and there has been broad support for the notion of aid allocation based on the recipient country's commitment to good development policy.

Not surprisingly, there also has been significant debate about funding levels for the MCA. The administration proposed ramping up the funding over three years to US $5 billion per year. The administration actually requested US $1.3 billion for the first year (October 2003 to September 2004). However, the final budgeted amount is likely to be smaller, both because of budget deficit pressures and because the administration has been slow to design some key aspects of the programme (such as precisely how MCA aid will be delivered once countries are selected). Over the longer run, the growing US budget deficit may mean that the MCA never reaches its proposed US $5 billion annual budget. However, even with a more likely ultimate annual budget of US $3–4 billion, the MCA will still represent a significant increase in US foreign aid.

The MCA signals a significant shift on the part of the US government towards allocating at least some of its aid to countries with a stronger commitment to better governance and fighting corruption. Other donors are likely to follow in different ways, which could bring about one of the most significant shifts in donor and recipient country behaviour in decades. This shift is welcome and long overdue. The system to choose qualifying countries, while a good step forward, could be improved. The modest changes outlined here could help strengthen the system, especially by using in-depth diagnostics to help countries with weak corruption scores to address the key problems. This strategy would build in appropriate incentives for countries to reduce corruption while giving them the support (both technical and financial) needed to implement a programme that can actually help them do it.

Notes

1. Steve Radelet is senior fellow, Center for Global Development, and formerly deputy assistant secretary of the US Treasury from January 2000 to June 2002.
2. See www.mca.gov/iab_speech.html
3. For a more thorough analysis of the MCA see Steve Radelet, *Challenging Foreign Aid: A Policymaker's Guide to the Millennium Challenge Account* (Washington, D.C.: Center for Global Development, 2003).
4. See Craig Burnside and David Dollar, 'Aid, Policies and Growth', *American Economic Review* 90 (4), September 2000; and Paul Collier and David Dollar, 'Aid Allocation and Poverty Reduction', *European Economic Review* 46 (8), 2002. For a critique that questions the earlier empirical results, see William Easterly, Ross Levine and David Roodman, 'New Data, New Doubts: Revisiting "Aid, Policies and Growth"', Center for Global Development Working Paper #26 (February 2003), at www.cgdev.org/wp/cgd_wp026.pdf
5. These characteristics of the MCA open a range of questions on US government aid operations in countries that do not qualify for the MCA, a topic that is addressed at length in Radelet, *Challenging Foreign Aid*.
6. Daniel Kaufmann and Aart Kraay (2002), 'Governance Indicators, Aid Allocation, and the Millennium Challenge Account', www.worldbank.org/wbi/governance/mca.htm; Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi (2003), 'Governance Matters III: Governance Indicators for 1996–2002', www.worldbank.org/wbi/governance/pdf/govmatters3.pdf