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Convention against Corruption**

**Executive summaries**

**Note by the Secretariat**

**Addendum**

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\* CAC/COSP/IRG/2012/1.



## **II. Executive summaries**

### **Fiji**

#### **Legal system**

Fiji acceded to the Convention on 14 May 2008 (Depositary Notification C.N.373.2008.TREATIES-16).

Like other international instruments, the Convention is not self-executing in Fiji. Fiji officials advised that there is no single piece of legislation in Fiji that implements the Convention in its entirety into domestic law. Fiji officials advised that the principles of the Convention could also be established in domestic law through case law development.

The main legal instruments relevant for the implementation of the provisions of the Convention are the Crimes Decree 2009, which applies to conduct that occurred after February 2010, Penal Code (as amended), Prevention of Bribery Promulgation 2007, Proceeds of Crimes Act 1997 (as amended in 2004), Fiji Independent Commission Against Corruption (FICAC) Promulgation 2007, Financial Transactions Reporting Act 2004, Extradition Act 2003, and 1997 Mutual Legal Assistance in Criminal Matters Act and its 2005 amendment. Other legal instruments relevant for the implementation of the Convention are the Public Service Act 1999, including the Public Service Code of Conduct, the Sentencing and Penalties Decree 2009, the State Services Decree 2009, the Bail Act 2002 and the Prisons Act 1996. Common law principles are also relevant to the implementation of the provisions of the Convention.

The Fijian legal system is governed by the laws adopted from the colonial period and other international conventions and covenants that are ratified and accepted in Fiji. Fiji has a law reform and a law revision commission and continues to produce its own laws. The legal hierarchy of the courts of law encompasses the Magistrate's Court, followed by the High Court, which has unlimited jurisdiction, and the Fiji Court of Appeals, which has appellate jurisdiction to the Magistrate's and High Courts. The Supreme Court is the final appellate court in the legal hierarchy of Fiji.

On an institutional level, FICAC was established under section 3 of the FICAC Promulgation on 4 April 2007. Its mission is to effectively spearhead the prevention and combating of corruption in order to promote integrity, transparency and accountability for the attainment of zero tolerance of corruption, good governance and sustainable development for the benefit of all citizens of Fiji. FICAC follows a three-part approach to fighting and preventing corruption: prevention, investigation and prosecution, which aims to engage all relevant stakeholders, including the private sector, in the fight against corruption. A central component is promoting awareness of laws and mechanisms to report allegations. FICAC's challenges are having sufficient experienced prosecutors, qualified forensic auditors and sufficiently trained investigators.

Among the institutions relevant to the fight against corruption in Fiji, the Director of Public Prosecutions (DPP), Attorney General, Solicitor General, Financial Intelligence Unit (FIU), Police, Public Service Commission, Government Tender

Board, Auditor General and Ministry of Finance hold particular prominence. There is a national Anti-Money Laundering Council, which ensures cooperation with the DPP, and other relevant stakeholders include the judiciary, parliamentarians, the Independent Legal Services Commission, civil society, the private sector and the media.

Fiji is a member of the Asian Development Bank (ADB)/Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative for Asia-Pacific, the Asia/Pacific Group on Money Laundering, the Egmont Group of Financial Intelligence Units and the Pacific Islands Forum Secretariat (membership suspended as of the date of the country visit).

## **Reform efforts**

Fiji has not assessed the effectiveness of its measures adopted to implement the Convention. Fiji has requested assistance in conducting such an assessment in the form of different assessment mechanisms used by States parties. Moreover, since its ratification of the Convention, Fiji has identified some areas in its domestic law which are inconsistent with the Convention and amendments are being drafted for submission to Cabinet. For example, officials reported that for the full implementation of the article on extradition, a review and amendment of the Extradition Act are needed. Fiji indicated that it would require technical assistance to conduct an assessment of the Act and eventually for its revision.

Fiji's legal framework for extradition, mutual legal assistance and the recovery of proceeds of corruption was assessed in a 2007 report of the ADB/OECD Anti-Corruption Initiative for Asia-Pacific. Furthermore, a 2006 assessment report by the World Bank has been issued on Fiji's regime for anti-money-laundering and combating the financing of terrorism.

Concerning pending legislation, officials at the office of the DPP noted during the country visit that legislation addressing unexplained wealth was pending in the Attorney General's office

## **Observations on implementation**

### **Chapter III. Criminalization, articles 15 to 25**

Fiji's statutes use several terms to define the pertinent class of officials addressed by each statute. The terms used in the laws of Fiji are not consistent throughout.<sup>1</sup> During the country visit, high-level officials acknowledged the need for a gap analysis and harmonization of these terms in Fiji's legislation.

In general, due to constraints with regard to data collection, there were few cases reported to illustrate the implementation of the different provisions of UNCAC. Fiji officials acknowledged a need to develop statistical indicators to establish

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<sup>1</sup> For example, the Crimes Decree 2009 uses the term "public official". In subsequently cited statutes other non-identical coverage terms are used, such as "employed in the public service" (various sections of the Penal Code) and "public servant" in the Prevention of Bribery Promulgation.

benchmarks and measure progress. It was noted that no central office for the collection of corruption data exists.

Criminal offences are principally contained in the Crimes Decree 2009, the Prevention of Bribery Promulgation and the Penal Code. Specific implementing legislation for UNCAC has not been adopted.

Sections 134(1), 136(1), 135(1) and 137(1) of the Crimes Decree 2009 as well as Sections 4(1) and 4(2) of the Prevention of Bribery Promulgation and Sections 106(a) and (b) of the Penal Code criminalize active and passive bribery. Under common law principles, the concept of “reasonable excuse” provides the basis for an affirmative defence for which the defendant bears the burden of proof beyond a reasonable doubt. The active bribery provisions also apply to foreign public officials and officials of public international organizations. Officials explained that the Prevention of Bribery Promulgation 2007 covers conduct both within and outside of Fiji and cases were reported in which foreign officials had been charged with bribery. The non-mandatory UNCAC provisions on passive bribery of foreign public officials and officials of public international organizations have not been implemented, and reported challenges include the inadequacy of existing normative measures and limited capacity.

Section 274 (b) of the Penal Code and Section 319 of the Crimes Decree 2009 criminalize the embezzlement, misappropriation or other diversion of property by a public official. The concept of conversion in the Crimes Decree applies not just to public officials but to any person who is entrusted with or has received property, as well as company directors, members and officers. Moreover, trading in influence is criminalized in Sections 5(1) and 5(2) of the Prevention of Bribery Promulgation.

The concept of illicit enrichment is covered in Section 10 of the Prevention of Bribery Promulgation. There have been no cases to date under this section. It was noted that, while at present there is no asset and income disclosure regime for elected and public officials in Fiji, Ministers presently disclose their assets and interests to the Prime Minister, and annual financial disclosures are required for FICAC under FICAC Standing Orders. Public disclosure was not contemplated in Fiji at the time of the review.

Bribery in the private sector is prohibited by Section 149 of the Crimes Decree 2009, Section 9 of the Bribery Promulgation 2007 and, for conduct that occurred before February 2010, Section 376 of the Penal Code. High-level officials reported that a key priority for government is preventing and fighting corruption in the private sector.

Embezzlement in the private sector is covered in Section 9(2) of the Prevention of Bribery Promulgation and Section 274 of the Penal Code, as well as the corporate responsibility provisions (Sections 51-56) of the Crimes Decree 2009 for conduct that occurred after February 2010. Section 319 (conversion) of the Crimes Decree also covers the concept of misappropriation.

The Proceeds of Crimes Act 1997 (as amended) and the Crimes Decree 2009 (Sections 327-330) address the provisions of article 23 of UNCAC. During the country visit, officials at the FIU confirmed that Fiji’s money-laundering laws apply to a wide range of offences, namely all “serious offences”, as defined, and also to conduct occurring outside of Fiji. Section 69 of the Proceeds of Crimes Act

authorizes not only criminal but also civil forfeiture in corruption cases. No cases or statistics were provided during the review.

Sections 190 and 147 of the Crimes Decree 2009, as well as Sections 131 and 116 of the Penal Code cover the elements of the offence of obstruction of justice. During the country visit Fiji officials emphasized the broad authority of judges to issue appropriate orders in specific criminal proceedings. Physical protection has been afforded to judges and witnesses in specific cases.

### **Chapter III. General provisions and law enforcement, articles 26 to 42**

Fiji provides for criminal liability of legal persons in relevant provisions of the Crimes Decree 2009, Penal Code, and Prevention of Bribery Promulgation read together with the Interpretation Act. Part 8 of the Crimes Decree provides for the criminal responsibility of bodies corporate. Where criminal, civil and administrative liability are applied to natural persons, they can also be applied to legal persons. Penalties against legal entities are covered, inter alia, in Section 51(2) of the Crimes Decree 2009 and Section 15 of the Sentencing and Penalties Decree 2009.

Regarding the statute of limitations, Fiji relies on its common law. Unless specifically provided for in its legislation, Fiji does not impose any time limit for commencing prosecutions against offences. Section 31A of the Prevention of Bribery Promulgation 2007 establishes a 2-year limitations period from the time when the complaint or information arose for certain enumerated offences and a 1-year period for others. While the reviewers were initially concerned about the relatively short statutes of limitations, they received assurances from all relevant authorities that statutes of limitations do not present impediments to effective and timely prosecutions. The possible suspension of the statute of limitations where an alleged offender has evaded the administration of justice is not addressed.

Concerning the implementation of article 30, it was noted that the maximum sentence under the previous Penal Code was 7 years, while actual sentences imposed in corruption cases ranged on average from 2 to 5 years. Under the Crimes Decree, the maximum sentence is 10 years, but no sentences had been imposed in corruption cases at the time of the country visit. Section 12 of the Prevention of Bribery Promulgation further provides for fines and imprisonment of up to 10 years for corruption offences. Regarding paragraph 2 of article 30, Fiji officials reported that functional immunity is not granted to public and elected officials, though immunity from prosecution may be granted on a case by case basis to further the interests of the prosecution. The DPP is accountable to the Minister of Justice, and the Attorney General is not involved in the day-to-day operations of the DPP. Persons convicted of corruption offences may be disqualified for a period of 10 years from the date of conviction from being elected as members of Parliament and Cabinet under Section 33 of the Prevention of Bribery Promulgation 2007.

Fiji has implemented article 31 of UNCAC in relevant provisions of the Proceeds of Crimes Act 1997 and Financial Transactions Reporting Act 2004. It was noted that there have been no cases by FICAC under the Proceeds of Crimes Act. Further, the Act does not authorize FICAC to seize and confiscate assets, and this authority is currently exercised by the DPP.

It was observed that Fiji appears to have done little in the way of witness and victim protection beyond fairly standard obstruction of justice statutes contained

principally in the Penal Code and Crimes Decree. Due to limited resources, there are no witness protection programmes. Several of the elements of article 32 are not implemented, due to limited capacity, specificities in the legal system and the inadequacy of existing implementing normative measures. Further, Fiji provides no protection for whistle-blowers beyond measures protecting the identity of informants and allowing anonymous reporting. Officials confirmed that whistle-blower protection is a serious problem, citing job loss and re-posting as possible consequences of reporting misconduct.

Fiji has available a broad range of options to address possible consequences of corruption as envisioned by UNCAC article 34, notably the possibility of contract rescissions. Practical examples of implementation were provided. High-level officials emphasized that an authority to blacklist companies would be useful.

Regarding the institutional framework to tackle corruption, Fiji has partially implemented UNCAC article 36 with the creation of FICAC. Section 5 of the FICAC Promulgation provides for the independence of the FICAC, but states that the Commissioner is subject to the orders and control of the President. The reviewing States parties observed that, due to the significance of the position, and given that current Deputy Commissioner's five-year term ends in 2012, a prolonged vacancy has the potential to erode public confidence in FICAC. Priority challenges in the fight against corruption are engaging relevant stakeholders, promoting public awareness and encouraging the reporting of corruption incidents. It was noted that the number of corruption cases instituted by FICAC relative to the total number of allegations is strikingly low, due to FICAC's encouraging open lines of communication with the public. During the country visit, civil society representatives expressed their opinion that corruption levels had decreased in recent years and emphasized the importance of timely resolution of criminal prosecutions.

Fiji has partially implemented article 37 of UNCAC, although concrete protections afforded to cooperating witnesses are limited to fairly standard obstruction of justice statutes and protections of confidentiality. It was noted that the DPP may grant immunity to a person who agrees to testify in another prosecution. FICAC can withdraw charges on a case-by-case basis against cooperating participants in corruption matters, and charges can be reduced or otherwise modified in appropriate instances of cooperation. While various measures are in place through which national authorities cooperate with law enforcement, communication and data sharing among law enforcement is a challenge in Fiji. The reviewing States parties acknowledged FICAC's outreach to civil servants and the private sector in fighting corruption as well as oversight of the legal profession.

#### **Chapter IV. International cooperation, articles 44 to 50**

Relevant instruments and frameworks of bilateral/multilateral cooperation as provided by Fiji include the Commonwealth system, INTERPOL, the Pacific Transnational Crime Coordination Centre (comprising Fiji, Papua New Guinea, Samoa, Tonga and Vanuatu), the Asia/Pacific Group on Money Laundering, and the Egmont Group. With regard to extradition, Fiji is a member of the Pacific Islands Forum, which comprises 16 States. Fiji has extradition treaties with New Zealand and China. A number of other bilateral treaties which were extended to Fiji by virtue

of its former status as a colony of Great Britain have also been in use (with Poland, Spain, Switzerland, the USA, Thailand and Uruguay).

**Extradition, transfer of sentenced persons and transfer of criminal proceedings (Articles 44, 45 and 47)**

The conditions and procedures regulating extradition to and from Fiji are found in the 2003 Extradition Act. Dual criminality is a requirement for extradition from Fiji, and the definition of dual criminality is conduct-based. Fiji currently has two bilateral treaties in place with New Zealand and China. Several treaties concluded by Great Britain before Fiji's independence have been also in use.

Fiji is able to grant extradition for most offences covered by the Convention pursuant to its 2003 Extradition Act, in combination with existing bilateral treaties and arrangements in place with Commonwealth countries, Pacific Islands Forum countries, treaty countries and comity countries. In particular, the Pacific Islands Forum scheme allows Fiji to handle incoming and outgoing extradition requests with other Pacific Islands Forum countries efficiently and in a timely manner.

Fiji has extradited two fugitives pursuant to the 2003 Extradition Act and one case is currently pending in the High Court. At the time of the review, Fiji had made three extradition requests to other countries, of which two were pending and one had been denied.

Article 44.2 is covered by Section 3(4) of the 2003 Extradition Act. However, in practice, Fiji has not had any cases in which it received an extradition request for an act that was not criminalized under Fijian laws.

With regard to article 44.3, Fiji provided that it may grant extradition only for extraditable offences, and that it may request that the person whose extradition is sought be tried in the requesting State only for those offences, pursuant to the rule of specialty.

Extradition shall not be conducted in cases of political offences (Section 4, Extradition Act). The Extradition Act contains a negative definition of political offences, which does not refer to corruption offences.

There was some uncertainty among the reviewing experts and the officials consulted during the country visit as to whether the Convention can be used as a sole legal basis for making and acting upon extradition requests. Thus, the reviewers were of the view that article 44.5, although not implemented by Fiji, has limited impact because Fiji does not make extradition conditional on the existence of a treaty.

The Extradition Act establishes the minimum requirements (Section 3(1)) for granting and grounds for refusal (Section 4) of requests. If extradition is refused for such reason, Fiji may prosecute the person if there is sufficient evidence and the conduct in question meets the dual criminality test. Alternatively, Fiji may extradite the person solely for trial, after which the person, if convicted, is returned to serve any sentences. Extradition may also be denied if the person sought is a Fijian citizen, though Fiji may prosecute nationals in lieu of extradition. Fiji reported that it had never refused extradition based on the grounds of nationality. Simultaneous proceedings and double jeopardy, among other factors may also be grounds to refuse extradition.

The Extradition Act provides the legal framework for all incoming and outgoing extradition requests in Fiji, including requests made in the absence of a treaty. However, the Act does not expressly require reciprocity for cooperation in the absence of a treaty.

Due to the absence of a Constitution at the time of the country visit, Fiji does not have formal arrangements or requirements in place to implement paragraph 14 of article 44. However, it was confirmed that Section 4 of the Extradition Act continues to be applicable in the absence of a Constitution and the relevant protection has been granted under common-law principles. The reviewing experts strongly noted the fundamental importance of guaranteeing fair treatment in extradition cases and reaffirmed the importance of measures being in place to address the situation where extradition cases are brought for purposes of discrimination.

Fiji reported that it has not entered into any bilateral or multilateral agreements with regard to the transfer of sentenced persons. One request for transferring a prisoner sentenced in Fiji to his country had been refused because there was no legal framework in place for this purpose.

With regard to article 47, Fiji has considered transferring criminal proceedings in appropriate cases. An example was provided where it was agreed, following consultations, that the prosecution should occur in Fiji. The prosecution was successfully concluded and the convicted person was serving a lengthy sentence in Fiji at the time of the country visit.

#### **Mutual legal assistance (Article 46)**

The conditions and procedures regulating mutual legal assistance are found in the 1997 Mutual Legal Assistance in Criminal Matters Act, as well as its 2006 amendment. There is no other bilateral or multilateral agreement by Fiji in place. Some provisions of the Proceeds of Crime Act apply as well with regard to confiscation matters.

Fiji reported that it has not refused assistance or the provision of information in investigation requests by foreign countries. The reviewers noted that assistance was rendered informally by the DPP to foreign colleagues and through police networks such as INTERPOL. Policy, practice and procedure in connection with mutual legal assistance afforded by Fiji generally conforms to the requirements of article 46 of the Convention in affording the widest possible measure of mutual legal assistance in relation to offences established under the Convention.

The reviewers observed that Fiji is in substantial compliance with the provisions of paragraph 3 of article 46, noting that the Mutual Legal Assistance in Criminal Matters Act of Fiji contains provisions for the facilitation of foreign forfeiture orders, foreign restraining orders and foreign pecuniary penalty orders, and that Fiji's policies, practices and procedures are to afford mutual legal assistance in each of the categories enumerated in article 46.3.

With regard to article 46.8, there is no specific provision relating to the lifting of the corporate veil under the Mutual Legal Assistance in Criminal Matters Act. However, the Financial Transactions Reporting Act has been used by the FIU of Fiji to obtain information and assist the police in terms of property-tracking documents.



Section 50 of the Proceeds of Crime Act is also used to make applications for inspection orders and for the production of documents that would assist the Police in locating, tracing and freezing proceeds of crime. The reviewing experts were satisfied that Fiji had not and would not decline to render mutual legal assistance on the grounds of bank secrecy.

There is no specific provision in the Mutual Legal Assistance in Criminal Matters Act for assistance to be rendered in the absence of dual criminality. The reviewing experts were satisfied that dual criminality is not required for Fiji to render mutual legal assistance.

Fiji reported that the Attorney General is the designated central authority for mutual legal assistance, though this function does not involve any substantive review of requests.

Witnesses and experts can be heard in Fiji in relation to mutual legal assistance, as foreseen by article 46.18 of the Convention. The reviewing experts highlighted that the extensive use of video links, as permitted by Section 11(5) of the Mutual Legal Assistance in Criminal Matters Act, is effective.

With regard to the grounds for refusal of requests, the reviewing experts were satisfied that Sections 4 and 6 of the Mutual Legal Assistance in Criminal Matters Act contemplate the grounds for refusal. Fiji stated that it has not previously refused a request for mutual legal assistance in criminal matters, and that it would provide reasons for the denial if the situation arose. In practice, the DPP consults relevant authorities of the requesting States before refusing any requests.

#### **Law enforcement cooperation, joint investigations and special investigative techniques (Articles 48 to 50)**

Fijian law enforcement agencies cooperate with their foreign counterparts both through formal and informal channels. The reviewing experts observed that Fiji has effective channels of communication in place for Fiji to cooperate with other States for the purposes enumerated in article 48 of the Convention.

The reviewers observed that national authorities have an effective cooperation framework in place to facilitate international cooperation. Given that Fijian law enforcement authorities have established a record of collaborating with foreign counterparts, experts believe that there is no demonstrated need for formal cooperation mechanisms in this area.

Regarding special investigative techniques, while FICAC is permitted to conduct telephone tapping upon the prior permission of the President, FICAC reported that it does not have the equipment, nor the expertise and experience to use the techniques foreseen in the Convention. While the Police use surveillance and information techniques in corruption cases, when necessary they are able to use special investigative techniques in cooperating with foreign law enforcement authorities. Experts observed that there has been no need to enter into agreements or arrangements for using special investigative techniques in the context of international cooperation.

## 1. Recommendations and technical assistance needs

While Fiji has made progress towards implementing the Convention, a number of institutions relevant to the prevention and combating of corruption needed to be further encouraged and strengthened. Moreover, key pieces of legislation had been operational only for a few years and needed to be more fully and effectively applied, including through appropriate awareness-raising among relevant institutions. The reviewing States parties made a number of specific recommendations in several areas related to the implementation of UNCAC:

With regard to existing institutional frameworks, a number of arrangements and processes could be streamlined and optimized. Notably, concerning corruption in the private sector, the reviewing States parties recommend that FICAC explore opportunities for increased cooperation with the DPP, the office with primary responsibility for prosecuting private sector corruption, given the need for specialized investigative and analytical skills in their complimentary responsibilities to fight corruption. Furthermore, at the time of the review, FICAC referred cases involving corruption in the private sector to the police, leading to further diffusion of authority. With regard to asset confiscation and forfeiture, the reviewing States parties recommend that Fiji consider including FICAC as an agency authorized under the Proceeds of Crimes Act to seize and confiscate assets, as this authority is currently exercised by the DPP. The reviewing States parties also recommended that FICAC track the source of referrals to more efficiently focus resources and promote awareness. In this connection the reviewing States parties further recommended that the reports of the Auditor General be made publicly available.

Concerning the public sector, it was noted that there is no legal requirement that public officials report corruption, and the reviewing States parties recommended that Fiji should consider instituting appropriate administrative measures. Further, given the challenges in staffing the disciplinary tribunal of the Public Service Commission with civil servants adequately trained to handle ethics and disciplinary matters and frequent reassignments, the reviewing States parties recommend that a cadre of adequately trained civil servants be dedicated to fulfil the assigned functions.

It was suggested that Fiji take appropriate measures to more fully implement the witness and victim protection provisions of the Convention.

Concerning extradition, experts recommend that Fiji examine whether any enabling legislation is required to ensure compliance with article 44 of the Convention. This may include adding the Convention to the annex of the Extradition Act or enacting additional stand-alone legislation.

Concerning mutual legal assistance, experts noted that there appears to be a lack of enabling legislation in the domestic law of Fiji to fully implement the provisions of article 46. They recommend that Fiji closely examine its current law to ensure that the necessary enabling legislation for article 46 is in place and, if necessary, promptly enact legislation. Experts believed that Fiji effectively cooperates in mutual legal assistance matters through informal networks, but encouraged Fiji to consider entering into bilateral or multilateral agreements or arrangements to use article 46 to its full extent.

The technical assistance needs identified during the country review were related to capacity-building assistance for relevant stakeholders as a crucial condition for the successful implementation of UNCAC. This included capacity-building for authorities responsible for establishing and managing witness and expert protection programmes, as well as capacity-building with respect to whistle-blower protection, in particular those that would affect public servants. A need for FICAC to have sufficient experienced prosecutors, qualified forensic auditors and sufficiently trained investigators to carry out its functions effectively was identified and a need for capacity-building for all relevant criminal justice officials on investigating corruption cases under the recently enacted Crimes Decree was noted. Moreover, specific training for law enforcement was highlighted in the area of money-laundering. Specialized training for prosecutors and investigators on matters related to asset confiscation and forfeiture, including on the Proceeds of Crime Act and pending legislation on unexplained wealth, are also needed. In addition to capacity-building, a need for appropriate legislation and model legislation was observed with respect to witness protection provisions and foreign bribery. Furthermore, a summary of good practices and lessons learned as well as legislative drafting assistance was requested with respect to the provisions on criminal record (article 41).

There is a need to assess the comprehensiveness and effectiveness of the 2003 Extradition Act. If necessary, this law could be reviewed in order to develop a generally comprehensive framework for extradition to implement article 44 of the Convention. Technical assistance to this end would be helpful. A model legislation on undercover operations would be also useful for the Police.

## **United States of America**

### **Legal system**

The United States signed the UNCAC on 9 December 2003. The Convention was approved by the U.S. Senate on 15 September 2006. The ratification documentation was deposited with the United Nations on 30 October 2006 with a reservation preserving the right to assume obligations under the Convention in a manner consistent with the fundamental U.S. principles of federalism. Article VI of the U.S. Constitution states that such ratified treaties, along with federal law, constitute the “supreme Law of the Land.”

### **Overall findings**

Combating corruption is among the highest priorities of U.S. law enforcement authorities and substantial resources are devoted to the fight against corrupt practices. An inevitable outcome of the federal system and the strict separation of powers is that various authorities are involved in the investigation and prosecution of corruption offences.

Over the years, the United States has significantly strengthened its overall anti-corruption measures, implementing a large number of statutory amendments and structural changes. Consequently, the U.S. authorities have demonstrated impressive results against corruption in terms of legislative and regulatory

enforcement action, as well as indictments and convictions even in cases involving high-level corruption. Some elements for improvement, as indicated during the country review, are highlighted below.

One question raised was how the UNCAC can be implemented domestically consistent with the U.S. federal system. In this regard, the United States reserved the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. Although the reviewing experts found no evidence of gaps, the point was raised that given the complexity of the federal and state system, it might be possible for some criminal conduct not to be covered. The United States asserted that there are no gaps. In fact, most corruption cases pursued by the Justice Department are against state and local officials.

## **Criminalization and law enforcement**

### **Criminalization**

Domestic public corruption, whether active or passive, is criminalized under both federal and state laws. Under a broad range of federal laws, corruption committed by and against federal, state, and local officials is a criminal offence.

Concerning foreign public officials, active bribery is penalized under the Foreign Corrupt Practices Act (FCPA) of 1977. The FCPA concentrates on bribery in business activity, and applies to U.S. citizens and companies, whether operating in the U.S. or abroad, and with respect to foreign nationals and companies provided that acts in furtherance of the misconduct occur within the territorial jurisdiction of the U.S.

Relevant jurisprudence resulting from challenges to the definition of “foreign official” in the FCPA has been reported which confirms the U.S. Government interpretation that this definition covers employees of public enterprises, as well as all those holding legislative, judicial or executive positions. The definition also includes officials of political parties.

The reviewing experts observed that, while the FCPA criminalizes many forms of payment made to foreign government officials and employees, there is an exception for facilitation or expediting payments made to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official. In contrast, the principal domestic bribery statute contains no such exception.

In this regard, the competent U.S. authorities stated that the FCPA provisions provided additional clarification as to the reach of the Act, as such payments would lack the necessary intent to corrupt and would thus not fall within the parameters of the Act’s prohibitions in any event. However, the U.S. noted that facilitation payments could violate the accounting provisions of the FCPA, and there had been prosecutions for such violations. The examiners noted that the United States may well be the only country to have prosecuted such payments to foreign officials.

Notwithstanding the fact that the obligation of appropriate mens rea to establish a criminal offence is part of the “fundamental principles” of the U.S. legal system, as

well as a constituent element of the offence in article 16, paragraph 1, of the UNCAC (“committed intentionally”), the reviewing experts noted that the Convention contains no enumerated exception for facilitation payments. Accordingly, the United States should consider continuing to review its policies and approach on facilitation payments in order to effectively combat the phenomenon. The U.S. authorities should also continue to encourage companies to prohibit or discourage the use of facilitation payments, for example through including rules on facilitation payments in internal company controls, ethics and compliance programmes or measures.

For reasons of policy and jurisdictional concerns, the United States has not criminalized passive bribery of foreign public officials and is not required to do so under the UNCAC. However, foreign public officials have been prosecuted for money-laundering based on corruption or pursuant to the mail and wire fraud statutes, where such officials have fallen within U.S. jurisdiction.

The United States has implemented legislation to criminalize both the active and passive forms of trading in influence. Post employment restrictions of federal employees are also statutorily foreseen to prevent the exercise of any influence to obtain an undue advantage for a third person.

Constitutional limitations pertaining to the presumption of innocence hinder the — optional — criminalization of illicit enrichment. However, evidence of unexplained wealth can be introduced at trial as circumstantial evidence supporting charges of public corruption or other offences. Moreover, criminal statutes obligate senior-level officials in the federal Government to file truthful financial disclosure statements, subject to criminal penalties.

The United States has not enacted legislation at the federal level establishing domestic bribery in the private sector (commercial bribery) per se as a criminal offence because, pursuant to the U.S. Constitution, such crimes are exclusively reserved to the States to criminalize unless an additional element of the crime is added to the underlying offence which provides a basis for federal jurisdiction. In such cases, prosecution at the federal level may be and has been carried out through, inter alia, the mail and wire fraud statutes and the Travel Act. On the state level, 38 states have explicitly prohibited commercial bribery, whilst some states prosecute commercial bribery using generally applicable fraud statutes. In the states where commercial bribery is not a crime, the conduct is often punishable under unfair trade practices laws. Notwithstanding the lack of a federal commercial bribery law, commercial bribery can be and has been effectively prosecuted in the United States.

The reviewing experts noted that there had been increased enforcement of laws prohibiting foreign commercial bribery over the past fourteen years, even though it is not a mandatory UNCAC offence. Although other statutes criminalizing pertinent conducts were used to criminalize domestic bribery in the private sector at the federal level, such bribery seemed not to attract equal attention as official bribery.

There is no federal statute that prohibits embezzlement in the private sector in all circumstances. However, various federal laws can be used to cover many situations involving embezzlement in the private sector, while embezzlement from a private entity is primarily criminalized under state legislation.

Sections 1956 and 1957 of Title 18 of the Criminal Code criminalize money-laundering. In addition, the Bank Secrecy Act (BSA) and its implementing regulations require financial institutions and persons to file certain reports of financial transactions and create criminal offences for failure to file a report when required.

The United States has adopted a list approach to define the scope of predicate offences. The list includes almost all of the 20 designated categories of offences set out in the Glossary to the FATF 40 Recommendations. However, only 12 out of the 20 designated categories of offences are deemed predicate offences for money-laundering if they occurred abroad. Legislative language had been proposed to allow the expansion of the number of predicate offences and, thus, include any foreign crime that would be a felony predicate offence if it had occurred within the U.S. In the meantime, U.S. law specifies that offences occurring in another country and covered by any multilateral treaty under which the United States would be obligated to prosecute can be considered predicate offences, which would cover the mandatory UNCAC offences.

The money-laundering laws criminalize the laundering of property by any third party as well as the person who committed the predicate offence.

A number of federal laws criminalize as a form of obstruction of justice the use of inducement, threats or force to interfere with witnesses or officials. Moreover, several federal laws criminalize as obstruction of justice the interference with actions of judicial or law enforcement officials.

Overall, the domestic criminalization provisions comply with the UNCAC requirements. The following observations are brought to the attention of the U.S. authorities with a view to ensuring full compliance with the Convention and further strengthening the implementation and impact of the U.S. anti-corruption legislation:

- Continue to periodically review its policies and approach on facilitation payments in order to effectively combat the phenomenon and continue to encourage companies to prohibit or discourage the use of such payments e.g. in internal company controls, ethics and compliance programmes or measures;
- While noting that the current U.S. law recognizes the mandatory UNCAC offences as predicate offences for money-laundering purposes, continue efforts to amend federal legislation, and to the extent not yet accomplished state laws, to expand the general scope of predicate offences for money-laundering purposes and increase the number of predicate offences relating to conduct committed outside U.S. jurisdiction.

## **Law enforcement**

### **1. Legal framework supporting law enforcement**

The sanctions applicable to both legal and natural persons involved in corruption-related offences appear to be sufficiently dissuasive. The maximum sentences are set forth by law, but the general ranges of possible penalties are set forth in the Federal Sentencing Guidelines. Factors considered in the determination

of the sentences include the type of conduct associated with the offence and the criminal history of the defendant. Criminal violations may also be punished by the imposition of fines. Civil and administrative sanctions are also available for the government to redress corruption.

The statute of limitations for most non-capital federal offences is five years, which can further be “tolled” (i.e. suspended) for up to three years in initiated, but not completed, MLA proceedings. The reviewing experts took note of the assurances provided by the U.S. authorities regarding the adequacy of the limitations period and indicated that the lack of available statistics created difficulties in thoroughly assessing the issue. However, they recommended that a possible extension of the 5-year statute of limitations might be considered for practical reasons, as the lack of longer limitations period may create difficulties in the investigation of complex corruption cases, where the evidence gathering is challenging and may also involve multiple jurisdictions. In addition, an extension of the limitations period could also serve the purposes of legislative consistency and coherence, as such period is longer for a few other select economic crimes.

Under general legal principles, the United States may hold legal persons criminally responsible, as it does for individuals. A corporation is held accountable for the unlawful acts of its officers, employees and agents when these persons act within the scope of their duties and for the benefit of the corporation. The corporation is generally liable for acts of its employees with the exception of acts which are outside the employee’s assigned duties or are contrary to the company’s interests, or where the employee actively hides the activities from the employer. The criminal responsibility of the legal person is engaged by the act of any corporate employee, not merely high-level executives. The sanctions against legal persons, which may be criminal, civil or administrative, can further be mitigated if an effective compliance programme is already in place.

Generally, no public official in the U.S. federal Government has constitutional or statutory immunity from criminal investigation or prosecution relating to corruption. Certain procedural and timing considerations, however, do exist for certain categories of officials.

Prosecutors have discretionary powers to prosecute or decline to pursue allegations of criminal violations of federal criminal law. Those discretionary powers are based on considerations such as strength of the evidence, deterrent impact, adequacy of other remedies, and collateral consequences, and do not include political or economic factors. At the federal level, prosecutorial discretion is vested solely in the Department of Justice and the Attorney General, and protected from influence by improper political considerations. Allegations of prosecutorial misconduct can be brought before the courts at any time, including selective prosecution based on a number of prohibited factors.

In terms of prosecuting foreign and transnational bribery, the reviewing experts noted that law enforcement had been effective in combating and deterring corruption and, within the framework of prosecutorial discretion and other aspects of the U.S. legal system, had developed a number of good practices demonstrating a significant enforcement level in the U.S.

Measures to ensure that an accused person does not flee or leave the country pending trial were within the purview of the judicial authorities.

When considering the early release of persons convicted for UNCAC offences, the gravity of the offence is considered. There is regular follow-up and reporting conducted by the Bureau of Justice Statistics, often corroborated by independent federally funded grantees, which constitutes a good practice and could serve as an example for other States parties.

The United States has established disciplinary procedures to enable the removal, suspension or re-assignment of federal officials. The requirements for launching such procedures vary depending on the type of officials involved.

At the U.S. federal level, there is a two-tier system of conviction-based in personam forfeiture and non-conviction-based in rem forfeiture. These two parallel systems provide for the forfeiture of both the instrumentalities and proceeds of crime. Thus, the U.S. legal system goes beyond the UNCAC optional requirement on non-conviction based confiscation (article 54, paragraph 1 (c)). Administrative forfeiture can also be applied under certain conditions.

Under the U.S. legislation, defences are available in both civil and criminal forfeiture proceedings to bona fide third parties.

The United States relies on a wide range of protection measures for witnesses and victims. Protection is provided not only to persons that actually testify in criminal proceedings, but also to potential witnesses, as well as the immediate and extended family members of the witnesses and potential witnesses and the persons closely associated with them, if an analysis of the threat determines that such protection is necessary.

From an operational point of view, the protection of witnesses' and victims' physical security can be secured through the Federal Witness Security Program, if these persons meet the requirements for participation in that Program. Other procedures are also in place to provide limited protection through financial assistance for relocation.

With regard to the protection of reporting persons, the Federal Whistleblower Protection Act of 1989 makes the Office of the Special Counsel (OSC) responsible for, inter alia, protecting employees, former employees, and applicants for employment from twelve statutory prohibited personnel practices; and receiving, investigating, and litigating allegations of such practices.

The protection of witnesses may also be extended to cooperating informants and defendants who agree to become government trial witnesses. The discretionary powers of the prosecution services are of relevance. In addition to granting immunity, prosecutors often negotiate a plea agreement with a defendant to induce that defendant's cooperation by dismissing one or more of the charges, and/or by recommending that the defendant receive a lower sentence in exchange for his/her cooperation.

The United States is empowered to annul or void fraudulently obtained contracts with the federal Government and may sue for rescission in federal court to annul a fraudulently procured contract. The federal Government is also empowered to administratively bar a private firm from receiving further government contracts due to, inter alia, the contractor's corrupt acts in the acquisition or performance of a government contract.



The reviewing experts observed that the U.S. legislation was in compliance with article 40 of the UNCAC on bank secrecy. The U.S. authorities may wish to have in mind that, in terms of implementation, bank secrecy may also apply to the activities of professional advisors that could be linked to those of their clients under investigation (for example, the activities of lawyers acting as financial intermediaries).

The rules of criminal jurisdiction, as contained in the U.S. legislation, apply to all corruption-related offences. With regard to bribery of foreign public officials, the FCPA, as amended, asserts jurisdiction for acts committed abroad by U.S. nationals and businesses, as well as for acts in furtherance of a bribe committed within the territory of the U.S. by foreign nationals and foreign businesses.

The United States reserved the right not to apply in part the obligation set forth in article 42, paragraph 1 (b), of the UNCAC. Thus, the United States does not provide for plenary jurisdiction over offences that are committed on board ships flying its flag or aircraft registered under its laws. However, the abovementioned provision is implemented to the extent provided for under the U.S. federal law. During the country visit, it was noted that the establishment of jurisdiction aboard ships and planes would be revisited, as various new legislative proposals were under discussion.

Jurisdiction based on the passive and active personality principles is recognized under the U.S. law, but only in limited circumstances.

The following remarks are made with the intention to assist the U.S. authorities in rendering law enforcement mechanisms more efficient and effective:

- Ensure that the overall statute of limitations period applicable to UNCAC offences is sufficient to allow adequate investigation and prosecution;
- Explore the possibility of studying whether any significant correlations exist between recidivism rates and various corruption offences;
- Continue ongoing efforts to supplement, where necessary, the existing jurisdiction regime to ensure that multiple jurisdictional bases are available for the prosecution, investigation and adjudication of UNCAC offences, including jurisdiction for offences committed on board a vessel or an aircraft. In doing so, and if deemed appropriate, to establish jurisdiction on the basis of the active and passive personality principles in a wider context, consider implementing the term “national” in a broader manner, hence encompassing both citizens and legal persons registered in the U.S. territory.

In addition, the reviewing experts noticed that there had been few formal “internal” evaluations aimed at assessing the effectiveness of implementation measures for a series of UNCAC provisions. For most of the issues under consideration, an “external” evaluation was made in the context of other anti-corruption mechanisms, all of which have found the U.S. criminal and civil regimes for anti-corruption enforcement effective, and in many respects the U.S. has been commended for good practices developed in prosecuting corruption. It was further reported that the Department of Justice (DOJ) was constantly strengthening efforts to improve the process of assessing the effectiveness of domestic anti-corruption measures. The reviewing experts invited national authorities to continue devoting efforts and

resources to assess internally the impact of anti-corruption legislation, procedures and mechanisms in place.

### **Institutional framework**

Primary responsibility for the criminalization and enforcement aspects of the UNCAC at the federal level lies with the DOJ. Regarding corruption of domestic officials, the Public Integrity Section within the DOJ specializes in enforcing domestic U.S. anti-corruption laws. Under the umbrella of the DOJ, the Federal Bureau of Investigation (FBI) has, inter alia, the authority to investigate corruption matters throughout the federal Government and also at the state and municipal levels. The DOJ has 93 Attorney's Offices that also prosecute domestic corruption offences and, especially in large cities, have specialized public corruption units.

Three governmental agencies are primarily responsible for the prosecution of bribery of foreign officials: the DOJ's dedicated foreign bribery unit within the Criminal Division's Fraud Section; the Federal Bureau of Investigations (FBI) International Anticorruption Unit; and the Securities and Exchange Commission's (SEC) dedicated foreign bribery unit.

Within the federal legislative branch, committees of the House of Representatives and Senate have investigative jurisdiction to explore conditions that may need to be addressed by legislation, and oversight jurisdiction to address possible corruption within executive agencies.

Within the federal judicial branch, a statutory mechanism enables the designation by each federal judicial circuit of a committee to consider allegations of corrupt behaviour of a judge.

Every large agency of the federal executive branch has a statutory Inspector General (IG) to improve legislative oversight. The IG of these agencies typically has a quasi-independent status within the organization, is removable only by the President and has specific reporting responsibilities outside its agency and directly to Congress.

The reviewing experts noted that, in general, the United States had put in place an impressive array of institutions, bodies and agencies to detect, investigate and prosecute. They were of the view that the large number of institutions involved in the fight against corruption demonstrated the awareness of the danger that corruption represents at all levels of the Government and the public, as well as the high level of resources available to address this danger. However, they stressed that this "plethora" of institutional mechanisms entailed a potential overlap of their competencies, thus creating the need for better inter-agency coordination which would prevent fragmentation of efforts and ensure the existence of an efficient "checks and balances" system as an effective reaction to corruption.

Moreover, the reviewing experts stressed the importance of the independent status of the authorities specialized in combating corruption through law enforcement.

## **International cooperation**

The United States is engaged internationally in building and strengthening the capacity of prosecutors in foreign countries to fight corruption through their overseas prosecutorial and police training programmes. Anti-corruption assistance programmes are conducted at both the bilateral and regional levels.

### **Extradition**

The U.S. extradition regime, based on a network of treaties supplemented by conventions, is underpinned by a solid legal framework allowing for an efficient and active use of the extradition process. The shift from rigid list-based treaties to agreements primarily based on the minimum penalty definition of extraditable offences (in most cases deprivation of liberty for a maximum period of at least one year, or more severe penalty) for establishing double criminality has given the extradition system much more flexibility, and this should be highlighted as a good practice.

The possibility for the U.S. to extradite its own nationals is an additional asset that can assist in dealing with issues of double jeopardy, jurisdiction and coordination. This policy of the United States to extradite its own nationals should also be highlighted as a good practice.

The U.S. authorities indicated that no implementing legislation was required for the implementation of article 44 of the UNCAC. It was further reported that the United States may only seek extradition or grant an extradition request on the basis of a bilateral extradition treaty, and therefore the UNCAC alone cannot be used as the basis for extradition, although it is available to expand the scope of the extraditable offence when a bilateral treaty is already in place.

The United States does not refuse extradition requests solely on the ground that the offence for which extradition is sought involves fiscal matters.

The United States has bilateral extradition treaties with 133 States or multilateral organizations, such as the European Union. All incoming and outgoing extradition requests are reviewed and evaluated by the Office of International Affairs, Department of Justice and by the Office of the Legal Adviser, Department of State.

### **Mutual legal assistance**

The United States has provided and requested formal assistance in many cases for corruption offences using existing bilateral MLATs, as well as the UNCAC and other multilateral instruments. It has notified the Secretary-General that the Office of International Affairs of the Criminal Division of the Department of Justice acts as the central authority for all incoming and outgoing MLA requests.

Most of the bilateral treaties concluded by the U.S. authorities contain no dual criminality requirement as a condition for granting assistance. For the treaties with double criminality provisions, those provisions are mostly limited to requests for assistance requiring compulsory or coercive measures.

The United States also retains the ability to deny assistance where the matter involved is of a *de minimis* nature, or is opposed to its essential interests, or where

the assistance can be sought through other means, such as informal police cooperation.

Assuming that U.S. essential interests are not implicated, U.S. law does not impede assistance in the absence of dual criminality where the assistance does not require certain types of coercive action, such as requests for search warrants. Furthermore, assistance is not denied on the grounds of bank secrecy or solely on the ground that the related offence involves fiscal matters.

Incoming MLA requests are executed in accordance with the U.S. law and, to the extent not contrary to the domestic legislation, in accordance with the procedures specified in the request. One instance where the United States may not be able to execute an incoming request due to its domestic law is when the requesting State seeks to compel testimony from a defendant who has a right pursuant to the Fifth Amendment of the U.S. Constitution not to incriminate himself/herself.

The time frame for dealing with incoming MLA requests obviously varies depending on the applicable international instruments, the type of assistance, the complexity of the case, the type and location of the assistance sought, the quality of the initial request and whether additional information is needed. A newly enacted statute would likely increase efficiency in executing incoming MLA requests. The reviewing experts encouraged the U.S. authorities to continue to make best efforts to ensure such efficiency, including by giving careful consideration to the collection of data on the time frame for dealing with incoming MLA requests.

#### **Other forms of international cooperation**

The United States has several bilateral agreements on transfer of prisoners and is a party to the Council of Europe Convention on the Transfer of Sentenced Persons (1983) and the Inter-American Convention on Serving Criminal Sentences Abroad (1993). The Office of Enforcement Operations of the Criminal Division of the DOJ acts as the point of contact for these matters.

The U.S. authorities reported no cases of transfer of criminal proceedings involving U.S. citizens to foreign fora, due partly to the national policy of extraditing U.S. citizens.

The United States may consider the UNCAC as a legal basis for law enforcement cooperation in respect of the offences covered by this Convention. Additionally, the country has entered into bilateral or multilateral agreements or arrangements on direct cooperation with foreign law enforcement agencies.

The presence of law enforcement attachés abroad and the extensive use of the informal law enforcement channels in appropriate instances should be commended as a good practice. The Financial Crimes Enforcement Network (FinCEN) of the Department of Treasury, which is the U.S. financial intelligence unit (FIU) and part of the Egmont Group, also plays a significant role in promoting information-sharing with foreign counterparts in money-laundering cases.

The United States further concluded bilateral and multilateral agreements that allow for the establishment of joint investigative bodies. Joint investigations can also take place on a case-by-case basis, at the level of informal law enforcement cooperation, and entail information-sharing and cooperation on developing effective investigative strategies.

With the consent of the other country involved, and in compliance with the U.S. domestic law, there have been instances, on a case-by-case basis, where special investigative techniques have been employed. Electronic surveillance and undercover operations are permissible under the U.S. legislation.

The reviewing experts made the following remarks with the intention to assist the U.S. authorities in rendering international cooperation mechanisms more robust and effective:

- Reduce the possibility of non-fulfilment of the double criminality requirement in the extradition context of money-laundering cases by expanding the scope of predicate offences to include those committed outside the U.S. jurisdiction on the understanding that such offences would constitute crimes had they been committed in U.S. territory;
  - Continue to make best efforts to ensure efficiency in executing incoming MLA requests, including by giving careful consideration to the collection of data on the time frame for dealing with such requests.
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