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## **Anti-Corruption Dilemmas in Transition Countries and UN Convention against Corruption**

### **1. Anti-Corruption Dilemmas in Transition Countries**

Transition involves a transformation in the formal political structures of the state and it invokes new norms and expectations for politics, yet only rarely are these norms and expectations widely shared among the political élites and broader populations of these states. Widespread corruption is one likely consequence, but its control depends very much on the precise character of the corrupt activity.

There are some specifics characterized corruption in countries of transition and with less democracies:

- Systemic Network of Corruption Pyramids
- Patron-client relationships, nepotism and cronyism
- Horizontal and vertical structures of corruption in Public sector
- Reducing petty corruption/bribery in many citizen-Government interactions. But corruption becomes more sophisticated and latent and moves to the spheres where big money and power rest: budgeting, special funds, procurement, and privatization
- “Anti-Corruption” or Democracy? – In some countries “Anti-corruption” serves as main justification for many institutional failures of the new authorities and authorities are applying the law selectively in the on-going anti-corruption drive. Government’s highly-publicized fight against corruption is sometimes politically motivated and is used to strengthen control over all sectors, and monopolize power.
- Lack of transparency and communication with the public in explaining reforms

Some challenges and dilemmas within Donor Sponsored Anti-Corruption Projects

- Corruption in international organizations is a special problem that has been rarely addressed, because the media and host governments are afraid of embarrassing international assistance efforts to which they owe such a debt of gratitude.
- Although the fight against corruption enjoys a broad international consensus, it is still unclear to what extent anti-corruption measures advocated by international organisations can indeed prove successful in the long term.
- Lack of coordination and overlapping between different anti-corruption projects
- Successful cases

## **2. UN Convention against Corruption - Potential to Transition Countries and Some Dilemmas**

*UNCAC is both a legal and political document.*

The UN Convention against Corruption is a revolutionary step in international criminal law, as it is the first international instrument that attempts to regulate corruption in one complex legal act. The UNCAC is also a manifestation of international consensus on what the states should do to prevent and criminalize corruption, and to improve international cooperation in combating corruption and recovering assets. The Convention highlights the importance of distributing responsibility among states for the occurrence of trans-boarder corruption crimes.

### **Major Achievements**

The UNCAC's major achievements are the diversity of preventive measures, criminalization of corruption in both public and private sectors, broadening of the concept of liability of legal persons, extension of the statute of limitations on corruption crimes, enhancement of the role of civil society and access to information, reinforcement of anti-money laundering measures, and encouragement of mutual legal assistance among states. The biggest UNCAC innovation has to do with asset recovery, which consists of measures for direct recovery of property, international cooperation for purposes of confiscation, and return and disposal of assets.

### **Some Weaknesses and Fears**

Many experts pointed out that one of main weaknesses of UNCAC is lack of concrete provisions

on a monitoring mechanisms and lack of resources for implementation. However it should be noted that after the 1st conference of state parties the situation has been improved and for instance, as the first step, UNODC has already completed the Self-Assessment Checklist on UNCAC Implementation, which is available (80 MB) on the UNODC website

At the same time UNCAC negotiators were unable to agree on a set of mandatory requirements and thus the convention is a mixture of mandatory and discretionary provisions. Experts also underscore the scarcity of obligatory provisions (for example, on political party financing, criminalization of private sector corruption, or whistleblower protection), which gives more discretion to national governments.

We all know that as with many international agreements, the devil is in the details. While the Convention requires signatories to take specific steps in various areas, the language is often notably vague in many areas. The parties are often given great discretion in how (and whether) to apply particular provisions.

For instance the phrase “in accordance with the fundamental principles of its legal system” found in many of the Convention’s Articles (e.g. 5 – Preventive Anti-corruption Policies and Practices; 6 – Preventive Anti-Corruption Body or Bodies, 7 – Public Sector, 10 – Public Reporting) may operate to hinder precisely those obligations found elsewhere in the article. Needless to say, few states explicitly sanction the abuse of public office, condone large-scale bribery or permit embezzlement. The problem is most often a lack of political will to prosecute the relevant individuals, the use of law as a political tool (i.e. selective prosecution for reasons other than that of limited resources), allocate sufficient personnel and material resources to combat the problem, support the existence of a free and vibrant press, and encourage civil society to play an active role in the policy making/monitoring process.

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- A mixture of mandatory and discretionary provisions.
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### **UNCAC and its Potential to the Situation in Transition Countries**

- Technical Assistance and Information Exchange: donor’s help in building capacity in the development and planning of strategic anticorruption policy, training authorities, enhancing financial and material assistance to support the anticorruption efforts

- The UNCAC also provides an agreed framework for providing support to developing countries to enhance their anti-corruption efforts. It specifically includes a chapter on Technical Assistance and Information Exchange. This covers a range of issues, including building capacity in the development and planning of strategic anticorruption policy, training competent authorities in the preparation of requests for mutual legal assistance, and activities relating to prevention of transfer of proceeds of offences. It also specifically calls on states parties, to the extent possible, to enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement the Convention successfully.
- Moreover, the UNCAC provides for a Conference of the States Parties to agree upon activities, procedures and methods of work to achieve the objectives of the Convention. These include mobilisation of voluntary contributions. Thus the Convention provides the possibility of an international institutional framework for assessing needs and coordinating development assistance in the field of anti-corruption.
- The public sector measures: anticorruption bodies, merit-based systems for selection of civil servants, codes of conduct for public officials, prevention of conflicts of interest, transparent procurement systems, the transparency and accountability of public finances.
- Preventing corruption in the judiciary and prosecution services
- Public access to information, and opportunities for the public to participate in government decision-making
- In its focus on public sector measures, the UN Convention's chapter on preventive measures goes beyond prior anticorruption conventions. 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). Information regarding the anti-corruption bodies and institutions established under the

- Convention must be made available to the public and anonymous reporting of incidents of corruption must be made possible.
- 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 weak. However the medal has another side: such "weak" provision (i.e. the possibility of reasonably limited, but still anonymous contributions to political parties financing from private persons) often is only one way to survive for the opposition parties in less democratic countries, as private legal or/and physical persons are afraid to provide them open financial assistance under authoritarian rules.*

### **Gaps analyses and legislative harmonizations process**

- 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.
- Many of the UNCAC 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). Therefore a role of gaps analysis report and proper amendments in national laws is extremely important.
- There are some specific issues which should be dealt with gaps analyses and legislative harmonizations process:
  1. Application of Treaty Law concerning UNCAC - uniform and in-depth understanding of signature and ratification of treaties. Implementation aspects of treaty law and other international instruments by domestic institutions.
  2. Drafting aspects of primary and secondary legislation in line with UNCAC, Guidelines and tools when interpreting international standards and notions,
  3. Preventive legislation and penal legislation aspects: Aspects of civil, criminal and criminal procedure law, as well as legislation related to conflict of interests and declaration of assets

- How congruous is domestic legislation with the UNCAC? What steps could the Government undertake to ensure effective implementation of the treaty? National legislation(s) should be studied directly or marginally dealing with anti-corruption issues, as well as international best practices for combating corruption. Gaps analyses\_reports should include recommendations about which changes and amendments to national legislation would be useful for ratification and effective implementation of the Convention.