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Review of implementation of the United Nations Convention against Corruption

Executive summary: China

Note by the Secretariat

The present conference room paper is made available to the Implementation Review Group in accordance with paragraph 36 of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (Conference of the States Parties resolution 3/1, annex). The summary contained herein corresponds to a country review conducted in the fourth year of the first review cycle.

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II. Executive summary

1. Introduction: Overview of the legal and institutional framework of China in the context of implementation of the United Nations Convention against Corruption

China signed the Convention on 10 December 2003 and ratified it on 13 January 2006. The Convention entered into force for China on 12 February 2006 in accordance with its article 68 (2).

China attaches great importance to the implementation of the Convention. To more fully implement the requirements of the Convention, China has amended the Criminal Law, the Criminal Procedure Law and issued a series of judicial interpretations. The main requirements of chapters III and IV of the Convention are embodied in China's law and judicial practice.

The criminalization provisions of the Convention need to be implemented via domestic legal provisions. China recognizes the Convention as a legal basis for international cooperation.

China has developed a socialist legal system with Chinese characteristics.

The main source of criminal law in China are the legislative acts adopted by the National People's Congress and its Standing Committee.

Judicial decisions are not legal precedents; however, the interpretations of laws by the Supreme People's Court's (SPC) or those issued jointly with the Supreme People's Procuratorate (SPP)) have to be followed by courts at all levels.

The mutual evaluation regarding China's implementation of standards of the Financial Action Task Force (FATF) by the FATF and the Eurasian Group on Combating Money Laundering and Terrorist Financing (EAG) has completed.

According to Chinese Constitution and SAR Basic Laws, Hong Kong and Macao SARs enjoy high degree of autonomy, involving administrative power, legislative power, independent judicial power and power of final adjudication.

2. Chapter III: Criminalization and law enforcement

The definition of public official ("*state functionary*") is contained in art. 93 CL and is in line with art. 2 of the Convention.

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

China has criminalized active bribery of public officials in arts. 389 (offence of bribery), 390 (sentencing and penalties for bribery), 391 (bribery of entities), 392 (intermediaries in bribery) and 393 (bribery by entities) of the Criminal Law (CL). Passive bribery is criminalized in arts. 383 (sentencing and penalties for embezzlement offence), 385 (offence of passive bribery by public officials) and 386 (penalties for passive bribery and aggravated penalties for bribe solicitation), 387 (passive bribery by entities) of CL.

Such elements of art. 15 as *promising and offering, indirectly and for the benefit of another person or entity* are not contained in the CL. However, these elements are clearly stipulated in the binding *Interpretation of the SPC and the SPP on Certain Cases involving Bribery.* The object of the bribe may be *anything that can have monetary value.*

China has criminalized active but not passive bribery of foreign public officials and officials of public international organizations in art. 164 CL. The same elements as

noted with regard to domestic bribery are missing. Punishment is limited to cases with *a "relatively large amount of a bribe*".

Before the country visit China had introduced art. 390bis CL to criminalize trading in influence which was adopted on 29 August 2015.

Active and passive bribery in the private sector are criminalized in arts. 163 and 164 CL. The same elements as noted with regard to domestic bribery are not provided for. Punishment is limited to the cases starting with a *"relatively large amount of bribe"*.

Money-laundering, concealment (arts. 23 and 24)

Money laundering for purposes of art. 23 and concealment for purposes of art. 24 of the Convention are criminalized in arts. 191 and 312 CL. Art. 191 specifically criminalizes laundering of the proceeds of *"corruption and bribery"*, while art. 312 is focused on the proceeds of "all crimes." *The Interpretation of the SPC on Several Issues Pertaining to the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases* clarifies the scope of application of relevant provisions of CL. The elements envisaged in art. 23(1)(b)(ii) of the Convention are covered by arts. 22-29 CL.

Dual criminality is a required condition when foreign nationals commit predicate offences abroad; however, it is not required for Chinese nationals.

China has not criminalized self-laundering as a separate offence; however, the act of self-laundering will be considered during the sentencing for the predicate offence.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Art. 382 CL criminalizes the embezzlement by public officials, which includes diversion of property. Art. 382 does not explicitly cover the element of "*for the benefit of another person or entity*". Penalties for the offence under art. 382 are provided for in art. 383 CL.

There is also a separate provision on the misappropriation of *public funds* in art. 384 CL.

Embezzlement/Criminal Conversion in the private sector is criminalized under art. 271 CL where there is "*the relatively large amount of the embezzled assets*".

Abuse of functions is criminalized in art. 397 CL. The prosecution of the offence requires "*causing heavy losses to public money or property or the interests of the State and the people*".

China criminalized illicit enrichment in art. 395 CL.

Obstruction of justice (art. 25)

Art. 25(a) is implemented in art. 307 CL, which addresses the bribery of witnesses and obstruction by *any other means*.

Art. 25(b) is implemented in art. 277 CL.

Liability of legal persons (art. 26)

Arts. 30 and 31 CL provide for the criminal liability of a unit "单位(danwei)". The concept of "unit" includes companies, enterprises, institutions, state bodies and organizations. Whenever there is a provision on the liability of a unit in the articles of CL, criminal liability shall be applicable to legal persons. Some provisions of CL relevant to UNCAC offences do not explicitly provide for unit liability (e.g. art. 307

CL) however, in such cases the natural persons who committed related offences may be investigated and prosecuted.

Legal persons can also be civilly liable per art. 106 of the General Principles of the Civil Law. Additionally, administrative liability can be applied to legal persons per art. 22 of the Law against Unfair Competition for bribery, art. 72(2) of the Government Procurement Law for passive bribery and art. 39 of the Regulation on Registration and Administration of Judicial Authentication Institutions. Penalties include fines in case of criminal liability. Revoking of licenses and prohibition to engage in certain activities can also be applied administratively. The provisions on the liability of legal persons do not preclude the punishment of natural persons who committed corruption offences.

Participation and attempt (art. 27)

Arts. 25-29 CL criminalize the participation in criminal offences. Attempt is criminalized in art. 23 and preparation in art. 22 CL.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Based on arts. 5, 61 and 62 CL judges must take into account the gravity, nature and facts of the crime. Sanctions applied to different offences *generally* appear to be proportionate. The maximum penalties applicable to the crime of active and passive bribery of public officials are: life imprisonment in case of active bribery (art. 390 CL) and death penalty in case of passive bribery and embezzlement of public property (art. 383(1) CL).

Public officials are not entitled to any immunities or jurisdictional privileges in China.

People's Procuratorates generally follow the principle of mandatory prosecution (art. 172 of the Criminal Procedure Law (CPL)). Only in cases where the circumstances of the crime are slight and where criminal sanction is not necessary or a criminal penalty can be exempted, a decision not to prosecute may be taken (art. 173 CPL).

In that regard, it is notable that some corruption crimes in China may be punished only if the amount of the illicit benefits is *large or relatively large or where circumstances are serious*. Although no clear definitions of these circumstances are provided in CL or CPL, these circumstances are clearly described in judicial interpretations.

Art. 30(4) of the Convention is implemented in arts. 64, 65, 69, 72 and 75 CPL.

The rules on commutation or parole are contained in arts. 78–86 of CL and 262-263 of CPL.

According to art. 38 of the Regulations on Disciplinary Measures for Functionaries of Administrative Bodies and art. 25 of the Provisional Regulations on Disciplinary Measures against Misconduct by Staff of Non-administrative Public Institutions, public officials are suspended once they are under investigation.

According to art. 24(1) of the Law on Public Servants, convicted criminals cannot be recruited as public servants. Persons convicted of corruption crimes cannot occupy senior positions in state-owned enterprise per art. 73 of the Law on State-owned Enterprises' Assets. Courts can also forbid someone from holding positions in non-administrative public institutions and state-owned enterprises as an auxiliary penalty per art. 37bis, and art. 54(3), (4) CL. In all cases involving public officials both disciplinary actions and prosecution can be taken simultaneously.

According to art. 68 CL, persons who have committed offences can be given a lighter or mitigated punishment or exempted from punishment in case of providing major assistance to law enforcement and may receive the same protections as witnesses.

In cases where a briber voluntary confesses *before the investigation* (art. 164 CL), a briber voluntary confesses *before he is investigated for criminal liability* (art. 390 CL), or an intermediary in bribery voluntary confesses *before he is investigated for criminal liability* (art. 392 CL), a mitigated punishment or exemption from punishment may be given. During the review China introduced amendments to the CL that specify that cooperation shall be taken into account in considering granting exemption from punishment for confessing persons; the amendments came into force after the country visit.

Based on the circumstances of non-prosecution under Art. 173 CPL, which include the degree of cooperation by a suspect, a prosecutor may opt not to prosecute him/her.

Protection of witnesses and reporting persons (arts. 32 and 33)

CPL provides for protection measures for witnesses, experts and *victims in cases of national security, terrorism, organized crime and drug-related offences* (art. 62). Protection measures can be also applied to witnesses, experts and victims in corruption cases based on ad hoc requests by the courts or law enforcement.

Some aspects of art. 33 of the Convention are addressed in art. 47 of the Law on Administrative Supervision and in the Regulations on Protection of Whistleblowers and Accusers (art. 2. 10-11). Certain protection measures are also contained in the Labour Law (art. 101). During the review China introduced new regulations on the physical protection of reporting persons which came into force after the country visit.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

Confiscation (including value-based) of criminal proceeds and instrumentalities of crime is provided by art. 64 CL. Art. CL requires the recovery of *"all illegally obtained*" property and confiscation of "*prohibited items and assets of the criminal used in the commission of the crime*". Chinese authorities explained that the concept of "*proceed*s", as stipulated in the Convention, is covered by the wording of the "*recovery of all illegally obtained property*". Additionally, art. 282 CPL stipulates that *"illicit proceeds*" and *"other properties involved in the case*" shall be confiscated.

The confiscation of income or benefits derived from proceeds of crime is addressed in art. 44 the Provisions of the People's Procuratorate on Seizure and Freezing of Money and Property involved in Cases.

The confiscation of intermingled proceeds is covered in art. 239 of the Rules of the People's Procuratorates on Criminal Procedure (for Trial Implementation) and art. 19 of the Provisions of the People's Procuratorate on Seizure and Freezing of Money and Property involved in Cases.

Art. 280 CPL, allows for a special procedure to confiscate the illegal proceeds in cases involving embezzlement and bribery, where the suspect or the defendant hides and cannot be brought to justice within 1 year after his arrest warrant was issued or where he is deceased.

According to art. 142 CL and art. 234 CPL, law enforcement agencies may access, seize or freeze bank accounts and other assets. The banks are obliged to provide requested information per art. 142 CPL and art. 29 and 30 of the Law on Commercial Banks. Bank secrecy is not an obstacle to getting such information. Administrative supervisory organs such as the Ministry of Supervision (MOS) can also access bank

and financial records when investigating corruption cases and request the courts to freeze the assets (art. 21 of the Law on Administrative Supervision). The administration of the seized and confiscated property is conducted by law enforcement agencies and people's courts (art. 234 CPL, the Provisions of People's Procuratorate on Management of Property Involved in Criminal Proceedings).

Rights of bona fide third parties are protected by art. 106 of the Property Law and procedurally in arts. 280 and 281 CPL.

Statute of limitations; criminal record (arts. 29 and 41)

Statute of limitations periods depend on the punishment applicable to a particular crime (art. 87 CL) and are not applied in cases where the alleged offenders evade the administration of justice (art. 88 CL).

China does not have specific legislative provisions on the consideration of foreign criminal records.

Jurisdiction (art. 42)

China has established territorial jurisdiction in art. 6 CL and jurisdiction over its nationals who commit offences abroad, with a possibility of exemption from criminal liability if the relevant conduct is punishable by imprisonment of less than 3 years (art. 7 CL). That exemption does not apply to Chinese public officials. China also has jurisdiction for the purposes of art. 42(2(a) and (d)) when the relevant offences meet the dual criminality requirement and are punishable by at least 3 years' imprisonment (art. 8 CL). In relation to money laundering China has jurisdiction as long as the offence is linked to its territory (Art. 6 CL).

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

According to art. 64 of CL and art. 11 of the Interpretation of the SPC and SPP on Certain Issues concerning Specific Application of the Law in Handling Criminal Cases involving Bribery, any improper property interests obtained through corruption shall be returned to victims. Under art. 58 of the General Principles of the Civil Law of the PRC's and art. 52(5) of the Contract Law, civil acts or contracts undertaken by means of corruption are invalid. Administrative permits or licenses obtained by means of bribery shall be revoked (art. 69 of the Administrative Licensing Law (ALL)).

Under art. 36 and 37 CL offenders shall compensate losses to victims of the crimes. Under art. 99 CPL victims can initiate affiliated civil actions against the offenders (art. 99 CPL).

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

Since the 18th CPC National Congress in November 2012, the Chinese leadership has been attaching an ever greater importance to combating corruption. The review noted the continued resolute determination of the Chinese authorities at the highest 1evel to fight corruption that has resulted in an increased number of successfully prosecuted corruption cases in recent years. In 2014 the procuratorate organs nationwide investigated and prosecuted 41487 cases of various public duty-related crimes involving 55101 persons; courts at all levels heard and concluded 31,000 cases of embezzlement and bribery involving 44,000 persons, including a number of highly publicised cases implicating high ranking officials. As part of the efforts to eliminate corruption risks in the government, 537 ministerial level approval procedures were eliminated or demoted to lower level.

China has several specialized authorities to combat corruption.

The CPC Central Commission for Discipline Inspection (CCDI) is tasked with the oversight of the implementation of the Party discipline.

The Ministry of Supervision (MOS) supervises administrative bodies.

In 1993 CCDI and MOS were merged to provide an integrated discipline inspection and supervision function to the government. CCDI/MOS can conduct internal investigation and apply disciplinary/administrative measures. Cases are transferred to law enforcement authorities if the evidence of criminal offences is detected. CCDI/MOS also coordinate domestic anti-corruption efforts between different government and law enforcement agencies.

China set up a General Bureau of Anti-Corruption and Bribery at the SPP in 1995, which was reorganized in 2014. Anti-corruption institutions are established at procuratorates at all local levels and focus on the investigation of corruption offences of public officials such as embezzlement and bribery. The guarantees of independence of the people's procuratorates are enshrined in the Constitution (art. 131) and the Organic Law of the People's Procuratorates (art. 9).

Public security organs also have specialised investigation departments of economic crimes to investigate the corruption crimes in the private sector.

Necessary training is systematically provided to improve the capacities of law enforcement staff in investigation and prosecution of corruption crimes.

The financial intelligence unit functions have been allocated among two units of the People's Bank of China (PBC): the Anti-Money Laundering Bureau (AMLB) and the China Anti-Money Laundering Monitoring and Analysis Center (CAMLMAC).

According to art. 108 CPL, any individual has a duty to report facts of a crime or a criminal suspect to law enforcement authorities. Per article 20 of the Anti-Money Laundering Law, financial institutions are obliged to report suspicious transactions. The Regulations of the People's Procuratorates on Offence Reporting provides for a possibility of giving financial rewards to reporting citizens.

The people's procuratorates and police have hotlines and websites where citizens can report suspicious conduct. CCDI/MOS also has online reporting platforms and hotlines.

2.2. Successes and good practices

- Art. 280 CPL is positively noted as a useful tool for the confiscation of corruption proceeds.
- Provisions of art. 64 CL on the return of property confiscated from a criminal to the victim without delay are positively noted.
- Art. 36 CL providing for the duty of the criminal to compensate economic losses to the victim of a crime is positively noted.
- Special anti-corruption bureaus and departments in the law enforcement agencies are positively noted.
- Elimination and delegation of 537 ministerial level approval procedures is noted as an effective corruption prevention measure.
- The important preventive functions of the MOS and its role as the coordination centre of the national anti-corruption efforts.
- Application of the active nationality jurisdiction principle to government officials *without any limitations* can be considered as a good practice conducive to the effective prosecution of corruption crimes.

2.3. Challenges in implementation

- The following measures could enhance implementation of the Convention:
- Consistently apply its current judicial interpretation in respect of *promising and offering of an undue advantage, indirectly and for the benefit of another person or entity*, and to consider introducing corresponding legal amendments in case of future deviations (arts.15, 16(1)).
- Ensure the full implementation of Article 15 whereby *undue advantages in bribery are considered to include immaterial benefits* through appropriate regulation, subject to China's basic legal system and in line with China's actual conditions.
- Ensure the full implementation of Article 16(1) whereby *the similarities of bribery of foreign and national public officials* are taken into account in order to keep necessary consistency in the criminalization of these two sorts of acts.
- Ensure that legal persons may be held liable for *participation in all Convention offences* (art. 26).
- Acknowledging China's current judicial practice, ensure *that the motives and degree of cooperation* are taken into account *in applying the mitigated punishment provisions to confessing persons* (art. 37(2)).
- Explicitly extend the protection afforded by art. 62 CPL *to witnesses, experts and victims in corruption-related cases* (art. 32).
- Ensure consistent application of current judicial practice in respect of *confiscation of transformed, converted or intermingled proceeds, as well as income or other benefits derived therefrom* (31(4-6)).

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

China has adopted an Extradition Law (EL), but there is no law on mutual legal assistance (MLA). The Convention's chapter IV provisions are viewed as a valid multilateral treaty with other States parties on international cooperation in the absence of bilateral treaties. China will conduct MLA based on the Convention. China will use the Convention as a legal basis for extradition with States Parties that also recognize the Convention as a legal basis.

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

Dual criminality is a strict requirement under art. 7(2) of EL with a minimum punishment threshold of 1 year.

China allows for accessory extradition as stipulated in art. 44(3) of the Convention per art. 7(2) EL. Convention offences are not considered political crimes.

China can conduct extradition based on bilateral treaties and also based on the principle of reciprocity (art. 15 EL).

The People's Republic of China and foreign States shall communicate with each other through diplomatic channels for extradition. (art. 4 EL).The Higher People's Court designated by the Supreme People's Court shall examine whether the request for extradition made by the Requesting State conforms to the provisions of EL and of extradition treaties regarding conditions for extradition and render a decision on it. The decisions made by the Higher People's Court are subject to review by the

Supreme People's Court (art. 16 EL). Upon receiving the decision made by the Supreme People's Court that the request meets the conditions for extradition, the Ministry of Foreign Affairs shall submit the decision to the State Council for which to decide whether to grant extradition. Where the State Council decides not to grant extradition, the Ministry of Foreign Affairs shall, without delay, notify the Requesting State of the same. The People's Court shall immediately notify the public security organ to terminate the coercive measures against the person sought. (art. 29 EL).

The grounds for the rejection of extradition requests are contained in art. 8 of the EL.

China received two extradition requests based on the Convention that were accepted and processed.

China does not have an expedited extradition procedure, though in practice requests based on the Convention are given priority.

China does not extradite its nationals (art. 8(1) EL). China will submit the case to its competent authorities for the purpose of prosecution per art. 44(11) of the Convention. China cannot enforce foreign sentences for the purposes of art. 44(13) of the Convention.

The guarantees of fair treatment are provided in arts. 23, 25 and 34 EL, including the rights to counsel and appeal.

China has a practice of consulting with requesting countries before refusing extradition, though this matter is not directly addressed in EL.

At the time of the country visit China had bilateral extradition treaties with 41 countries.

China can conduct the transfer of sentenced persons based on the principle of reciprocity and had also concluded prisoner transfer treaties with 13 countries at the time of the country visit.

China will consider the possibility of transferring proceedings if necessary in line with art. 47 of the Convention.

Mutual legal assistance (art. 46)

China provides MLA based on international treaties or the principle of reciprocity (art. 17 CPL) and in accordance with applicable provisions of domestic legislation (CL, CPL and Rules of the People’s Procuratorates on Criminal Procedure). China reported at the time of the country visit that it was in the process of drafting a comprehensive Law on MLA in Criminal Matters. China will apply paras. 9 to 29 of art. 46 of the Convention in MLA processes with other States parties in the absence of bilateral MLA treaties.

China reported that it had received 4 and made 3 MLA requests based on the Convention. China also generally noted difficulties in getting assistance when sending outgoing MLA requests based on the Convention.

China can afford all forms of legal assistance listed in art. 46(3) of the Convention.

Currently, China cannot spontaneously provide information to competent authorities of other States parties as stipulated in art. 46(4) of the Convention; however, that issue will be fully taken into account in the Law on MLA in Criminal Matters which is in draft form. China maintains the confidentiality of information in accordance with its treaty obligations, as required by art. 46(5) of the Convention. A limitation on the use of information received through MLA is addressed in existing treaties and in the draft Law on MLA in Criminal Matters.

China generally follows the principle of dual criminality with regard to MLA requests; however, it is applied flexibly and in practice assistance may be provided in the absence of dual criminality, including non-coercive measures as required by art. 46(9)(b) of the Convention.

The CPL does not have specific provisions with regard to the matters covered in art. 46(10-12) of the Convention; however, such provisions are present in some bilateral treaties.

China indicated that the SPP is the central authority for mutual legal assistance for the Government of China for the purposes of art. 46(13) of the Convention. Requests should be made in the Chinese language and may be received through INTERPOL channels

The Ministry of Justice (MOJ) is designated as the central authority in most bilateral treaties. The central authority makes a preliminary review of the request and follows up with the requesting States and relevant domestic authorities.

Based on art. 682 of the Rules of the People's Procuratorates on Criminal Procedure (for Trial Implementation), MLA requests can be refused if the requested assistance will damage the sovereignty, security or social and public interests or will infringe upon the Chinese law.

China has concluded bilateral criminal MLA treaties with 54 countries and also ratified or acceded to 20 UN multilateral conventions containing MLA provisions.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

China indicated that it considers the Convention as a legal basis for mutual law enforcement cooperation in respect of the corruption-related offences.

The CPL, the Interpretations of the SPC on the Application of the CPL, the Rules for Criminal Procedure of the People's Procuratorate (for Trial Implementation) and the Provisions on the Procedures for Handling Criminal Cases by Public Security Agencies address international law enforcement cooperation. China also noted that law enforcement cooperation will be fully taken into account in the Law on Mutual Legal Assistance in Criminal Matters.

The SPP had entered into 127 cooperation agreements and memoranda of understanding with 91 foreign Prosecutor General's offices and Ministries of Justice at the time of the country visit. The SPP has sponsored the establishment of cooperation mechanisms such as the Prosecutor Generals meetings of China-ASEAN members and the meetings of Prosecutor Generals of Shanghai Cooperation Organization members.

The International Association of Anti-Corruption Authorities (IAACA) was officially established in October 2006 in China. The IAACA encompasses 300 organizational members from law enforcement and national institutions entrusted with the task of fighting corruption. SPP has been acting as the IAACA secretariat since 2006.

The MPS has established cooperation with 189 countries and regions. It set up 75 24-hour communication channels with the law enforcement agencies such as internal affairs, police force, migration and procuratorates of more than 60 countries, and signed 300 cooperation documents. The MPS has 62 police liaison officers in 31 foreign countries and regions.

At the time of the country visit the PBC had signed memoranda on cooperation and exchange of financial intelligence with 33 jurisdictions.

In August 2014 anti-corruption authorities and law enforcement agencies from the 21 APEC economies established in Beijing *the APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET)*, which is aimed at sharing of information in transnational corruption and asset recovery cases. The secretariat of ACT-NET is hosted by the MOS in Beijing. APEC Members adopted *the Beijing Declaration on Fighting Corruption*, wherein they pledged to eliminate corruption through extradition and judicial assistance, and adopt more flexible measures to recover the proceeds of corruption by enhancing bilateral cooperation through the use of the Convention and other international instruments.

China can conduct joint investigations with foreign counterparts in accordance with provisions in the CPL and Rules of the People's Procuratorates on Criminal Procedure (for Trial Implementation).

China's law enforcement agencies under the coordination of the CPC Central Commission for Discipline Inspection and MOS conducted "Operation Skynet", "Operation Foxhunt" and "Special Operation of International Pursuit of Escaped Criminals and Recovery of Illicit Asset" in 2014-2015. These operations aimed at the apprehension and prosecution of corrupt officials who fled abroad and recovery of their ill-gotten assets in cooperation with foreign counterparts and Interpol. China reported a case of successful asset recovery where Convention was used as a legal basis.

The use of special investigative techniques is governed by arts. 148-152 CPL and possible in corruption cases as *"crimes seriously endangering the society*" (art. 148 CPL). Special investigative techniques can include electronic surveillance, controlled delivery and undercover operations.

3.2. Successes and good practices

- Use of the Conventionas a legal basis for extradition, MLA and law enforcement cooperation can be commended as a good practice conducive to the efficient conduct of international cooperation.
- Efficient system of collecting and organising statistical information on extradition and MLA.
- 75 24-hour communication channels with the departments of internal affairs and police forces of 44 countries as effective law enforcement cooperation tools.
- Active role in the creation of the APEC ACT-NET as a useful platform conducive to law enforcement cooperation to combat corruption.

3.3. Challenges in implementation

- Consider adopting an expedited extradition procedure (art. 44(9)).
- China is recommended to continue efforts on the adoption of the Law on Mutual Legal Assistance in Criminal Matters to ensure a comprehensive regulation of the MLA process in domestic legislation, and ensure the swift implementation of the new legislation.
- Acknowledging China's existing practice, it is recommended that China continues to provide non-coercive MLA in the absence of dual criminality where consistent with the basic concepts of its legal system in accordance with article 46, para. 9(b) of the Convention.
- China is recommended to continue enhancing capacity of the Central Authority for MLA through adequate resources and training.

Hong Kong Special Administrative Region of the People's Republic of China

1. Introduction: Overview of the legal and institutional framework of Hong Kong Special Administrative Region of the People's Republic of China (HKSAR) in the context of implementation of the United Nations Convention against Corruption

The People's Republic of China (PRC) signed the Convention on 10 December 2003 and ratified it on 13 January 2006. In accordance with Article 153 of the Basic Law of HKSAR of the PRC (BL), the Convention is applicable to HKSAR. In accordance with the BL, HKSAR practices the common law. The Convention is implemented in HKSAR through the use of local legislation.

HKSAR was established on 1 July 1997 in accordance with Articles 31 and 62(13) of the Constitution of the PRC. The BL, which was adopted by the National People's Congress of the PRC (NPC), was promulgated by the President of the PRC on 4 April 1990 and came into force upon the establishment of HKSAR to provide for the systems to be practised in HKSAR pursuant to the principle of "One Country, Two Systems". The NPC authorizes HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the BL. The laws in force in Hong Kong before the establishment of HKSAR (i.e. common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except those which contradicted the BL or were amended by the legislature of HKSAR.

The political structure in HKSAR is an executive-led system. The Chief Executive is accountable to the Central People's Government (CPG) and HKSAR (Article 43, BL). The Legislative Council is the legislature of HKSAR.

The independence of the Judiciary is enshrined in Article 85 of BL. The courts comprise the Court of Final Appeal, the High Court (Court of Appeal and Court of First Instance), the District Court, Magistrates' Courts and other special courts.

Relevant institutions in the fight against corruption include: Independent Commission Against Corruption (ICAC), Department of Justice (DoJ), Hong Kong Police Force (HKPF), Customs and Excise Department, Joint Financial Intelligence Unit (JFIU) and others.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

The definition of "prescribed officer" in section 2 of the Prevention of Bribery Ordinance (Cap. 201) (POBO) encompasses most categories of persons listed in article 2(a) of the Convention. Unpaid persons holding public office are covered by the definition of "public body".

Bribery and trading in influence (arts. 15, 16, 18 and 21)

HKSAR has criminalized active and passive bribery of public officials (sections 4, 5 and 8 of POBO). Section 2 of POBO provides broad definitions for the terms "advantage", "entertainment", "prescribed officer", "public servant", "agent", "principal" and "public body".

HKSAR applies section 9 of POBO (Corrupt transactions with agents) to address the active and passive bribery of foreign public officials. Under section 2 of POBO, an agent includes "any person employed by or acting for another". "Agent" covers a public official of a place outside Hong Kong (*B v ICAC* [2010] 13 HKCFAR 1). A case

example was provided. However, there have been no cases or jurisprudence applying section 9 to officials of public international organizations. Furthermore, section 9(2) has no extraterritorial effect and therefore the offence is limited to acts of bribery offered to an agent in HKSAR and does not apply to bribes offered to agents outside HKSAR (*HKSAR v. Krieger & Anor. (06/08/2014, FAMC1/2014)*).

HKSAR relies on the general bribery provisions to pursue cases of trading in influence (sections 3, 4, 5 and 8 of POBO). The abuse of real or supposed influence is covered in section 4. Relevant case examples were provided.

Bribery in the private sector is criminalized in POBO, sections 6, 7 and 9.

Money-laundering, concealment (arts. 23 and 24)

The elements of the offence of money-laundering are satisfactorily covered, notably in section 25 of the Organized and Serious Crimes Ordinance (Cap. 455) (OSCO). Although the extra-territorial application is established, OSCO applies only to "conduct which would constitute an indictable offence if it had occurred in Hong Kong" (section 25(4) of OSCO). This, however, covers all offences in the Convention which are indictable offences. Section 3 of POBO (Soliciting or accepting an advantage without permission) is not an offence stipulated in the Convention, **but it is used in practice to prosecute the solicitation as well as acceptance of undue advantages by prescribed officers**. It is a summary offence and does not constitute a predicate offence for the purposes of section 25. Section 25A of OSCO provides a "statutory defence" for persons who self-report the commission of a money-laundering offence, not having had an intention to engage in the offence.

Concealment as prescribed in section 25 of OSCO also covers persons who conceal criminal proceeds without having participated in the underlying offence.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

Embezzlement, misappropriation and diversion of property are addressed by provisions in the Theft Ordinance (Cap. 210) (TO) (sections 9, 16A, 17, 18, 18D and 19). Embezzlement of property by public officials can also be dealt with by the common law offences of "conspiracy to defraud" and "misconduct in public office" (MIPO).

The common law offence of MIPO has been used to deal with cases where public officials abuse their position and powers for the benefit of themselves or others. See e.g., *Sin Kam Wah & Another v HKSAR* [2005] 8 HKCFAR 192 (FACC 14/2004).

Illicit enrichment is criminalized (section 10 of POBO).

The cited provisions in the TO also cover the embezzlement of property in the private sector.

Obstruction of justice (art. 25)

HKSAR has comprehensively criminalized obstruction of justice in section 90(1) of the Criminal Procedure Ordinance (Cap. 221) (CPO) and sections 24 and 31 of the Crimes Ordinance (Cap. 200) (CO). Section 38 of CO treats as a principal offender any person who aids, abets, counsels, procures or suborns another person to commit perjury or who incites or attempts to procure or suborn perjury. The common law offence of perverting the course of public justice (e.g., *HKSAR v Law Kam Fai & Another* [2006] 2 HKLRD 879 (CACC 189/2005)) is also applicable.

The Offences Against The Person Ordinance (Cap. 212) (OATPO) prohibits various forms of violence (sections 17, 19, 39 and 40). Section 13A of the ICAC Ordinance

(Cap. 204) (ICACO) and section 36 of OATPO specifically protect ICAC and HKPF officers. The broad common law offence of contempt of court could also be applied.

Liability of legal persons (art. 26)

HKSAR has established the criminal, civil and administrative liability of legal persons, which is independent of the liability of natural persons. Civil liability applies to companies as constructive trustees under the common law based on a concept of "knowing receipt" (*Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* (No. 2) [2010] 13 HKCFAR 479). In respect of administrative liability, contractors may be removed from approved bidding lists for public works or subject to other regulating action on account of corruption.

Participation and attempt (art. 27)

Participatory acts are covered through common law provisions on joint enterprise, incitement, conspiracy (section 159A of CO), and aiding, abetting, counselling or procuring (section 89 of CPO). Section 159G of CO provides for the statutory offence of attempt. Conduct that is merely preparatory is not criminalized.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

HKSAR has adopted penalties for corruption-related acts that take into account the gravity of the offence (e.g., section 12 of POBO, section 27 of OSCO; *HKSAR v Yang Tu-lian and others* (DCCC 237/2012; CACC 177/2012)). The maximum period of imprisonment under POBO is 7 years (for those offences under sections 4, 7 and 9) or 10 years (for those offences under sections 5, 6 and 10) and under OSCO 14 years.

There are no criminal immunities or jurisdictional privileges accorded to HKSAR officials (article 25, BL). The Chief Executive of HKSAR is directly accountable for corruption offences under sections 4(2B), 5(4) and 10(1) of POBO.

DoJ of HKSAR controls criminal prosecutions free from any interference (Article 63, BL). A Code for Prosecutors sets out guiding principles in relation to prosecution policy and practices. A person may seek judicial review in the High Court against a decision by the Director of Public Prosecutions not to prosecute, if such person feels aggrieved by the decision. In practice, such application for judicial review is rarely made. Private prosecutions may be instituted pursuant to section 14 of the Magistrates Ordinance (Cap. 227) (MO).

Measures have been adopted to ensure the presence of defendants during criminal proceedings and investigations. Once charged and brought to court, the accused principally has the right, subject to conditions, to be admitted to bail unless there are substantial grounds for the court to believe that the accused would fail to surrender to custody, commit an offence or obstruct the course of justice (sections 9D and 9G of CPO).

Pursuant to the Prisoners (Release under Supervision) Ordinance (Cap. 325) (P(RUS)O) and Regulations, the Release under Supervision Board is established to consider applications from eligible prisoners for joining two early release under supervision schemes. Under the Long-term Prison Sentences Review Ordinance (Cap. 524) and Regulation, the Long-term Prison Sentences Review Board is established to conduct regular reviews of certain prisoners' sentences and may recommend to the Chief Executive of HKSAR that a prisoner's determinate sentence be remitted or that a prisoner's indeterminate sentence be substituted by a determinate one. These two statutory boards take into account the gravity of offences when considering early release of prisoners.

Disciplinary action may be taken against civil servants convicted of corruption related or other criminal offences in accordance with the Public Service (Administration) Order or the relevant disciplined services legislation as appropriate (e.g. section 11, PS(A)O). These officers may also be interdicted from service if considered appropriate in the public interest (e.g. section 13, PS(A)O).

Sections 33 and 33A of POBO and Article 79(6), BL principally address the disqualification of convicted persons from holding public office; whereas section 168E of the Companies Ordinance (Cap. 32) provides for the disqualification of convicted persons in connection with the promotion, formation, management, etc. of a company, which would include companies owned fully or in part by the government. See also, *HKSAR v CHAN Tat-chee* (DCCC 661A/2006).

Section 2 of the Rehabilitation of Offenders Ordinance (Cap. 297) (ROO) provides for rehabilitation of first offenders convicted of minor offences. Furthermore, the Correctional Services Department provides post release supervision for some discharged rehabilitated offenders in accordance with various legislation.

Cooperating offenders may receive mitigated punishment (e.g., Z v HKSAR [2007] 10 HKCFAR 183 (FACC 9/2006)). DoJ has a Prosecution Code and established work practice/procedure governing grants of immunity, which form part of the court record. Considerations involve the sufficiency of evidence, seriousness of the offence, role of the offender, and presence of mitigating factors. See HKSAR v Cheung Ting Bong [2006] 3 HKLRD 171 (CACC 89/2003), HKSAR v Tong Sui-lun, Franco (DCCC 282/2011). Cooperating offenders are eligible for the same protections as witnesses, including eligibility for the witness protection programme.

Protection of witnesses and reporting persons (arts. 32 and 33)

A number of legislative provisions facilitate witnesses to testify in a non-intimidating atmosphere. The courts also possess inherent jurisdiction in common law to make orders to protect witnesses in appropriate situations, such as testifying behind "screens" (*HKSAR v Chan Shu-kong and another* (DCCC 314/2006)) and limiting the disclosure of their identity (*L and Equal Opportunities Commission & Others* [2002] 3 HKLRD 178 (CACV 265/2002). Under sections 122 and 123 of CPO, the courts may order that part or all of criminal proceedings be held in closed court. HKPF and ICAC have dedicated witness protection units.

Section 79B of CPO provides that witnesses who fear for their or their families' safety will have no direct contact with the defendant or the general public and may testify remotely, via live television link (*HKSAR v See Wah-lun & Others* [2011] 2 HKLRD 957 (CACC 370/2009)). They may also adduce evidence in writing (section 65C of CPO) or by reading out witness statements (section 65B of CPO).

Under section 8 of the Witness Protection Ordinance (Cap. 564) (WPO), a new identity may be established for witnesses included in the witness protection scheme. Physical protection, including relocation, the use of safe houses, escorting by a law enforcement officer and 24-hour protection, are available in appropriate cases (section 7 of WPO).

Experts and victims are covered in the same manner as witnesses, their relatives and close associates under WPO, and further protected under the Victims of Crime Charter and section 27 of OSCO. Victim impact statements are admissible in sentencing proceedings.

HKSAR has not entered into any witness relocation agreements.

Section 30A of POBO and section 26 of OSCO prohibit disclosure of the identity of informers. However, no law has been passed specifically for the protection of reporting persons against unjustified treatment.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

HKSAR follows a conviction-based confiscation regime. The main provisions are sections 8, 10, 13, 15-18 of OSCO and sections 12, 12AA and 14C of POBO Confiscation is ordered as part of the sentencing process by a judge after conviction, based on the balance of probabilities. Value based confiscation is possible (e.g., sections 12AA of POBO, 12(6) of OSCO). Under OSCO (section 8(4)), restraint and forfeiture is limited to cases where benefits of at least HK$100,000 are involved.

There are provisions in OSCO, POBO and ICACO to enable the identification, tracing, freezing or seizure of proceeds and instrumentalities of crime. Under OSCO, upon conviction, the DoJ may apply to the court for the confiscation of the realizable property of the defendant, which includes all instrumentalities of value, regardless of whether they have come into the possession of a court, police, ICAC or customs agencies.

Although instrumentalities destined for use in the commission of offences may be confiscated (e.g., *HKSAR v Fan Wai-ping and others*), section 102(1)(c) of CPO specifically refers only to property that "has been used" in the commission of an offence. The court can invoke the power of this section where it appears to the court the property has been so used. Moreover, section 103 of CPO provides the court with the power to order seizure of instruments and things which there is reason to believe are provided/prepared with a view to the commission of any indictable offence, and these instruments or things will be subject to disposal by court under section 102(1)(c).

Receivers appointed under section 17 of OSCO manage realisable property pending confiscation and are responsible for realising and liquidating restrained property for complying with a confiscation order made under section 8 of OSCO.

The issuance of production orders (section 4 of OSCO), search warrants (section 5 of OSCO, section 10B of ICACO) and authorizations (section 13 of POBO) allow for the seizure and inspection of bank and financial records. See, e.g., *HKSAR v Tong Sui-lun, Franco* (DCCC 282/2011), *HKSAR v BHATTY Manoj Chainman Rai* (DCCC 1108/2012).

Offenders may be required to demonstrate the lawful origin of alleged proceeds of crime. Moreover, all restraint orders under DTROP and OSCO contain a disclosure order which requires the defendants to disclose the assets under their effective control.

Bank secrecy is not an apparent hindrance to the investigation and prosecution of domestic criminal offences.

Statute of limitations; criminal record (arts. 29 and 41)

There is no time limit for prosecutions in relation to indictable offences under sections 4-9 of POBO. Statutory limitation periods are only applicable to the more minor offences defined as summary offences. Section 31A of POBO extends the time limit for prosecution in relation to summary offences in POBO.

Foreign criminal records may be considered as part of the general background of the accused (section 54(1)(f) of CPO, *HKSAR v Singh Bal Winder* (CACC 166/2014)).

Jurisdiction (art. 42)

HKSAR has established jurisdiction over offences committed in its area and on board ships and aircraft (e.g., sections 23A to 23C of CO). HKSAR has not established jurisdiction over offences committed either: against its citizens, by its citizens or stateless persons residing in HKSAR, or against HKSAR.

HKSAR has not established the aut dedere aut judicare obligation, but may apply the Convention's article 44(11) directly.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

The rules for civil liability for bribery, including principles of contract rescission, are contained in case law. Administrative law provisions address the removal of licenses, the Government's right to terminate contracts on grounds of corruption, and removal of contractors from approved bidding lists.

In addition to initiating civil proceedings, legislative provisions may assist victims in seeking damages, compensation and restitution, namely sections 12 and 12AA of POBO, sections 73, 84 and 84A of CPO, and section 98 of MO.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

ICAC derives its charter from ICACO. Its independence is guaranteed in Article 57 of BL, with the Commissioner of ICAC being formally and directly responsible to the Chief Executive of HKSAR. Article 48 of BL provides that the Chief Executive shall nominate and report to the CPG on appointment of the ICAC Commissioner. The ICAC Commissioner serves a fixed term. The Chief Executive is empowered to recommend to the CPG the removal of the ICAC Commissioner.

ICAC conducts extensive in-house and external training to enhance officers' leadership and professional capabilities. As at the end of 2012, ICAC had a staff of 1,282. The budget of the Operations Department of ICAC for 2012-13 was HK$662.6 million.

Section 16 of POBO imposes a statutory duty for public servants to provide assistance to ICAC. Also, failure to report an arrestable offence to law enforcement agencies may render a person liable for the offence under section 91 of CPO (Penalties for concealing offences), if the person accepts or agrees to accept any consideration for not disclosing that information. ICAC has established liaison channels for referrals from government departments and public bodies.

Financial institutions are required via supervisory policy manuals and guidelines to report matters that could give rise to corruption or other illegal activities to the enforcement and regulatory authorities as soon as possible. ICAC has established liaison contacts with all major banks, insurance companies, accountancy firms, professional bodies and other private entities. JFIU and relevant law enforcement and regulatory authorities responsible for anti-money laundering organize a full spectrum of publicity and educational programmes.

Members of the public are encouraged to report suspected corruption to either the Report Centre of ICAC or its seven regional offices, including anonymously. The Report Centre operates on a 24-hour basis throughout the year. ICAC conducts a range of outreach to encourage the reporting of corruption.

2.2. Successes and good practices

- The extraterritorial scope of application of section 4 of POBO, as well as the broad definition of an 'advantage' in the POBO.

- The possibility of adjudicated cases in the courts against legal persons relative to corruption related offences would encourage persons to seek redress in like situations.
- The existence of a "Statement of Prosecution Policy and Practice - Code for Prosecutors" (http://www.doj.gov.hk/eng/public/pubsoppaptoc.html) and an independent ICAC Complaints Committee, which monitors and reviews complaints against ICAC or its staff, including for insufficient handling of investigations or prosecutions, and advises on follow-up actions.
- Measures to promote the reintegration of prisoners into society, including ROO and the two early release under supervision schemes under P(RUS)O.
- Decisions on the restraint and seizure of assets in contemplation of confiscation are taken simultaneously with decisions to prosecute suspects.
- Evidentiary presumptions applicable during confiscation hearings, including: (a) regarding the tainted sources of assets and the offender's knowledge thereof; (b) that any property transferred to the defendant within 6 years of the commencement of proceedings represents proceeds of crime; and (c) that any expenditure during that period was met out of his proceeds of crime (section 9 of OSCO).
- A number of good practices were noted in relation to the establishment and operation of ICAC, including the elaborate system of checks and balances in respect of its operations and the political will and resources dedicated to ICAC, including regarding specialized staff training (art. 36).
- Effective inter-agency coordination among relevant law enforcement institutions, in particular ICAC, HKPF, JFIU and other institutions, for example through the operational liaison groups set up between ICAC and other law enforcement agencies (art. 38).
- Apparent effective coordination between national agencies and entities of the private sector (art. 39(1)).

2.3. Challenges in implementation

The following actions are recommended to further strengthen the existing anti-corruption framework:

- In the absence of relevant case law involving officials of public international organizations, specify the legislation on bribery involving agents to specifically adopt an offence of bribery of foreign public officials and officials of public international organizations, which also captures bribes offered, made or promised to officials outside HKSAR (art. 16).
- Consider making section 3 of POBO an indictable offence to qualify it as a predicate offence for money-laundering (art. 23).
- Eliminate the threshold (section 8(4) of OSCO), whereby restraint and forfeiture is limited to cases where benefits of at least HK$100,000 are involved (art. 31(1)).
- Consider the adoption of witness relocation agreements (art. 32(3)).
- Consider expanding its legislation to ensure the protection of reporting persons against unjustified treatment (art. 33).

- Consider adopting jurisdiction over offences committed: against its citizens; by its citizens or stateless persons residing in HKSAR; and against HKSAR (art. 42(2)(a), (2)(b) and 2(d)).
- Notwithstanding that the Convention is directly applicable as a legal basis for surrender of fugitive offenders, HKSAR may wish to specify the aut dedere aut judicare obligation (arts. 42(3), 44(11)).

3. Chapter IV: International cooperation

The term "extradition" used in the Convention is referred to as "surrender of fugitive offenders" in HKSAR to describe removal of fugitive offenders from a non-state entity as opposed to removal from a state entity. The BL provides that, with the assistance or authorization of the CPG, HKSAR may make appropriate arrangements with foreign States for reciprocal juridical assistance (article 96). Such assistance may include cooperation in the areas of surrender of fugitive offenders and mutual legal assistance in criminal matters.

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

The Fugitive Offenders Ordinance (Cap. 503) (FOO) provides the legal framework for surrender of fugitive offenders. Agreements on surrender of fugitive offenders are implemented by way of orders passed under section 3 of FOO. Surrender from HKSAR must be pursuant to arrangements made the subject of an order under section 3.

HKSAR recognizes the Convention as the basis for surrender (C.N.549.2014.TREATIES-XVIII.14). The Fugitive Offenders (Corruption) Order (Cap. 503AB) was passed pursuant to section 3 of FOO to implement article 44 of the Convention. Accordingly, a State party to the Convention may make a request to HKSAR for surrender even though it has no bilateral agreement with HKSAR.

At present, pursuant to the authorization of the CPG, 19 bilateral agreements on surrender of fugitive offenders are signed (all are in force).

The list of offences liable to surrender in Schedule 1 to FOO covers Convention offences that are subject to more than 12 months' imprisonment in HKSAR and the requesting jurisdiction (section 2(2) of FOO).

Dual criminality is a fundamental principle for surrender (section 2(2) of FOO). However, it is the underlying conduct which is the determining factor (*Ho Man Kong v Superintendent of Lai Chi Kok Reception Centre* [2012] 5 HKLRD329), not the categorization or denomination of offences (*Cosby v Chief Executive HKSAR* [2000] 3 HKC 662).

The conditions to surrender are found in the various surrender agreements, as well as sections 2(2), 5, 10(6)(b), 13 and 24(3) of FOO.

Although the nationality of the accused is a discretionary ground for refusal (section 13(4) of FOO), surrender has never been refused on this ground. FOO does not address the *aut dedere aut judicare obligation*, but HKSAR follows the Convention and the obligations under its international agreements. HKSAR's domestic law does not provide for a mechanism for the enforcement of a sentence in lieu of surrender.

Fair treatment protections are in place (e.g., articles 4, 35, 38, 39, 41, BL; sections 12, 14 of FOO).

HKSAR requires the provision of prima facie evidence to enable surrender (section 10(6)(b) of FOO). In conviction cases, only evidence of conviction and (pending) sentence is needed. The evidentiary requirements are applied in a flexible and reasonable manner. Case examples evidencing the expeditious surrender of persons were provided.

The Secretary for Justice of DoJ (SJ) of HKSAR is the central authority for surrender (C.N.687.2012.TREATIES-XVIII.14). The statutory procedures for surrender are set out in FOO. A request for surrender may be made in relation to a person wanted for prosecution or for the imposition or enforcement of a sentence (section 4 of FOO). If arrested, the person will be brought before a court of committal presided by a magistrate (section 10 of FOO), which decides whether the offence is one for which surrender may be granted and the sufficiency of evidence.

From 2003 to 2012, a total of 8 fugitive offenders were surrendered by HKSAR on the offences of theft, money laundering and corruption. Since its entry into force, HKSAR has received one request (pending at the time of review) and made one request on the basis of the Convention. No requests based on the Convention have been refused by HKSAR to-date.

Surrender requests are generally concluded within two to three months, although it may take significantly longer if the person sought challenges the surrender proceeding.

The transfer of sentenced persons is possible in accordance with the Transfer of Sentenced Persons Ordinance (Cap. 513) and bilateral agreements with 15 jurisdictions. From 1997 to 2012 some 68 cases were dealt with.

On matters relating to the transfer of criminal proceedings, HKSAR consults foreign authorities to determine if to withhold prosecution and to provide evidence to assist in the foreign prosecution.

Mutual legal assistance (art. 46)

Even in the absence of an agreement or convention, the Mutual Legal Assistance In Criminal Matters Ordinance (Cap. 525) (MLAO) permits the provision of assistance on conditions of reciprocity.

Since 2010, HKSAR has received the following requests (not limited to corruption offences): 147 in 2010, 187 in 2011, 232 in 2012, 267 in 2013 and 303 in 2014. To date, HKSAR has not refused any requests made under this Convention or for corruption-related offences.

MLAO provides for a wide range of MLA in relation to offences involving natural or legal persons, including financial institutions, such as taking of evidence, search warrants, production orders, transfer of persons to assist in investigations and prosecutions, and restraint and confiscation of proceeds of crime (sections 10, 12, 15, 16, 17, 23, 27, 28 and 31 of MLAO as well as Schedule 2 to MLAO). HKSAR can share information spontaneously and has done so on a number of occasions.

MLAO contains provisions for overcoming confidentiality in complying with production orders for bank records (section 15(9)(c)). Bank staff may also be summoned before a court under section 10 of MLAO or under sections 74 to 77B of Evidence Ordinance (Cap. 8) to produce bank records and give oral evidence.

Although dual criminality is required for coercive measures under MLAO, the dual criminality requirement is considered loosely by way of the conduct test, not the elements of the offence. HKSAR applies the Convention directly where there is no agreement in place.

SJ of DoJ is the central authority for MLA (C.N.51.2006.TREATIES-3). Requests are assigned to counsel in the MLA Unit (MLAU) for advice and execution, who are required to respond to all incoming requests within 10 working days in accordance with MLAU's Performance Pledge, and to provide all follow-up advice in a timely schedule.

SJ of HKSAR may make arrangements for removal from HKSAR of consenting persons, whether detained or not, to provide assistance outside HKSAR (sections 23-24 of MLAO).

HKSAR provides assistance in accordance with procedures specified in the request to the extent that they are not contrary to domestic law.

HKSAR may provide assistance in hearing witnesses present in HKSAR by videolink (section 10(1)(b) of MLAO) and has done so in prior cases. As a matter of practice and pursuant to its agreements, HKSAR adheres to a limitation on use of information or evidence obtained pursuant to a request.

Confidentiality restrictions are adhered to as a matter of practice and in accordance with procedures specified by requesting States (section 8(2) of MLAO). Reasons are provided for any refusal and consultations are held as a matter of practice before assistance is postponed. HKSAR regularly updates requesting countries on the status of requests.

HKSAR bears the ordinary costs of executing requests. If expenses of an extraordinary nature arise, HKSAR consults the requesting party.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

ICAC has established channels of communication with law enforcement or anti-corruption agencies of various overseas jurisdictions. ICAC engages in information exchange and participates in visits, meetings and training with overseas counterparts and international initiatives, including APEC, the ADB/OECD Anti-Corruption Initiative for Asia-Pacific, and the Economic Crime Agencies Network. A dedicated operational liaison section of ICAC maintains close contact with law enforcement or anti-corruption agencies worldwide.

To combat money laundering arising from bribery cases, ICAC utilizes its liaison networks with overseas law enforcement agencies and also through interaction with JFIU. Investigation units of HKPF use Egmont Group channels to exchange financial intelligence.

HKPF has established communication channels with overseas counterparts through INTERPOL and liaison officers of overseas law enforcement agencies.

HKSAR has sent and received law enforcement officers for attachments and training with other States. HKPF has sent officers on secondment abroad to facilitate exchange of police personnel and experts between competent authorities.

HKSAR considers this Convention as the basis for mutual law enforcement cooperation. HKPF has signed Memoranda of Understanding with overseas law enforcement agencies for cooperation in combating transnational crimes, exchange of intelligence, personnel and training. ICAC does not require formal agreements but exchanges intelligence as a matter of practice and on the basis of the Convention.

HKSAR has undertaken joint investigations concerning offences under the Convention. ICAC and HKPF consider such investigations as permitted by the laws of HKSAR on a case-by-case basis.

Special investigative techniques may be conducted under the Interception of Communications and Surveillance Ordinance (Cap. 589) and common law principles. Surveillance, undercover operations and controlled delivery may all be conducted on a case-by-case basis.

3.2. Successes and good practices

- The website of the DoJ includes (inter alia) a comprehensive list of agreements on surrender of fugitive offenders, mutual legal assistance and other matters related to international cooperation, as well as guidelines on requesting MLA.
- HKSAR takes a conduct based approach in assessing dual criminality requirements (art. 44(1)).
- HKSAR has reportedly not refused assistance under this Convention or for corruption-related offences to date (art. 46(9)).
- Measures allowing for enforcing both conviction-based confiscation orders and civil forfeiture orders for purposes of MLA are broader than the domestic confiscation regime which is generally conviction-based. These measures allow for a wide scope of MLA to be provided and to facilitate asset recovery through international cooperation (art. 46(3)).
- Assistance is rendered in the absence of dual criminality for non-compulsory measures. Dual criminality is flexibly interpreted, considering whether the conduct not each element of the offence constitutes an offence in HKSAR (art. 46(9)).
- MLAU's standing guidelines for processing requests and timeframes established therein (art. 46(24)).
- The exchange of experience and personnel by HKSAR's law enforcement authorities with their foreign counterparts, including as providers of technical assistance (art. 48).

3.3. Challenges in implementation

- Notwithstanding that the Convention is directly applicable as a legal basis for surrender of fugitive offenders, HKSAR may wish to specify the aut dedere aut judicare obligation (arts. 42(3), 44(11)).
- Consider adopting laws providing for the enforcement of a sentence in lieu of surrender, where surrender is refused on the ground of nationality (art. 44(13)).

Macao Special Administrative Region of the People's Republic of China

1. Introduction: Overview of the legal and institutional framework of Macao Special Administrative Region of China in the context of implementation of the United Nations Convention against Corruption

On 20 December 1999, China resumed exercise of sovereignty over Macao. On that day, the Macao SAR was established in accordance with the provisions of Articles 31, and 62 paragraph 13 of the Constitution of the People's Republic of China, and the Basic Law of Macao Special Administrative Region of the People's Republic of China became effective. China ratified the Convention on 13 January 2006, and under Notification No. 5/2006 issued by the Chief Executive on 20 February 2006, the Convention become effective in Macao SAR.

Under the Basic Law of Macao SAR and the policy of "one country, two systems", Macao SAR enjoys executive, legislative and independent judicial powers, including that of final adjudication. The Basic Law of Macao SAR provides the basic principles and core of the legal regime of Macao SAR. As a consequence, Macao SAR's legal regime remains based on the civil law system of Portugal.

Two independent supervisory agencies, namely the Commission against Corruption (CCAC) and the Commission of Audit, have been established in the Macao SAR in accordance with the Basic Law.

2. Chapter III: Criminalization and Law Enforcement

The lack of statistical data or information on the practical application of some provisions of the Convention was an obstacle to the review of their implementation.

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (articles 15, 16, 18, 21)

A comprehensive definition of public official is found in article 336 of the Macao SAR Penal Code (PC) in line with article 2(a) of the Convention.

Active bribery is established in article 339 of the PC, foreseeing the acts of giving or promising an undue advantage, but not explicitly of "offering" Macao SAR authorities clarified that *the Portuguese verb "dar" used in article 339 encompasses both the concepts of "offering" and "giving" as required under the Convention*. However, the authorities were not able to demonstrate any corresponding case practice supporting this interpretation. According to that provision, if the active bribery is for the commission of a licit act, penalties are lighter than if it were for the commission of an illicit act. Noting that the requirement of the UNCAC is for active bribery for the public official to "act or refrain from acting in the exercise of his or her official duties", essentially the offence described in article 339(2) of the PC, observations were made on the proportionality of the penalties, under article 30(1) of UNCAC.

Passive bribery is adequately foreseen in article 338 of the PC, which defines passive bribery for the commission of licit acts, in spite of the light penalties stipulated.

Concerning the bribery of foreign public officials and officials of public international organizations, Macao SAR recently adopted Law 10/2014, on the regime of prevention and repression of acts of corruption in foreign business, which adequately implements the offence of active bribery of a foreign public official outside the Macao SAR or an official of a public international organization. The definitions of foreign public officials outside the Macao SAR and of officials of public international organizations are consistent with Article 2(b) and (c) of the Convention. Macao SAR has opted for

not explicitly establishing the passive bribery of foreign public officials and officials of public international organizations as a criminal offence. Under certain circumstances, related conduct may be covered by Law 19/2009 on bribery in the private sector.

Specific provisions are not in place on trading in influence, but perpetrators may, in some circumstances, be punished as accomplices to active or passive bribery.

The offences of active and passive bribery in the private sector are covered in articles 3 and 4 of Law 19/2009, on prevention and suppression of bribery in the private sector.

Money-laundering, concealment (articles 23, 24)

Most elements of the offence of money-laundering are satisfactorily covered under article 3 of Law 2/2006, on the prevention and repression of the offence of money-laundering. This law defines as predicate offences of money-laundering all offences carrying a penalty of imprisonment of a maximum term above 3 years imprisonment. As such, not all Convention offences are covered. It was noted that Macao SAR is currently considering amendments to its anti-money-laundering legal framework.

Furthermore, the specific formulations in articles 227 and 228 of the PC, while covering some of the elements of the offence required by article 23(1)(b) of the Convention, as well as the offence of concealment appear to be overly narrow, and only refer to proceeds of crimes against property and not to any proceeds of crime.

Embezzlement, abuse of functions and illicit enrichment (articles 17, 19, 20, 22)

Embezzlement and related offences are defined in article 340 of the PC of Macao SAR, on embezzlement, or peculation, by a public official, article 341 on misappropriation by a public official and article 342, on sharing of economic benefits through legal acts.

The requirements related to abuse of functions are covered by article 347 of the PC, on abuse of powers, which applies to situations not specifically covered by its preceding articles 343, on the invasion of dwelling by a public official, 344, on illegally receiving, 345, on using public force to obstruct the enforcement of a law or legitimate order, and article 346, on refusal to cooperate.

The offence of illicit enrichment is satisfactorily covered in article 28 of Law 11/2003.

Embezzlement of property in the private sector is addressed in articles 197 to 199, 211 and 217 of the PC, on the offences of theft, aggravated theft, abuse of trust, fraud and breach of trust.

Obstruction of justice (article 25)

Obstruction of justice offences are covered in the general offences against the administration of justice in the PC of Macao SAR, its article 311 on resistance and coercion, in the offence of breach of judicial confidentiality in Law 6/97/M, on organized crime, as well as in article 14 of Law 10/2000, on disobedience in relation to investigations by the Commission against Corruption.

Liability of legal persons (article 26)

Macao SAR has established the criminal liability of legal persons for offences of money-laundering, as evidenced, respectively by article 5 of Law 2/2006 and article 10 of Law 6/97/M, as well as active bribery of foreign public officials from outside the jurisdiction of Macao SAR or officials from public international organizations, as

provided for in article 5 of Law 10/2014. Civil liability for the offences defined in the Convention is established as a consequence of article 477 of the Civil Code of Macao SAR, which defines a general right to seek compensation for damages committed by natural or legal entities. Macao SAR has not established the administrative liability of legal persons for Convention offences.

Participation and attempt (article 27)

The modalities of participation in the commission of offences foreseen in the Convention are covered in articles 25 to 28 of the PC. In accordance with articles 21 and 22 of the PC, the attempt to commit offences is also punishable, for offences carrying a maximum sentence of imprisonment of more than three years. Currently, several offences established in accordance with the Convention have a maximum sentence of three years or less.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30, 37)

Judges exercise discretion in considering favourable and unfavourable circumstances specified in article 65 of the PC in sentencing within the penalty ranges provided for by legislation. Penalties for offences established in accordance with the Convention were found to present disparities and to be rather low, not only in comparison with other criminal offences, but also given that most of them would not qualify as predicate offences of the crime of money-laundering, which are required to be sanctioned with more than 3 years imprisonment. Moreover, the imposition of fines in lieu of imprisonment is provided for. This same threshold is necessary to qualify punishable attempts. For example, while active corruption committed by a "secret association or society" (as defined in Law 6/97) could be punished with imprisonment from 5 to 12 years, active corruption ("for the commission of a licit act, or "in the exercise of [*the public official's*] official duties") as defined in the Convention could be punished with imprisonment up to six months or a fine. The reviewers noted the various examples provided in this regard, demonstrating consistent administrative action in proper procedures, which were also subject to administrative appeal and judicial review. Disqualification from holding public office in this context can only take place by court order.

While certain officials, such as the Chief Executive, members of the Legislative Council, judicial officers and the Commissioner against Corruption, enjoy procedural rights, including to give testimony in writing, no person has immunity from prosecution in Macao SAR.

The prosecutors has no discretion in initiation and prosecution of cases in accordance with the principle of mandatory prosecution.

In accordance with the the *Statute of Personnel of the Public Administration of Macao*, public officials are subject to administrative penalties ranging from admonition in writing, fine and suspension, to forced retirement or dismissal, following proper disciplinary proceedings where criminal acts were also deemed to be violations of discipline. The suspension from the exercise of political rights, the prohibition from holding public office for a period of 10 to 20 years, the prohibition from exercising functions of administration, oversight or any nature in public legal entities, or corporations of public capital majority or concessionaires of public services or goods, for a period of 2 to 10 years, are among the accessory penalties foreseen in Law 6/97/M, on organized crime, which could apply to active bribery.

Article 40(1) of the PC stipulates that the purpose of criminal penalties and security measures of a penal nature is to protect legal interests and reintegrate perpetrators into

society. In accordance with article 52 of the PC, an individual plan of social reintegration is developed, as much as possible in agreement with the convicted person, foreseeing participation in social programs developed for social reintegration.

The exemption of penalty for cases of effective collaboration with law enforcement authorities is foreseen in articles 23 and 24 of the PC and article 262 of the Code of Criminal Procedure, to encourage joint or individual offenders to supply information to the Commission against Corruption for investigative and evidentiary purposes. Article 7 of the *Organic Law of the Commission Against Corruption of Macao* also stipulates the circumstances of exemption of penalty for offenders who help effectively in the search for evidence which may be decisive in establishing the elements of the crime or the identification of other offenders.

Protection of witnesses and reporting persons (articles 32, 33)

Macao SAR does not have specific provisions on the protection of witnesses, experts and victims, though it was indicated that the practice exists to provide physical protection to witnesses and those qualifying as a privy under article 57 of the Code of Criminal Procedure. The competence to coordinate any work pertaining to witness protection is attributed to the Commission against Corruption under article 18 of Administrative Regulation 3/2009. Witness protection is also among the circumstances allowing staff of the Commission to use guns (article 3, Commissioner against Corruption's Order 86/2000. Article 28 of Organized Crime Law 6/97/M could be also applied to protect the identity of witnesses under certain circumstances.

Freezing, seizing and confiscation; bank secrecy (articles 31, 40)

Confiscation of proceeds of crime acquired by the perpetrator of an offence or in the name of a third party, including value-based, is possible in accordance with article 103 of the PC. The confiscation of instrumentalities used or intended to be used for the commission of an offence established in accordance with the Convention, is covered by article 101 of the PC, which however contains the requirement that the instrumentalities create a danger to the safety of persons or to public order, or pose a serious risk of being used for the further commitment of criminal offences, by their nature or the circumstances of the case. Measures allowing for the tracing and seizure of proceeds and instrumentalities are also in place, notably as a result of article 163 of the Code of Criminal Procedure and article 103 of the Penal Code. The rights of bona fides third parties are protected in article 102 of the PC. Seizure and forfeiture of assets are also foreseen where those are deemed to be unreasonably superior to the income of the officials obliged to submit declarations in accordance with Law 11/2003.

The management of seized or confiscated assets depends on judicial orders, in accordance with the Penal Procedure Code, which specifically foresees in article 170 a judicial order for the anticipated sale, destruction or use on behalf of society of seized perishable or hazardous objects. It is carried out by law enforcement agencies, including the Commission against Corruption.

The waiver of the duty of bank secrecy is possible with the consent of the bank customer or by court order, in accordance with article 80 of Decree Law 32/93/M, on the financial system act, as well as article 8(2) of Law 10/2000, the organic law of the Commission against Corruption.

Statute of limitations; criminal record (articles 29, 41)

Statutes of limitation are defined in article 110 of the PC, which also includes suspension of the time period in a number of cases. Suspension and interruption of

statutes of limitation are also provided based on articles 112 and 113 PC. Interruption of statutes of limitation under article 113 PC can be also applicable to the situations where the alleged offender has evaded the administration of justice. Given the relatively low penalties foreseen for most offences established in accordance with the Convention, they do not carry longer periods of limitation.

Article 69 of the PC provides for consequences of recidivism, and Law no. 6/2006, on mutual legal assistance in criminal matters covers the provision of information related to the criminal record of suspects, accused or sentenced persons.

Jurisdiction (article 42)

Article 4 of the PC determines jurisdiction for acts committed within the boundaries of Macao SAR, regardless of the citizenship of the person who commits the act, or on board of vessels or aircraft registered in Macao SAR. Article 5 determines the principles of active and passive personality for acts committed outside its boundaries, under certain circumstances. Article 3 of Law 10/2014 also extends the jurisdiction over active corruption of foreign public officials or officials of a public international organization committed abroad, when the perpetrator is found within the Macao SAR boundaries.

Paragraph 2 of article 5 of the PC enables Macao SAR to establish jurisdiction on the basis of international treaties or judicial assistance agreements. This provision enables Macao SAR to broadly exercise jurisdiction and implement the '*aut dedere aut judicare*' principle. In addition, while extradition does not apply to Macao as a special administrative region of the People's Republic of China, article 33 of Law no. 6/2006 sets out the grounds for refusal of surrender. In those cases, article 33(2) determines that proceedings should be initiated in case of refusal to surrender, and relevant evidence requested from the requesting State.

Consequences of acts of corruption; compensation for damage (articles 34, 35)

Macao SAR had adopted measures for annulling or rescinding contracts and withdrawing concessions, in accordance with relevant provisions of its Code of Administrative Procedure and Civil Code.

Persons aggrieved as a result of an act of corruption have the right to initiate legal proceedings against those responsible for damage by means of separate or supplementary civil action in order to seek compensation.

Specialized authorities and inter-agency coordination (articles 36, 38, 39)

The Commission against Corruption of Macao SAR is the specialized body responsible for the investigation of corruption offences, and it may also investigate other offences, if found to be related to acts of corruption. Money-laundering, and other offences, are generally under the investigative purview of the judiciary police. Coordination is on an ad hoc basis with the police and the prosecution services. Information exchange takes place with the financial investigation unit. In accordance with article 13 of its Organic Law, the Commission against Corruption may refer concerned parties to other concerned authorities where administrative and judicial remedies under their purview were provided by law.

The Financial Intelligence Office, responsible for receiving financial and non-financial information, in accordance with Article 7 of Administrative Regulation no. 7/2006, analyses the information received and reports suspicious money-laundering activities to the Public Prosecution Office. Meanwhile, according to law, this Office also provides assistance to law enforcement agencies, judicial authorities and other entities

empowered to prevent and prohibit money-laundering and terrorism financing, based on their requests.

Generally, cooperation between governmental authorities and the private sector functions well, including on the basis of general duties of cooperation provided for under the Organic Law of the Commission against Corruption (Law no. 10/2000).

2.2. Successes and good practices

Overall, the following good practice in implementing Chapter III of the Convention is highlighted:

- It was noted with appreciation that Macao SAR's Law 2/2006 stipulates that the act of conversion or transfer of proceeds of crime is permissible even if the commission of the predicate offence takes place outside Macao SAR.
- In Macao SAR, all public servants, from the Chief Executive to workers and those of the same rank, shall declare their assets and interests, with the consequence that making a false declaration or possessing unjustified assets constitutes a criminal offence.
- In accordance with article 8 of Law 10/2000 read together with article 80 of Decree Law 32/93/M, the duty of cooperation with the Commission against Corruption prevails over the duty of confidentiality of any natural or legal entities, in particular bank secrecy, which may be waived with consent of the bank customer or by court order.
- In accordance with article 5(2) of the PC, the criminal law of Macao SAR is applicable where the obligation to try acts committed outside Macao SAR has its origin in international treaties or judicial assistance agreements applicable to Macao SAR.

2.3. Challenges in implementation

The following steps could further strengthen existing anti-corruption measures:

- Adapt its data collection systems to allow for the provision of data in relation to investigations, prosecutions and convictions of the offences established in accordance with the Convention
- Continue efforts to ensure the full implementation of arts. 15 and 16(1) and 21 of the Convention, in particular, with regard to the criminalization of offering of undue advantage
- Consider criminalizing passive bribery of foreign public officials and officials of public international organizations (art. 16(2))
- Consider amending legislation to punish the person who carries out trading in influence as an independent offence in accordance with the requirements of the Convention (art. 18)
- Modify the scope of the money-laundering offences to ensure that all offences under the Convention are deemed predicate offences and to ensure that the acquisition, possession or use of proceeds of all UNCAC offences (not just property-related offences) is covered (art. 23)
- Consider expanding the offence of concealment to cover all UNCAC offences (art. 24)
- Consider to extend the criminal liability of legal persons to active and passive bribery and other related offences of the PC (art. 26)

- Consider whether legislation could be amended to establish that attempts to commit any offence established in accordance with the Convention, as well as preparatory acts, could be made punishable (art. 27)
- Establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice (art. 29)
- Review the range of penalties for the offences established in accordance with the Convention, and amend legislation to ensure that the sanctions stipulated take into account the gravity of the offences (art. 30)
- Consider providing for the possibility of reassignment of public officials accused of offences established in accordance with the Convention (art. 30)
- Amend laws to eliminate the requirement that instrumentalities of crimes pose a danger to personal safety or to public order, or pose a risk of being used for the commitment of further criminal offences as a condition for seizure and confiscation (art. 31)
- Adopt a specific and comprehensive legal regime to protect victims and witnesses (art. 32)
- Consider adopting measures to protect reporting persons in the penal, administrative and labour spheres in matters of corruption (art. 33)
- Consider adopting systems to allow for the collection of data on lifting of bank secrecy in cases involving cooperation with the Commission against Corruption (art. 40)

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Article 4 of Law 6/2006 establishes that judicial cooperation in criminal matters is regulated primarily by applicable international conventions or by provisions of this law where international conventions are silent or insufficient.

Extradition; transfer of sentenced persons; transfer of criminal proceedings (articles 44, 45, 47)

Extradition does not apply to Macao as a special administrative region of the People's Republic of China. However, surrender of fugitives is regulated by Law No. 6/2006, on judicial cooperation in criminal matters, and relations with foreign countries are possible with the assistance and authorization of the Central Government of P.R. China.

Law 6/2006 contains measures for expediting surrender proceedings, in addition to a simplified procedure for surrender with consent in its art. 41. In addition to the general grounds for refusal outlined in articles 7 to 9 and 19, articles 32 and 33 also contain possible grounds for refusal.

As a consequence of article 4 of Law 6/2006, offences established in accordance with the Convention are, in principle, deemed as 'extraditable', or allowing for surrender of fugitives. However, article 32(2) of Law 6/2006 establishes that surrender of fugitives can only take place for acts punishable by both the law of Macao SAR and the law of the requesting State with a maximum penalty of at least one year of imprisonment. Therefore, the offence of active bribery of public officials to the practice of an illicit act (art. 339 (1), PC) is legally suitable to allow the surrender of fugitives, but the offence of active bribery of public officials to the practice of an licit act (art. 339 (2),

PC) is not; and the offence of active bribery in the private sector is only legally suitable to allow the surrender of fugitives when it is also "*suitable to cause a prejudice to the health or safety of others"* (art. 4, n. 3 Law 19/2009).

The law establishes the requirement of dual criminality in its article 6. It also permits surrender on the basis of reciprocity, in accordance with its article 5 and recent practice. Therefore, while Macao SAR may surrender fugitives on the basis of the Convention, it is also in a position to surrender fugitives in the absence of a specific treaty.

The Office of the Secretary for Administration and Justice of Macao SAR was designated by China as the competent authority for cooperation on the surrender of fugitive offenders for the purpose of Article 44 of the Convention.

Macao SAR has not entered into bilateral agreements on surrender of fugitives, but is making efforts to undertake bilateral agreements, as also foreseen in article 213 of the Code of Penal Procedure. However, such agreements are not a pre-condition for transfers to be conducted on a case-by-case basis.

No requests for surrender of fugitives related to corruption have been refused by Macao SAR to date.

Concerning the transfer of sentenced persons, has an agreement with Portugal, and further agreements are under consideration with Portugal and Timor-Leste. Law 6/2006 also regulates in considerable level of detail the transfer of prisoners (articles 106 to 115) as well as the transfer of criminal proceedings (articles 75 to 88). Though case examples are not available on many aspects of implementation, statistics are available on the transfer of prisoners and there have been no cases on transfer of proceedings.

Mutual legal assistance (article 46)

Mutual legal assistance is also regulated in Macao SAR by Law 6/2006 on judicial cooperation in criminal matters, for which the general grounds for refusal in articles 7 to 9 apply. Fiscal matters are not among such grounds. Dual criminality also applies to mutual legal assistance, and the only exception for providing assistance in absence of dual criminality is for the purpose of proof of causes of exclusion of the unlawfulness of the criminal act or of the guilt of the accused.

In accordance with article 132(2) of Law 6/2006, at the request of the requesting State, mutual legal assistance could be afforded in accordance with the foreign legislation, as long as it does not contravene fundamental legal principles of Macao SAR or cause serious damage to the proceeding.

In accordance with Law 6/2006, the Public Prosecution's Office is responsible for receiving, transmitting and handling requests for mutual legal assistance and for formulating recommendations to the Chief Executive, for him to determine whether to afford assistance or not. The Office of the Secretary for Administration and Justice is the governmental authority for international cooperation, and transmits requests to the Public Prosecution's Office.

Pursuant to article 24(3) of Law 6/2006, if Macao SAR finds that information in a foreign request is incomplete, its authorities may request supplementary information, without prejudice to adopting urgent provisional measures.

The respect for confidentiality of requests is regulated in article 134 of Law 6/2006 in line with the Convention. While there are means in Macao SAR's legislation to lift bank secrecy by judicial order, there is no provision ensuring that requests for mutual legal assistance would not be denied on the ground of bank secrecy.

In terms of time required to execute requests, Macao SAR legislation does not set a time limit, but it was indicated that proceedings normally do not take longer than 6 months. In case of urgency, urgent measures are possible in accordance with article 30 of Law 6/2006, including direct communication with judicial authorities of Macao SAR, through the International Criminal Police Organization (INTERPOL), and transmittal of the request by any means that allow for a written record to be made.

The cost of mutual legal assistance in the absence of a different agreement with the requesting State or territory, as a general rule is free-of-charge, with the exception of the expenses and remuneration of witnesses and experts, including their travel and accommodation, expenses resulting from the sending or delivering objects, expenses involving the transport of persons, and other expenses deemed relevant by the requested party, as a consequence of human and technological resources involved in the execution of the request.

No mutual legal assistance requests related to corruption have been refused by Macao SAR to date. While there have been no incoming cases on the basis of the Convention, Macao SAR has made a request using the Convention as a legal basis.

Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49, 50)

Macao SAR considers the Convention as a legal basis for mutual law enforcement cooperation, though there have been no cases on that basis.

International law enforcement cooperation, including dissemination of arrest warrants, can be done through the Macao Sub-Bureau of the China National Central Bureau of INTERPOL, within the judiciary police. The Macao SAR Financial Intelligence Unit has signed 15 MoUs/ Cooperation Agreements with other Financial Intelligence Units and is a member of the Asia Pacific Group on Money Laundering (APG)..

Joint investigations are not explicitly foreseen in the legislation of Macao SAR.

Articles 172 to 174 of the Code of Penal Procedure regulate the interception of telephone communications by judicial order, which may be carried out only for corruption related offences with maximum penalties of at least 3 years' imprisonment. Certain forms of undercover operations are made possible by virtue of article 7 of the Organic Law of the Commission against Corruption. Despite not having agreements or arrangements in place for the use of special investigative techniques at the international level, Macau SAR informed of its willingness to consider such cooperation on a case-by-case basis.

3.2. Successes and good practices

Overall, the following points are regarded as successes and good practices in the framework of implementing Chapter IV of the UNCAC:

- Among measures intended to expedite surrender proceedings, Law 6/2006 waives certain formal requirements for a request for surrender of a fugitive offender and allows for the adoption of an urgent temporary measure pending the provision of additional information (art. 24(3) and (4)); it requires no certification for documents attached to the request (art. 24(2), and it provides that proceedings shall be conducted even during a holiday (art. 74) (art. 44(9) of the Convention)
- While in principle cooperation is undertaken on the basis of international conventions or Law 6/2006, Macao SAR is also able to apply laws of the requesting State if those are more favourable to the "people intervening in the process" (the accused and other participants, including victims and witnesses), in

consistency with Macao SAR legal principles and at the request of the requesting State, as provided for in article 132 of Law 6/2006 (art. 46(17)).

3.3. Challenges in implementation, where applicable

The following points could serve as a framework to strengthen and consolidate the actions taken by Macao SAR to combat corruption:

- Consider the possibility of granting surrender for corruption offences in absence of dual criminality (art. 44(2) of the Convention)
- Amend its legislation to recognize all offences covered by the Convention as the offences for the commission of which surrender can be conducted, which may also result from a revision of penalties recommended to take into account the gravity of the offences (art. 44(7))
- Continue to consider entering into bilateral or multilateral agreements or arrangements on the surrender of fugitive offenders, the transfer of sentenced persons, and mutual legal assistance (arts. 44(18), 45 and 46(30))
- Consider explicitly regulating the possibility of providing assistance in cases of recovery of assets (art. 46(3)(j) and (k))
- Ensure that mutual legal assistance requests cannot be denied on the ground of bank secrecy (art. 46(8))
- Ensure that the scope of legal assistance be as wide as possible and consider to provide it also in the absence of dual criminality (art. 46(9))
- Consider establishing a foreseeable legal framework to facilitate the conduct of joint investigations with other States (article 49)
- Intensify efforts to collaborate with other States to combat corruption offences committed by use of modern technology (art. 48(3))
- Consider regulating in a comprehensive manner the use of controlled delivery and other special investigative techniques and to allow for the admissibility in court of evidence derived therefrom (art. 50)

II. 执行概要

1. 介绍

1.1. 在实行《联合国反腐败公约》过程中，中国的法律和制度框架概述

中国于2003年12月10日签署了《联合国反腐败公约》（“《公约》”），并于2006年1月13日批准了《公约》。根据公约第68(2)条，《公约》于2006年2月12日对中国生效。

中国高度重视公约的落实工作。为了进一步全面落实公约的要求，中国修订了《刑法》与《刑事诉讼法》，并发布了一系列司法解释。《公约》第三章和第四章的主要要求都在中国的法律和司法实践中得到了体现。

《公约》的定罪条款需要通过中国国内的法律法规来实施。

中国承认《公约》是国际合作的法律依据。

中国发展出了一套有中国特色的社会主义法律体系。

中国刑事法律的主要渊源是全国人民代表大会及其常务委员会通过的法律。

司法判决不是具有约束力的司法先例；然而，各级法院必须遵守最高人民法院（SPC）的司法解释以及最高人民法院与最高人民检察院（SPP）共同发布的司法解释。

欧亚反洗钱和反恐融资组织（EAG）与金融行动特别工作组（FATF）就中国对FATF标准的执行情况进行了评估。

根据中国宪法和特别行政区基本法，香港特别行政区和澳门特别行政区享有高度自治，包括行政管理权、立法权、独立的司法权和终审权。

2. 第三章：定罪和执法

《刑法》第93条中包括了“公职人员”（“国家工作人员”）的定义，该术语定义符合《公约》第2条。

2.1. 对审议条款实施情况的意见

贿赂和影响力交易（第15条、第16条、第18条和第21条）

中国在《刑法》第389条（行贿罪）、第390条（行贿罪的量刑与处罚）、第391条（对单位行贿罪）、第392条（介绍贿赂罪）以及第393条（单位行贿罪）对贿赂公职人员的行为进行了定罪。《刑法》第383条（贪污罪的量刑与处罚）、第385条（公职人员受贿罪）和第386条（受贿罪的处罚与对索贿的从重处罚）、第387条（单位受贿罪）对受贿进行了定罪。

《刑法》没有明确包含第15条要求的一些内容，包括“间接，并且为了其他人或实体的利益许诺给予、提议给予”。然而，具有法律约束力的《最高人民法院和最高人民检察院关于办理贪污贿赂刑事案件适用法律若干问题的意见》中清晰地规定了这些内容。贿赂行为的客体为“具有金钱价值的一切利益”。

中国在《刑法》第164条中对行贿（而非受贿）外国公职人员或者国际公共组织官员的行为进行了定罪。惩罚仅限于“贿赂数额较大”的案件。

在国别访问前，中国于2015年8月29日在《刑法》中新增了第390条之一，对向有影响力的人行贿进行定罪。

《刑法》第163条、第164条中对私营部门中的行贿与受贿进行了定罪。但尚缺少类似国内贿赂的同样规定，惩罚仅限于“贿赂数额较大”的案件。

洗钱、窝赃（第23条和第24条）

《刑法》第191条和第312条中对第23条中的洗钱和第24条中的窝赃进行了定罪。《刑法》第191条特别对“贪污和贿赂”之所得的洗钱行为进行了定罪，而第312条重点放在了“所有犯罪”的所得。《最高人民法院关于审理洗钱等刑事案件具体应用法律若干问题的解释》明确了《刑法》的有关规定的适用范围。《刑法》第22-29条包含了《公约》第23(1)(b)(ii)条中所指的一些内容。

如果外籍人士在国外实施了上游犯罪，则双重犯罪是一个必要条件；然而，对于中国公民而言，双重犯罪不是一个必要条件。

中国尚未对自洗钱进行单独定罪；但是，在对上游犯罪量刑的过程中，自洗钱行为会得到考虑。

贪污、滥用职权和资产非法增加（第17条、第19条、第20条和第22条）

《刑法》第382条对公职人员贪污行为（包括转移财产的行为）进行了定罪。第382条没有明确包含“为了其他人或实体的利益”的内容。第383条中规定了对第382条项下犯罪行为的处罚。

第384条中对挪用公款做出了专门规定。

《刑法》第271条中对私营部门的贪污/非法侵占行为进行了定罪，条件是“侵占的财物数额较大”。

《刑法》第397条对滥用职权行为进行了定罪。起诉该罪需要满足“致使公共财产、国家和人民利益遭受重大损失”这个条件。

中国在《刑法》第395 条中对资产非法增加进行了规定。

妨碍司法公正（第25条）

《刑法》第307条落实了《公约》第25(a)条，包括了对证人的贿赂与任何其他方式的妨碍。

《刑法》第277条落实了《公约》第25(b)条。

法人责任（第26条）

《刑法》第30条和第31条规定了单位的刑事责任。“单位”的概念包括公司、企业、事业单位、国家机关和团体。凡在《刑法》条款规定了单位责任的，刑事责任应适用于法人。与《公约》中犯罪相关的一些《刑法》条款缺少对单位刑事责任的明确规定（例如《刑法》第307条），但在这种情况下，犯罪的自然人可能会被调查和起诉。

根据《中华人民共和国民法通则》第106条，法人还可以承担民事责任。此外，根据《中华人民共和国反不正当竞争法》中第22条中关于贿赂的规定，以及《中华人民共和国政府采购法》第72(2)条关于受贿的规定以及根据《司法鉴定机构登记管理办法》第39条，可以判处承担行政责任。在刑事责任中，处罚包括罚金。行政责任还包括吊销许可证和禁止参加某些活动。对法人责任的规定并不排除实施腐败犯罪的自然人的刑事责任。

参与犯罪、犯罪未遂和犯罪中止（第27条）

《刑法》第25-29条对共同参与刑事犯罪进行了定罪。《刑法》第23条对犯罪未遂进行了定罪，《刑法》第22条对犯罪预备进行了定罪。

起诉、审判和刑罚：与执法机关的合作（第30条和第37条）

根据《刑法》第5条、第61条和第62条，法官必须考虑罪行的危害程度、罪行的性质和情节。刑罚应当与其所犯罪行相当。贿赂公职人员以及公职人员受贿所适用的最高刑罚：行贿罪的，无期徒刑（《刑法》第390条）；受贿罪和贪污罪，死刑（《刑法》第383(1)条）。

在中国，公职人员无权享有豁免或司法特权。

人民检察院通常遵守必须起诉的原则（《刑事诉讼法》（CPL）第172条）。只有在犯罪情节轻微、不需要判处刑罚或可以免于刑罚的案件中，才能做出不起诉决定（《刑事诉讼法》第173条）。

就此而言，值得注意的是在中国，对于一些贿赂犯罪，只有非法利益较大或情节严重才能进行处罚。虽然《刑法》和《刑事诉讼法》对此等情节没有明确定义，但司法解释对此进行了明确地规定。

《刑事诉讼法》第64条、第65条、第69条、第72条、第75条落实了《公约》第30(4)条。

《刑法》第78-86条以及《刑事诉讼法》第262-263条中包含了减刑或假释的规定。

根据《行政机关公务员处分条例》第38条和《事业单位工作人员处分暂行规定》第25条，一旦公职人员被调查将暂停履行职务。

根据《中华人民共和国公务员法》第24(1)条，曾因犯罪受过刑事处罚的人员不得录用为公务员。根据《中华人民共和国企业国有资产法》第73条，被判犯有贪污罪的人员不得在国有企业中担任重要职务。作为补充惩罚，法院还可以根据《刑法》第37条之一和第54(3)、(4)条判决禁止在事业单位和国有企业中担任职务。在涉及公职人员的所有案件中，可以同时给予纪律处分和提起诉讼。

根据《刑法》第68条，犯罪分子为执法提供重大帮助的可以从轻或者减轻处罚或者免除处罚，并且可以获得与证人一样的保护。

如果行贿人在被追诉前主动交待（《刑法》第164条）、行贿人在对其进行刑事责任调查前主动交待（《刑法》第390条）或介绍行贿人在对其进行刑事责任调查前主动交待（《刑法》第392条），可以减轻处罚或者免除处罚。在审议过程中，中国通过了《刑法》修正案，其中明确了当决定是否对认罪者免予处罚时，将认罪者的配合作为考虑因素。该修正案在国别访问后生效。

基于《刑事诉讼法》第173条所列的不起诉情形（其中包括犯罪嫌疑人的配合程度），检察官可以选择不起诉他/她。

证人和举报人的保护（第32条和第33条）

《刑事诉讼法》为危害国家安全犯罪、恐怖活动犯罪、有组织犯罪和毒品犯罪等案件的证人、专家、受害者规定了保护措施（第62条）。根据法院或执法机构的特别要求，在腐败案件中也可以对证人、专家和受害者采取保护措施。

根据《中华人民共和国行政监察法》第47条与《关于保护检举人、控告人的规定》（第2，10，11条）规定了第33条中的一些方面的内容。在《劳动法》（第101条）中还包含了一些保护措施的规定。在审议过程中，中国介绍了对报告人采取实体防护措施的新规定。该规定在国别访问后生效。

冻结、扣押和没收；银行保密（第31条和第40条）

《刑法》第64条规定犯罪所得和犯罪工具应当予以没收（包括基于价值的）。《刑法》规定，犯罪分子“违法获得的一切财物”，应当予以追缴；“违禁品和供犯罪所用的本人财物”，应当予以没收。中国有关部门解释称，“违法所得的一切财物应当予以追缴”的措辞包括了《公约》中规定的“所得”的概

念。此外，《中华人民共和国刑事诉讼法》第282条规定，“违法所得”和“其他涉案财产”应予没收。

《人民检察院扣押、冻结款物工作规定》第44条对犯罪所得产生的收入或利益的没收作出了规定。

《人民检察院刑事诉讼规则（试行）》第239条和《人民检察院扣押、冻结款物工作规定》第19条对没收混合所得作出了规定。

《刑事诉讼法》第280条规定，对于贪污贿赂犯罪案件，犯罪嫌疑人、被告人逃匿、在通缉一年后不能到案，或者犯罪嫌疑人、被告人死亡，可以采取没收其违法所得的特殊程序。

根据《刑事诉讼法》第142条和《刑事诉讼法》第234条，执法机关可以查询、扣押或冻结银行账户和其他资产。银行有义务根据《刑事诉讼法》第142条和《中华人民共和国商业银行法》第29条和第30条提供所需的信息。银行保密不构成获取这些信息的障碍。行政监察机关，例如，监察部（MOS）在调查贪污违法活动时还可以查看银行和财务记录，并且请求法院冻结资产（《中华人民共和国行政监察法》第21条）。被扣押和没收的财产由执法机关和人民法院管理（《中华人民共和国刑事诉讼法》第234条、《人民检察院刑事诉讼涉案财物管理规定》）。

善意第三方的权利根据《中华人民共和国物权法》第106条予以保护，并根据《刑事诉讼法》第280条和第281条从程序上予以保护。

时效；犯罪记录（第29条和第41条）

时效期取决于所涉嫌具体犯罪的最高法定刑（《刑法》第87条），逃避司法侦查或审判的，不受追诉时效的限制（《刑法》第88条）。

中国对考虑外国犯罪记录的内容没有做出具体的法律规定。

管辖权（第42条）

中国在《刑法》第6条中规定了属地管辖权，《刑法》第7条规定了属人管辖权。但是有一种例外，就是所犯的罪，最高刑为三年以下有期徒刑的，可以不追究其刑事责任（《刑法》第7条）。这项例外规定不适用于中国的公职人员。就第42(2(a)和(d))条而言，对于符合双重犯罪要求并且可处至少三年有期徒刑的犯罪，中国具有管辖权（《刑法》第8条）。对于洗钱，只要犯罪与中国的领域相关，中国便具有管辖权（《刑法》第6条）。

腐败行为的后果；损害赔偿（第34条和第35条）

根据《刑法》第64条以及《最高人民法院、最高人民检察院关于办理行贿刑事案件具体应用法律若干问题的解释》第11条，腐败犯罪取得的不正当财产性利益应返还被害人。根据《民法通则》第58条和《合同法》第52(5)条，通过腐败手段实施的民事行为或合同是无效的。通过贿赂方式获得的行政许可应予吊销（《中华人民共和国行政许可法》第69条）。

根据《刑法》第36条和第37条，犯罪分子应赔偿被害人的损失。根据《刑事诉讼法》第99条，被害人可以针对犯罪分子提起民事诉讼（《刑事诉讼法》第99条）。

专职机关和机关之间的合作（第36条、第38条和第39条）

自2012年11月召开的中国共产党第十八次全国代表大会以来，中国的领导层更加重视反腐工作。审议注意到，近年来中国最高层领导在反腐败问题上持续的、坚定不移的决心，更多腐败案件得到成功起诉。在2014年，全国的检察机关调查并起诉了41487件各类公职相关的案件，涉及55101人；各级法院审理并了结31000件贪污腐败案件，涉及44000人，包括一些备受关注的涉及高层官员的案件。作为根除政府腐败工作的一部分，537个部级审批程序被取消或下放给了下级部门。

中国有几个专职反腐机关。

中共中央纪律检查委员会（CCDI）负责监督中国共产党纪律的执行。

监察部（MOS）监督行政机关。

1993年，中共中央纪律检查委员会和监察部合署向政府承担全面的纪律检查和监督职能。中共中央纪律检查委员会/监察部可以进行内部调查，并且采取纪律/行政措施。如果发现了刑事犯罪证据，则将案件转交给司法机关。中共中央纪律检查委员会/监察部还负责协调不同政府部门和执法机关之间的国内反腐工作。

中国于1995年在最高人民检察院内部设立了反贪污贿赂总局，并于2014年重组。所有层级的地方检察院都设立了反贪机构，主要工作是调查公职人员的腐败案件，例如贪污与贿赂。《宪法》（第131条）和《中华人民共和国人民检察院组织法》（第9条）中对保证人民检察院的独立性做出了规定。

公安机关还设有专职的经济犯罪侦查局以调查私营部门的腐败犯罪。

中国系统性地提供了必要的培训来改进执法机关人员在腐败案件的侦查和起诉方面的能力。

金融情报中心的职能由中国人民银行的两个部门承担：反洗钱局（AMLB）以及中国反洗钱监测分析中心（CAMLMAC）。

根据《刑事诉讼法》第108条，任何单位和个人有义务向执法机关举报犯罪事实或刑事犯罪嫌疑人。根据《中华人民共和国反洗钱法》第20条，金融机构有义务举报可疑的交易。《人民检察院关于举报犯罪的规定》中规定对进行举报的公民给予物质奖励。

人民检察院和公安机关均设有热线和网站，公民可以使用这些热线和网站举报可疑的犯罪活动。中共中央纪律检查委员会/监察部也设有在线举报平台和热线。

2.2. 成功之处和良好实践

•对于没收腐败所得而言，《中华人民共和国刑事诉讼法》第280条是一个有用的工具，值得赞赏。

•值得赞赏的条文：《刑法》第64条中把从犯罪分子那里没收的财物立即返还给受害人的规定。

•值得赞赏的规定：《刑法》第36条对犯罪分子有义务赔偿受害人经济损失的规定。

值得赞许的做法：

•在执法机构中设立专职的反腐局和反腐败部门。

•取消和下放537个部级审批程序是防止腐败的一项有效措施。

•在国内反腐工作中监察部（MOS）承担了重要的预防腐败的职能，并且发挥了全国反腐败工作协调中心的作用。

•将有效的属人管辖权无限制地用于政府官员可以视为一个良好的做法，有利于对腐败犯罪进行有效起诉。

2.3. 实施中的问题

下列措施可以促进公约的落实：

•始终如一地贯彻现行司法解释中关于“间接，并且为了其他人或实体的利益，许诺给予、实际给予不正当好处”的规定，并考虑如果未来发生偏差，通过相应的法律修正案（第15条，第16(1)条）。

•确保第15条的全面落实，在符合中国的基本法律制度和实际情况下，并考虑通过适当的法规，在贿赂犯罪的“不当利益”中包括“非物质利益”。

•全面落实第16(1)条，考虑贿赂外国公职人员与中国公职人员之间的相似之处，以在对两类行为定罪时保持必要的一致。

•确保法人可以因参与《公约》所有犯罪而被追诉（第26条）。

•鉴于中国当前的司法实践，确保在对自首人员进行从轻处罚时，犯罪动机和合作的程度得到了考虑（第37（2）条）。

•将《刑事诉讼法》第62条规定的保护措施扩大至腐败相关案件中证人、专家和受害人（第32条）。

•确保司法实践在没收转移、转化、与合法所得相混合的犯罪所得以及由犯罪所得产生的收入与其他价值等方面保持一致（第31（4-6）条）。

3. 第四章：国际合作

3.1. 对审议中的这些条款执行情况的意见

中国已经通过了《引渡法》（EL），但是，在司法协助（MLA）方面尚无专门法律。在缺少双边条约的情况下，中国在与其他缔约国开展国际合作时将《公约》第四章的规定视为有效多边条约。中国已经并将继续基于《公约》开展司法协助。中国将在与同样承认《公约》为法律依据的缔约国的引渡合作中使用《公约》作为法律依据。

引渡；被判刑人的移管；刑事诉讼的移交（第44条、第45条和第47条）

双重犯罪是《引渡法》第7(2)条项下一条严格要求，最低刑罚门槛为1年。

根据《引渡法》第7(2)条，中国允许《公约》第44(3)条中规定的附带性引渡。《公约》规定的犯罪不视为政治犯罪。

中国可以根据双边条约来实施引渡，也可以根据互惠原则进行引渡（《引渡法》第15条）。

中国和外国之间的引渡，通过外交途径联系。中国外交部为指定的进行引渡的联系机关。（《引渡法》第4条）。外交部收到请求国提出的引渡请求后，应当对引渡请求书及其所附文件、材料是否符合本法第二章第二节和引渡条约的规定进行审查。最高人民法院指定的高级人民法院对请求国提出的引渡请求是否符合本法和引渡条约关于引渡条件等规定进行审查并作出裁定。最高人民法院对高级人民法院作出的裁定进行复核。（《引渡法》第16条）。外交部接到最高人民法院符合引渡条件的裁定后，应当报送国务院决定是否引渡。国务院决定不引渡的，外交部应当及时通知请求国。人民法院应当立即通知公安机关解除对被请求引渡人采取的强制措施（《引渡法》第29条）。

在《引渡法》第8条中包含了拒绝引渡请求的依据。

中国收到过基于《公约》提出的两个引渡请求，均已接受和处理。

虽然在实践中基于《公约》提出的引渡请求会优先处理，但是中国没有一套加快引渡程序。

中国不引渡具有中华人民共和国国籍的人员（根据《引渡法》第8(1)条）。就根据《公约》第44(11)条进行起诉而言，中国将把案件提交给有关机关。

就《公约》第44(13)条而言，中国不能执行国外判决。

在《引渡法》第23条、第25条和第34条中对保证公平对待做出了规定，包括聘请律师和上诉的权利。

尽管在《引渡法》中没有做出直接规定，但是，中国通常在拒绝引渡之前会与请求国进行协商。

截至国别访问时，中国已经与41个国家签订了双边引渡条约。

中国可以基于互惠原则移管被判刑人员，并且截至国别访问时，已经与13个国家签署了犯人移管条约。

中国将考虑根据《公约》第47条实施移交程序的可能性（如果必要）。

司法协助（第46条）

中国基于国际条约或互惠原则（根据《刑事诉讼法》第17条）并按国内有关法律规定（《刑法》、《刑事诉讼法》和《人民检察院刑事诉讼规则》）提供司法协助。在国家访问时中国在报告中称其正在起草一部综合的《国际刑事司法协助法》。在缺少双边司法协助条约的情况下，中国将在与其他缔约国的司法协助程序中采用第46条第9款至第29款的规定。

中国报告称，中国曾收到过其他缔约国根据《公约》提出的4个司法协助请求，并且基于《公约》提出过3个司法协助请求。中国还指出了在基于《公约》向外发出司法协助请求时取得帮助过程中遇到的困难。

中国可以提供《公约》第46(3)条中所列的所有形式的司法协助。

目前，中国无法自发地按照第46(4)条的规定向其他缔约国的主管机关提供信息；然而，在新的《国际刑事司法协助法》中将对这些问题作出全面的规定，这目前处在草案阶段。中国按照《公约》第46(5)条的规定根据其条约义务为信息保密。通过司法协助收到的信息的使用限制在现行的条约和《国际刑事司法协助法》草案中做出了规定。

对于司法协助请求，通常情况下中国遵守双重犯罪原则；然而，在缺少双重犯罪的情况下，这项原则被灵活使用，并且在实践中可以提供协助，包括《公约》第46(9)(b)条要求的非强制性措施。

对于第46(10-12)条中包含的事宜，《刑事诉讼法》没有做出具体规定；然而，在一些双边条约中有此等规定。

中国指出，就《公约》第46(13)条而言，最高人民检察院是中国政府司法协助的中央机关。提出的请求应当使用中文，可以通过国际刑事警察组织接收（INTERPOL）。

在大多数的双边条约中，司法部（MOJ）被指定为中央机关。中央机关对请求进行初步审核，并且与提出请求的缔约国和有关国内机构进行跟进。

根据《人民检察院刑事诉讼规则（试行）》第682条，如果被请求的协助将损害领土、安全或社会和公共利益或可能违反中国的法律，则可以拒绝司法协助请求。

中国已经与54个国家签订了双边司法协助条约，并且还批准或加入了20个含有司法协助规定的联合国多边条约。

执法合作；联合侦查；特殊侦查手段（第48条、第49条和第50条）

中国指出，对于与腐败有关的犯罪，中国把《公约》视作执法合作的法律依据。

《刑事诉讼法》、《最高人民法院关于适用中华人民共和国刑事诉讼法的解释》、《人民检察院刑事诉讼规则（试行）》以及《公安机关办理刑事案件程序规定》对国际执法合作做出了规定。中国还指出，《国际刑事司法协助法》中将对国际执法合作做出全面的规定。

截至国别访问时，最高人民检察院已经与91个国外的检察长办公室和司法部签订了127个合作协议和备忘录。最高人民检察院在中国-东南亚国家联盟和上海合作组织框架下组织了检察长会议合作机制。

国际反贪局联合会（IAACA）于2006年10月在中国正式成立。国际反贪局联合会包括300个组织成员，它们来自执法机构和承担反腐工作的国家机构。最高人民检察院从2006年开始一直担任国际反贪局联合会的秘书处。

中国公安部已经与189个国家和地区建立了合作关系。它还建立了75个与60多个国家的内政部门、警察机关、移民局和检察院之间的24小时联系渠道，并且签订了300个合作文件。公安部还在31个国家和地区配备了62名警务联络官。

截至国别访问时，中国人民银行已经与33个司法管辖区域就金融情报的合作和交换签署了备忘录。

2014年8月，来自21个亚太经贸合作组织成员国的反腐机构和执法机构在北京建立了亚太经合组织反腐败执法合作网络（ACT-NET），目的是在跨国腐败和资产追缴案件中共享信息。亚太经合组织反腐败执法合作网络的秘书处在北京由监察部担任。亚太经贸合作组织成员国通过了《北京反腐败宣言》，这些国家在该宣言中承诺通过引渡和司法协助方式打击腐败，并且采用更具灵活性的措施通过使用《公约》和其他国际协议加强双边合作来追缴腐败所得。

中国根据《刑事诉讼法》和《人民检察院刑事诉讼规则（试行）》的规定与其他国家的相应部门进行联合侦查。

在中共中央纪律检查委员会监察部的协调下，中国执法机关在2014-2015年实施了“天网行动”、“猎狐行动”和“国际追逃与资产追回特别行动”。这些行动针对逃往国外的腐败官员，中国与国外有关机构和国际刑警组织合作对他们进行逮捕和起诉，并且追缴他们的非法所得资产。中国报告了一起成功利用《公约》作为法律依据的资产追回案例。

特殊侦查手段的使用规定在《刑事诉讼法》第148-152条，并且在“严重危害社会”的腐败犯罪案件中可能使用特殊侦查技术（《刑事诉讼法》第148条）。特殊侦查技术可以包括电子监视、控制下交付和卧底行动。

3.2. 成功之处和良好实践

- 使用《公约》作为引渡、司法协助和执法合作的法律依据均是良好的实践做法，有利于高效地进行国际合作。
- 采集和组织有关引渡和司法协助的统计信息的有效系统。
- 作为有效执法合作的工具，75个与44个国家的内政部门和警察机关之间的24小时联系渠道。
- 在建立亚太经合组织反腐败执法合作网络中发挥的积极作用，它是一个有效的平台，有利于反腐执法合作。

3.3. 实践中的挑战

•考虑采纳一套加急引渡程序（第44(9)条）。

•建议中国继续努力通过《国际刑事司法协助法》以便确保在国内立法中司法协助程序有全面的规定，并确保迅速落实该新法。

•鉴于中国当前的实践，推荐中国继续依照《公约》第46条第9（b）款在缺乏双重犯罪的情况下提供符合其法律制度基本理念的非强制性司法协助。

•推荐中国通过充足的资源和培训继续增强司法协助中央机关的能力。

中华人民共和国香港特别行政区

1. 介绍： 在实行《联合国反腐败公约》过程中，中华人民共和国香港特别行政区（“香港特区”）的法律和制度框架概述

中华人民共和国（“中国”）于2003年12月10日签署了《公约》，并在2006年1月13日批准了《公约》。根据《中华人民共和国香港特别行政区基本法》（“《基本法》”）第153条，《公约》适用于香港特区。根据《基本法》，香港特区奉行普通法。香港特区通过本地立法实施《公约》。

香港特区在1997年7月1日根据《中华人民共和国宪法》第31条和第62条第13项成立。全国人民代表大会（“全国人大”）通过的《基本法》，由中国国家主席于1990年4月4日颁布，并随着香港特区成立而生效。《基本法》依据“一国两制”原则，确立香港特区所奉行的制度。全国人大授权香港特区依照《基本法》的规定实行高度自治，享有行政管理权、立法权、独立的司法权和终审权。香港在特区成立前的法律（即普通法、衡平法、条例、附属立法和习惯法），除了与《基本法》相抵触或经香港特区立法机关做出修改者外，予以保留。

香港特区实行行政主导的政治体制，行政长官对中央人民政府（“中央政府”）和香港特区负责（《基本法》第43条）。立法会是香港特区的立法机关。

司法独立的原则体现于《基本法》第85条。香港特区的法院体系包含终审法院、高等法院（上诉法庭和原诉法庭）、区域法院、裁判法院和其他专门法庭。

打击贪污的相关机构包括：廉政公署（“廉署”）、律政司、香港警务处、香港海关、联合财富情报组等。

2. 第三章：刑事定罪和执法

2.1. 对审议条款实施情况的意见

《防止贿赂条例》（第201章）（“《防贿条例》”）第2条中对于“订明人员”的定义覆盖了《公约》第2（a）条中所列出的大多数类人员。“公共机构”的定义覆盖了无报酬担任公职的人员。

贿赂和影响力交易（第15条、第16条、第18条和第21条）

香港特区把贿赂公职人员(行贿和受贿)列为刑事罪行（《防贿条例》第4、5、8条）。《防贿条例》第2条对“利益”、“款待”、“订明人员”、“公职人员”、“代理人”、“主事人”及“公共机构”等字眼定下了广阔的定义。

香港特区运用《防贿条例》第9条(代理人的贪污交易)来处理外国公职人员的贪污贿赂。根据《防贿条例》第2条，“代理人”包括“受雇于他人或代他人办事的人”。“代理人”包括香港以外地方的公职人员（B诉廉政专员[2010] 13 HKCFAR 1）。香港提供了一个相关案例。然而，尚未有案件或判例应用第9条于国际公共组织官员。而且，第9（2）条也没有域外效力，因此其只限于香港特区内贿赂代理人的行为，而不适用于在香港特区外对代理人作出的贿赂行为（香港特区诉Krieger & Anor）（06/08/2014, FAMC1/2014）。

香港特区依据一般性的贿赂条款来追诉以权力影响交易的案件（《防贿条例》第3、4、5、8条）。第4条涵盖了滥用实际影响力或被认为具有的影响力。香港特区提供了相关的案例。

《防贿条例》第6、7、9条将私营机构的贿赂行为，定为刑事罪行。

洗钱、窝赃（第23条和第24条）

洗钱罪的罪行元素得到了全面的覆盖，尤其是《有组织及严重罪行条例》（第455章）第25条。尽管《有组织及严重罪行条例》适用于域外，但只限于“如果发生在香港域内，会构成可公诉罪行的犯罪行为”（《有组织及严重罪行条例》第25

（4）条）。然而这覆盖了所有《公约》列出的可公诉的罪行。《防贿条例》第3条（未经允许索取或接受利益）并不是公约所列的罪行，但是在实践中，它被用以起诉订明人员索取和收受不正当利益。这是一项简易罪行，并不构成第25条目的下的上游犯罪。《有组织及严重罪行条例》第25A条为那些并非故意犯洗钱罪后自首的人士提供法定辩护。

《有组织及严重罪行条例》25条对于窝赃行为的规范，覆盖了未参与所牵涉的犯罪活动但隐藏犯罪得益的人士。

贪污、滥用职权和资产非法增加（第17条、第19条、第20条和第22条）

盗用、挪用、非法转移财产的行为由《盗窃罪条例》（第210章）规范（第9、16A、17、18、18D、19条）。公职人员侵吞财产也可以按普通法的“串谋诈骗”及“公职人员行为失当”罪行处理。

普通法的公职人员行为失当罪有被用来处理公职人员为他人或自身利益滥用职位与职权的行为。例如冼锦华及另一人 诉 香港特区[2005] 8 HKCFAR 192 （FACC 14/2004） 。

资产非法增加被列为刑事罪行（《防贿条例》第10条）。

上文提及的《盗窃罪条例》中的条款亦覆盖了私营机构内的侵吞财产行为。

妨害司法（第25条）

香港特区在《刑事诉讼程序条例》（第221章）（“《刑诉条例》”）第90（1）条，以及《刑事罪行条例》（第200章）第24、31条已对妨害司法全面定为刑事罪行。《刑事罪行条例》第38条将任何协助、怂使促致或唆使他人在宣誓下作假证供的人，或任何煽动、企图促致、企图唆使他人在宣誓下作假证供的人，视为主犯一样。普通法罪行“妨碍司法公正罪”（例如香港特区 诉 罗锦辉及另一人[2006] 2 HKLRD 879 CACC 189/2005）也同样适用。

《侵害人身罪条例》（第212章）禁止了各种形式的暴力（第17、19、39、40条）。《廉政公署条例》（第204章）（“《廉署条例》”）第13A条和《侵害人身罪条例》第36条专门保障廉署和香港警务处人员。普通法中广义的蔑视法庭罪也适用于此。

法人责任（第26条）

香港特区为法人规定了刑事、民事和行政责任，并独立于自然人责任之外。公司在普通法原则下作为推定受托人“在知情下接收”负有民事责任（Thanakharn Kasikorn Thai Chamkat （Mahachon） 诉雅佳控股有限公司（第2号） [2010] 13 HKCFAR479）。就行政责任而言，当局可基于承建商的贪污行为，把他们从《认可公共工程承建商名册》中除名，或对他们采取其他规管行动。

参与、未遂和中止（第27条）

普通法涵盖有关共同犯罪、煽惑、串谋（《刑事罪行条例》第159A条）以及协助、教唆、怂使或促致（《刑事诉讼程序条例》第89条）的参与犯罪行为。《刑事罪行条例》第159G条订明企图犯罪为法定罪行。仅是预备犯罪行为则未列为刑事罪行。

起诉、审判和制裁；与执法机关的合作（第30条和第37条）

香港特区考虑了罪行的严重性而对贪污相关行为采取相应的刑罚（例如，《防贿条例》第12条、《有组织及严重罪行条例》第27条；香港特区 诉 杨土连及其他人（DCCC 237/2012; CACC 177/2012）。《防贿条例》下最高可判处监禁7年（针对第4、7、9条下的犯罪）或10年（针对第5、6、10条下的犯罪），《有组织及严重罪行条例》下最高可判处监禁14年。

香港特区官员没有刑事豁免权或司法特权（《基本法》第25条）。根据《防贿条例》，香港特区行政长官也受《防贿条例》第4（2B）、5（4） 和 10（1）条的贪污罪行所规范。

香港特区律政司主管刑事检控工作，不受任何干涉。检控守则就检控政策及做法提供指引和原则（《基本法》第63条）。如果某人因刑事检控专员不予起诉的决定感到冤屈，该人可以向高等法院就此提请司法复核。实践中，这样的司法复核申请并不多见。根据《裁判官条例》（第227章）第14条，个人可以提出私人检控。

香港特区采取措施确保被告在刑事诉讼和调查过程中的参与。被控人士被落案起诉及带上法庭后，除却法庭有足够的理由相信被告人会不归押、在保释期间犯罪或妨害司法，有权在有条件约束的情况下获准保释（《刑事诉讼程序条例》第9D及9G条）。

监管下释囚委员会是根据《囚犯（监管下释放）条例》（第325章）及其规例而设立，以考虑合资格参与两项监管下提早释放计划的囚犯所提交的申请。长期监禁刑罚复核委员会是根据《长期监禁刑罚复核条例》（第524章）及其规例而設立，以定期复核特定囚犯的刑罚，并可向香港特区行政长官建议减免囚犯确定限期的刑罚，或以确定限期刑罚取代囚犯的无限期刑罚。这两个法定委员会在考虑提早释放囚犯时，均会审视罪行的严重程度。

如公务员被裁定犯了贪污或其他刑事罪行，当局可按《公务人员（管理）命令》或相关的纪律部队法例（视何者适用而定）对该等人员采取纪律行动（例如《公务人员（管理）命令》第11条）。如认为公众利益有所需要，亦可着令该等人员停职（例如《公务人员（管理）命令》第13条）。

《防贿条例》第33及33A条和《基本法》第79（6）条主要处理被定罪的人士丧失担任公职的资格；《公司条例》（第32章）第168E条则订明，任何被裁定与公司的发起、組成、管理等事宜相关罪行的人士，可被取消出任公司职务的资格，当中包括由政府全资或部分拥有的公司。另参见香港特区 诉 陈达志（DCCC 661A/2006）。

《罪犯自新条例》（第297章）第2条为初次触犯轻微罪行而被定罪的人士安排了更生的事宜。此外，惩教署根据不同的法例向更生人士提供释后监管。

愿意合作的罪犯或可能得到减刑（例如Z 诉 香港特区 [2007] 10 HKCFAR 183（FACC 9/2006））。律政司有一套检控守则，并建立了一套工作常规/程序以管理豁免起诉，这也构成了法庭记录的一部分。律政司根据掌握的证据是否充分、罪行的严重性、罪犯的角色以及减轻因素的存在，考虑豁免起诉涉案的罪犯。参见香港特区 诉 张定邦[2006] 3 HKLRD 171 （CACC 89/2003）、香港特区 诉 董瑞麟（DCCC 282/2011）。愿意合作的罪犯可获得与证人同样的保护，包括参与证人保护计划的资格。

证人和举报人的保护（第32条和第33条）

现行法例中订有多项条文，使证人在不具威吓性的环境下作供。此外，法庭具有普通法下的固有司法管辖权，可作出命令，要求在适当的情况下保护证人，例如坐在“屏幕”后作证（香港特区 诉 陈树光及另一人（DCCC 314/2006））以及限制披露证人的身份（L 诉平等机会委员会及其他人[2002] 3 HKLRD 178 （CACV 265/2002））。根据《刑事诉讼程序条例》第122及123条，法庭可以命令部分或全部刑事法律程序以非公开聆讯方式进行。香港警务处和廉署均设有专责的证人保护组。

《刑事诉讼程序条例》第79B条訂明，如果证人为其自身安全或其家人安全感到忧虑，则可以不与被告或大众进行直接接触，并可以通过电视直播联系方式提供证据（香港特区 诉 施华伦和其他人[2011] 2 HKLRD 957 （CACC 370/2009））。他们也可以以书面形式（《刑事诉讼程序条例》第65C条）或通过朗读证人供词的方式（《刑事诉讼程序条例》第65B条）提出证据。

根据《证人保护条例》（第564章）第8条，可为已納入证人保护计划内的证人建立新的身份。在适当的情况下可以移管证人、使用安全屋、由执法人员护送以及24小时的人身保护（《证人保护条例》第7条）。

根据《证人保护条例》，专家和受害者与证人、其亲属、关系密切的人受到同样的保护，并获得《罪行受害者约章》和《有组织及严重罪行条例》第27条的进一步保障。在判刑的法律程序中，受害人影响陈述亦可接纳为证据。

香港特区仍未与其他地方签订移管证人协定。

《防贿条例》第30A条和《有组织及严重罪行条例》第26条禁止披露举报人身份。然而，目前仍未有特定的法例向保护举报人提供保障，使其免受不公正待遇。

冻结、扣押和没收；银行保密（第31条和第40条）

香港特区遵循基于定罪的没收机制。主要的规例有《有组织及严重罪行条例》第8、10、13、15-18条和《防贿条例》第12、12AA、14C条。在裁定罪名成立后，法官会以相对可能性的衡量标准，下令没收犯罪得益。基于价值的没收也是可能的（例如，《防贿条例》第12AA条、《有组织及严重罪行条例》第12（6）条）。根据《有组织及严重罪行条例》（第8（4）条），限制和没收只适用于至少涉及100，000港元利益的案件。

《有组织及严重罪行条例》、《防贿条例》和《廉署条例》均有关于识别、追踪、冻结或扣押犯罪所得与工具的规定。根据《有组织及严重罪行条例》，一旦定罪，律政司可以向法庭申请没收被告可变现的财产，包括具有价值的犯罪工具，不论其是否已经由法院、警察、廉署或海关管有。

尽管准备用于犯罪的工具可能会被没收（例如，香港特区 诉Fan Wai-ping和其他人），但是《刑事诉讼程序条例》第102（1）（c）条特指那些在犯罪过程中“已经使用”的财产。当法庭认为有财产被如此使用时，法庭可以引用此条。另外，《刑事诉讼程序条例》第103条为法庭提供了命令没收工具和有理由认为可能会用于/准备用于任何可诉犯罪的物件的权力。这些工具和物件将由法庭根据第102（1）（c）条进行处置。

根据《有组织及严重罪行条例》第17条委任的接管人，将管理被告人等候被没收的可变现财产。接管人亦负责将遭限制的财产变现及清算，以符合根据《有组织及严重罪行条例》第8条发出的没收令。

提交令（《有组织及严重罪行条例》第4条）、搜查令（《有组织及严重罪行条例》第5条、《廉署条例》第10B条）和授权书（《防贿条例》第13条）允许扣押和检查银行、财务记录。参见例如香港特区 诉 董瑞麟（DCCC 282/2011）、香港特区 诉 BHATTY Manoj Chainman Rai（DCCC 1108/2012）。

所有根据《贩毒（追讨得益）条例》及《有组织及严重罪行条例》发出的限制令均包含一项披露令，要求被告人披露所有受其实际控制的资产。

银行保密并不妨碍本地刑事罪行的调查和检控工作。

时效；犯罪记录（第29条和第41条）

《防贿条例》第4-9条下的可公诉罪行，并没有检控时限。法定时效只适用于界定为简易罪行的较轻微罪行。《防贿条例》第31A条把该条例内所订的简易罪行的检控时限延长。

外国犯罪记录可能会被视作被诉人一般背景的一部分（《刑事诉讼程序条例》第54（1）（f）条，香港特区 诉 Singh Bal Winder （CACC 166/2014））。

管辖权（第42条）

香港特区已确立对在其领域内的及在其船只上和飞机上的犯罪具有管辖权（例如，《刑事罪行条例》第23A至23C条）。香港特区尚未确立下列罪行的管辖权：

对其居民犯的罪行、其居民或居住在香港特区的无国籍人士所犯的罪行、针对香港特区所犯的罪行。

香港特区尚未制定法规确立或引渡或起诉的义务，但可直接引用《公约》第44（11）条。

腐败行为的后果；损害赔偿（第34条和第35条）

案例囊括了适用于贿赂的民事责任规则，包括合同解除的原则。行政法亦涉及吊销执照、政府基于贪污问题而终止合同的权利、将承包商从竞标清单上除名的事宜。

除了启动民事程序，有关法例条文亦能协助受害者寻求损害赔偿和恢复原状，具体来说就是《防贿条例》第12和12AA条，《刑事诉讼程序条例》第73、84、84A条以及《裁判官条例》第98条。

专职机关和机关之间的合作（第36条、第38条和第39条）

廉署的权力源于《廉署条例》，其独立性受《基本法》第57条保障。廉政专员直接向香港特区行政长官负责。《基本法》第48条规定，廉政专员由行政长官提名并报请中央政府任命。廉政专员有一个既定的任期。行政长官有权建议中央政府免去廉政专员职务。

廉署提供完善的的内部和外间培训来增强人员的领导能力和专业技能。2012年底，廉署有员工1282人。廉署执行处在2012-2013年度的财政预算为6亿6,260万港元。

《防贿条例》第16条规定公职人员向廉署提供协助的法定义务。另外，根据《刑事诉讼程序条例》第91条（隐匿罪的处罚），如某人犯可逮捕的罪行，而另一人知悉却未向执法机关报告，并接受或同意接受任何不披露该信息的代价，可被检控。廉署与政府部门和公共机构建立了联系渠道，以转介案件。

金融机构须遵循政策手册和指引，尽快向执法和规管部门报告可能引致贪污或其他非法活动的事项。廉署与主要的银行、保险公司、会计师事务所、专业团体和其他的私营机构建立了联络渠道。联合财富情报组以及相关负责反洗黑钱的执法和规管机构筹办了多元化的宣传和教育活动。

廉署鼓励市民到举报中心或其七个地区办事处举报可疑的贪污行为，包括通过匿名的方式报案。举报中心全年24小时运作。廉署举办一系列外展活动，以鼓励市民举报贪污。

2.2. 成功之处和良好实践

- 《防贿条例》第4条的应用范围扩展到域外，以及“利益”一词在《防贿条例》中定义广泛。
- 针对法人贪污相关犯罪的既判案例所展示的胜诉的可能性，鼓励着人们在这种情况下提出申索。
- 《检控政策和实践宣言——检控守则》（http://www.doj.gov.hk/eng/public/pubsoppaptoc.html）的存在，以及一个独立的廉政公署事宜投诉委员会，监控并审议针对廉署或其工作人员的投诉，包括未做充足调查和检控，以及针对后续行动的建议。
- 促进罪犯重新融入社会的措施，包括《罪犯自新条例》，以及按《囚犯（监管下释放）条例》而设立的两项监管下提早释放计划。
- 在决定检控疑犯时，一并决定限制和扣押资产以便日后充公有关资产。
- 在没收聆讯时使用证据推定原则，包括：（a）资产来源有问题以及罪犯对此知悉；（b）自被告人被起诉日期6年前起计的以后，曾经移转予被告人的任

何财产，均为犯罪得益；（c）被告人自起诉日期6年前起计算，一直以来的任何开支，都是由他从犯罪所得中支付（《有组织及严重罪行条例》第9条）。

- 关于廉署建立和运行的一系列良好实践，包括其运作、政治意愿和资源方面精密的制衡措施（包括其对人员的专职培训）（第36条）。
- 有关执法机构间的有效合作，尤其是廉署、香港警务处、联合财富情报组和其他机构之间，例如通过廉署和其他执法机构之间建立的联络小组（第38条）。
- 国家机关和私营机构实体之间的明显有效协作（第39（1）条）。

2.3. 实施中的问题

下列措施可以进一步加强现行的反腐败措施：

- 在缺乏关于国际公共组织官员的案例下，制订反贪法规中涉及代理人贿赂的相关条款，明确订明贿赂外国公职人员或国际公共组织官员的罪行，适用于香港境外向公职人员或国际公共组织官员給予、提供或承诺給予的贿赂（第16条）。
- 考虑将《防贿条例》第3条中的行为列为洗钱罪的上游犯罪（第23条）。
- 移除限制和扣押只适用于案件涉及利益高于100,000港元的门槛（《有组织及严重罪行条例》第8（4）条》）（第31（1）条）。
- 考虑签订移管证人的协定（第32（3）条）。
- 考虑将扩大立法以确保保护举报人免受不公正待遇（第33条）。
- 考虑对下列罪行确立管辖权：对其居民所犯的罪行；由其居民或在香港境内居住的无国籍人士所犯的罪行；针对香港特区所犯的罪行（第42、42（2）（a）、（2）（b） 和2（d）条）。
- 尽管《公约》可以直接作为移交逃犯的法律依据，香港特区可以考虑制定法规，具体确立或引渡或起诉的义务（第42（3）、44（11）条）。

3. 第四章：国际合作

《公约》中使用的“引渡”一词在香港特区称为“移交逃犯”，以指从非国家实体移送逃犯，而有别于从国家实体移送。《基本法》规定，在中央政府的协助或授权下，香港特区可以就司法互助关系与外国作出适当的安排（第96条）。这样的协助可包括在移交逃犯及刑事事宜司法互助方面的合作。

3.1. 对审议中的这些条款执行情况的意见

引渡；被判刑人的移管；刑事诉讼的移交（第44条、第45条和第47条）

《逃犯条例》（第503章）提供移交逃犯的法律框架。移交逃犯的协定藉《逃犯条例》第3条下所通过的命令实施。香港特区必须依循根据第3条作出命令的移交逃犯安排移交逃犯。

香港特区承认《公约》是移交逃犯的法律依据（C.N.549.2014.TREATIES-XVIII.14）。《逃犯（贪污）令》（第503AB章）是根据《逃犯条例》第3条，为了实施《公约》第44条而制定的。因此，即使《公约》的某一缔约国与香港特区并无双边协定，仍可以向香港特区发出移交请求。

目前，根据中央政府的授权，香港特区签订了19项有关移交逃犯的双边协定（所有都已生效）。

《逃犯条例》附表1中列载的可予移交的罪行，涵盖可被香港特区及请求方判处超过12个月监禁的《公约》罪行（《逃犯条例》第2（2）条）。

双重犯罪是移交的基本原则（《逃犯条例》第2（2）条）。然而，在决定是否双重犯罪时，无须考虑该罪行如何分类或采用的名称（Cosby 诉 香港特区行政长官[2000] 3 HKC 662），该罪行的相关行为才是决定因素（何民刚 诉 荔枝角收押所监督[2012] 5 HKLRD 329）。

移交的条件载于不同的移交协定和《逃犯条例》第2（2）、5、10（6）（b）、13和24（3）条中。

尽管被诉人国籍是酌情的拒绝移交理由（《逃犯条例》第13（4）条），但香港特区从未基于此种原因拒绝过移交。《逃犯条例》没有订定或引渡或起诉的原则，但香港特区遵守《公约》和其国际条约下的义务。香港特区的法律没有规定执行判决以代替移交的机制。

法律上已提供公平对待的保障（例如《基本法》第4、35、38、39、41条；《逃犯条例》第12、14条）。

香港特区要求有表面证据以进行移交（《逃犯条例》第10（6）（b）条）。在已经定罪的案件中，只需要定罪的证据和（待判）判刑。对证据要求的处理是灵活而合理的。香港特区提供了实践案例证明可以迅速移交逃犯。

香港特区律政司司长是移交事宜的中心机关（C.N.687.2012.TREATIES-XVIII.14）。《逃犯条例》规定了移交的法定程序。可以就被追緝以作起诉的人士或以作判刑或强制执行判刑的人士提出移交请求（《逃犯条例》第4条）。如果被逮捕，该人会被带至裁判官席前（《逃犯条例》第10条），并由裁判官决定该罪是否是可移交之罪行、判断证据是否充分。

2003年至2012年期间，香港特区共移交了8名逃犯，所犯罪行为偷窃、洗黑钱和贪污。从《公约》生效开始至审议时，香港特区接收到了一项根据《公约》提出的请求(在审议时并未完成处理)，并根据《公约》提出一项請求。截至目前，香港特区没有拒绝过根据《公约》提出的移交请求。

移交请求通常在2至3个月内完成处理，但如果被移交人士对移交的诉讼程序提出挑战，整个过程会明显拉长。

移交被判刑人士是根据《移交被判刑人士条例》（第513章）和与15个司法管辖区的双边协定进行。从1997年至2012年，香港特区共处理了68个此种案件。

在关于移交刑事诉讼程序的问题上，香港特区咨询外地机关，以决定是否暂停诉讼并提供证据以协助外地的起訴。

司法互助（第46条）

即使在缺乏协定或公约的情况下，《刑事事宜相互法律协助条例》（第525章）（“《刑事互助条例》”）也允许基于互惠原则提供协助。

自2010年起，香港特区收到了下列数量的请求（不限于贪污犯罪）：2010年147宗、2011年187宗、2012年232宗、2013年267宗及2014年303宗。截至目前，香港特区未曾拒绝过任何根据《公约》提出的请求或关于贪污犯罪的请求。

关于涉及自然人和法人(包括金融机构)的犯罪，《刑事互助条例》提供了广泛的司法互助，例如提取证据、搜查令、交出物料的命令、移交人士以协助调查起诉、限制与没收犯罪得益（《刑事互助条例》第10、12、15、16、17、23、27、28及31条和《刑事互助条例》附表2）。香港特区可以自发地分享信息，并在若干个案中已经这样做。

《刑事互助条例》载有克服保密规定的条款以履行关于银行记录的交出令（第15（9）（c）条）。银行职员也可能会被法庭依据《刑事互助条例》第10条或《证据条例》（第8章）第74至77B条传唤以提供银行记录或提供口头证据。

尽管在《刑事互助条例》下，采取强制措施需要满足双重犯罪，这个要求透过应用“行为标准”进行宽松的考量，并不需要考虑犯罪的要件。在没有协定的情况下，香港特区会直接引用《公约》。

律政司司长是司法互助事宜的中心机关（C.N.51.2006.TREATIES-3）。请求会被分配给司法互助组的律师以提出意见并执行。依照司法互助组的服务承诺，他们应当在10个工作日内回应所有传入的请求，并及时提供后续意见。

香港特区律政司可以安排移交自愿人士离开香港特区以对香港特区外提供司法协助，无论他们是否被拘留（《刑事互助条例》第23-24条）。

香港特区在不违反本地法律的范围内，根据请求中要求的程序提供协助。

香港特区还可通过电视直播联系方式向身在香港的证人取证（《刑事互助条例》第10(1)(b)条），并在过去的案件中已经进行了实践。按一贯做法以及根据协定，香港特区遵从对使用根据请求获得的信息或证据所施加的限制。

香港特区按实践以及依照请求国提出的程序，遵从所实施加的保密限制（《刑事互助条例》第8（2）条）。香港特区提供拒绝协助的理由，在暂缓协助前，按一贯做法，香港特区会进行磋商。香港特区定时向请求国提供请求的更新状态。

香港特区承担执行请求的一般性费用。如有特殊费用出现，香港特区会和请求方进行磋商。

执法合作；联合侦查；特殊侦查手段（第48条、第49条和第50条）

廉署与许多海外地区的执法机构或反贪污机关建立沟通渠道。廉署参与信息交换，并参与到海外对口单位的访问、会议、培训，以及参加各种国际组织，包括亚太经合组织、亚洲开发银行及经济合作与发展组织亚太地区反贪污联盟，与及经济罪行调查机构网络。廉署中有一个专责行动联络小組与世界各地的执法或反贪污机构保持密切联系。

廉署亦利用与海外执法机构的联系网络，透过与联合财富情报组相互合作打击与贿赂案件有关的洗黑钱活动。香港警务处的调查单位利用埃格蒙特组织的渠道，与海外执法机构交换金融活动情报。

警务处已透过国际刑警组织及海外执法机构的联络官建立与海外对口单位的沟通渠道。

警务处与其他国家之间派送并安排执法人员进行驻守与培训。警务处派出借调人员前赴海外，以促进香港警方与当地主管机关之间的警务人员及专家交流。

香港特区将《公约》视为相互执法合作的依据。警务处与其他海外执法机构签订谅解备忘录，以合作打击跨国罪案；交换情报、人员与培训。廉署没有签订正式的协定，但在实践中基于《公约》进行情报交换。

香港特区就《公约》下的犯罪行为，与其他地方进行联合调查。廉署和警务处因应每宗个案情况的需要，采取香港法律所允许的有关联合侦查行动。

执法机构可以根据《截取通信及监察条例》（第589章）和普通法原则，采用特殊的调查手段，并会因应每宗个案的情况而采取一切监察、卧底和控制下交付的行动。

3.2. 成功之处和良好实践

总体来说，下面几点是实施《公约》第四章的框架中的成功之处和良好实践：

- 律政司的网站包含了详细的移交逃犯、司法互助和其他国际合作事宜的协定定清单，以及请求司法互助的指引手册。
- 香港特区基于犯罪行为本身來判断双重犯罪的规定（第44（1）条）。

- 据报告，香港特区至今从未拒绝根据《公约》提出的请求或是贪污相关犯罪的请求（第46（9）条）。
- 司法互助下可执行以定罪为基础的没收令和民事没收令，这样的措施比本地的没收机制（通常是以定罪为基础的）更加广泛。这些措施允许提供范围较广的司法互助，并通过国际合作便利资产追回（第46（3）条）。
- 在缺乏双重犯罪时也可以提供非强制性措施的协助。对双重犯罪有灵活的解释，考虑行为，而非考虑构成香港特区罪行的每一个要件（第46（9）条）。
- 司法互助组建立了处理司法互助请求的既定指引和时间框架（第46（24）条）。
- 香港特区执法机关与外地对口单位交换经验与人员，包括提供技术援助（第48条）。

3.3. 实践中的挑战

- 尽管《公约》可以直接作为移交逃犯的法律依据，香港特区可以考虑制定法规，具体确立或引渡或起诉的义务（第42（3）、44（11）条）。
- 考虑通过法律以规定当因国籍原因拒绝移交时，用执行判决来代替移交（第44（13）条）。

中华人民共和国澳门特别行政区

1. 介绍

1.1. 在实行《联合国反腐败公约》过程中，澳门特别行政区的法律和制度框架概述

1999年12月20日中国对澳门恢复行使主权。根据《中华人民共和国宪法》第31条, 第62条第13项和《中华人民共和国澳门特别行政区基本法》，中华人民共和国澳门特别行政区从那天成立。中国于2006年1月13日批准了《公约》。根据行政长官在2006年2月20日发布的第5/2006号公告，《公约》在澳门特区生效。

在《中华人民共和国澳门特别行政区基本法》和“一国两制”的政策下，澳门特区享有行政管理权、立法权、独立的司法权（包括终审权）。《中华人民共和国澳门特别行政区基本法》确立了澳门特区法律制度的基本原则和核心规范，也确保了澳门特区的法律制度继续运行，以葡萄牙法律为基础的大陆法系传统得以延续。

根据《基本法》的规定，澳门特区自回归以后还设立了廉政公署（CCAC）与审计署两个独立监察实体。

2. 第三章：定罪和执法

缺乏《公约》某些条款实际操作的具体统计数据或信息对审议构成了一定的障碍。

2.1. 对审议条款实施情况的意见

贿赂和影响力交易（第15条、第16条、第18条和第21条）

澳门特区《刑法典》第336条对于“公职人员”进行了全面的、符合《公约》第2（a）条的定义。

《刑法典》第339条对行贿行为进行了规定，包括了给予或许诺不当利益，但没有明确地囊括“提供”。澳门特区政府澄清，第339条使用的葡萄牙语动词“dar”包括了《公约》要求的“提供”和“给予”两个概念。然而，澳门特区政府并没有能够展示相应的支持此种解读的案例实践。根据该条规定，对请托一个合法事项而行贿的处罚比请托一个非法事项要轻。审议者注意到《公约》的要求是针对贿赂公职人员以使该公职人员“在执行公务时作为或不作为”作出的，本质上来说，《刑法典》第339（2）条遵守了《公约》第30（1）条关于使犯罪受到与其严重性相当的制裁的要求。

受贿行为在《刑法典》第338条中得到了充分的规定，其中定义了对合法事项进行请托的行为，尽管其处罚较轻。

至于对外国公职人员和国际公共组织官员的贿赂，澳门特区近期通过了关于预防和打击对外贸易中腐败行为的第10/2014号法律，它充分规制了向澳门特区外的外国公职人员或国际公共组织官员行贿的行为。澳门特区外的外国公职人员和国际公共组织官员的定义符合《公约》第2（b）和（c）条。澳门特区选择不明确将外国公职人员和国际公共组织官员的受贿行为定为刑事犯罪。在特定的情况下，相关的行为可能会被关于私营部门贿赂的第19/2009号法律所囊括。

关于影响力交易没有特别的法规，但是犯罪者在某些情况下可能会作为行贿或受贿的共犯受到惩罚。

关于预防和打击私营部门贿赂的第19/2009号法律第3、4条包括了私营部门的行贿与受贿犯罪。

洗钱、窝赃（第23条和第24条）

关于预防与打击洗钱犯罪的第2/2006号法律第3条包括了大多数洗钱犯罪的要素。此法律将洗钱的上游犯罪定义为所有最大刑期超过3年的犯罪。因此，并非所有《公约》所列的犯罪都被包括在内。审议者注意到澳门特区正在考虑为其反洗钱法律框架通过修正案。

进一步地，尽管《刑法典》第227和228条的特殊规定覆盖了《公约》第23（1）（b）条所要求的犯罪要素，但窝藏罪的范围显得过窄，并且只涉及财产犯罪的收益而非所有犯罪所得。

贪污、滥用职权和资产非法增加（第17条、第19条、第20条和第22条）

《刑法典》第340条（公职人员贪污、挪用公款）、第341条（公职人员侵占）、第342条（通过合法行为共享经济利益）定义了贪污和相关犯罪。

《刑法典》第347条（滥用职权）包含了《公约》对滥用职权行为的要求。第347条之前的第343条（公职人员侵犯住所）、第344条（违法收取）、第345条（运用公共部队妨碍法律或正当命令之执行）、第346条（拒绝合作）详细地体现了这些要求。

11/2003号法律第28条很好地囊括了资产非法增加犯罪。

《刑法典》第197条至199条、211条和217条（偷窃罪、严重盗窃罪、滥用信任罪、欺诈罪和背信罪）规定了私营部门中的财产贪污。

妨碍司法公正（第25条）

《刑法典》第311条（阻碍与胁迫）、第6/97/M号法律（有组织犯罪）中关于违反司法保密罪的规定，以及第10/2000号法律第14条（违抗廉政公署调查）中广义上的违抗司法管理罪的规定包括了妨碍司法公正的行为。

法人责任（第26条）

澳门特区为洗钱（分别由第2/2006号法律第5条、第6/97/M号法律第10条）、行贿澳门特区以外的外国公职人员或国际公共组织官员（第10/2014号法律第5条）的法人设立了刑事责任。《民法典》第477条为《公约》所列的犯罪设立了民事责任，该条定义了对自然人或法人造成之损害的普遍追偿权。

参与犯罪、犯罪未遂和犯罪中止（第27条）

《刑法典》第25-28条对犯罪参与形态进行了规定。《刑法典》第21和22条规定如果一项犯罪的最大刑期超过3年，犯罪未遂也具有可罚性。目前，一些《公约》所列犯罪的最大刑期为3年或更少。

起诉、审判和刑罚；与执法机关的合作（第30条和第37条）

根据《刑法典》第65条详细列出的各种有利或不利情形，法官在量刑时依据法定刑罚的范围行使自由裁量权。一些《公约》所列的犯罪与其他犯罪相比，刑罚有所差距并且相对较轻，而且它们大多数不能成为洗钱罪的上游犯罪，因为这要求因这些罪行能够被判处超过三年的有期徒刑。而且，罚金可以替代有期徒刑。例如，由“秘密会社或团体”（在第6/97号法律中定义）行贿可能会被判处5至12年的监禁，而《公约》所定义的贪污（“请托合法的事项”，或

“在该公职人员履职期间”）可能只会被处以最高六个月的监禁或罚金。审议者注意到，许多展示恰当程序中一贯的行政措施的例子，受到了行政上诉和司法审查。禁止执行公共职务只能在有法院命令的情况下进行。

然而一些特定的官员，例如行政长官、立法会成员、司法官员和廉政专员享有包括用书面方式提交证言的权利。但在澳门特区，没有人能被免予起诉。

检察官在立案和起诉阶段没有自由裁量权，必须遵守强制起诉原则。

根据《澳门公共行政工作人员通则》，在适当的纪律程序，公职人员可能受到的行政处罚包括书面警告、罚款、停职、强制退休、撤职等，而刑事犯罪也违反纪律。暂停行使政治权利、禁止担任公职的期间为10至20年，禁止在公共法人实体内担任管理、监督等职位，或禁止在公共资产占优的企业中、公共服务/货物的受让人中担任职位的期间为2至10年。关于有组织犯罪的6/97/M号法律中规定了这些附带刑罚。

《刑法典》第40（1）条规定，刑事处罚和保安处分的目的是保护合法利益以及帮助罪犯重新融入社会。根据《刑法典》第52条，在尽可能与被判刑者达成协议的情况下制定个人重返社会的计划，体现了重返社会项目的参与。

《刑法典》第23与24条以及《刑事诉讼法典》第262条规定了因有效配合执法机关而免予处罚的情况，以鼓励个犯或共犯向廉政公署提供用于调查或作为证据的信息。《廉政公署组织法》第7条也规定如果罪犯能够有效帮助搜集定罪证据或供认其他罪，可以犯免予处罚。

证人和举报人的保护（第32条和第33条）

澳门特区没有保护证人、专家和受害者的专门规定，尽管在实践中为证人和那些根据《刑事诉讼法典》第57条规定的利害关系人提供物理保护。廉政公署基于第3/2009号行政法规第18条协调证人保护相关事宜。证人保护也是允许公署人员使用枪支的情形之一（第86/2000号廉政专员批示）。6/97/M《有组织犯罪法》第28条也可以在特定情况下用以保护证人身份。

冻结、扣押和没收；银行保密（第31条和第40条）

根据《刑法典》第103条可以没收犯罪者获得的或以第三方名义获得的犯罪所得（包括基于价值的）。《刑法典》第101条规定了犯罪工具的没收，无论是已经使用的还是准备使用于《公约》所规定的犯罪中。然而该条包含了“根据工具的特性或案件的情况，该工具对人身安全和公共秩序构成了威胁，或极有可能被用来进一步犯罪”的要求。《刑事诉讼法典》第163条和《刑法典》第103条规定了追踪和扣押犯罪所得和犯罪工具的手段。善意第三方的权利在《刑法典》第102条中得到了保护。根据11/2003号法律，如果官员的收入大幅超过其申报的数额，可以扣押和没收这部分财产。

根据《刑事诉讼法典》，司法命令决定了扣押或没收的财产的管理。其中的第170条详细描述了司法命令可以出售、销毁或代表社会使用扣押的易腐或有害物品。这种行为由执法机关进行，包括廉政公署。

根据关于金融系统行为的第32/93/M号法令和《廉政公署组织法》（第10/2000号法律）第8（2）条，基于银行客户同意或法庭命令，可以免除银行保密义务。

时效；犯罪记录（第29条和第41条）

《刑法典》第110条定义了时效制度，也包含了一些时间中止的情形。《刑法典》第112和113条也规定了时效的中止与中断。《刑法典》第113条下的时效

中断制度也适用于法罪嫌疑人逃避司法机关管理的情形。鉴于《公约》的大多数罪行刑罚相对较轻，它们不享有更长的时间限制。

《刑法典》第69条包含了对累犯的规定，关于刑事问题司法互助的第6/2006号法律包含了对于嫌疑犯、被起诉人或被判刑人士的犯罪记录信息的规定。

管辖权（第42条）

《刑法典》第4条确立了对于澳门特区内发生的、在澳门特区注册之轮船或飞机上发生之行为的管辖权，不论罪犯的国籍为何。第5条确立了在特定情况下，对于发生在其域外的犯罪行为，适用主动与被动属人管辖原则。第10/2014号法律第3条也将管辖权延伸至向外国公职人员的或国际公共组织官员行贿的行为，只要该等事实的行为人被发现身处澳门特区。

根据《刑法典》第5条第2款，澳门特区可以基于国际条约或司法互助协议建立管辖权。这个条款令澳门特区能够广泛地行使管辖权，并且落实或引渡或起诉原则。另外，作为中华人民共和国的特别行政区，引渡在澳门特区不适用，第6/2006号法律第33条为拒绝移交逃犯创造了依据。同时，第33（2）条规定，如果拒绝移交逃犯，则须要求请求方提供必要资料，以便就其提起诉讼程序。

腐败行为的后果；损害赔偿（第34条和第35条）

根据《行政诉讼法典》和《民法典》中的相关条款，澳门特区采取措施以撤销或解除合同，或撤回授权。

因腐败行为受到损害的个人有权通过单独或附带民事诉讼向责任人寻求赔偿。

专职机关和机关之间的合作（第36条、第38条和第39条）

澳门特区廉政公署是专门负责腐败犯罪调查的机构，它也可能调查一些其他与腐败行为相关的犯罪。洗钱和其他犯罪通常由司法警察进行调查。警察与检察机构在有必要时进行协作。同金融调查部门也有信息交换。根据其《组织法》第13条，如果廉政公署认定向其提出的事宜应为法律特别规定的行政申诉或者司法申诉，可以将关系人转介至相关有权限实体。

根据第7/2006号行政法规第7条，金融情报办公室负责接收金融与非金融信息，分析所接收的信息并将有洗钱嫌疑的活动向检察院报告。同时，根据法律，该办公室也根据请求为执法机构、司法机关和其他有权预防和组织洗钱及资助恐怖主义的实体提供协助。

总体上来说，政府机关与私营部门之间的合作良好，包括《廉政公署组织法》（第10/2000号法律）所规定的广泛合作的义务。

2.2. 成功之处和良好实践

总体上来说，在落实《公约》第三章中，下列良好实践值得注意：

- 值得赞扬的是，澳门特区第2/2006号法律规定，转换或转移犯罪所得的行为即使发生在澳门特区外也是可罚的。
- 在澳门特区，所有的公职人员，上至行政长官下至普通员工（以及与他们相同级别的），都应进行资产和利益申报，如果申报不当或拥有不正当资产则可能构成刑事犯罪。
- 根据第10/2000号法律第8条与第32/93/M号法令，同廉政公署合作的义务优于自然人或法人实体的保密义务（尤其是银行保密义务，可以通过客户同意或法庭命令豁免）。
- 根据《刑法典》第5（2）条，如果有相应的国际条约或司法互助协议，澳门特区刑事法律可以适用于发生在澳门特区外的行为。

2.3. 实施中的问题

下列措施可以进一步加强现行的反腐败措施：

- 更改其数据收集系统，以适应根据《公约》关于调查、起诉、定罪数据的规定
- 继续全面落实《公约》第15、16（1）、21条，尤其是关于将提供不正当利益入罪的部分。
- 考虑将外国公职人员与国际公共组织官员受贿入罪。（第16（2）条）
- 考虑修订法律以根据《公约》的要求，用独立的罪名处罚利用影响力进行交易的人士。（第18条）
- 修正洗钱罪的范围以确保所有《公约》列出的犯罪都被认定为上游犯罪，并确保获得、保有或使用所有《公约》列出的犯罪（而非仅是财产相关犯罪）之所得都被囊括在内。（第23条）
- 考虑扩大隐匿罪的范围以覆盖所有《公约》所列犯罪。（第24条）
- 考虑扩大法人的刑事责任以包括法人行贿与受贿行为，以及其他《刑法典》所列出的犯罪。（第26条）
- 考虑是否可以修订法律，以令《公约》设立的犯罪之未遂与准备均具有可罚性。（第27条）
- 建立更长的时效制度或为逃避司法管理的嫌疑犯提供时效中止。（第29条）
- 审阅《公约》设立的犯罪的处罚范围，并修订法律以确保规定的制裁考虑了行为的严重性。（第30条）
- 考虑对于被指控犯有《公约》所列罪行的官员的改任之可能性。（第30条）
- 修正法律以去除“该工具对人身安全和公共秩序构成了威胁，或极有可能被用来进一步犯罪”作为扣押和没收的一个条件。（第31条）
- 采取全面、具体的法律制度来保护受害者与证人。（第32条）
- 考虑采取措施以保护在刑事、行政、劳动方面就贪污问题进行举报的举报人。（第33条）
- 考虑在与廉政公署合作的案例中，采纳克服银行保密的数据收集系统。（第40条）

3. 第四章：国际合作

3.1. 对审议中的这些条款执行情况的意见

第6/2006号法律规定，刑事司法合作主要由国际条约进行规范，或者当没有国际条约、或国际条约不充分时，由本法的相关规定进行规范。

引渡；被判刑人的移管；刑事诉讼的移交（第44条、第45条和第47条）

作为中华人民共和国的特别行政区，引渡在澳门特区并不适用。然而关于刑事司法合作的第6/2006号法律对移交罪犯进行了规定。同外国政府的关系在中国中央政府的协助与授权下可以得到处理。

第6/2006号法律包含了加急移交罪犯的措施，并且在其第41条中含有移交罪犯的简化程序。除了第7至9条与第19条所列出的拒绝移交的理由，第32与33条也包括了一些可能拒绝移交的理由。

根据第6/2006号法律第4条的规定，《公约》所列犯罪原则上来说是“可引渡的”，或是允许移交的。然后，第6/2006号法律第32（2）条规定，只有在该行为在澳门特区与请求国都被判处一年以上有期徒刑的情况下，移交才可能进行。因此，为实施一个非法行为而贿赂公职人员（《刑法典》第339（1）条）是可移交的，但为实施一个合法行为而贿赂公职人员（《刑法典》第339（2）条）是不可移交的；并且私营部门内的贿赂只有在“可能对他人健康和安全产生损害”时才可以移交（第19/2009号法律第4条第3款）。

该法第6条提出了双重犯罪的要求。其第5条和最近的实践也允许基于互惠原则进行移交。因此，尽管澳门特区可能依据《公约》移交罪犯，它也可能在缺乏特定条约情况下移交罪犯。

根据《公约》第44条，澳门特区的行政法务司被中国指定为罪犯移交合作的主管部门。

澳门特区尚未缔结任何罪犯移交的双边条约，但根据《刑事诉讼法典》第213条，正在努力着手于双边条约的缔结。然而，这样的条约并非所有罪犯移交的先决条件。

截至当前，澳门特区没有拒绝过关于腐败的嫌犯移交请求。

关于被判刑人员的移交，澳门特区同葡萄牙有协议，与葡萄牙和东帝汶的进一步的协议正在考虑中。第6/2006号法律还在规定了大量移交犯人的细节（第106至115条）以及刑事诉讼的移交（第75至88条）。尽管在许多方面无法提供落实的案例，但是有关于移交犯人的数据。没有移交诉讼的案例。

司法互助（第46条）

关于刑事司法合作的第6/2006号法律对司法互助进行了规定，其中的第7至9条规定了拒绝请求的理由。财政问题不是拒绝的理由之一。司法互助也要求双重犯罪，唯一在缺乏双重犯罪时仍进行司法互助的例外是，刑事司法互助请求的目的为证明是否存有阻却事实的不法性或阻却被追诉人的罪过的事由。

根据第6/2006号法律第132（2）条，基于请求国的请求，在不违反澳门特区基本法律原则或对诉讼构成重大损害，司法互助可以按照外国法律提供。

根据第6/2006号法律，检察院负责接收、传递和处理司法互助请求，并向行政长官提出意见，由其决定是否提供协助。行政法务司是国际合作的政府机关，并向检察院传递这些司法互助请求。

按照第6/2006号法律第24（3）条，如果澳门特区发现一外国请求中的信息不完整，在不影响采取不可延误的临时措施的前提下，当局可以要求其提供补充信息。

同《公约》一致，第6/2006号法律第134条对请求的保密作出了规定。尽管在澳门特区立法中可以通过司法命令免除银行保密，但在并没有条款保证司法互助的请求不会因为银行保密而被拒绝。

就处理请求所需的时间而言，澳门特区的法律没有设定一个时限，但一般来说整个过程不会超过6个月。在紧急情况下，根据的/2006号法律第30条，可以采取紧急措施，包括通过国际刑警组织直接与澳门特区司法当局对话，以及采用任何方式传送信息，只要其能以书面方式记录。

在缺乏与请求国或请求区域的协议时，司法互助原则上来说是免费的，但是作为执行请求的人员和技术费用，专家和证人的花销和报酬不在此列，包括他们的旅行和住宿费用、寄送物件的费用、人员交通费以及其他的被请求方认为应当包括在内的费用。

截至目前，澳门特区没有拒绝过关于腐败问题的司法互助请求。虽然没有收到过基于《公约》提出的请求，但是澳门特区利用《公约》作为法律依据提出过一个请求。

执法合作；联合侦查；特殊侦查手段（第48条、第49条和第50条）

澳门特区把《公约》视作共同执法合作的法律依据，尽管尚未有基于此依据的案例。

国际执法合作，包括逮捕令的散布，可以通过国际刑警组织中国国家中心局澳门支局由司法警察来完成。澳门特区金融情报办公室同其他金融情报机构已经签署了15个备忘录/合作协议，并且是亚太反洗钱组织（APG）的一员。

澳门特区的法律对于联合调查没有作出明确规定。

《刑事诉讼法典》第172至174条规定，只有在腐败相关犯罪的最高刑罚至少为三年有期徒刑的情况下才可以实施电话通讯监听。《廉政公署组织法》第7条允许采取特定形式的卧底行动。尽管在使用特殊调查手段方面，澳门特区没有国际层面相应的协议或安排，但澳门特区表达了就个案进行此种合作的意愿。

3.2. 成功之处和良好实践

总体来说，下面几点是实施《公约》第四章的框架中的成功之处和良好实践：

- 在用以加速移交罪犯过程的措施中，第6/2006号法律为移交逃犯的请求免除了特定的形式要求，并在有额外信息的情况下允许采取紧急临时措施（第24（3）（4）条）；它不要求在请求后附上相关证明（第24（2）条），并规定即使在节假日程序依然应当进行（第74条）。（《公约》第44（9）条）
- 尽管原则上来说，合作应当基于国际公约或第4/2006号进行，但根据第6/2006号法律第132条，如果更有利于“程序参与者”（被起诉人和其他参与人，包括被害者和目击者），澳门特区也可以适用请求国法律，只要请求国提出此等要求且不违背澳门特区法律原则。

3.3. 实践中的挑战

下列几点可以作为帮助澳门特区加强并巩固打击腐败能力的框架：

- 考虑在缺乏双重犯罪时允许对腐败犯罪进行移交。（《公约》第44（2）条）
- 修改法律以承认所有《公约》覆盖的犯罪都是可移交的罪行。这可能由修改刑罚的严厉程度导致，因为《公约》建议将这些罪行的严重程度考虑在内。（第44（7）条）
- 考虑加入关于移交逃犯、移交被判刑人员和司法互助的双边或多边协议。（第44（18）、45、46（30）条）
- 考虑明确规定可以在资产追回案件中提供协助。（第46（3）（j）（k）条）
- 确保司法互助请求不会因为银行保密而被拒绝。（第46（8）条）
- 确保司法协助的范围最大化地宽泛，并考虑在缺乏双重犯罪时也提供协助。（第46（9）条）
- 考虑建立一个可预见的法律框架以实施与其他国家的联合调查。（第49条）
- 增强与他国合作打击利用现代科技进行腐败的力度。（第48（3）条）
- 考虑详细规定使用控制下交付等特殊调查手段并允许在法庭上使用通过此类手段获得的证据。（第50条）