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**Review of implementation of the United Nations
Convention against Corruption**

Executive summary

Note by the Secretariat

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II. Executive summary

1. Introduction

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

China signed the United Nations Convention against Corruption (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. In furtherance of the full implementation of the Convention, China has amended the Criminal Law (“CL”) and the Criminal Procedure Law (“CPL”) and issued a series of judicial interpretations. All the main requirements set forth in chapters III and IV of the Convention are embodied in the legal and judicial practices of China.

The criminalization provisions of the Convention need to be implemented through domestic laws and regulations of China.

China recognizes the Convention as a legal basis for international cooperation.

China has developed a socialist legal system with Chinese characteristics.

The criminal law of China has its origin principally in laws adopted by the National People’s Congress and its Standing Committee.

Judicial decisions are not binding judicial precedents; however, the courts at all levels must follow the judicial interpretations of the Supreme People’s Court (SPC) and the judicial interpretations issued jointly by SPC and the Supreme People’s Procuratorate (SPP).

The Eurasian Group on Combating Money Laundering and the Financing of Terrorism (EAG) and the Financial Action Task Force (FATF) have assessed China’s implementation of the FATF standards.

According to China’s Constitution and basic laws of special administrative regions (SARs), Hong Kong and Macao SARs exercise a high degree of autonomy and enjoy executive, legislative and independent judicial powers, including that of final adjudication.

2. Chapter III: Criminalization and law enforcement

The definition of public official (“state functionary”) contained in article 93 of CL is in line with article 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 articles 389 (active bribery), 390 (sentencing and penalties for active bribery), 391 (bribery of entities), 392 (intermediaries in bribery) and 393 (active bribery by entities) of CL. Passive bribery is criminalized in articles 383 (sentencing and penalties for embezzlement), 385 (passive bribery by public officials), 386 (penalties for passive bribery and aggravated penalties for bribe solicitation) and 387 (passive bribery by entities) of CL.

Some elements of article 15, including “the promise, offering or giving ... indirectly, of an undue advantage ... for ... another person or entity”, are not explicitly contained in the CL. However, these elements are clearly stipulated in the legally binding Guidelines of the SPC and the SPP on Several Issues Pertaining to the Specific Application of Law

in the Handling of Embezzlement and Bribery Cases. The object of the bribe may be “any advantage that has a monetary value”.

China has criminalized active (but not passive) bribery of foreign public officials and officials of public international organizations in article 164 of CL. Punishment is limited to cases with a “relatively large amount of a bribe”.

Before the country visit, on 29 August 2015, China introduced article 390 bis of CL to criminalize trading in influence.

Articles 163 and 164 of CL criminalize active and passive bribery in the private sector. The same elements as noted with regard to domestic bribery are not provided for. Punishment is limited to cases with a “relatively large amount of bribe”.

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

Articles 191 and 312 of CL criminalize money-laundering and concealment in accordance with articles 23 and 24 of the Convention. Article 191 of CL specifically criminalizes laundering of the proceeds of “embezzlement and bribery”, while article 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. Articles 22-29 of CL contain some elements envisaged in article 23(1)(b)(ii) of the Convention.

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

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

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

Article 382 of CL criminalizes embezzlement by public officials (including diversion of property). Article 382 does not explicitly incorporate the element of “giving of undue advantage for another person or entity”. Article 383 prescribes the penalties for the offence under article 382.

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

Article 271 of CL criminalizes embezzlement/criminal conversion in the private sector where “the amount of embezzled money or property is relatively large”. Article 397 of CL criminalizes abuse of functions. To prosecute this crime it is necessary to satisfy the condition of “causing heavy losses to public money or property or the interests of the State and the people”.

Article 395 of CL provides for illicit enrichment.

Obstruction of justice (art. 25)

Article 307 of CL implements article 25(a) of the Convention, including the bribery of witnesses and obstruction by any other means.

Article 25(b) of the Convention has been incorporated into article 277 of CL.

Liability of legal persons (art. 26)

Articles 30 and 31 of CL provide for the criminal liability of a “unit”. The concept of “unit” covers companies, enterprises, public institutions, State organs and organizations. Whenever there is a provision on the liability of a unit in the articles of CL, the criminal

liability shall be applicable to legal persons. Some provisions of CL relevant to offences under the Convention do not explicitly provide for unit liability (e.g. art. 307 CL). In such circumstances, however, the natural person who has committed relevant offences may be investigated and prosecuted.

Legal persons can also be held civilly liable, according to article 106 of the General Principles of Civil Law of the People's Republic of China. In addition, legal persons can also be held administratively liable pursuant to bribery provisions under article 22 of the Law of the People's Republic of China against Unfair Competition, passive bribery provisions under article 72(2) of the Procurement Law of the People's Republic of China and article 39 of the Administrative Measures for Registration of Judicial Expertise Institutions. Penalties for criminal liabilities include fines. Administrative penalties also include revocation of licences and the prohibition of certain activities. The provisions on the liability of legal persons do not preclude the criminal liability of natural persons who have committed corruption offences.

Participation and attempt (art. 27)

Articles 25-29 of CL criminalize joint participation in criminal offences. Article 23 of CL criminalizes attempt and article 22 of CL criminalizes preparation for a crime.

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

According to articles 5, 61 and 62 of CL, judges must take into account the gravity, nature and circumstances of a crime. The sanctions applied shall be proportionate to offences. The maximum penalties applicable to the crime of active and passive bribery of public officials are: life imprisonment for active bribery (art. 390 CL) and death penalty for passive bribery and embezzlement (art. 383(1) CL).

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

The people's procuratorates generally follow the principle of mandatory prosecution (art. 172 CPL). A decision not to prosecute may be taken only in cases where the circumstances of the crime are minor and where criminal sanction is not necessary or a criminal penalty can be waived (art. 173 CPL).

In that regard, it should be noted that some corruption crimes in China may be punished only if the amount of the illicit benefits is relatively large or where the circumstances are serious. Though neither CL nor CPL clearly defines such circumstances, they are clearly described in judicial interpretations.

Article 30(4) of the Convention has been enshrined in articles 64, 65, 69, 72 and 75 of CPL.

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

Public officials will be suspended from their duties once they are under investigation, according to article 38 of the Regulations on Disciplinary Measures for Functionaries of Administrative Bodies and article 25 of the Provisional Regulations on Disciplinary Measures against Misconduct by Staff of Public Institutions.

Any person who has been criminally punished for any offence cannot be recruited as a civil servant, according to article 24(1) of the Law on Civil Servants of the People's Republic of China. Any person convicted of embezzlement shall not hold any important position in a State-owned enterprise, according to article 73 of the Law of the People's Republic of China on the State-Owned Assets of Enterprises. Courts can also forbid someone from holding positions in public institutions and State-owned enterprises as an

auxiliary penalty pursuant to article 37 bis and article 54(3)-(4) of CL. Both disciplinary actions and prosecution can be taken in all cases involving public officials.

According to article 68 of CL, any criminal who provides major assistance in law enforcement may be given a lighter or mitigated punishment or exempted from punishment and receive the same protections as witnesses.

A briber who voluntarily confesses to his bribery before being prosecuted (art. 164 CL) or a briber who voluntarily confesses to his bribery before being investigated for criminal liability (art. 390 CL) or an intermediary in bribery who voluntarily confesses the act before being investigated for criminal liability (art. 392 CL) may be given a mitigated punishment or exempted from punishment. During the review, China adopted amendments to CL to explicitly take into account any cooperation on the part of confessing persons in considering their exemption from punishment. The amendments entered into force after the country visit.

A prosecutor may choose not to prosecute him/her under the non-prosecution circumstances (including the degree of cooperation by criminal suspects) set out in article 173 of CPL.

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

CPL sets forth protections 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 agencies.

Some aspects of article 33 of the Convention are addressed in article 47 of the Administrative Supervision Law of the People's Republic of China and in the Regulations on Protection of Whistleblowers and Accusers (arts. 2, 10 and 11). Some protection measures are also contained in the Labor Law (art. 101). During the review, China introduced new regulations on the physical protection of reporting persons, which entered into force after the country visit.

Freezing, seizure and confiscation; Bank secrecy (arts. 31 and 40)

Confiscation (including value-based) of criminal proceeds and instrumentalities of crime is provided by article 64 of CL. 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”. The Chinese authorities have explained that the concept of “proceeds”, as stipulated in the Convention, is covered by the wording of the “recovery of all illegally obtained property”. In addition, article 282 of CPL provides that “illicit proceeds” or “other properties involved in the case” shall be confiscated.

The confiscation of income or benefits derived from proceeds of crime is addressed in article 44 of 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 article 239 of the Rules of the People's Procuratorates on Criminal Procedure (for Trial Implementation) and article 19 of the Provisions of the People's Procuratorates on Seizure and Freezing of Money and Property Involved in Cases.

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

Law enforcement agencies may access, seize or freeze bank accounts and other assets, according to articles 142 and 234 of CPL. Banks are obligated to provide requested information in accordance with article 142 of CPL and articles 29 and 30 of the Law of the People's Republic of China on Commercial Banks. Bank secrecy is not an obstacle to accessing such information. Administrative supervision agencies, such as the Ministry of Supervision (MOS), can also access bank and financial records when investigating corruption cases and request the courts to freeze assets (art. 21 of the Administrative Supervision Law of the People's Republic of China). The administration of the seized and confiscated property is conducted by law enforcement agencies and people's courts (art. 234 CPL and the Provisions of People's Procuratorate on Management of Property Involved in Criminal Proceedings).

The rights of bona fide third parties are protected by article 106 of the Property Law of the People's Republic of China and are also procedurally protected by articles 280 and 281 of CPL.

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

The statute of limitations depends on the statutory maximum penalty applicable to a particular crime (art. 87 CL) and is not applied in cases where the alleged offenders evade investigation or adjudication (art. 88 CL).

China has no specific legislative provisions on the consideration of foreign criminal records.

Jurisdiction (art. 42)

China has established territorial jurisdiction in article 6 of CL and nationality jurisdiction in article 7 of CL, with a possibility of exemption from criminal liability if the relevant offence is punishable by imprisonment for less than three years (art. 7 CL). That exemption does not apply to Chinese public officials. China also has jurisdiction for the purposes of article 42 (2(a) and (d)) when the relevant offences meet the dual criminality requirement and are punishable by at least three years' imprisonment (art. 8 CL). With respect 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)

Any improper property interests obtained through corruption shall be returned to victims, according to article 64 of CL and article 11 of the Interpretation of the SPC and the SPP on Several Issues Pertaining to the Specific Application of Law in the Handling of Criminal Cases involving Active Bribery. Civil acts or contracts undertaken by means of corruption are invalid, according to article 58 of the General Principles of the Civil Law and article 52(5) of the Contract Law of the People's Republic of China. Administrative licences obtained through bribery shall be revoked (art. 69 of the Administrative Licensing Law of the People's Republic of China).

Offenders shall compensate victims for their losses, according to articles 36 and 37 of CL. Under article 99 of CPL, victims can initiate civil actions against the offenders (art. 99 CPL).

Specialized authorities and cooperation between authorities (arts. 36, 38 and 39)

The Chinese leadership has been attaching ever greater importance to combating corruption since the 18th National Congress of the Communist Party of China (CPC) in November 2012. The review noted the continued resolute determination of the Chinese authorities at the highest level to fight corruption that has resulted in an increased number of successfully prosecuted corruption cases in recent years. In 2014 the

procuratorates nationwide investigated and prosecuted 41,487 cases of various public duty-related crimes involving 55,101 persons; courts at all levels heard and concluded 31,000 cases of embezzlement and corruption involving 44,000 persons, including a number of highly publicized cases implicating high-ranking officials. As part of the efforts to eradicate corruption in the government, 537 ministerial approval procedures were eliminated or delegated to lower levels.

China has several specialized authorities to combat corruption.

The CPC Central Commission for Discipline Inspection (CCDI) is responsible for overseeing implementation of the CPC discipline.

The MOS supervises administrative agencies.

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

The General Bureau of Anti-Corruption and Bribery was set up at the SPP in 1995 and later 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 independence of the people's procuratorates is enshrined in the Constitution (art. 131) and the Organic Law of the People's Procuratorates (art. 9).

Public security authorities also have specialized economic crime investigation departments to investigate the corruption crimes in the private sector.

Necessary training is systematically provided in China 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 article 108 of CPL, any organization and individual has a duty to report facts of a crime or a criminal suspect to law enforcement authorities. According to 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 material rewards to reporting citizens.

The people's procuratorates and public security authorities have hotlines and websites through which citizens can report suspected criminal activities. CCDI/MOS also has online reporting platforms and hotlines.

2.2. Successes and good practices

- Article 280 of CPL is positively noted as a useful tool for the confiscation of proceeds of corruption.
- Provisions of article 64 of CL on the return of property confiscated from a criminal to the victim without delay are positively noted.
- Article 36 of CL providing for the duty of the criminal to compensate economic losses to the victim of a crime is positively noted.

The following practices are positively noted:

- Specialized anti-corruption bureaus and departments have been established in the law enforcement agencies.
- Elimination and delegation of 537 ministerial approval procedures are noted as an effective corruption prevention measure.
- MOS assumes the important function of preventing corruption and plays a role as the coordination centre of national anti-corruption efforts.
- Application of the active nationality jurisdiction principle to government officials without any limitations can be considered 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 the current judicial interpretation in respect of the “promise, offering or giving ... indirectly, of an undue advantage, for ... another person or entity”, and consider adopting corresponding legal amendments in the event 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 maintain necessary consistency in the criminalization of these two types 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 reasons for the commission of an offence and degree of cooperation are taken into account in applying lighter punishment to persons who confess (art. 37(2)).
- Extend the protection provided by article 62 of CPL to witnesses, experts and victims in corruption-related cases (art. 32).
- Ensure consistent application of current judicial practices in respect of confiscation of transformed, converted or intermingled proceeds, as well as income or other value derived therefrom (art. 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 has no law on mutual legal assistance (MLA). Chapter IV provisions of the Convention are viewed as a valid multilateral treaty with other States Parties on international cooperation in the absence of bilateral treaties. China has conducted and will continue to 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 article 7(2) of EL with a minimum punishment threshold of one year.

China allows for accessory extradition as stipulated in article 44(3) of the Convention pursuant to article 7(2) of EL. The offences described in the Convention are not considered political crimes.

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

China and foreign states shall communicate with each other through diplomatic channels for extradition. The Ministry of Foreign Affairs of China is designated as the communicating authority for extradition. (art. 4 EL). Upon receiving a request for extradition from the requesting State, the Ministry of Foreign Affairs shall examine whether the letter of request for extradition and the accompanying documents and material conform to the provisions of Section 2 in Chapter II of this Law and the provisions of extradition treaties. 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 this Law and of extradition treaties regarding conditions for extradition and shall render a decision on it. The decision made by the Higher People's Court is 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 refer to the State Council for the decision 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 compulsory measures against the person sought (art. 29 EL).

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

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

China does not have an expedited extradition procedure, although 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 pursuant to article 44(11) of the Convention.

China cannot enforce foreign sentences for the purposes of article 44(13) of the Convention.

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

China has a practice of consulting with requesting countries before refusing extradition, although 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 article 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 paragraphs 9 to 29 of article 46 of the Convention in MLA processes with other States Parties in the absence of bilateral MLA treaties.

China reported that it had received four and made three MLA requests based on the Convention. China also noted difficulties in obtaining assistance when sending outgoing MLA requests based on the Convention.

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

Currently, China cannot spontaneously provide information to competent authorities of other States Parties as stipulated in article 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 article 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 article 46(9)(b) of the Convention.

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

China has indicated that the SPP is the central authority for MLA for the Government of China for the purposes of article 46(13) of the Convention. Requests should be made in the Chinese language and may be received through International Criminal Police Organization (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 of follow-up with the requesting States and relevant domestic authorities.

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

China has concluded bilateral criminal MLA treaties with 54 countries and has 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 has indicated that it considers the Convention to be a legal basis for mutual law enforcement cooperation in respect of corruption-related offences.

The CPL, the Interpretations of the SPC on the Application of the CPL, the Rules of the People's Procuratorate on Criminal Procedure (for Trial Implementation) and the Provisions on the Procedures for Handling Criminal Cases by Public Security Agencies address international law enforcement cooperation. China has 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 as at the time of the country visit. The SPP has organized cooperation mechanisms for the Prosecutor Generals' meetings under the China-ASEAN and the Shanghai Cooperation Organization frameworks.

The International Association of Anti-Corruption Authorities (IAACA) was officially established in October 2006 in China. 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.

MPS has established cooperation with 189 countries and regions. It has also 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. MPS has 62 police liaison officers in 31 foreign countries and regions.

As at the time of the country visit, 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 have adopted the Beijing Declaration on Fighting Corruption, wherein they pledged to combat corruption through extradition and MLA, 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 conducts joint investigations with foreign counterparts in accordance with provisions in the CPL and the Rules of the People's Procuratorates on Criminal Procedure (for Trial Implementation).

China's law enforcement agencies under the coordination of the CCDI 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 were aimed at the arrest and prosecution of corrupt officials who had fled abroad and the 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 articles 148-152 of CPL and is possible in corruption cases "seriously endangering the society" (art. 148 CPL). Special investigative techniques may include electronic surveillance, controlled delivery and undercover operations.

3.2. Successes and good practices

- Use of the Convention as a legal basis for extradition, MLA and law enforcement cooperation is a good practice conducive to the efficient conduct of international cooperation.
- Efficient system of collecting and organizing 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 continue to provide non-coercive MLA in the absence of dual criminality that is consistent with the basic concepts of its legal system in accordance with article 46, paragraph 9(b) of the Convention.
- China is recommended to continue enhancing the 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 the 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 (the "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 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 powers, 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 (art. 43 of BL). The Legislative Council is the legislature of HKSAR.

The independence of the Judiciary is enshrined in article 85 of BL. The courts in HKSAR 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: the 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 (sects. 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. Commissioner of the 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 (sects. 3, 4, 5 and 8 POBO). The abuse of real or supposed influence is covered in section 4. Relevant case examples have been provided.

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

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 extraterritorial application is established, OSCO applies only to “conduct which would constitute an indictable offence if it had occurred in Hong Kong” (sect. 25(4) 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) (sects. 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, for example, *Sin KamWah & Another v. HKSAR* [2005] 8 HKCFAR 192 (FACC 14/2004).

Illicit enrichment is criminalized (Section 10 of POBO).

The TO provisions mentioned above 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 (sects. 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 List of Approved Contractors 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 (sect. 159A of CO), and aiding, abetting, counseling or procuring (sect. 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. sect. 2 POBO, sect. 27 OSCO; *HKSAR v. Yang Tu-lian & Others* (DCCC 237/2012; CACC 177/2012)). The maximum period of imprisonment under POBO is seven years for offences under sections 4, 7 and 9 or 10 years for offences under sections 5, 6 and 10 and under OSCO 14 years.

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

The DoJ of HKSAR oversees criminal prosecutions free from any interference. A Code for Prosecutors sets out guiding principles in relation to prosecution policy and practices (art. 63 BL). A person may seek judicial review in the High Court of 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).

HKSAR has taken measures 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 (sects. 9D and 9G CPO).

Pursuant to the Prisoners (Release under Supervision) Ordinance (cap.325) (P(RUS)O) and Regulations, the Release under Supervision Board has been established to consider applications from eligible prisoners for joining two schemes for early release under supervision. Under the Long-term Prison Sentences Review Ordinance (cap. 524) and Regulation, the Long-term Prison Sentences Review Board has been 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 or other criminal offences in accordance with the Public Service (Administration) Order or the relevant disciplined services legislation as appropriate (e.g. sect. 11 PS(A)O). These officers may also be interdicted from service if considered appropriate in the public interest (e.g. sect. 13 PS(A)O).

Sections 33 and 33A of POBO and article 79(6) of 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 legislative provisions.

Cooperating offenders may receive mitigated punishment (e.g. Z v. HKSAR [2007] 10 HKCFAR 183 (FACC 9/2006)). The 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 testimony by witnesses 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-kwong & Another (DCCC 314/2006)) and limiting the disclosure of their identity (L v. 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 (sect. 65C CPO) or by reading out witness statements (sect. 65B 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, escort by a law enforcement officer and 24-hour protection, is available in appropriate cases (sect. 7 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, seizure 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 of criminal proceeds is ordered as part of the sentencing process by a judge after conviction, based on the balance of probabilities. Value-based confiscation is also possible (e.g. sects. 12AA of POBO, 12(6) OSCO). Under OSCO (Section 8(4)), restraint and forfeiture is limited to cases where benefits of at least HKD100,000 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 & 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 that the property has been so used. Moreover, section 103 of CPO provides the court with the power to order seizure of instruments and objects which are reasonably believed to be provided/prepared with a view to the commission of any indictable offence, and these instruments or objects will be subject to disposal by court under section 102(1)(c).

Receivers appointed under section 17 of OSCO manage realizable property pending confiscation and are responsible for realizing and liquidating restrained property in compliance with a confiscation order made under Section 8 of OSCO.

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

All restraint orders under the Drug Trafficking (Recovery of Proceeds) Ordinance (DT(ROP)) and OSCO contain a disclosure order which requires the defendants to disclose assets under their effective control.

Bank secrecy is not a 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 to be part of the general background of the accused (sect. 54(1)(f) CPO, HKSAR v. Singh Bal Winder (CACC 166/2014)).

Jurisdiction (art. 42)

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

HKSAR has not established the *aut dedere aut iudicare* obligation, but may apply article 44(11) of the Convention 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 revocation of licences, the Government's right to terminate contracts on grounds of corruption, and removal of contractors from the list of approved bidders.

In addition to initiating civil proceedings, relevant 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 cooperation between authorities (arts. 36, 38 and 39)

ICAC derives its power from ICACO, with its independence enshrined in article 57 of BL. The Commissioner of ICAC is directly accountable 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 skills. At the end of 2012, ICAC had a staff of 1,282. The budget of the Operations Department of ICAC for 2012-13 was HKD 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 to follow policy manuals and guidelines and report matters that could give rise to corruption or other illegal activities to the law enforcement and regulatory authorities as soon as possible. ICAC has established liaison channels 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 programs.

Members of the public are encouraged to report suspected corruption to either the Report Center of ICAC or its seven regional offices, including anonymously. The Report Center 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 POBO.
- The possibility of adjudicated cases in the courts against legal persons relative to corruption related offences would encourage persons to seek redress in similar 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 action.

- Measures to promote the reintegration of prisoners into society, including the Rehabilitation of Offenders Ordinance (ROO) and the two schemes under P(RUS)O for early release under supervision.
- 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 six years of the commencement of proceedings represents proceeds of crime; and (c) that any expenditure during that period was met out of the offender's proceeds of crime (sect. 9 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, political will and resources, including specialized staff training (art. 36).
- Effective cooperation among relevant law enforcement agencies, in particular ICAC, HKPF, JFIU and other agencies, for example through the liaison groups set up between ICAC and other law enforcement agencies (art. 38).
- Apparent effective coordination between national agencies and private-sector entities (art. 39(1)).

2.3. Challenges in implementation

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

- In the absence of relevant case law involving officials of public international organizations, formulate legislative provisions on bribery involving agents to specifically adopt an offence of bribery of foreign public officials and officials of public international organizations that also captures bribes offered, given or promised to officials outside HKSAR (art. 16).
- Consider making the acts under section 3 of POBO an indictable offence to qualify it as a predicate offence for money-laundering (art. 23).
- Eliminate the threshold (sect. 8(4) OSCO), whereby restraint and forfeiture are limited to cases involving benefits of at least HKD100,000 (art. 31(1)).
- Consider signing witness relocation agreements (art. 32(3)).
- Consider expanding the legislation to ensure the protection of reporting persons against unjustified treatment (art. 33).
- Consider establishing jurisdiction over offences committed against its citizens; by its citizens or stateless persons residing in HKSAR; or against HKSAR (art. 42, 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 consider legislating the *aut dedere aut judicare* obligation specifically (arts. 42(3) and 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. BL provides that, with the assistance or authorization of the CPG, HKSAR may make appropriate arrangements with foreign

States for reciprocal juridical assistance (art. 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 a legal basis for surrender of fugitive offenders (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, HKSAR has signed 19 bilateral agreements on surrender of fugitive offenders (all 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 (sect. 2(2) FOO).

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

The conditions attaching 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 (sect. 13(4) FOO), surrender has never been refused on this ground by HKSAR. FOO does not establish the *aut dedere aut judicare* principle, but HKSAR follows the Convention and the obligations under its international agreements. The domestic law of HKSAR does not provide for a mechanism for the enforcement of a sentence in lieu of surrender.

Fair treatment protections are legislatively in place (e.g. arts. 4, 35, 38, 39 and 41 BL; sects. 12 and 14 FOO).

HKSAR requires the provision of *prima facie* evidence to enable surrender (sect. 10(6)(b) 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 have been provided by HKSAR.

The Secretary for Justice of the DoJ 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 (sect. 4 FOO). If arrested, the person is brought before a court of committal presided over by a magistrate (sect. 10 FOO), which decides whether the offence is one for which surrender may be granted and rules on the sufficiency of evidence.

From 2003 to 2012, a total of eight 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 proceedings.

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, HKSAR dealt with a total of 68 such cases.

On matters relating to the transfer of criminal proceedings, HKSAR consults foreign authorities to determine whether 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 (sects. 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 (sect. 15(9)(c)). Bank staff may also be summoned before a court under section 10 of MLAO or sections 74 to 77B of the 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.

The DoJ Secretary for Justice is the central authority for MLA (C.N.51.2006.TREATIES -3). Requests are assigned for advice and execution to counsels in the MLA Unit (MLAU), 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.

The Secretary for Justice of HKSAR may make arrangements for removal from HKSAR of consenting persons, whether detained or not, to provide assistance outside HKSAR (sects. 23-24 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 (sect. 10(1)(b) MLAO) and has done so in prior cases. As a matter of practice and pursuant to its agreements, HKSAR adheres to a limitation on the 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 (sect. 8(2) MLA). Reasons are provided for any refusal and consultations are held as a matter of practice before assistance is postponed. HKSAR regularly updates requesting States 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 organizations, including APEC, the ADB/OECD Anti-Corruption Initiative for Asia-Pacific, and the Economic Crime Agencies Network. A dedicated operational liaison group of ICAC maintains close contact with law enforcement and 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 with overseas law enforcement agencies.

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

HKPF 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 the Convention a basis for mutual law enforcement cooperation. HKPF has signed memorandums 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 to be permitted by the legislation of HKSAR on a case-by-case basis.

Law enforcement agencies may adopt special investigative techniques under the Interception of Communications and Surveillance Ordinance (cap. 589) and common law principles, and conduct surveillance, undercover operations and controlled delivery on a case-by-case basis.

3.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter IV of the Convention are highlighted:

- The website of DoJ includes a comprehensive list of agreements on surrender of fugitive offenders, MLA 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 any requests made under the 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 for asset recovery to be facilitated 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 conduct other than each element of an offence in HKSAR (art. 46(9)).
- MLAU's standing guidelines for processing MLA requests and timeframes have been established (art. 46(24)).
- Exchange of experience and personnel by HKSAR's law enforcement authorities with their foreign counterparts, including provision 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 consider legislating the *aut dedere aut judicare* obligation specifically (art. 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

1.1. Overview of the legal and institutional framework of Macao SAR in the context of implementation of the United Nations Convention against Corruption

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

Under the Basic Law 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 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 (arts. 15, 16, 18, 21)

A comprehensive definition of public official is provided 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, covering 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, Macao SAR 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. Reviewers noted that the requirements of the Convention address active bribery that is for the public official to "act or refrain from acting in the exercise of his or her official duties" and essentially article 339(2) of PC conforms to requirements on the proportionality of sanctions to the gravity of an offence under article 30(1) of the Convention.

Passive bribery is adequately provided for in article 338 of PC, which defines passive bribery for the commission of licit acts, albeit with light penalties.

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 trade, which adequately provides for 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 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 criminalizing the passive bribery of foreign public officials and officials of public international organizations. Under certain circumstances, related conduct may be covered by Law 19/2009 on bribery in the private sector.

No specific provisions are in place on trading in influence, but offenders 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 (arts. 23 and 24)

Most elements of the offence of money-laundering are 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 maximum penalty of more than three years' imprisonment. As such, not all Convention offences are covered. Reviewers noted that Macao SAR is currently considering amendments to its anti-money-laundering legal framework.

Furthermore, although the special provisions in articles 227 and 228 of PC cover the elements of the offence required by article 23(1)(b) of the Convention, the offence of concealment appears to be too narrow, and only refers to proceeds of crimes against property rather than all proceeds of crime.

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

Embezzlement and related offences are defined in articles 340 (embezzlement or peculation by a public official), 341 (misappropriation by a public official) and 342 (sharing of economic benefits through legal acts) of PC.

The requirements related to abuse of functions are covered by article 347 (abuse of powers) of PC. These requirements are embodied specifically in its preceding articles 343 (invasion of dwelling by a public official), 344 (illegally receiving), 345 (using public force to obstruct the enforcement of a law or legitimate order), and 346 (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 197-199, 211 and 217 (offences of theft, aggravated theft, abuse of trust, fraud and breach of trust) of PC.

Obstruction of justice (art. 25)

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

Liability of legal persons (art. 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 under the

Convention is established by 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.

Participation and attempt (art. 27)

The modalities of participation in the commission of offences described in the Convention are covered in articles 25-28 of PC. In accordance with articles 21 and 22 of 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 (arts. 30 and 37)

Judges exercise discretion in considering favorable and unfavorable circumstances specified in article 65 of PC in sentencing within the penalty ranges provided for by legislation. Penalties for some offences under 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 three years of imprisonment. Moreover, the imposition of fines in lieu of imprisonment is provided for. For example, while active bribery committed by a “secret association or society” (as defined in Law 6/97) could be punished with imprisonment from 5 to 12 years, embezzlement (“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 giving testimony in writing, no person has immunity from prosecution in Macao SAR.

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

In accordance with 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. Suspension from the exercise of political rights, prohibition from holding public office for a period of 10 to 20 years and prohibition from exercising functions of administration or oversight of 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 provided in Law 6/97/M on organized crime.

Article 40(1) of PC stipulates that the purpose of criminal penalties and security measures of a penal nature is to protect legal interests and reintegrate offenders into society. In accordance with article 52 of PC, an individual plan of social reintegration is developed, as much as possible in agreement with the convicted person, foreseeing participation in social programmes developed for social reintegration.

The exemption from penalties for cases of effective collaboration with law enforcement authorities is set out in articles 23 and 24 of 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 sets out circumstances where offenders can be exempted from penalties for helping effectively in the search for evidence leading to conviction or confession of other offences.

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

Macao SAR does not have specific provisions on the protection of witnesses, experts and victims, although 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 (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, seizure and confiscation; Bank secrecy (arts. 31 and 40)

Confiscation of proceeds of crime acquired by the offender or in the name of a third party, including value-based, is possible in accordance with article 103 of PC. The confiscation of instrumentalities used or intended to be used for the commission of an offence under the Convention is covered by article 101 of 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 set out in article 163 of the Code of Criminal Procedure and article 103 of PC. The rights of bona fide third parties are protected in article 102 of PC. Seizure and forfeiture of assets are also foreseen where those are deemed to be substantially 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 Code of Criminal Procedure, which specifically describes 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 the Decree-Law 32/93/M (financial system act) and article 8(2) of the Organic Law of the Commission against Corruption (Law 10/2000).

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

Statutes of limitation are defined in article 110 of PC, which also includes suspension of the time period in a number of cases. Suspension and interruption of statutes of limitation are also provided for in articles 112 and 113 of PC. Interruption of statutes of limitation under article 113 of PC can be also applicable to situations where the alleged offender has evaded the administration of justice. Given the relatively low penalties foreseen for most offences under the Convention, they do not carry longer periods of limitation.

Article 69 of PC provides for consequences of recidivism, and Law 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 (art. 42)

Article 4 of PC establishes jurisdiction over acts committed within the boundaries of Macao SAR, regardless of the citizenship of the person who commits the act, or on board 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 bribery of foreign public officials or officials of a public international organization committed abroad, when the offender is found to be physically present within the Macao SAR boundaries.

Paragraph 2 of Article 5 of PC enables Macao SAR to establish jurisdiction on the basis of international treaties or MLA 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 PRC, article 33 of Law 6/2006 sets out the grounds for refusal of surrender of fugitive offenders. Also, article 33(2) provides that in the case of refusal to surrender, relevant evidence shall be requested from the requesting State to facilitate the initiation of legal proceedings.

Consequences of acts of corruption; compensation for damage (arts. 34 and 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 cooperation between authorities (arts. 36, 38 and 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 7/2006, analyses the information received and reports suspected 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 at 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 10/2000).

2.2. Successes and good practices

Overall, the following good practices in implementing Chapter III of the Convention are notable:

- 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 predicate offence was committed 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 and the 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 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 MLA 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 articles 15 and 16(1) and 21 of the Convention, in particular, with regard to the criminalization of offering an 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 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 Convention offences (not just property-related offences) is covered (art. 23).
- Consider expanding the offence of concealment to cover all Convention offences (art. 24).
- Consider extending the criminal liability of legal persons to active and passive bribery and other related offences of PC (art. 26).
- Consider whether legislation could be amended to establish that the attempt to commit or the preparation for any offence established in accordance with the Convention 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 “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” 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

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 absent or inadequate.

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

Extradition does not apply to Macao as a special administrative region of the People’s Republic of China. However, surrender of fugitive offenders is regulated by Law 6/2006 on judicial cooperation in criminal matters, and relations with foreign governments are possible with the assistance and authorization of the Central Government of the PRC.

Law 6/2006 contains measures for expediting surrender proceedings, in addition to a simplified procedure for surrender in its article 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.

Under 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 commit 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 commit a 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(3) of 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 in accordance with article 213 of the Code of Penal Procedure. However, such agreements are not a precondition for all surrenders of fugitive offenders.

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

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

Mutual legal assistance (art. 46)

Mutual legal assistance (MLA) is 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 MLA, 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, MLA could be provided 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 proceedings.

In accordance with Law 6/2006, the Public Prosecution's Office is responsible for receiving, transmitting and handling requests for MLA and for formulating recommendations to the Chief Executive 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 the adoption of urgent provisional measures.

The confidentiality of requests is regulated in article 134 of Law 6/2006 in line with the Convention. While there is provision in Macao SAR's legislation for lifting bank secrecy by judicial order, there is no provision ensuring that requests for MLA cannot 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 proceedings do not normally take longer than six 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 INTERPOL, and transmittal of the request by any means that allow for a written record to be made.

The cost of MLA in the absence of a different agreement with the requesting State or region is free of charge as a general rule, with the exception of the expenses and remuneration of witnesses and experts, including their travel and accommodation, expenses resulting from the sending or delivering of 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 MLA requests related to corruption have been refused by Macao SAR to date. While there have been no incoming requests 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 (arts. 48, 49 and 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 addressed 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 three 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 having no agreements or arrangements in place for the use of special investigative techniques at the international level, Macao SAR expressed 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 Convention:

- 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 provides that proceedings shall be conducted even during a holiday (art. 74) (art. 44(9) of the Convention).
- While in principle cooperation should be undertaken on the basis of international conventions or Law 4/2006, Macao SAR is also able to apply laws of the requesting State if those are more favorable to the “persons 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.

3.3. Challenges in implementation

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 the absence of dual criminality (art. 44(2) of the Convention).
- Amend its legislation to recognize all offences covered by the Convention as offences for the commission of which surrender can be conducted, which may also

result from a revision of penalties recommended by the Convention 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 MLA (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 MLA requests cannot be denied on the ground of bank secrecy (art. 46(8)).
 - Ensure that the scope of legal assistance is as wide as possible and consider providing 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 (art. 49).
 - Intensify efforts to collaborate with other States to combat corruption offences committed by use of modern technology (art. 48(3)).
 - Consider regulating in detail the use of controlled delivery and other special investigative techniques and allowing for the admissibility in court of evidence derived therefrom (art. 50).
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