

**The United Nations Convention Against Corruption:
The Globalization of Anticorruption Standards**

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**Panel I: What the UN Convention on
Anticorruption Will Mean**

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INTRODUCTION

The last decade has witnessed the rapid development and acceptance of international standards to combat corruption, as well as a host of standards in related areas such as anti-money laundering, international cooperation, and accounting. Although virtually all countries have, and have had, statutes on the books prohibiting domestic bribery, particularly of public sector officials, until the mid 1990s, anticorruption measures were not regarding as a suitable subject of international agreements, but rather a matter reserved to national sovereignty.

With respect to the issue of transnational bribery, the United States stood alone for twenty-five years in criminalizing, through the Foreign Corrupt Practices Act (FCPA),¹ the bribery of foreign public officials in international business transactions. Measures at the national level with respect to private sector corruption were likewise relatively limited, although not as limited as measures with respect to transnational bribery. Requirements for corporate recordkeeping and internal control systems were not well developed in many countries. Moreover, most countries, even major capital exporting countries, permitted companies to take

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¹ 15 U.S.C. §§ 78dd-1, 78dd-2 (1994), *amended by* Pub. L. No. 105-366, 112 Stat. 3302 (1998) (adding a new § 78dd-3 for “any person”).

tax deductions for bribes. And international cooperation in the investigation and prosecution of cases was limited by both legal and practical barriers, including requirements of dual criminality, bank secrecy, and a lack of experience of prosecutors in dealing with the complexities of transnational corruption offenses, as well as a lack of political will in many countries

By the early 1990s, a variety of events began to change the domestic and international political dynamic with respect to the issue of corruption. The fall of the Berlin Wall and the collapse of the Soviet Union, the spread of democracy and more open societies (including a free press) in many parts of the world, globalization, and the prevalence of market-based economic models, among other developments, created a climate favoring openness, transparency, merit-based competition, and accountability. International businesses became increasingly aware of the costs of corruption, and governments and international organizations became increasingly sensitive to the distortions it created.

These events spurred the rapid development of international anticorruption standards. In less than a decade, dozens of countries have signed on to treaties requiring them to criminalize transnational bribery of foreign officials in similar terms to the antibribery prohibition of the FCPA, requiring criminalization of money laundering where the predicate offense is a corrupt practice, and requiring cooperation with other countries in investigations and enforcement. The trend towards international standards began with a Latin American regional convention in 1996, encompassed the major capital-exporting countries with the OECD Convention of 1997, grew in regional breadth with the adoption of the Council of Europe Criminal and Civil Law Conventions and the European Union Convention in the late 1990s and the African Union Convention in 2003, and expanded to the international financial institutions with the World Bank's adoption of new anticorruption rules in 1997, to mention just the most significant developments.²

As rapid and important as these developments have been, however, they remained patchwork. Accordingly, and on the heels of its Convention Against Transnational Organized Crime concluded in November 2000³, which includes a number of anticorruption provisions, the United Nations in late 2000 decided to pursue the negotiation of a global convention focused solely on the issue of corruption. This convention -- the United Nations Convention Against Corruption ("UN Corruption Convention" or "UN Convention") -- represents an attempt to establish universal anticorruption standards, including a common set of obligations on the part of

² For a more detailed discussion of these developments, see Lucinda A. Low, *The New Global Legal Framework: The OECD, OAS, and Council of Europe Antibribery Conventions: New International Standards and National Anti-Corruption Laws: Challenges for Effective Implementation And Enforcement*, prepared for the IBA/ICC/OECD Conference on "The Awakening Giant of Anti-Corruption Enforcement," Paris 22-23 April 2004 ("2004 Paris Conference Comparative Paper"), available on the IBA Website, www.ibanet.org.

³ The Convention against Transnational Organized Crime and its Protocols, U.N. Doc. A/55/383 (Nov. 2, 2000), entered into force 29 September 2003, available at <http://www.unodc.org/palermo/convmain.html>.

countries around the world to cooperate in investigations and enforcement. After preparatory work in 2001, negotiations began in early 2002. They were concluded with the adoption of the text of the Convention in the fall of 2003. The Convention was opened for signature in Merida, Mexico, on December 9, 2003,⁴ and entered into force on 14 December 2005. As of April 2006, 140 countries had signed the Convention, and 50 had ratified it.⁵

The parties to the UN Convention include significant international players that are not parties to any other international anticorruption treaty. Most notable in this regard is the People's Republic of China. Moreover, the Convention has already attracted adherents from virtually every region of the globe.⁶ Its rapid acceptance by a substantial number of countries -- with the number continuing to grow -- indicates its potential to create truly international standards as well as a worldwide infrastructure for international cooperation by governments in prosecuting corruption cases. This capacity for universality makes the Convention capable of playing a role that no other international anticorruption convention can play. There is no question, therefore, of the significance of the UN Convention to efforts to combat corruption.

At the same time, the Convention enters territory previously unexplored by other conventions, including asset recovery, and (in terms of their scope) its provisions on collateral consequences. It therefore also represents potential new tools for prosecutors and private actors to combat corruption, and potential risks.

This paper provides an overview of the Convention, with a particular focus on its chapters dealing with criminalization and international cooperation, as well as its provisions for civil liability and collateral consequences.

I. OVERVIEW OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION AND SOME INITIAL OBSERVATIONS REGARDING ITS APPROACH AND EFFECT

The UN Convention is by far the broadest in scope, as well as the most detailed, complex, and far-reaching, of any of the international anticorruption treaties to date. Its scope includes criminalization requirements, obligations regarding preventive measures in the public and private sectors, international cooperation in investigations and enforcement, technical

⁴ See Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, United Nations General Assembly, fifty-eighth session, A/58/422, 7 October 2003 (English).

⁵ The full text of the convention is available on the U.N. web site. See <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf>. An index of signatories and parties is also available there. See <http://www.unodc.org/unodc/crime_signatures_corruption.html>.

⁶ The United States has signed the Convention. It was transmitted to the Senate for its advice and consent on October 27, 1005. See Treaty Doc. No. 109-6, 109th Cong., 1st Sess. (2005).

assistance measures, and asset recovery provisions. Its 71 articles (compare the OECD Convention with only 17 articles) are distributed in eight chapters, as follows:

- Chapter I, General Provisions (Articles 1-4)
- Chapter II, Preventive Measures (Articles 5-14)
- Chapter III, Criminalization and Law Enforcement (Articles 15-42)
- Chapter IV, International Cooperation (Articles 43-50)
- Chapter V, Asset Recovery (Articles 50-59)
- Chapter VI, Technical Assistance and Information Exchange (Articles 60-62)
- Chapter VII, Mechanisms for Implementation (Articles 63-64), and
- Chapter VIII, Final Provisions (Articles 65-71).

With respect to asset recovery, the UN Convention breaks entirely new ground in terms of multilateral treaty regimes. Moreover, even with respect to topics such as criminalization, prevention, and international cooperation, which have parallels in other conventions, the UN Convention is broader in scope, and in many areas more detailed in its treatment of issues than its predecessor conventions. This breadth and depth reflect the drafters' goal of closing gaps in standards and requirements, and creating a global architecture that will facilitate enforcement.

Despite its sweeping reach, the approach the UN Convention takes is generally similar to that found in other anticorruption conventions. Many of its provisions are not self-executing, but require implementation through the national laws of participating countries, as well as national enforcement. This is generally true with respect to criminalization, preventive measures, and a number of the asset recovery provisions as well. In contrast, the international cooperation chapter -- as is the case with other conventions -- is predominately self-executing. However, even these provisions do not operate in a vacuum, but interact with existing treaties in the areas of extradition and mutual legal assistance as well as national laws. With respect to all these issues, therefore, how participating countries implement and enforce these provisions will become key issues in assessing the UN Convention's impact and effectiveness.

Moreover, the UN Convention has at least a dozen different levels of implementation obligations that it creates for States Parties, from "hard" obligations (mandatory requirements) to very soft ones. Some provisions require countries to implement prescribed provisions, while others permit but do not require them to do so. Still others only require countries to "consider" taking certain steps, while others impose requirements but then establish permissive "escape hatches." At this author's count, there are at least a dozen varieties of escape hatches in the UN Convention. They range from relatively narrow ones, focusing on the constitution or fundamental principles of a country's domestic law, to broader ones that defer to the country's domestic law. Implementation obligations for a few provisions are dependent on a country's economic means. In some measures, two or more of these qualifiers operate in tandem. Moreover, in several places the UN Convention appears to give overarching deference to national sovereignty (*e.g.*, Article 4) and domestic policy decisions generally.

All of these variants increase the complexity that any analysis of the Convention and its potential impact must take into account. This complexity arises even before turning to the questions of possible reservations countries may take (not specifically addressed in the

Convention), mechanisms for implementation, and the capacity of countries to implement its obligations. This complexity also increases the likelihood that the Convention, despite its goal of universality, will produce an even more diverse array of national obligations than already exists. As with other anticorruption conventions, the UN Convention does not necessarily harmonize international standards. Its setting of a floor for national measures without prescribing the precise approach to be taken in adopting such measures gives states the freedom to adopt measures that may or may not be consistent with the measures adopted by other states. From a business compliance standpoint, therefore, the UN Convention must be seen as complicating what is already a considerably more complex picture than existed a few years ago.

The following sections of this paper will discuss key provisions of the UN Convention in more detail. Part II will address preventive measures; Part III, criminalization; Part IV, private rights of action and the collateral consequences of corruption; Part V, international cooperation; Part VI, asset recovery; and Part VII, implementation issues.

II. PREVENTIVE MEASURES

In its focus on private sector as well as public sector measures, the UN Convention's chapter on preventive measures goes beyond prior anticorruption conventions. We will discuss both in turn, although it is the private sector measures that could, subject to national implementation, have the most direct impact on private companies.

A. Public Sector Measures

The public sector measures include requirements (subject to various degrees of obligation, as noted earlier) for countries to develop anticorruption policies and practices, to establish anticorruption bodies with the requisite independence to carry out their functions, to institute merit-based systems for selection of civil servants and -- taking into account their level of development -- to pay those civil servants adequate remuneration, to establish codes of conduct for public officials including measures to combat conflicts of interest, to implement transparent procurement systems, and to take measures to improve the transparency and accountability of public finances. Provisions of a fairly general nature relating to preventing corruption in the judiciary and prosecution services are also included (Article 11).

The public sector preventive measures also call on countries to take measures to enhance transparency in public administration generally, including through the adoption of freedom of information laws, simplification of administrative procedures, and publishing of information (Article 10). They require countries to take measures, within their means and in accordance with fundamental principles of domestic law, to promote public access to information, and opportunities for the public to participate in government decision-making (Article 13). If the U.S. experience is any indication, these provisions could have a significant impact in those countries that adopt them.

Perhaps most controversial among the UN Convention's public sector preventive measures is Article 7(3), dealing with campaign finance. This provision only requires countries to "consider" taking "

appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

Because of the soft nature of the “shall consider” obligation, this provision has been criticized as being so weak as to be toothless. Particularly those who consider the U.S. campaign financing system to be corrupt were hoping for a more forceful measure.

B. Private Sector Measures

Chapter II’s preventive measures focused on the private sector call on countries to take a variety of measures, in accordance with the fundamental principles of their domestic law, to prevent private sector corruption. The number of private sector-focused preventive measures appears to reflect an evolution in focus beyond the public sector, and a greater appreciation of the key role private sector compliance and good performance plays on the “supply side” of the corruption problem.

Requirements to establish accounting and internal control standards that roughly correspond to the FCPA’s books and records provisions are a significant, but not the sole, focus of the UN Convention’s private sector provisions. These provisions also contemplate the promotion of corporate codes of conduct, best practices, and compliance programs for business and the professions, measures to promote corporate transparency, including measures to assist in identifying the identity of legal and natural persons involved in the establishment and management of corporate entities, provisions to restrict the activities of former public officials (so-called “revolving door” provisions), and the disallowance of the tax deductibility of bribes. (Article 12).

The UN Convention also calls for countries to adopt a variety of anti-money laundering (AML) preventive measures. These measures are complemented by additional AML-related preventive measures found in the asset recovery chapter. (*See, e.g.*, Article 52, discussed in Section VI, *infra*) (Article 14). In doing so, it goes beyond prior conventions’ AML provisions, which focus on criminalization. New AML preventive measures (generally based on the non-treaty-based standards of the Financial Action Task Force (FATF) include the establishment of regulatory regimes for bank and non-bank financial institutions⁷, the establishment of financial intelligence units (FIUs), and measures to monitor cash transfers and the movement of negotiable instruments across borders. In addition, softer requirements (“shall consider implementing appropriate and feasible measures”) are imposed with respect to certain activities of financial institutions, including origination to provide identifying information with respect to electronic funds transfers, and enhanced scrutiny obligations for transactions that do not meet the established transparency standards.

⁷ Under U.S. laws, and under a number of other national AML regulatory regimes, the range of entities treated as financial institutions is surprisingly broad. It includes dealers in precious metals and gems, certain insurers, travel agents, automobile, boat and aircraft dealers, and others.

III. CRIMINALIZATION

As finally adopted, the UN Convention's criminalization chapter, Part III, although more limited in scope than what was on the table during the UN Convention's negotiation, calls for criminalization of a wide array of corrupt practices. In its broad scope and approach, it is more consistent with the regional conventions of the OAS and CoE (Criminal Law) Anti-Corruption Conventions than with the narrowly-focused OECD Antibribery Convention, although its provisions appear to go beyond even the wide scope of the regional convention. Some of the proposed offenses appear to be exceedingly broadly conceptualized, with the full scope of their application likely only to become clear through their implementation in national laws and enforcement. Even at this stage, however, it is apparent that a number of the provisions have potentially significant compliance implications for private parties.

Part III articulates an array of potential obligations with respect to criminalization, from the mandatory (*e.g.*, "shall adopt"), to the permissive ("shall consider adopting"), and other formulations in between. Although states apparently may take reservations to the provisions of this Chapter without restriction⁸ and other limitations or escape clauses apply as noted above, the UN Convention's criminalization provisions remain, at the end of the day, ambitious.

Chapter III also addresses a number of issues critical to how these offenses will be applied and enforced. For example, virtually all of the offenses require intent; the Convention (Article 28) does allow knowledge and intent to be inferred from circumstances, however, as discussed below.

Finally, Chapter III contains highly controversial provisions relating to private rights of action and the consequences of corruption. These are discussed separately in Part IV.

A. Criminalization Requirements

Below is a brief article-by-article summary which attempts to highlight some key features of the acts of corruption which are (to varying degrees as indicated) subject to the criminalization requirements in Chapter III.

- **Article 15: Bribery of National Public Officials:** This is a mandatory article requiring the criminalization of the domestic bribery of public officials, an act which is already criminalized in most national laws. The offense is defined in a way that is less broad than many existing national laws (the "promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act

⁸ International law, particularly the Vienna Convention on the Law of Treaties, imposes some general limitations on reservations authority. In general, the reservations must be germane and should not vitiate the basic purpose of the Treaty. *See* Vienna Convention on the Law of Treaties, 1115 U.N.T.S. 331, arts. 2(1)(d) & 19, *entry into force* Jan. 20, 1980.

or refrain from acting in the exercise of his or her official duties”), but is basically consistent with other conventions that include this type of offense.

A key issue for the application of this provision is the scope of definition of “public official” in Article 2(a). The UN Convention contains a semi-autonomous definition that establishes certain categories of persons as officials without regard to local law, but also extends the definition to any other person defined as a public official by local law. The autonomous component of the definition covers officials of all branches of government, specifically mentioning legislative, executive (which the *travaux préparatoires* indicate will include the military⁹), administrative and judicial, persons who perform a public function, and officials of public agencies or enterprises. Regrettably, there is no definition of the term “public enterprise.”¹⁰

- **Article 16: Bribery of Foreign Public Officials or Officials of Public International Organizations:** This provision of the UN Convention is the analogue to the U.S. Foreign Corrupt Practices Act (FCPA), and the transnational bribery offense established by Article 1(1) of the OECD Antibribery Convention and other conventions. Article 16 treats the two sides (supply and demand) of transnational bribery differently, requiring criminalization on the supply side (Article 16(1)) of bribes promised, offered or given to foreign public officials of officials of public international organizations, and requiring only consideration of criminalization on the demand side (Article 16(2)).¹¹ The term “foreign public official” as used in this Article is defined in Article 2(b) of the new Convention in an autonomous fashion that basically parallels the definition in the U.S. FCPA and the OECD Convention; Article 2(c) defines “official of a public international organization as international civil servants or, somewhat circularly, persons authorized to act for a public international organization (not defined or scheduled).

⁹ See paragraph 2, Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, Addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention Against Corruption, A/58/422/Add.1, note 38, 7 October 2003 (hereinafter, “Interpretive Notes”).

¹⁰ Where a government owns all or a majority of the equity of an enterprise, there is generally little disagreement that it should be treated as a public enterprise. Where, however, an enterprise has been partially privatized, or the government has only a minority equity interest but retains significant management or control authority, questions may arise about its status. The issue becomes even more difficult when the government stake is held through intermediate entities rather than directly. One would have expected a similar approach to this issue as the Convention took to the definition of official – establishing an autonomous standard that local law could expand but not contract.

¹¹ Some have criticized this difference; however, it likely arises because of the jurisdictional and immunities issues that arise in attempting to criminalize the activities of another country’s public officials.

- **Article 17: Embezzlement, Misappropriation, or other Diversion of Property by a Public Official:** This is a mandatory article that is fairly self-explanatory, and focuses principally on the actions of public officials, rather than private practices.
- **Article 18: Trading in Influence:** This is a non-mandatory article (“shall consider”) directed at public officials. Even in its non-mandatory state, this article is controversial to the extent it could reach into the realm of lobbying. Trading in influence measures are defined, in parallel supply and demand side provisions, as

the promising, offering or giving [or, on the demand side, solicitation or acceptance], to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party any undue advantage for the original instigator of the act or for any other person.

This final language is less broad than proposals considered during the negotiations. Earlier drafts of the UN Convention, for instance, expanded the “undue advantage” prong to encompass any favorable decision, and provided that the violation was committed whether or not the influence was exerted or whether or not the supposed influence led to the intended result.¹²

The Convention’s provision is similar to a provision of the CoE Criminal Law Convention,¹³ and the codes of many European countries now include anti-trading in influence provisions. Nor is the concept of improper influence wholly unknown to U.S. law, even though lobbying in the U.S. is legal, although regulated through statutes such as the Lobbying Disclosure Act.¹⁴ The U.S. FCPA and domestic bribery legislation, 18 U.S.C. § 201, contain an “influence” prong in addition to the action/inaction in relation to duties prong, so that benefits given to an official, either directly or indirectly, that are given corruptly in order to influence an official action or decision, as well as those given to procure that action or decision, can violate the FCPA or domestic bribery standards, provided the acts occur in a business context. What is potentially the most significant is that the trading in influence provision of the UN Convention applies not just to direct dealings with public officials, but also to transactions with any other

¹² See, e.g., Revised Draft United Nations Convention Against Corruption, art. 21, U.N. Doc. A/AC.261/3/Rev. 4, May 12, 2003.

¹³ Article 12, discussed in Section II.D.2, 2004 Paris Conference Comparative Paper, *supra* n. 1.

¹⁴ Lobbying Disclosure Act of 1995, P.L. 104-65, 109 Stat. 691, Dec. 19, 1995, *codified at* 2 U.S.C. § 1601, *et seq.*

person. Multinational codes of conduct must therefore take care to deal with this issue, which although not a universal standard, seems to be gaining in acceptance.

- **Article 19: Abuse of Functions:** This article, which is non-mandatory, applies to public officials and thus has only indirect application to companies and their personnel.
- **Article 20: Illicit Enrichment:** This provision requires states to consider, subject to their constitutions and fundamental principles of their legal systems, establishing an offense of illicit enrichment. This is defined as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” The offense is thus very similar to that contained in the Inter-American Convention Against Corruption of the OAS.¹⁵ For some countries, such as the U.S., constitutional issues are raised by such a provision because of its apparent shifting of the burden of proof in criminal proceedings to the defendant to prove lawfulness of income. Recognizing this, the UN Convention offers the double escape hatches of constitutional and fundamental principles of the host country’s law.
- **Article 21: Bribery in the Private Sector:** This article is framed in non-mandatory (“shall consider”) terms. It is applicable to economic, financial or commercial activities, and is therefore of direct relevance to businesses to the extent implemented by countries. The offense is crafted in a parallel fashion to the official bribery offense. On the supply side, it requires a promise, offer or giving of an “undue advantage” to a private person of any capacity in order that that person should act or refrain from acting in breach of his or her duties. There is a mirror image demand side provision.

Although non-mandatory, it is possible many states will criminalize commercial bribery if they have not already done so. The CoE Criminal Law Convention already requires it (although states may take a reservation to this provision).¹⁶ The EU has also decided that states should criminalize private sector bribery.¹⁷ Many countries in which significant privatization has occurred have already concluded that private sector bribery needs to be criminalized on the same footing as public sector bribery since the lines between the two have become blurred.

In the U.S., there is no federal legislation criminalizing private sector bribery *per se*, although most states do so. Federal prosecutors can use existing authorities,

¹⁵ Article IX; *see* Section II.C.1, 2004 Paris Conference Comparative Paper, *supra* n. 1.

¹⁶ Article 7; *see* Section II.D.2, *id.*

¹⁷ Joint Action 98/742/JHA of 22 Dec. 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, O.J.L. 358, Dec. 31, 1998, available at <<http://europa.eu.int/scadplus/leglen/lvb/133074.htm>>.

however, such as mail and wire fraud statutes, and interstate travel in aid of racketeering, to reach some commercial bribery, as was the case in the recent Salt Lake City Olympics prosecution. Indictment, *United States v. Thomas Welch and David Johnson*, Case No. 2:00CR-0324S, filed July 20, 2000 (D. Ut.).

- **Article 22: Embezzlement of Property in the Private Sector:** This provision corresponds to the public sector provision referred to above (Article 17), except that it is non-mandatory (“shall consider”). It applies to “any person who directs or works, in any capacity, in a private sector entity” who embezzles any property, private funds or securities, or any other thing of value entrusted to him or her by virtue of his or her position.
- **Article 23: Laundering of the Proceeds of Corruption:** This is a mandatory provision that focuses, as its title suggests, on criminalization of actions involving the proceeds of corruption crimes. The actions include conversion or transfer of property, concealment or disguise of the nature and source of property, and the acquisition, possession and use of property, as well as the participation in money laundering conspiracies. The UN Convention focuses on knowing activities with respect to all of these. It contemplates that both foreign and domestic corruption can serve as predicate offenses for money laundering of this type, provided that foreign corruption offenses must also be offenses under the laws of state prosecuting the conduct.

These provisions are more detailed than the money laundering provisions of other anticorruption conventions. For example, the OECD Convention only requires that foreign bribery be made a predicate offense to the same extent as domestic bribery. However, they are not as broad as some national anti-money laundering laws. All of the UN Convention’s provisions apply to the proceeds of corruption. One of the most frequently used anti-money laundering provisions of U.S. law in the corruption area in recent years is the prohibition on the interstate or international transport of funds to promote a corruption offense.¹⁸

- **Article 24: Concealment:** This is a non-mandatory offense (“shall consider”) that is not intended to undercut the AML obligations established by the preceding article. It focuses on the concealment or continued retention of property when the person involved knows that the property is the result of any offense established under the Convention.
- **Article 25: Obstruction of Justice:** This is a mandatory offense, focusing on inducing false testimony, interfering in the giving of testimony or the production

¹⁸ See, e.g., 18 U.S.C. § 1956(a)(2) (prohibiting interstate or international transfers of monetary instruments with the intent to promote a specified unlawful activity. The United States has relied on this provision in recent anti-corruption enforcement actions. See, e.g., *United States v. Giffen*, Case No. 1:03-cr-00404-WHP, filed April 2, 2003 (S.D.N.Y.); *United States v. Bodmer*, Case No. 1:03-cr-00947-SAS, filed Aug. 5, 2003 (S.D.N.Y.).

of evidence in a corruption-related proceeding, or the use of physical force, threats or intimidation to interfere with a law enforcement or justice official's exercise of official duties.

- **Article 27: Participation and Attempt:** Under this formulation, criminalization of participation would be mandatory, while criminalizing attempts and preparation for offenses would be optional. It is not entirely clear why the Convention makes this distinction.

In summary, the mandatory versus non-mandatory measures of the criminalization chapter of the UN Convention break down as follows:

- Mandatory: domestic bribery; the supply side of transnational bribery; embezzlement of public officials; illicit enrichment (with escape clauses); laundering of proceeds; obstruction; and participation.
- Non-Mandatory: the demand side of transnational bribery; trading in influence; abuse of function; private sector bribery; private sector embezzlement; concealment; and attempts and preparation.

B. Related Interpretive and Enforcement Issues

Additional provisions of Chapter III deal not with the criminal corruption-related offenses to be established, but with other relevant scope, interpretive, and law enforcement issues for these offenses. This includes standards of liability for legal persons (companies), how the knowledge and intent standards of the offenses are to be interpreted, statute of limitations, immunities, and jurisdiction. These provisions add important flesh to the bones of these offenses and should help to promote uniformity among national laws.

- **Article 26: Liability of Legal Persons and Corporate Sanctions:** This Article, while requiring countries to make legal persons (companies) liable for corrupt actions, does not require them to establish corporate criminal liability as exists in the United States and some other countries, but has historically not been found in civil law countries. Rather, it allows the liability to be criminal, civil or administrative in character. The UN Convention picks up the OECD's formulation for corporate sanctions ("effective, proportionate and dissuasive"), which seems to have become the preferred international formulation.
- **Article 28: Knowledge, Intent or Purpose as Elements of an Offense:** This article, as noted in the introduction to this section, would allow for intent to be inferred from circumstances. This is consistent with the U.S. "willful ignorance" standard that is used in many criminal contexts, including corruption and money laundering. This is a new provision in international anticorruption conventions. Like the U.S. "willful ignorance" standard, its practical importance could be enormous.

- **Article 29: Statute of Limitations:** The Convention requires countries to establish a “long” statute of limitations for any offenses established under this Convention. Thus, it appears that although a state may not be required to criminalize certain actions, *e.g.*, private sector bribery, should it do so, this Article would require it to ascribe a long statute of limitations to that offense. What is “long” is not specified.
- **Article 30: Prosecution, Adjudication, and Sanctions:** This Article contains a number of important concepts, including that sanctions (including early release or parole) should take into account the gravity of an offense, the disqualification of offenders from holding public office, and removal or suspension rights.

For many, however, the most troublesome provision of this Article will be paragraph 2, which deals with the issue of official immunities. It requires only that states

maintain, in accordance with [their] legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, for effectively investigating, prosecuting and adjudicating offenses established in accordance with this Convention.

It thus appears to give states almost unfettered discretion regarding immunities. In recent years, it has become increasingly obvious that immunities are a significant barrier to prosecution in many countries and are being manipulated so as to shield even former officials from suit (for example, by giving them figurehead positions in international organizations after they leave national office that confer continued immunity).¹⁹ While there is obviously some legitimate need for immunity from prosecution for sitting officials in order to enable them to perform their duties, these provisions seem inadequate. This concern is reinforced by the reservation in favor of domestic law contained in paragraph 9 of this article. This will almost certainly be an issue that needs to be addressed at the international level in the relatively near future.

- **Article 31: Freezing, Seizure and Confiscation:** This Article requires states to take a number of confiscation-related measures. The obligation is written in mandatory terms; the importance accorded to these measures is underscored by the qualifier “to the greatest extent possible within its domestic legal system.” It applies not only to proceeds of crime, but in 31(1)(b) to property “destined for use” in offenses. It requires that countries take measures to enable them to identify, trace, freeze and seize proceeds and instrumentalities of corruption-

¹⁹ See *Latin Leaders' Legal Escape Hatch*, washingtonpost.com, May 22, 2004, available at <<http://www.washingtonpost.com/wp-dyn/articles/A47238-2004May22.html>>.

related offenses. It also requires, in paragraph 7 that the courts of each state party should be empowered to seize bank, financial or commercial records to implement the purposes of this article and certain asset recovery provisions of Chapter V, without regard to bank secrecy. It allows countries to require than an offender (a term not defined) “demonstrate the lawful origin of such alleged proceeds of crime of other property subject to confiscation” (para (8)). However, it states that these provisions “shall not be so construed as to prejudice the rights of bona fide third parties.”

Although a number of national laws already contain provisions similar to these, they are by no means universal. Accordingly, the widespread adoption of such provisions could have a significant impact on business activity. and enforcement authorities.

- **Article 32: Protection of Witnesses, Experts and Victims:** This article is written in mandatory terms.
- **Article 33: Protection of Reporting Persons:** This is a whistleblower protection provision. Somewhat surprisingly, however, it is written in considerably weaker, non-mandatory, terms than the preceding article: “shall consider...appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds.”
- **Article 37: Cooperation with Law Enforcement Authorities:** This provision requires states to encourage voluntary disclosures by persons who have participated in the commission of an offense, and requires states to consider mitigating the punishment of persons who have provided substantial cooperation, and even to provide them with immunity. This provision would not require any changes to U.S. law, although many believe that current policies of U.S. enforcement officials do not provide adequate incentives for voluntary disclosures, since it is impossible for disclosing parties to predict the extent to which penalties will be reduced. Moreover, the granting of immunity, a practice in some areas of federal enforcement, is not generally used in this area.
- **Article 38: Cooperation Between National Authorities:** This article encourages cooperation between national authorities, including the provision of information on a country’s own initiative.
- **Article 39: Cooperation Between National Authorities and the Private Sector:** This article is focused on encouraging the reporting of offenses by the private sector. It is written in stronger terms for financial institutions than for other private parties, although even as to the latter who are habitual residents of a country, reporting is encouraged. This is consistent with the policing role that anti-money laundering laws have shifted to the private sector, and particularly to financial institutions, in recent years.

- **Article 40: Bank Secrecy:** This article requires countries to establish mechanisms to overcome bank secrecy limitations in domestic criminal investigations of anticorruption offenses. Although bank secrecy has begun to erode in recent years, aided by other conventions that restrict its use as a defense against criminal law enforcement, it has by no means been eliminated. The inclusion of this provision is thus potentially quite important. The presence of similar provisions in the OAS Convention was one of the main reasons that Convention was ratified by the United States.
- **Article 41: Criminal Record:** This provision allows countries to take into account convictions of anticorruption offenses that have occurred in other states.
- **Article 42: Jurisdiction:** In general, the proposed provisions regarding jurisdiction, which would apply to all of the offenses established in this part of the Convention and are therefore of broad significance, are consistent with those established in other conventions. While certain jurisdictional bases are mandatory (for example, territoriality), most are optional (nationality, habitual residence, and the protective principle (against a national of the state or the state itself).

All of the jurisdictional provisions refer to “the place” where the offense was committed. These provisions thus appear to take a unitary approach to the offense. To the extent offenses under the Convention, and particularly the offense of transnational bribery, are complex and capable of commission in more than one jurisdiction, the application of these requirements, if strictly followed by States Parties to establish only one place where an offense can be committed, may limit jurisdiction. In this regard, the jurisdictional provisions of the UN Convention may not prove to be adequately developed.

Paragraph (5) contemplates the possibility of multiple states having jurisdiction over a given matter. However, in requiring states to consult with a view towards coordinated action, it does not go beyond the provisions of the OECD Convention. Even though concerns about adequate enforcement exist, those cases that are prosecuted often spawn proceedings in multiple jurisdictions. Thus, it may not be too early to begin to articulate standards for which a country has the primary interest in prosecuting an alleged violation. To avoid multiple proceedings internationally, such priority of interest should arguably govern priority of prosecution. As will be discussed *infra* in Part V, Article 47 seems to move in the right direction in this regard.

IV. CONSEQUENCES OF CORRUPTION AND PRIVATE RIGHTS OF ACTION

The Convention also contains potentially far-reaching provisions on civil liability and collateral consequences. The two provisions discussed in this Part are Article 34, consequences of acts of corruption, and Article 35, compensation for damage.

- Article 34: Consequences of Acts of Corruption:** This article breaks significant new ground in international anticorruption conventions. It obliges states to take measures to address the consequences of corruption, including through the annulment or rescission of contracts, withdrawal of concessions, or other similar instruments that may have been tainted by corrupt practices. It is written in mandatory terms, but states are directed to give due regard to the rights of third parties acquired in good faith -- a key qualification -- and the obligation is subject as well to fundamental principles of the state's domestic law. On the other side, it is not limited by its terms to offenders -- that is, those convicted of violations of the offenses prescribed by the Convention. The absence of such a limitation may enable this article to be applied in a wider variety of situations than its inclusion in the criminalization chapter of the Convention suggests. Companies that do business abroad or at home through government contracts, concessions, licenses and permits should be aware that this provision may prompt more widespread revocation of rights than has historically been the case. This article does not speak to the issue of debarment or contracting ineligibility of the person found to have engaged in corrupt practices, but rather focuses on the property acquired through such practices. However, the Convention would not preclude debarments or declarations of ineligibility by national authorities.²⁰ Close attention should be paid to how this article is implemented by States Parties.
- Article 35: Compensation for Damages:** This Article requires states to take such measures as may be necessary, in accordance with their domestic law principles,

to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

The Article thus appears to require states to establish private rights of action in civil proceedings for damages. However, the *travaux préparatoires* to the Convention state as follows:

. . . this article is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State Party where the proceedings are to be brought). While article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its

²⁰ In the U.S., for example, the mere indictment of a company for corruption may result in suspension or debarment from government contracting. 48 C.F.R. §§ 9.407-2(a)-(b).

courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.²¹

This article is written in non-self-executing terms, meaning that, like most of the Convention's provisions, national legislation is required to implement it. The U.S. Government interprets this article as not requiring it to adopt new federal legislation establishing a cause of action for damages suffered from corruption.²²

However, other countries may adopt measures that permit injured parties to sue for compensation for acts of corruption. Measures promoting civil liability are required by the Council of Europe Civil Law Convention Against Corruption,²³ so the UN Convention is not the first international anticorruption treaty to focus on this area. However, the broader reach of the UN Convention will accelerate the trend in recent years for parties who claim injury from another's corrupt practices to bring civil suits.²⁴ These civil liability risks, coupled with the enhanced criminal liability risks, put an additional premium on preventive measures.

These two articles thus signal a resolve on the part of negotiators of the UN Convention to unleash the power of private civil litigation and collateral legal and administrative sanctions on persons that commit corrupt practices. The former can be seen as a further step in the privatization of law enforcement. Perhaps recognizing the difficulties national law enforcement authorities face in prosecuting bribery offenses, they see benefits to encouraging possible litigation. Evidence developed in such litigation may be useful in subsequent criminal prosecutions, or may alert prosecutors to situations which should be investigated. Civil suits also increase the costs of corruption.

Of course, such remedies may be abused. Just as an opponent of a merger or acquisition or a competing bidder may use complaints to authorities as an "offensive weapon" against his opponent in an attempt to scare and deter him, so litigation strike suits or requests to cancel contracts may be used to further private commercial interests rather than the public interest. It will thus be incumbent on the gatekeepers of these new rights to police their invocation to avoid what could otherwise be profound abuse. The reputational issues associated with corruption allegations make them a potent weapon. Higher initial standards of proof, such as those used in some types of defamation cases, may become necessary.

²¹ See note 38, Interpretive Notes, n. 8, *supra*.

²² See Treaty Doc. No. 109-6, at 10 (noting that "the current laws and practices of the United States are in compliance with Article 35"). The government's analysis also negates any intention that this provision create private rights of action under the U.S. Foreign Corrupt Practices Act. *Id.*

²³ Signed Nov. 11, 1999, entered into force Jan. 11, 2003. Council of Europe, ETS No. 174, available at <http://www.conventions.coe.int/treaty/en/treaties/html/174.htm>.

²⁴ See, e.g., *National Group v. Lucent Technologies*, Case No. 1:03-cv-06001-NRB, filed Aug. 8, 2003 (S.D.N.Y.).

V. INTERNATIONAL COOPERATION

Chapter IV of the Convention deals principally with mutual legal assistance and extradition. As with other anticorruption conventions, the UN Convention's provisions on these issues are designed to operate as independent treaties where permitted by local laws. They are also designed to supplement existing extradition and mutual legal assistance treaties.

The provisions in each area are exceedingly detailed, and would require many pages to explore fully. The Convention's general approach is to try to create a broad enabling framework for international cooperation in investigations and enforcement proceedings, and to eliminate obstacles (such as dual criminality requirements and bank secrecy laws) that are thought to have hindered prosecutions in the past.

As noted at the outset, most of the provisions of this Chapter are self-executing. Unlike, for example, the criminalization provisions, they require that no implementing legislation be passed by countries that are party to the UN Convention. However, in some cases they will be subject to existing national laws, while in others, they will be affected by treaties. They do not, as a result, operate in a vacuum.

Whether or not a particular offense is mandatory or permissive in Chapter III, Chapter IV applies once that offense has been implemented at the national level. The character of the cooperation obligation imposed by Chapter IV will turn in some cases on whether the offense is one for which dual criminality (criminalization in both the requesting and requested state) is present. For example, Article 44 (Extradition) applies on a mandatory basis to offenses for which there is dual criminality between the country making the extradition requests and the country where the person whose extradition is requested is present. Without such dual criminality, Article 44's provisions apply only on a permissive (discretionary) basis with the requested country.

As in other anticorruption treaties, Article 44's goal is to create a mechanism for extradition within the treaty, without having to resort to other treaties or national laws. Recognizing, however, that some countries (such as the United States) require that an extradition treaty exist with any country to which it extradites, to ensure a level of comfort with that country's judicial system, the UN Convention encourages States that do not accept the Convention as a basis for extradition to seek to conclude such treaties with other UN Convention countries to implement this article (Article 44(6)(b)).

The grounds for refusing extradition under the UN Convention are limited. Article 44(15) provides that:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political

opinions or that compliance with the request would cause prejudice to that person's position for every one of these reasons.

Also, any grounds for refusal to extradite present in domestic law or applicable extradition treaties may be invoked (Article 44(8)). However, the fact that the offense involves fiscal (tax) matters is not a ground for refusing to extradite (Article 44(16)).

Mutual legal assistance is required under the UN Convention for a wide array of activities, although confidentiality requirements and limited use principles may be applied. Bank secrecy is not a basis for refusal (Article 46(8)), nor, as noted earlier, is there a defense for a fiscal request. However, States retain various grounds for refusal, including sovereignty, security, public order, and other essential interests. Some of these grounds are potentially very broad, especially if the refusing state is permitted to define their scope.

Article 47 provides for states to consider the transfer of criminal proceedings from one state to another of cases involving Convention-related offenses where such transfer "is considered to be in the interests of the proper administration of justice, in particular where several jurisdictions are involved, with a view to concentrating the prosecution." This goes a step beyond other Convention's very general, and soft, obligation in Article 42, discussed in Part III.B, *supra*, to consult where multiple proceedings arise, and is potentially very useful. Article 49 established the possibility of joint investigations, and Article 48 calls for transboundary law enforcement cooperation.

Experience to date with other international conventions has demonstrated that the cooperation provisions are potentially the most significant tools of the conventions, especially where offenses like those established by the FCPA are concerned. That is because the evidence is almost by definition located in multiple jurisdictions. Today, international cooperation is much more prevalent than was the norm ten years ago. The UN Convention's provisions in this regard could have a profound impact, not only because of their depth and breadth but most importantly, because of their potential for creating a global, possibly even universal, enforcement network. The more countries that ratify the Convention, the more potent this network could be.

VI. ASSET RECOVERY

A detailed examination of the asset recovery provisions of the UN Convention is beyond the scope of this paper. Suffice to say that Chapter V of the UN Convention is effectively a treaty within a treaty. It is also, as noted earlier, the first anticorruption treaty to address the issue of asset recovery.

However, legal proceedings to recover assets are not the only topic of the chapter. As noted earlier, the Chapter includes a number of preventive measures as well, especially in the AML arena (*e.g.*, Article 52). These should be read in conjunction with the provisions in Chapter II, preventive measures. Their inclusion was based on the theory that effective preventive measures may avoid the need to undertake costly and difficult asset recovery efforts.

Although the UN Convention does not establish asset recovery as a fundamental right of states, it is articulated in Article 51 as a “fundamental principle” of the Convention. States are also directed to give each other the widest measure of cooperation and assistance in asset recovery. The Convention takes pains, however, to attempt to preserve the rights of *bona fide* purchasers and third parties who have innocently acquired property for value. How successful its attempt will be will be determined in individual cases arising under national laws.

The Chapter establishes mechanisms for recovery of property through international cooperation in confiscation, as well as requiring countries to establish measures for the direct recovery of property, for example, through civil suits. It requires States to “take such measures as may be necessary” to permit its courts to order that compensation be paid by those who have committed offenses established under the Convention to another State Party that has been harmed by the offense (Article 53(b)). This provision, while probably narrower than the provisions of Article 35, clearly raises an additional specter of civil liability risks. There are also provisions for the return of assets, once confiscated, including to their prior legitimate owners.

The possibility that property could be subject to claims for asset recovery underscores the need for companies to conduct due diligence when acquiring property rights, particularly those emanating from corrupt regimes, to determine what risks may inhere in the acquisition. Although *bona fide* purchasers may be protected, it seems unlikely companies will be able to shield themselves from acquiring that status by failing to do due diligence. Rather, it is more likely they will be charged with any knowledge reasonable and appropriate due diligence would have uncovered. This Chapter thus has far-reaching implications.

VII. IMPLEMENTATION ISSUES

Unlike the OECD Convention, which established from the outset a monitoring mechanism to ensure adequate implementation and enforcement, and similar provisions of other anticorruption conventions, the UN Convention does not prescribe such a mechanism. Rather, Article 63 establishes a conference of states parties which will meet periodically to facilitate cooperation, information exchange, and use of information produced by other anticorruption bodies. In addition, Chapter VI provides for technical assistance and training, as well as information exchange.

The challenges faced by other international bodies in making their respective monitoring mechanisms effective suggests that a UN monitoring mechanism would have faced even greater hurdles. Had the UN Convention established such a mechanism from the outset, it seems likely its potential for effectiveness would have been widely questioned. On the other hand, experience to date has shown that some monitoring capacity, however challenged, is essential. It would therefore be a mistake to simply conclude that the UN cannot effectively monitor such a wide-ranging instrument. The way forward would therefore seem to lie in crafting a mechanism that is complementary and non-duplicative of the efforts of other organizations that are judged to be effective. The resource-intensiveness of monitoring suggests that every effort should be given to streamline monitoring efforts among different international bodies and avoid duplication and inefficiency. The United Nations should also take steps to promote harmonization in implementation.

CONCLUSIONS

The UN Convention provides the basis for a truly global anticorruption architecture. While its effectiveness and impact will depend on national implementation and enforcement, the international cooperation provisions will provide an immediate boost to prosecutors seeking to obtain evidence abroad or the extradition of accused persons. Such cooperation provisions are features of other international anticorruption treaties, and their importance has been demonstrated even in the short history of those treaties. The broader the adherence to the UN Convention in years to come, the more the reach of national prosecutors will be enhanced.

The Convention also sets the stage for a potential explosion of claims for civil liability and for a dramatic increase in the collateral consequences of corruption. It provides developing countries with important new tools to attempt to recover looted assets.

For private companies, the Convention underscores the globalization of anticorruption standards and the need to have programs for prevention of corrupt practices that are likewise global in scope.