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Regional Strategies and  
International Instruments  
to Fight Corruption

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# India's Anticorruption Strategy

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This paper gives a brief historical perspective of corruption in India, describes the administrative apparatus for dealing with corruption, discusses the limitations of the ongoing debate on corruption, and makes a few suggestions.

## HISTORICAL PERSPECTIVE

Government corruption has long been recognized as a fact of life. The extent of corruption has often been debated, its existence always acknowledged. Empires and rulers took various ingenious measures to contain corruption. Codification commenced in 1860 with the Indian Penal Code, defining corruption as acceptance by public servants of any gratification, other than legal remuneration, in exchange for an official act. Public servants included all officials (including those in the Defence Forces) employed by the State, other than elected officials, such as ministers.

After independence, the Delhi Special Police Establishment Act of 1946 was amended in 1952 and 1964 to enlarge its scope. Pursuant to the recommendations of the Santhanam Committee on Prevention of Corruption, the Central Vigilance Commission was constituted by a resolution of Government in 1964. Many of the steps taken up to 1988 were consolidated in the Prevention of Corruption

Act of 1988, which expanded the definition of "public servant" to include elected public officials and members of the legislature.

### **ADMINISTRATIVE APPARATUS FOR DEALING WITH CORRUPTION**

The Central Bureau of Investigation, a special police establishment, and equal in rank and status to the top echelons of the civil service, inquires, investigates, and prosecutes cases of corruption. In the provinces, similar bodies discharge the same function vis-a-vis provincial government officials.

Public servants now include not only all officials directly employed by government (central or provincial), but also all those employed by public sector enterprises, including banks, the Central Bank (Reserve Bank of India), and insurance companies. Thus, all government employees are covered by the Central Bureau of Investigation or the concerned provincial police establishment.

The Central Vigilance Commission and the State Vigilance Commissions advise governments on the following:

- complaints about corruption and action to be taken;
- gravity of transgression and sufficiency of evidence for prosecution or departmental action; and
- suitability of officials to hold posts—particularly sensitive ones—at the highest level.

A comprehensive legal framework thus deals with corruption by all public servants. The Prevention of Corruption Act also enables the constitution of special courts of law for the expeditious disposal of corruption cases.

## LIMITATIONS OF THE PRESENT SYSTEM

How successful has this system been in containing corruption? Annual Reports of the Central Vigilance Commission point to the continuous increase in the number of complaints, cases received and disposed of, and cases where Government sought its advice. The 1998 Corruption Perceptions Index compiled by Transparency International ranks Denmark at the top, with the least amount of corruption, and India at number 66, with a score of 2.9. Despite its comprehensive legal framework and administrative machinery, India still ranks as one of the most corrupt countries in the world. Central Vigilance Commission statistics also suggest an increase rather than a decline in corruption.

The reasons for India's poor ranking are the following:

- Corruption has an added dimension: participation by public servants, members of legislature, ministers, local government officials, and so on.
- The Central Bureau of Investigation is under the control of the administration and is therefore unable to act independently.
- Even where prosecution or action is recommended, governments can and do delay action.
- The Central Vigilance Commission's role is merely advisory, and governments can protect officials simply by ignoring the commission's advice.

The central Government has tried to address these issues. In 1996, the Lok Pal Bill was drafted to deal more effectively with corruption in high places. Unfortunately, it has yet to be discussed by Parliament due to frequent changes in Government and frequent elections. It is worth noting that most provinces—Andhra Pradesh, Madhya Pradesh, Maharashtra, Karnataka, Haryana, Gujarat, and

Rajasthan have passed similar laws. Elected public officials in the provinces have been governed by a special law for at least 10 years, yet the success in prosecuting and convicting them has been extraordinarily meager. This has led at least one agency to lament that it may as well be wound up since governments seldom heed its advice and often protect the corrupt. The debate on government corruption continues, since the framework in the provinces is ineffective and no framework exists in the Government.

In 1998, the Government decided to appoint a new central vigilance commissioner under a new ordinance that gave the official more power by providing for a multi-member commission, assigning the selection of members to a bipartisan mechanism, and placing the Central Bureau of Investigation under its administrative control. However, the ordinance has had a particularly unlucky history. It was not endorsed by Parliament. When the Government made a second attempt to pass the bill, Parliament again ignored it. Parliament was dissolved, elections are being held, and it is hoped that the new Government and the newly constituted Lok Sabha (House of the People) will address the bill. There is a lack of political consensus on the nature and extent to which arrangements to deal with corruption must be strengthened.

## **SUGGESTIONS FOR CHANGE**

While the debates continue on how to deal with elected public officials and how to strengthen the existing mechanism, it is possible to make a few suggestions for change within the existing framework and to raise a more fundamental issue.

First, all public servants, including the judiciary, the Defence Forces, and public sector employees should be governed by the Conduct Rules, which require all public officials to file with their administrative heads an Annual

Return of Moveable and Immoveable Property. The Prevention of Corruption Act also defines as corruption ownership of assets that are disproportionate to known sources of income. In other words, corruption need not be proved by establishing a specific act, but merely by showing that a public official's assets are disproportionate to his or her legitimate sources of income. Unfortunately, investigative agencies have made little use of these provisions even though ownership of disproportionate assets by many a public official is common knowledge. Judicial pronouncements have been conservative, requiring a high standard of proof, which has worked to the advantage of the corrupt. In conclusion, even though it is not easy to secure convictions, it is possible to make greater use of these provisions.

Second, it must be recognized that a great number of corrupt practices are cases of "white-collar corruption." The stereotyped poorly paid official accepting a few hundred rupees for supplying a set of public documents needs to be given up. It is not that such officials no longer exist, but that they should not be the core issue. Given the fact that governments have limited resources, their fight against corruption should focus on highly paid powerful public servants, who cost the exchequer dearly. For instance, during the construction of a sewerage system in a newly developed urban area, some low-level officials were punished for accepting illegal gratification from the contractor. The contractor had been benefited immensely by the authorities' specification that the main sewerage line be laid at a depth of 1 m instead of 2. Such undue favor, in which very large sums of money hinge on a single technical issue, leads to corruption on a higher scale. The police staff in charge of the existing anticorruption machinery fail to comprehend and are unable to cope with this kind of corruption.

The field of corruption has become so vast and complex that a multidisciplinary investigation is required. The

absence of expertise delays cases and results in many unsuccessful prosecutions. In other words, white-collar corruption requires technical understanding, multidisciplinary investigation, and systematic prosecution. The staff of the Central Bureau of Investigation has to be multidisciplinary and should resort to hiring experts on a short-term basis from the open market.

To ensure economy and efficiency in public expenditure, a number of agencies review and audit government and public enterprise transactions. Their reports contain a great deal of material that could aid investigators in exposing many a corrupt transaction.

Lord Acton famously said, "Power corrupts and absolute power corrupts absolutely." Corruption cannot be fought by passing more laws and increasing controls, which only serve to increase government power at the expense of the common man. Lessening government regulation and control, delegating decision making, among other things, are likely to have a more salutary effect on reducing corruption than continuing a system that fosters corruption and then attempting to clean the Aegean Stables.

# Corruption in Papua New Guinea

PAUL BENGU

Corruption is a problem for both developing and established democracies, as it undermines confidence in democratic governments, fosters criminality, wastes public resources, slows economic development, and distorts trade.

Bribery, corruption, and misconduct challenge many developing and developed countries, which now experience a general decline in confidence, fueled by well-publicized scandals. There is a growing tension between traditional values and the roles public officials play in a modern results-based public management environment.

Responses have varied and include campaigns to "clean up" public life, review the rules and regulations applying to public officials, redefine public service "values," and formulate new codes of conduct.

## AN OVERVIEW OF CORRUPTION

In Papua New Guinea (PNG), corruption is fast becoming endemic and threatens to become systemic in public and private sector operations. Empirical evidence suggests that bribery, back-room deals, excessive payoffs, and widespread theft are rampant and threaten to cripple investment. However, while PNG recognizes the causes, consequences, scope, and cure of corruption, it lacks the techni-

cal and financial resources and the institutional capacity to combat it. We therefore bring no solutions to this workshop, but an appeal for the support of the international community in our endeavor to establish an anticorruption institution.

Corruption has existed for thousands of years but has only recently attracted increasing attention. Does the attention reflect an increasing awareness or an increasing scope of the problem, or is it that corruption has increased in recent decades?

There is "demand" (by the public) for corrupt acts and there is "supply" (by public officials). Among the major factors affecting the "demand" side are (i) regulations and authorizations, (ii) certain characteristics of the tax system, (iii) certain spending decisions and (iv) provision of goods and services at below-market prices. On the other hand, among the factors affecting the "supply" side of corruption are (i) the bureaucratic tradition; (ii) the level of public sector wages; (iii) the penalty systems; (iv) institutional controls; (v) transparency of rules, laws, and processes; and (vi) examples set by the leadership.

At present, there are no known developed indexes to measure corruption. Nevertheless, it is possible to measure perceptions of corruption. In PNG, corruption is evident in the national planning and budgetary processes, where resources are allocated along political, regional, or ethnic inclinations and affiliations.

In resource sectors such as forestry, coffee, and copra, evidence of malpractices such as transfer pricing, grant facilitation, and rebate payments has increased in the last decade. Financial misappropriation in tendering, contract approval, and procurement of goods and services is gradually becoming more widespread in the construction sector and major resource development projects.

Media reports of politicians and public servants abusing their positions for personal financial gain have become

common. Enraged by public officials' continuing unethical behavior, the public is using its voice and votes to force the Government to act. In the last national elections, for instance, candidates campaigning against corruption won. Still, much is left to be done by the Government in fighting corruption.

The country faces (i) uncertain norms in corporate institutions, (ii) underdeveloped control mechanisms, and (iii) a poorly paid civil service—elements that have aggravated unethical tendencies. Common practices—giving gifts to employers, superiors, and other influential people, for example—are inherently inimical to procedures such as formal tendering. Corruption has damaged the public procurement process, reduced confidence in Government, and slackened competition for Government contracts, rendering public procurement less economical.

PNG's economic and democratic development depends on maintaining high ethical standards in Government. However, these standards are being threatened partly because the new managerial thinking values efficiency and results more than traditional administrative qualities such as certainty, predictability, equality of treatment, and procedural regularity. PNG is at risk because of its historical situation, because it depends on foreign inputs of capital and knowhow, and because it is actively pursuing economic integration. Foreign interests are in a race to establish economic bridgeheads in PNG's domestic markets. The contagion of corruption is spreading in all directions.

## **COPING MECHANISM**

How is PNG fighting corruption? Parliament is considering a constitutional bill that seeks to establish an independent commission to fight corruption. The Government recently established the National Government Contracts Review Committee in response to serious allegations of cor-

rupt practices in awarding of contracts whereby the State and many of its statutory and corporate institutions had been committed to pay huge sums of money for goods, services, and works.

Laws are not enough. An appropriate legal framework is just one of the many elements PNG needs to maintain public and private ethical standards. Also necessary are (i) genuine political support, (ii) accountability mechanisms for Government activities, (iii) codes of conduct, (iv) socialization mechanisms, (v) public service conditions, (vi) an ethics coordinating body, and (vii) an active civil society.

Corruption is a complex and pervasive phenomenon. It threatens democratic public institutions by permitting improper influence on the use of public resources and power, and by undermining legitimate activities of the State.

The international community is becoming more aware of the fact that sound governance plays an important role in combating corruption. PNG needs the input of the international community in order to draw up anticorruption measures and set up corruption-prevention mechanisms. It also needs (i) strict law enforcement, (ii) investigation, (iii) control measures and sanctions, and (iv) preventive approaches such as financial and management controls and training.

Transparency International promotes moves to increase administrative transparency in PNG, including the following:

- Oblige public officials to declare financial and other interests incompatible with public duty.
- Streamline excessive or irrelevant regulation.
- Target high-risk areas of government activity.
- Ensure more effective financial and banking regulation.

This approach—looking beyond individual corrupt transactions to the conditions that allow corruption to develop—represents a major policy shift. The fight against corruption requires reforms not only in criminal law and the justice system, but also in public administration, regulatory management, and finance (for example, competition policy and tax policy).

Public servants in PNG and elsewhere operate in a changing world. The nameless, faceless public servant is becoming a relic of the past. Greater transparency in government operations due to public access to official information, coupled with the efforts of an increasingly zealous media and well-organized interest groups, means that public servants today work in a virtual “fishbowl.” Their actions are more visible and publicized as are their mistakes and misdemeanors. They face higher public expectations of the quality of public services and their capacity to deliver them. This pressure is driven partly by governments’ own attempts to publicize standards of public sector behavior. If these standards are not met, the result is public dissatisfaction.

Public management reform has changed the internal environment in which PNG public servants operate. Individual statutory bodies now enjoy substantial autonomy, defining their own “corporate culture,” standards, and ways of operating, and giving rise to concerns that systems of “professional socialization”—the indication of public service values across the public sector—are breaking down. The breakdown is compounded by more recruitment from the private sector. The old-style public service culture or ethos is disappearing. In any case, traditional public service values may need to be amended as the country moves away from an emphasis on strict compliance with rules and procedures, toward considerations such as “efficiency and effectiveness,” “value for money,” “service to the citizen,” and “equal opportunities.”

Increased devolution of authority and more discretion for public sector managers allow more opportunities for "irregular behavior." But irregular behavior may not be bad; it may reflect innovation rather than misconduct. Nonetheless, some public officials are simply confused about how to operate, especially where detailed regulations and rules have been reduced and management information systems and accountability structures have not kept pace with devolution.

PNG is a country driven by the "new managerialism." Public officials, especially those in the statutory agencies, are encouraged to emulate private sector ways of doing business. What might be seen as misconduct in the public sector could be viewed as initiative in the private sector. For example, offering hospitality or gifts is currently disapproved of in the public sector but is normal practice in the private sector. This raises questions as to whether public sector managers should be given free rein to operate like their private sector counterparts, especially in competitive environments.

Public servants in PNG are increasingly involved in possibly risky commercial operations such as contract management and management of privatization processes. Some of these operations involve contracts with foreign-based or multinational enterprises that play by or expect different rules of the game. More direct contact with public money coupled with less micro control over its use has led to greater temptation for corruption or conflict of interest. For example, despite relatively high standards in the national public service, there is allegation after allegation of nepotism in appointments and awards of contracts.

The relationship between public servants and ministers is also evolving. The concept of "ministerial responsibility" is changing, with public servants being more visibly responsible for certain operations, especially operations

carried out by "arm's length" agencies. Ministers may now be distancing themselves from responsibility for the actions of their officials, and passing the buck to public servants, some of whom are now directly answerable to Parliament. In this sense, the concept of accountability through ministers to Parliament is changing, and traditional accountability relationships are becoming blurred.

The relationship between public servants and citizens is also in transition. The concept of "loyalty to the democratically elected minister" is changed when public servants are also asked to directly serve another boss, "the citizen." Public servants are increasingly expected to use discretion in day-to-day dealings with citizens, which in practice often amounts to having to balance (or even define) the "public interest" against taxpayers interests and against the interests of individual clients.

Other pressures from the external environment impact on the conduct of public servants. For example, globalization has increased contact between public officials in different administrations with potentially different behavioral and ethical standards. It is unclear whether such pressure is leading officials to agree on the lowest common denominator, or whether it is improving standards. In any case, for the global policy environment to function, public officials and their international counterparts must trust each other and build that trust on shared frameworks—or at least an understanding of what is acceptable behavior.

Behavioral standards in the public sector also reflect changing societal norms. For example, measures against sexual harassment and racism now appear in codes of conduct or public service value statements. In the private sector, as well, most of our business institutions now offer courses on ethics, and many companies include ethical issues in mission statements and/or run complex ethics training programs.

## CONCLUSION

While corruption continues to ravage our societies, it can be curtailed. The consequences of not joining a concerted effort to combat corruption will be severe. The work done before and after this workshop will help both international development partners and member countries to better understand the dimensions of the fight against corruption and ascertain how we are all affected and coping with it. It will help governments and international agencies devise short- and long-term responses and develop and/or adopt a corruption-monitoring mechanism.

The fight against corruption is being waged by and for the people. Their varied needs, aspirations, beliefs, and expectations shape their responses to corruption and determine how they cope with it. Their culture, society, and institutions provide the foundation for combat strategies. The more they understand corruption, the better they will be able to identify areas that need reform and to help strengthen anticorruption systems.

# International Instruments to Fight Corruption

MARK PIETH

Only 10 years ago, when the Organisation for Economic Co-operation and Development (OECD) started its efforts to combat corruption, the reactions were far from enthusiastic. I personally have often been called "naïve" or a "Don Quixote" by more outspoken members of the private sector. Not that the negative consequences of corruption (both on the country of the recipient and on competitors) are unknown, but rather that those who live under conditions of endemic corruption tend to be fatalistic, believing the problem simply too big to solve.

## REASONS FOR CHANGE

Now corruption is at the top of international agendas. Many theories have been put forward to explain why attitudes have changed so dramatically in just 10 years.

The end of the Cold War and the acceleration of globalization have been crucial because they have made globally active business entities aware that bribery abroad also hampers their access to markets, and their chances to obtain permits, licenses, and contracts. Ultimately they also suffer from the lack of legal procedures and corruptible justice-problems, they have come to realize, to which they have contributed if they have ever bribed abroad.

Industrialized nations often found that their nationals and companies actively bribed foreign officials or prepared or laundered bribes. In many instances, businesses felt that they were forced to pay. However, this merely underlines the fact that corruption requires the participation of two or three parties, and it is of little use to point fingers at each other. The fight against corruption has to start at each end simultaneously.

It is crucial for industrialized countries to make a strategic decision to concentrate on the so-called "supply side" of corruption. In 1989, based on an initiative by the United States, which 12 years before had already enacted laws against "foreign corrupt practices," OECD started to work on an instrument against the active bribery of foreign public officials.

While the distinction between the "supply" and "demand" sides of corruption will prove to be rather artificial in the long run, it is essential now in order to create a strong momentum in the fight against corruption. The logic is very simple: If the group of countries hosting the largest investors and exporters—and the 29 OECD members and 5 additional signatories to the convention represent 70 percent of exports and 90 percent of foreign direct investments—threatens to sanction transnational bribery, the influx of large funds into economies will be reduced, and the capability of all players to subvert democracy and the state of law will be substantially reduced. At the same time, the action will contribute to fair competition among major trading partners.

The first phase of OECD's work, until 1994, had a catalytic effect on other organizations, especially on regional forums such as the Council of Europe, the European Union, and the Organization of American States, which started to develop their own instruments to harmonize or even unify criminal, civil, and administrative law against corruption. At the same time, the multilateral development banks, es-

pecially the World Bank, International Monetary Fund, but also the regional development banks such as the Asian Development Bank, have developed strict anticorruption policies. The United Nations Development Programme has a long history of fostering "good governance" as the best preventive concept against corruption. Clearly, all these initiatives influence each other.

Civil society, the mass media, nongovernment organizations, most notably Transparency International, but also the business sector (especially the International Chamber of Commerce) have helped significantly to promote confidence that meaningful action against corruption on a worldwide scale is possible.

## **OECD INITIATIVES AGAINST BRIBERY**

Two international instruments (the recommendation and the convention) and two essential procedures (monitoring and outreach) have to be taken into account.

The Revised Recommendation of May 1997 (a more complex version of the Recommendation of 1994) may be considered the "mother document." Containing the entire work program and using a broad multidisciplinary approach, it addresses the following issues:

- criminalization of transnational bribery;
- tax treatment of bribes;
- accounting and auditing rules to create transparency;  
and
- sanctions in public procurement procedures.

The following items are merely mentioned and still await further elaboration by the Working Group:

- civil law sanctions;
- export guarantees; and

- possibly private-to-private corruption.

The Working Group has also been asked to discuss a set of additional issues, so far not explicitly mentioned in the recommendation, notably:

- the definition of recipient (whether or not party officials, parties, and candidates are to be included);
- the treatment of foreign subsidiaries; and
- money laundering and offshore banking.

Rapidly, it has become clear that criminalization of transnational bribery (the active bribery of foreign public officials) is crucial, not so much because as many managers as possible should be jailed, but because the anticorruption approach depends on a clear distinction between legal and illegal behavior. Upon insistence by some of its members, OECD decided to define the criminalized behavior in legally binding terms in the convention of December 1997.

OECD's "supply side" approach, however, focuses narrowly on (i) active bribery, (ii) bribery of public officials, and (iii) commercial bribery. But it deals with the issue from all possible angles of preventive measures and sanctions.

In order to maintain the momentum of the dynamic process, OECD provides a peer-review mechanism to accompany its instruments. This follow-up procedure allows for monitoring the implementation of minimal standards and for reviewing the instruments themselves at regular intervals. Both aspects are crucial for further development since those who corrupt will seek new ways to continue to bribe.

## SECURING IMPLEMENTATION

High expectations are placed on monitoring the implementation of OECD instruments. Especially members of the private sector and also parliamentarians in some of the countries involved have repeatedly asked, "Why do you believe this initiative will succeed when others have failed in the past?"

The answer is that OECD is submitting the legislation of the 34 Parties to a strict peer review. By end-2000, all enacted laws in the implementation instruments are to be examined by experts of other OECD members and finally evaluated in an extensive report to ministers. The examination procedure is taken very seriously. The first results of the surveys (of over 20 countries) are to be published after the Ministerial Meeting in June 2000.

In a further phase, the Parties' application of the implementing legislation and their ability to react to incidents of transnational corruption as well as changes in compliance structures of companies will be analyzed during on-site visits by experts from country representatives in the group.

"Functional equivalence" does not force countries to streamline their legislation according to an international model. Rather, they have to meet the standard overall, using their own legal concepts.

## FURTHER INTERNATIONAL INITIATIVES

Other international forums have taken further initiatives. Each of them has a specific approach.

### Council of Europe

The Council of Europe is an organization primarily involved in legal harmonization, fostering human rights, and the legal integration of Eastern Europe. The main aim

of its anticorruption work is to establish a common standard enabling mutual legal assistance. Its approach is therefore broad, and its definition of corruption much wider than the OECD's, including the following:

- domestic active and passive corruption;
- transnational active and passive corruption;
- commercial corruption; and
- influence peddling.

Its main instruments are its 20 Guiding Principles of 1997, the Criminal Law Convention of January 1999, and the Civil Law Convention of November 1999. Its main focus is on sound legal analysis. A comprehensive follow-up instrument is included in an independent agreement called Group d'Etats Contre la Corruption (GRECO). While the Council of Europe's definition of an "official" and "breach of duty" refers to the country of the recipient on essential points, the OECD's is more autonomous.

#### European Union

The European Union's anticorruption work follows a different agenda. On the one hand, it is predicated upon the protection of the financial interests of the European Union; on the other hand, it is set in the context of the fight against organized crime. Its three main instruments attempt to create unified criminal law in a group of countries aiming for supranationality. The details are complex, especially because the European Union cannot simply enact criminal law but has to follow the traditional ways of international law. Further significant work is being done on private-to-private corruption.

## United Nations

After a phase of cautious self-restraint (after the failure to finalize a convention in 1979), the UN reopened the issue of corruption in its General Assembly Resolutions of 1996. New work on transnational economic crime has, among other issues, focused on corruption. Finally, special attention is given to the misuse of offshore resorts for corruption.

## CONCLUSIONS

There is reason for optimism. While the task of fighting corruption is difficult, a dramatic worldwide change is taking place. It would make sense for countries so far not involved in the global anticorruption drive to join it, be it in a regional setting or by joining OECD's efforts, depending on whether they are exporters, investors, importers, or an importer and place of investment. Being able to live up to OECD's anticorruption standards is an asset both for countries in search of investors and for companies tendering abroad.

# Fostering Greater Transparency in the Asia-Pacific Region

ROBERT LEES

Transparency is consistently identified as an important ingredient in fostering economic growth and stability. The Pacific Basin Economic Council (PBEC) has long been committed to helping build a business environment where PBEC member corporations can grow and prosper. Its working committee on transparency has spoken out forcefully in support of initiatives enhancing transparency, and has adopted a charter on transparency.

## **SENIOR BUSINESS LEADERS AGAINST CORRUPTION**

PBEC, an association of senior business leaders representing more than 1,100 major corporations in 20 economies in the Pacific Basin Region, is dedicated to expanding trade and investment by fostering open markets. Founded in 1967, it is a key organization through which regional executives encourage increased trade and investment and address emerging issues likely to shape the Pacific and global economies, including the fight against corruption.

PBEC's mission is to create a business environment that achieves the following:

- increased trade and investment;
- competitiveness;
- provision of information, networking forums, and services to the business community in the Asia-Pacific region; and
- cooperative business efforts to address the economic well-being of the region's citizens.

The PBEC Working Committee on Transparency is the primary vehicle through which PBEC members explore and discuss corruption-related issues. Its goal is to ensure complete integrity, transparency, and accountability in all business-government transactions, and the enforcement of anticorruption statutes. It initiated a charter on transparency, which was adopted by the PBEC Steering Committee and Board of Directors in November 1997.

### **COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS**

The PBEC Charter on Standards for Transactions Between Business and Governments is designed to promote integrity, transparency, and accountability in transactions between business and governments. It references the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was formally signed by 29 OECD members (including 4 from the Asia-Pacific region) and 5 non-members on 17 December 1997.

The convention is a path-breaking agreement aimed at (i) strengthening good governance and corporate integrity, (ii) promoting economic efficiency and development, and (iii) providing direct benefits to consumers around the world through lower prices for goods and services. As these benefits would be maximized through the broadest possible participation in the agreement, PBEC has continuously

urged all Asian and Pacific Economies to sign, ratify, and implement the convention as early as possible.

The PBEC charter not only calls upon governments to redouble their efforts to ensure complete integrity, transparency, and accountability in all business-government transactions, but also to vigorously enforce their anticorruption statutes. It encourages PBEC member companies to conform to the Statement of Transaction Standards set forth in the charter, which calls for integrity, transparency, and accountability in transactions between enterprises and public bodies. The charter's topics include (i) respect for law and standards, (ii) improper inducements, (iii) agents, (iv) financial reporting and auditing, (v) responsibilities of enterprises, (vi) political contributions, and (vii) company codes.

## **CLEANING UP PUBLIC PROCUREMENT**

The economic downturn and financial problems confronting Asian and Pacific Economies have highlighted the need to ensure that government procurement projects are carried out transparently and fairly, so that optimum use is made of scarce capital resources and money. In 1998, PBEC included in its charter a provision for Asian and Pacific Economies to support a regional or World Trade Organization (WTO) Agreement on Transparency in Procurement.

During PBEC's 1999 midterm meeting, its board of directors approved policy recommendations calling on the leaders of the Asia Pacific Economic Co-operation (APEC) economies to support the early conclusion by WTO of the Agreement on Transparency in Government Procurement. It also called for inclusion of the principles set forth in the APEC Principles on Transparency in Government Procurement adopted by the APEC Government Procurement Experts Group in September 1997.

The board believed that, if widely accepted and implemented, a multilateral agreement on transparency in government procurement would strengthen the confidence of investors, leaders, and the public in the implementation by governments of infrastructure and other major procurement projects. This, in turn, would stimulate increased capital flows to the region and enhance public confidence in the processes of government, thereby contributing directly to increased stability and growth.

## **CONCLUSION**

Corruption has become an important issue in global business, not least because the free-market system operates best when it is anchored on the rule of law and pluralism. Both governments and businesses have increasingly recognized that corruption has many harmful effects on societies and economies. PBEC has therefore taken major initiatives to improve transparency and combat corruption. It encourages APEC members to ratify the OECD anti-bribery convention, promotes a regional agreement on transparency in government procurement, and urges the adoption by its members of the standards of conduct set forth in its transparency charter.

PBEC Charter on Standards for Transactions  
Between Business and Governments

Preamble

The Pacific Basin Economic Council (PBEC) is an association of senior business leaders representing more than 1,200 businesses in 20 economies around the Pacific. PBEC members account for more than US\$4.25 trillion in global sales and employ more than 10.9 million people. The unprecedented scope and leverage of PBEC's membership ensures that its recommendations and policy positions are drawn from a broad and balanced reservoir of international business knowledge. As the oldest regional private sector organisation encompassing the Pacific Rim, PBEC serves as a forum through which business leaders can create new business relationships, exchange views with government officials, and produce recommendations on key business issues.

PBEC advocates the rapid and effective liberalisation of trade and investment in the Pacific economies, as the key to maintaining growth, promoting development, and increasing living standards in the region. Experience has demonstrated that the benefits of trade and investment liberalisation can be fully realised if transactions between business and government are consistently honest and transparent. Integrity, transparency, and accountability in the awarding of government contracts and permits, in tax matters, in environmental and other regulatory matters, and in judicial and legislative proceedings are necessary elements for a productive economy and an open and predictable trade and investment climate.

Integrity, transparency, and accountability strengthen the efficient management of enterprises, facilitate the operation of open, competitive markets, and bolster consumer welfare. Moreover, achieving these goals will improve the efficient allocation of scarce investment capital, augment support for international financial institutions and aid programs that are vital sources of development funding, and increase public

confidence in, and support for, the procedures and institutions of both business and government.

Recognising the strong linkage between good governance and economic growth and the need for prompt and effective action, PBEC advocates zero tolerance for infringements on transparency in business-government transactions with a view to eliminating corruption in all its forms. PBEC is heartened by the support for this stance on the part of the many governments, international organisations, and business corporations which have taken meaningful steps to promote integrity, transparency, and accountability in business transactions with government, as follows:

The United Nations General Assembly demonstrated the political will to meet this challenge in its 1996 Declaration Against Corruption and Bribery in International Commercial Transactions, wherein Member States commit themselves to take effective and concrete action to combat all forms of corruption, bribery, and related illicit practices.

The World Bank revised its procurement rules with explicit requirements for a high standard of ethics in procurement and execution of contracts.

The Organisation of American States' Inter-American Convention Against Corruption entered into force in 1997 and recognises the primary role of national governments in ensuring enforcement of relevant domestic laws and promoting regional co-operation including curbing transnational bribery.

The Organisation for Economic Co-operation and Development (OECD) members have agreed to negotiate a convention by December 1997 to criminalise foreign bribery and have committed to eliminate tax deductions for bribes.

PBEC calls upon governments to re-double their efforts to ensure complete integrity, transparency, and accountability in all business-government transactions, and to vigorously enforce their anti-corruption statutes. Governments must recognise that transparency is an important building block for economic growth and development.

Specifically PBEC urges each member economy to:

1. Consider means to enhance transparency in procurement, including adherence to a regional or WTO Agreement on Transparency in Procurement.
2. Ensure that the highest standards of honesty and efficiency are practised by public officials and that each member economy strengthen the enforcement of domestic laws to achieve this goal.
3. Sign on to the OECD convention.

PBEC believes that these important public sector initiatives should be complemented by a corresponding private sector undertaking. It notes the contribution of the International Chamber of Commerce, which in 1996 issued Revisions to its Rules of Conduct on Extortion and Bribery in International Business Transactions, calling for mutually supportive action by governments and the business community; Transparency International, which promotes Standards of Conduct and has encouraged private sector co-operation with governments in combating corruption in international business transactions; and the VIIIth International Conference Against Corruption, which issued the Lima Declaration in 1997, calling for action at the international, national, and local level.

Encouraged by the public sector commitments and guided by the private sector initiatives, PBEC articulates the following Statement on Standards for Transactions between Business and Governments.

#### Statement on Standards for Transactions Between Business and Government

To promote integrity, transparency, and accountability in transactions between enterprises and public bodies, PBEC adopts this Statement of Transactions Standards and encourages member companies to adopt and conform to it.

### 1. Respect for Laws and Standards

All business enterprises should conform to the relevant laws and regulations of the countries in which they are established and in which they operate.

### 2. Improper Inducements

a) No business enterprise should directly or indirectly offer, promise, or make a gift, or extend any other advantage or benefit, whether or not monetary, to any public official or his relatives or business associates to induce any actions or inaction by that official or other officials of the government for express intention of offering or soliciting a business advantage. Demands for such improper inducements should be rejected. However, nothing here is intended to prevent bona fide and reasonable expenditures for ordinary marketing and promotion of goods and services.

b) No business enterprises should utilise techniques, such as sub-contracts, purchase orders, or consulting agreements, to channel, directly or indirectly, payments or other benefits to government officials, with decision-making responsibility or influence, or to their relatives or business associates for the express intention of offering or soliciting a business advantage.

### 3. Agents

Business enterprises should take reasonable measures to ensure:

a) that any payment made to any agent represents no more than an appropriate remuneration for legitimate services rendered by that agent;

b) that no part of any such payment is passed on by the agent as an improper inducement or otherwise in contravention of the principles of this Statement; and

- c) that they maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises.

#### 4. Financial Recording and Auditing

Business enterprises should:

- a) assure that financial transactions be properly and accurately recorded in appropriate books of account available for inspection by their boards of directors, if applicable, or a corresponding body, as well as auditors;
- b) assure that there are no "off the books" or secret accounts, nor may any documents be issued which do not properly and accurately record the transaction to which they relate; and
- c) establish independent systems of auditing in order to bring to light any transactions which contravene the principles of this Statement. Appropriate corrective action must then be taken by senior corporate management of the business enterprise.

#### 5. Responsibilities of Enterprises

The board of directors or other body with ultimate responsibility for the business enterprise should:

- a) take reasonable steps, including the establishment and maintenance of proper systems of control aimed at discovering and preventing any payments being made by or on behalf of the enterprise which contravene the principles of this Statement;
- b) periodically review compliance with these principles and establish procedures for obtaining appropriate reports for the purposes of such review; and
- c) take appropriate corrective action against any director or employee contravening these principles.

#### 6. Political Contributions

Contributions to political parties or committees or to individual politicians may only be made in accordance with the applicable law, and all requirements for public disclosure of such contributions shall be fully complied with. All contributions of corporate funds for political purposes must be reported to senior corporate management.

#### 7. Company Codes

Business enterprises should develop and implement their own codes of conduct consistent with this Statement and with applicable laws in their economy. Such codes may usefully include examples and should enjoin employees or agents who find themselves subjected to or pressured for improper inducements immediately to report the same to senior corporate management. Companies should develop clear policies, guidelines, and training programmes for implementing and enforcing the provisions of their codes.

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# Actions to Fight Money Laundering of Proceeds of Crime

MICHAEL C. BLANCHFLOWER

The term "money laundering" has gained international acceptance and usage, but it has no single definition. Money laundering refers to activities that have the purpose of disguising the origin of and preserving proceeds of crime, and include concealing, converting, disposing of, transferring, or using them to acquire other property.

Money laundering may involve a courier taking cash out of one country and depositing it with foreign banks, or, where the physical handling of proceeds of crime is difficult or risks detection, making electronic transfers. Such transfers allow for a swift and risk-free passage of proceeds of crime between countries.

It is impossible to estimate the amount of money laundering worldwide. There are no accurate measures of money laundering, and any estimate must be viewed cautiously.

## **EFFECTS OF MONEY LAUNDERING**

Of the many initiatives to stop money laundering, one of the most important is the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic

Substances (Vienna Convention), which provides that signatory states must criminalize money laundering from drug trafficking and that mutual legal assistance and extradition apply to money laundering. In 1989, the principal international organization dedicated to combating money laundering, the Financial Action Task Force (FATF), was established, as were the Caribbean FATF and the Asia-Pacific Group on Money Laundering (APG).

Other initiatives include the following:

- the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;
- the June 1991 Council of European Communities Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering;
- the 1992 Resolution and Report of the International Organization of Securities Commissions (IOSCO), which encourages members to take measures to curtail money laundering in securities and futures markets; and
- the 1992 Convention on Combating Corruption in International Business Transactions.

Global interest in money laundering is on the rise for three reasons:

- There is worldwide recognition that depriving criminals of the proceeds of crime helps prevent future crimes.
- There is worldwide acceptance of the principle that crime must not pay: criminals must not benefit from their activities.
- International crime, particularly drug trafficking, fraud, and corruption, has grown over the past two decades.

Countries are concerned that criminals use the enormous sums of "dirty" money to influence political and economic institutions and to affect national or regional security interests. International money laundering is inextricably tied to serious crime, both local and international.

The success of money laundering in preserving proceeds of crime depends, in some instances, upon public and private corruption or sometimes upon government and institutional indifference. Proceeds of crime are paid to businessmen, politicians, and government officials to secure protection against prosecution.

Once a country becomes identified as one that condones or tolerates money laundering, its criminals thrive and it attracts foreign criminals. Its citizens lose trust in government and confidence in the financial system. It is shunned by international bodies and private business, which are sources of foreign aid and investment.

Countries that are aware of the effects of money laundering and are determined to prevent it are commendable, but they must be part of a larger effort to suppress and prevent all serious crime, including private and public corruption. In the fight against crime there is no single front.

## **MONEY-LAUNDERING LAWS**

Before money-laundering laws may be enacted, politicians and government must first be convinced that they are necessary to preserve a country's political, economic, and security interests. Difficult policy choices may have to be made, for example, between suppressing money laundering and retaining bank secrecy laws, which protect money launderers.

They must demonstrate their commitment by implementing effective measures against money laundering. They must allocate resources to train police and legal offi-

cials, and support investigations and prosecutions of money-laundering offenses.

Countries should choose laws that are (i) simple to understand, (ii) efficient and effective to administer, (iii) compatible with existing criminal laws and procedures, (iv) operable with existing resources, and (v) have severe consequences for the criminals. There are no perfect money-laundering laws, but examples from around the world, and model laws prepared by international organizations can be examined by lawmakers, who will then decide which are suitable for their country.

The laws should be comprehensive. They should cover all serious crimes, including private and public corruption, and crimes committed in other countries, to prevent one country from being used to launder proceeds of crime committed elsewhere. Criminals must be deprived of their proceeds. The laws must therefore contain the following:

- power to restrain or seize the property of a suspect, defendant, or a third party, pending further investigation or prosecution;
- power to order the confiscation of the value of a convicted person's proceeds of crime and the forfeiture of property or investments acquired from those proceeds; and
- power to order the confiscation of a person's property where it can be proven that it did not derive from legitimate sources.

Laws should allow for restraint and confiscation proceedings to be taken against the accused who have fled the country, as criminals should not be allowed to retain their illegally obtained property.

The laws, while severe, must also take into account a country's human rights laws. But laws are not enough.

There must be support and assistance from other sectors of the economy, principally the financial sector. Banks, *bureaux de change*, moneychangers and remitters, and securities companies, are widely used to launder proceeds of crime and must therefore enforce measures against money laundering.

Banks should follow the recommendations of the Basle Committee on Banking Regulation and Supervisory Practices contained in the December 1988 Statement of Principles on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering. The recommendations include (i) identifying customers, (ii) avoiding suspicious transactions, and (iii) cooperating with law-enforcement agencies.

## **MONEY LAUNDERING IN ASIA**

Money laundering is carried out in the region as a result of a number of factors:

- The region is a major source of heroin sold elsewhere, and some of the proceeds from its sale return to Asia.
- Some countries have highly developed banking and communications systems and accounting and legal firms that assist money launderers and make it more difficult to detect or investigate money laundering.
- Some countries have underdeveloped financial and legal systems, which make money laundering easy to carry out and without risk of detection.
- Some countries do not have effective anticorruption laws.
- Countries with bank secrecy laws offer great protection to the money launderer and pose insurmountable problems to the investigator.

### Money Laundering in Hong Kong, China

Hong Kong, China, has been a member of Financial Action Task Force (FATF) since 1989. The second FATF Mutual Evaluation Report on the Hong Kong-China Special Administrative Region (SAR) in March 1999 discussed the money-laundering situation:

Trafficking in dangerous drugs is assessed to be the criminal activity which generates the most criminal proceeds in Hong Kong-China. The majority of opiate drugs in Hong Kong-China originate from the Golden Triangle. Psychotropic drugs are introduced primarily from Europe and the mainland of China. Traditionally drug trafficking in Hong Kong-China has taken two forms: namely, supply for the domestic market, and transshipment to other international markets. Although the extent of drug trafficking is hard to estimate, the authorities believe that it has gradually declined, or at least remained steady in recent years. In addition, the level of re-export from Hong Kong-China has declined sharply since the early 1990s. The level of proceeds derived from drug trafficking within the territory might also have declined during the same period. In addition to drug trafficking, loan sharking, gambling (both illegal casino and bookmaking) and economic crimes are considered to be major sources of illegal proceeds.

Hong Kong-China continues to be a major international financial centre which is free and open. The financial system is characterised by a low tax system, sophisticated banking facilities and the absence of currency and exchange controls. Like other international financial centres with the same characteristics, Hong Kong-China is susceptible to money laundering ac-

tivities. The following are the most commonly used money laundering methods:

- bank accounts held in the name of the criminal himself or relatives or friends;
- bank accounts held by persons paid specifically to open the accounts, or to allow a money launderer to use an existing account;
- bank accounts opened with stolen or forged identification documents;
- layering, i.e. the transfer and division of funds between bank accounts;
- structuring;
- remittance centres to receive or remit money internationally;
- bank accounts opened in the names of shell companies registered in Hong Kong-China;
- shell companies;
- Hong Kong-China secretarial companies to operate bank accounts; and
- international cash or currency couriers.

There has been no drastic change in the methods used for money laundering since the last evaluation. The institutions most commonly used for money laundering continue to be banks, remittance businesses, shell companies (both in Hong Kong-China and offshore), and secretarial companies. It should be noted that money launderers operating outside of Hong Kong-China make use of shell companies and secretarial companies for money laundering purposes. The local criminal element seldom uses such sophisticated methods for laundering the proceeds of crime.

### Hong Kong, China's Responses to Money Laundering

Over the years, Hong Kong, China, has continuously implemented and updated its measures against money laundering. It is also a member of APG, which adopted FATF's Forty Recommendations to combat money laundering and aims to promote measures against money laundering in the region.

The measures taken to combat money laundering include the following:

- The Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405 (DIROP). Enacted in 1989, it provides for the restraint and confiscation of proceeds of drug trafficking, and defines money laundering as an offense.
- The Organized and Serious Crimes Ordinance, Cap. 455 (OSCO). Enacted in 1994, it provides for the restraint and confiscation of proceeds of serious offenses, including corruption offenses, and of money laundering.
- DIROP and OSCO. They obligate persons to report suspicious transactions that may involve money laundering.
- The Hong Kong-China Police Force and the Customs and Excise Department. They have special units to investigate the financial affairs of criminals for purposes of restraining their property and making confiscation orders, and to investigate money-laundering offenses.
- The Joint Financial Investigation Unit. It receives reports from bankers and other persons of suspicious money-laundering transactions. It analyzes the reports and passes them on to investigators.
- The Department of Justice. It has prosecutors responsible for applying for restraint and confiscation or-

ders, advising investigators on the operation of DTROP and OSCO, and prosecuting money-laundering offenses.

- The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It was extended to Hong Kong, China, in June 1997.
- The Securities and Futures Commission's Revised Guidance Note on "Money Laundering," issued in July 1997.
- The Hong Kong-China Monetary Authority's revised Guidelines on "Prevention of Money Laundering," issued in October 1997.
- The Commissioner of Insurance's Revised Guidance Note, "Prevention of Money Laundering," issued in December 1997.
- A bill to require moneychangers and remittance agents to employ measures against money laundering, such as customer identification and the maintenance of records of transactions, introduced in the Legislative Council in April 1999.
- A bill to further amend DTROP and OSCO in order to improve their effectiveness and to better deter money laundering, introduced in the Legislative Council in December 1999.

The private sector has also been active against money laundering. In September 1997, the Law Society of Hong Kong-China issued a circular, "Money Laundering-Guidance Notes for Solicitors."

#### Drug Trafficking (Recovery of Proceeds) Ordinance

DTROP provides powers for the tracing, freezing, and confiscation of proceeds of drug trafficking and defines

money laundering as an offence. The key money-laundering provisions are set out in Section 25:

(1) ...a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of drug trafficking, he deals with that property.

(2) a person who commits an offence under subsection (1) is liable—

(a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or

(b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

“Proceeds of drug trafficking” include drug trafficking in Hong Kong, China, or elsewhere in the world. “Dealing” has a wide definition and includes receiving or acquiring the property, disposing of or converting the property, or bringing it into or removing it from Hong Kong, China.

### **Organised and Serious Crimes Ordinance**

Section 25 of OSCO defines the offence of dealing with proceeds of “indictable” (serious) offenses, including drug trafficking:

(1) ... a person commits an offence if, knowing or having reasonable grounds or belief that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with the property.

(2) A person who commits an offence under subsection (1) is liable:

(a) on conviction upon indictment to a fine of \$5,000,000 and to imprisonment for 14 years; or

(b) on summary conviction to a fine of \$500,000 and to imprisonment for 3 years.

(3) In this section...references to an indictable offence include a reference to conduct which would constitute an indictable offence if it has occurred in Hong Kong, China.

Section 25(4) prohibits laundering proceeds of crimes committed overseas. For example, if a serious crime took place overseas and the proceeds of the crime were transferred to Hong Kong, China, then any person who knowingly dealt with those funds in Hong Kong, China, committed an offense.

## DETECTING PROCEEDS OF CRIME

Sections 25A of DTRDP and OSCO contain similar provisions obligating a person to report suspicious transactions:

(1) Where a person knows or suspects that any property—

(a) in whole or in part directly or indirectly represents any person's proceeds of;

(b) was used in connection with; or

(c) is intended to be used in connection with, an indictable (i.e. serious) offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2) A disclosure referred to in subsection (1)—

(a) shall not be treated as a breach of any restriction upon the disclosure of information im-

posed by contract or by any enactment, rule of conduct or other provision;

(b) shall not render the person who made it liable in damages for any loss arising out of—

- the disclosure; and
- any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

(3) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine...and to imprisonment for 3 months.

Section 25A imposes a statutory duty for persons—for example, banks, accountants—to disclose suspicious transactions. It limits any duty of confidentiality, including banker-client confidentiality, to permit and encourage the voluntary disclosure to investigators of information relating to funds derived from serious offenses.

#### Detention of Suspected Proceeds of Drug Trafficking

Parts of DIROP (OSCO has no equivalent provision) give the Police and Customs and Excise Department power to seize cash of an amount greater than HK\$120,000 (US\$16,000), or its equivalent in any currency, that is being imported into or exported from Hong Kong, China, suspected to be proceeds of drug trafficking or for use in drug trafficking. Officers may detain the money while they make inquiries. A court may order the forfeiture of the money.

#### Production Orders

DIROP permits a court to issue production orders, monitoring orders, and search warrants to assist law-enforcement officers in investigations of drug trafficking. The

information obtained in Hong Kong, China, may be supplied to investigators overseas. Banks, businesses, and individuals are protected from any legal action brought by customers for breach of the duty of confidentiality as a result of the production of information to investigators.

OSCO provides for the (i) application and issuance of production orders in Hong Kong, China, (ii) investigation of an organized crime, or (iii) investigation of the proceeds of an organized or serious crime. A production order may be issued in respect of information in Hong Kong, China, or outside Hong Kong, China—for example, where information relevant to an investigation is located in an overseas branch or head office of a company doing business in Hong Kong, China.

#### Restraint Orders

Under DTROP and OSCO, a court may issue orders to restrain or “freeze” defendants or their relatives or agents from dealing with or disposing of property. The restraint or freezing order is an essential legal tool to prevent dissipation of proceeds of crime. It freezes the property so that it will be available to satisfy a confiscation or forfeiture order.

#### Foreign Confiscation Orders

DTROP and Hong Kong, China’s Mutual Legal Assistance in Criminal Matters Ordinance, Cap 525, permit Hong Kong, China, on the request of a foreign government, to restrain a defendant’s property in Hong Kong, China, and to enforce that country’s confiscation or forfeiture order in relation to drug trafficking and serious offenses.

## CONCLUSION

Money laundering is a global problem that requires a strong, united global response. Countries in the Asia-Pacific region can and must play an important part in this response.

It is a challenge to all countries, but there is no allowance for complacency. Countries should not be discouraged by the enormity of the problems, because much work has been done by other countries and organizations. They can provide information, assistance in drafting workable laws, and assistance in training investigators and prosecutors. Participation in APG offers valuable insight into the problems of money laundering and the means to address it.