CHAPTER VII
MONITORING AND EVALUATION

WHY BOTHER TO MEASURE?

There are several related reasons why measurement and assessment of corruption is important.[477] Assessment at the beginning of anti-corruption programmes serves to identify the nature and extent of corruption, identify possible actions against it and helps in the setting of priorities and the sequencing of elements of the programme. It also provides essential "base-line" information against which later assessments can be compared, which in turn can form the basis of further adjustments in elements of the programme. Accurate and unbiased assessment is essential and must often be protected against those who would distort or falsify information to conceal malfeasance or a simple lack of success.

Measurements are needed not only of corruption itself, but of information in any subject area likely to be affected by corruption. This enables comparisons and other forms of analysis and creates redundancies which protect against inaccuracy or distortion. Figures which show that the number of corruption incidents in a government department are reduced can be cross-checked against other performance indicators, for example, to determine whether corruption itself has actually been reduced or merely displaced into areas where it is harder to detect. Measurement from a range of different perspectives is also important. Most government information is generated from within, but it is also important to use external and extrinsic assessments. Internal assessments showing that performance has improved might be treated with some skepticism if the outsiders who use the service are reporting that it has deteriorated.

This is a precaution against fraudulent assessment methods, but external assessment also serves the purpose of revealing to insiders what their consumers consider to be success. For example, police and law-enforcement agencies in many countries have been surprised on occasion to learn that, while they saw their primary objective as catching and prosecuting criminal offenders, the crime victims reported that they felt the primary indicator of success should be the mitigation of harm to victims, especially in crimes such as sexual assault/rape, where treatment of the victim was critical. In this context, measurement from different perspectives informs the assessment process itself, not only determining whether a programme has succeeded, but assisting in the definition of success itself. Once success is appropriately defined, further data is then generated: once people become aware what their tax payments should be buying, they become more critical and more likely to report cases where their expectations of success are not met.

Successful reforms can in some cases impede their own assessment. Streamlining and downsizing can make agencies more efficient, but may also

[477] See also Tools #1 and #2 for a more detailed explanation.

reduce the financial and human resources needed to gather the information on which assessments are based. Changing personnel and administrative reforms can also make “before” and “after” comparisons difficult.

In public service provision, there are a number of questions to which managers of public services need the answers if they are to overcome information constraints.

The first set of questions addresses the issue of what needs reform. What can be changed? What should be changed first? How much is gained from each of the actions taken? How does one measure progress? What is the confidence level of the answers obtained?

The second set of questions deals with the focus of the actions. Some of the questions include the following. Should we focus on particular service providers? Are there any special groups of service users (ethnic, generational and gender divisions are typical stratifications) especially harmed by system leakage? Are there any multiplier effects or combinations of actions that produce more than the sum of their individual effects?

A third set of questions deals with the financial and political costs of reducing system leakage. How much will the stakeholder information system cost to implement? How long do we have to wait for the returns? What evidence exists of community or constituency acceptance or a public mandate for change? What is the level of institutional acceptance from the service delivery agencies?

The solution to such information asymmetries and constraints requires a measurement interface between services and users: a process whereby the community voice can be built into planning. Service delivery surveys have been designed and implemented in a number of countries with the goal of providing such a measurement interface.

TOOL #38

SERVICE DELIVERY SURVEYS (SDSS)

The service delivery survey (SDS) is useful in a number of ways; it gives service providers the information necessary to implement reform and it gives service users information to help them promote reform. SDSs are valuable for a number of reasons:

- They give consumers a "voice" and allow them to exert pressure on service providers to delivery higher quality services;
- They provide concrete data about perceptions in a relatively unambiguous way; and
- They provide greater participation among service users in the service delivery process.

The SDS is especially useful as a management tool. Ultimately, it could be used internally by managers at all levels of the Government and externally by governmental oversight agencies, politicians, the public and international donors. The SDS would establish a baseline for service delivery to the public that could be used to improve the design of a reform programme. The indicators could be measured periodically to ascertain the progress of the reform. A service delivery survey would also build capacity within the country to design and implement surveys, as well as to implement results-oriented management.

Several provisions of the United Nations Convention against Corruption call indirectly for research into corruption, but it is silent as to specific methodologies or areas for research. Generally, the Convention calls for a number of measures which may well depend on research to gather the information needed to make them work, but leaves to the States Parties themselves the development of specific research programmes. Article 5, paragraph 3 calls on States Parties to periodically evaluate relevant legal instruments and administrative measures, and Article 6, subparagraph 1(b) calls for anti-corruption bodies which increase and disseminate knowledge about corruption, which could include various forms of research. Article 60, paragraph 4 calls on States Parties to assist one another, on request, in conducting “evaluations, studies and research” into the “types, causes, effects and costs” of corruption. Article subparagraph 4(a) then mandates the Conference of States Parties to facilitate a range of activities, including research and the mobilization of voluntary contributions. The extent to which the Conference will become involved in such activities and how it will draw upon the work of other bodies is left to the Conference itself.[478]

[478] The Conference is not first convened until at least 30 countries have ratified the Convention and it is in force. Article 63, paragraph 2 calls on the Secretary General to convene the first session within a year of the effective date of the Convention. Article 68, paragraph 1 brings the Convention itself into force on the 90th day following the filing of the 30th instrument of ratification, acceptance, approval or accession with the U.N. Treaty Office in New York. The resolution which adopts the Convention, GA/RES/58/4 of 31 October 2003, establishes some initial mandates for

DESCRIPTION

Service delivery surveys originate from a community-based action-research process developed in Latin America in the mid-1980s, known as Sentinel Community Surveillance. Since then, such stakeholder information systems have been implemented with World Bank support in Bosnia and Herzegovina, Mali, Nicaragua, Tanzania and Uganda. With the help of UNICEF and UNDP, they have been established in Bolivia, Burkina Faso, Costa Rica, Nepal and Pakistan.

The scheme was originally conceived to build capacities while producing accurate, detailed and "actionable" data rapidly and at low cost. Ordinarily, SDSs focus on the generation and communication of evidence for planning purposes at the level of a municipality, city, state, province or an entire country. In each of the settings, a representative sample of communities is selected to represent the full spread of conditions. The approach permits community-based, fact-finding through a reiterative process, addressing one set of issues at a time.

The SDS process[479] starts with a baseline of service coverage, impact and costs in a representative panel of communities. That involves a household survey, where local interviewers are trained to knock on doors and ask a limited number of well focused questions about use of services, levels of satisfaction, bribes paid and suggestions for change. Such data, and the institutional review from the same communities, are discussed in each community with the service workers and community leaders. The quantitative aspects are used to benchmark progress with subsequent reiterations of the survey. The logistics of the SDS focus on repeated measurement at the same sites, reducing sampling error and making impact estimation straightforward. The qualitative dimensions reveal what should be done about the problem.

Central to SDS is interaction with the research partners: the communities. The product is therefore the aggregation of data from the epidemiological analysis distilled through interaction with communities.[480] By feeding information back to the communities, dialogue for action is stimulated within households, in communities, and between communities and local authorities. The resulting mobilization to resolve specific problems also serves as a basis for empowerment. That involves initiation of cycles following a fairly constant rhythm, independent of the subject matter involved. Experience over more than a decade of implementation in 40 countries has shown that ownership and commitment on the part of the client is vital to successful development projects. The greater the intensity of participation (in terms of information sharing, consultation, decision making and initiating action), the greater the sustainability.

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the Conference when it convenes, but does not speak of research, which is thereby left to the Conference itself.

[479] *Service Delivery Survey (SDS): A Management Tool*. Langseth, Petter, Patricia Langan and Robert Taliercio. Washington: EDI, 1995.

[480] Webster's New Collegiate Dictionary defines "epidemiology" as: i) a branch of medical science that deals with the incidence, distribution, and control of disease in a population, ii) the sum of factors controlling the presence or absence of a disease or pathogen.

The method has been used to measure impact, coverage and cost of land mines, economic sanctions, environmental interventions, urban transport, agricultural extension, health services, judiciary and institutional restructuring. It has proved useful in generating community-designed strategies to combat corruption in the public services in several countries. Actionable results are provided in a short time and at low cost. Typically, the duration of a whole cycle, from the design stage to the report writing, is six to eight weeks.

SOME RESULTS OF THE SERVICE DELIVERY SURVEY (SDS)

Corruption (almost by definition) represents a separation between leaders and their constituencies and between public servants and the public. ***The first*** contribution of a SDS in overcoming that separation is that all segments of the public are reflected in the collected data. The data give a voice to the urban and rural, male and female, rich and poor, young and old and even those who do not have access to certain public services for physical or social reasons. Stratified focus groups are assembled to identify potential solutions so that each group is enabled to voice its opinions and solutions.

Simply to be included in the sample as people who give opinions on the services is, however, a fragile representation of the community voice. ***The second*** way in which SDSs reduce the separation is by involving stakeholders actively in the social audit process. Feedback of the data to the communities (as in Tanzania and Uganda) and systematic use of data to build solutions adds another dimension to the community voice in planning. In the examples given, the participants of the focus groups were invited to meetings with the local community leaders to discuss the feasibility and implications of the solutions.

The third way in which SDSs close the gap is by providing feedback in a positive way, using results to reveal options for the achievement of goals rather than underscoring deficiencies. Communities or districts with the poorest indicators are shown how certain reforms can improve their situation. Further, having a voice in the interpretation and analysis of the resulting data helps to build confidence among the stakeholders and provides a favourable climate for community mobilization.

The fourth way SDSs can help to bring the governed and governing together is by using results to manage a change process. The process starts with a necessary commitment by the Government to communicate results. The results of each cycle are then communicated to public service providers through a series of "change management" workshops. In Tanzania, the results were discussed in a cabinet retreat, where a national policy against corruption was formulated. In Uganda, the results were presented at a retreat of parliamentarians. Media workshops in both countries familiarized journalists with the data and the correct management of positive examples. In that way, the change-management workshops help build a sense of accountability, transparency and open Government.

SDSs also provide data necessary for results-oriented development planning. It is a fact that most local governments in developing countries are characterized

by poor fiscal outcomes. A results-oriented approach can help improve the outcomes. Results-oriented management, however, needs detailed "actionable" quantitative data. For a Government or municipal authority to act on behalf of a vulnerable subgroup, hard data are required to identify the subgroup concerned and for it to act as a benchmark to measure progress. Complementary qualitative data are also needed to indicate the cultural and gender constraints and opportunities as well as to confirm the analysis given to the quantitative data.

DIFFERENT TYPES OF MONITORING AT THE INTERNATIONAL LEVEL

At least three types of monitoring mechanisms are currently in use as part of anti-corruption programmes:

- Those based on international instruments;
- Those based on national instruments; and
- Those of a more general nature[481]

The advantage of instruments-based mechanisms is that the legal framework is clear: the monitoring focuses on the implementation and impact of the various provisions of the instruments. Examples of such monitoring are the mechanisms relating to the Convention on Combating Bribery of Officials in International Business Transactions of the Organisation of Co-operation and Development (OECD), the GRECO Programme of the Council of Europe and the various monitoring exercises within the European Union.

All official monitoring or review of the United Nations Convention against Corruption will fall to the Conference of States Parties established by Article 63 of the Convention. Drafters avoided the term “monitoring”, but once the Convention is in force and the Conference is convened,[482] Article 63, paragraph 5 calls on the Conference to:

> acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the States Parties.

Article 63, paragraph 6 then calls on States Parties to provide the necessary information as required by the Conference. It also calls on the Conference to determine the most effective way of receiving and acting on such information and clarifies that it may use information from States Parties, competent international organizations and , if it chooses, relevant non-governmental organizations.

[481] Petter, Langseth; (2001) Helping Member Countries Build Integrity to Prevent Corruption, Vienna 2002

[482] See GA/RES/58/4, paragraphs 4-6, Convention Articles 63 and 68, and the previous footnote for details.

Even without such a formal framework, however, monitoring the effectiveness of national strategies has been accomplished via the use of surveys. An example is the recently established monitoring mechanism used in Lithuania, Poland and Romania. Instead of being based on a legal instrument, monitoring takes place on the basis of questionnaires, listing relevant questions on national policies and legislation. Two other examples include the perception indices developed by Transparency International as well as the annual independent survey conducted by Independent Commission Against Corruption (ICAC) in the Hong Kong Special Administrative Region (SAR) that measures, inter alia, the trust level between ICAC and the public, the prosecution rate, as well as levels, types, location and causes of corruption. The United Nations is currently testing a method in two pilot countries using a so-called country assessment based on both facts and perceptions using hard facts, surveys focus groups and case studies.

CHALLENGES OF MEASURING THE IMPACT OF ANTI-CORRUPTION STRATEGIES

There are certainly many challenges in accurately measuring the impact of anti-corruption strategies, policies and measures.

First, collected data must be analysed by a competent and independent institution capable of interpreting it and extracting as much useful information and analysis as possible. Analysis highlighting differences and identifying so-called "best practices" can then be carried out. Availability of resources will always be a factor influencing credibility. That holds true even for monitoring mechanisms based on international instruments, where it is critical that monitoring bodies and secretariats are adequately resourced. Without appropriate resources, research may be under funded and inadequate, and without independent resources, research agendas may be dictated by financial officials or donors, thereby lacking the necessary objectivity and credibility.[483]

Secondly, current international monitoring mechanisms are unevenly distributed throughout the world. In some regions, countries tend to participate in more than one monitoring exercise, while in other parts of the world there are no operational monitoring mechanisms at all, as, for example, in most parts of Asia. Of course, the other extreme involves instances where there are multiple mechanisms applicable to the same region, and the challenge arises as to how to avoid duplication of effort.

Thirdly, monitoring can never be an end in itself. Rather, it should be an effective tool to bring about changes in international and national policies and improve the

[483] See GA/RES/58/4, paragraphs 4 and 9, calling on Member States to support efforts to ratify and implement the Convention and calling on the Secretary General to ensure that the secretariat serving both the pre-ratification assistance effort and the Conference of States Parties are adequately funded. See also United Nations Convention against Corruption Article 62, subparagraph 2(c), calling on States Parties to support technical assistance efforts. Apart from the basic provision of secretariat services as above, the financing of activities undertaken by the Conference of States Parties is left to that body once it convenes. See Article 63, paragraph 3.

quality of decision making. If the monitoring exercise is linked to an international instrument, the primary objective should be to ensure proper implementation of the technical aspects of the instrument and then the practical impact of its implementation. Monitoring can thus serve two immediate purposes. It helps to reveal any differences in interpretation of the instruments concerned and it can stimulate swift and effective translation of the provisions of those instruments into national policies and legislation. If it is determined that incomplete or ineffective implementation has occurred, sanctions can be imposed to motivate stronger efforts to achieve success. Accurate monitoring is therefore critical with respect to launching any successful anti-corruption initiative.

In the case of the OECD Convention, a built-in sanction requires that reports of the discussions on implementation be made available to the public. Such publicity can be an important mechanism in helping promote more effective measures. Reference can be made in that regard to the publicity surrounding the perception indices of Transparency International (TI). Even though the indices simply register the level of corruption as perceived by primarily the international private sector, they gain wide publicity. While the TI indexes are useful, however, a distinct disadvantage is that they:

- Do not always reflect the real situation,
- Do not involve the victims of corruption in the countries surveyed;
- Offer little or no guidance of what could be done to address the problem; and
- Can discourage countries from taking serious measures when their anti-corruption programme efforts are not seen as being successful by an improved score against the TI Index.

Fourthly, monitoring exercises cannot be separated from the issue of technical assistance. It is critical that monitoring not only addresses levels of corruption, but also its location, cost, cause and the potential impact of different remedies. Furthermore, since the trust level between the public and anti-corruption agencies is critical for the success of anti-corruption efforts, public trust levels should also be monitored.

It may be that participating countries agree on the need for implementing the measures identified as "best practices" but lack financial, human or technical resources to implement them. Under those circumstances, monitoring exercises would be much more effective if they were accompanied by targeted assistance programmes. It should be added, however, that not all measures require major resources, especially in the context of preventive measures where much can be done at relatively low cost.

Most of the data collection by the traditional development institutions is based on an approach that can be described as "data collection by outsiders for outside use". International surveys help spark debate about countries that fare badly. They help to place issues on the national agenda and keep them at the forefront of public debate. International surveys are, however, comparative and fraught with statistical difficulties.

They have, however, been important in highlighting the need for national surveys which are now being undertaken with increasing thoroughness. With public awareness of levels, types, causes and remedies of corruption having dramatically improved over the last five years, collecting data about corruption is useful because it increases the accountability of the State towards its public by establishing measurable performance indicators that are transparently and independently monitored over time.

TOOL #39

UNITED NATIONS COUNTRY ASSESSMENTS

United Nations country assessments aim to produce a clear and coherent picture of the current condition of a given country with respect to the:

- Levels, locations, types and cost of corruption;
- Causes of corruption; and
- Remedies for corruption.

Only about 20 per cent of the resources and efforts, however, are spent on the assessment as such. The main objective is to use and disseminate collected data in order to:

- Raise awareness among key stakeholders and the public;
- Empower civil society to oversee the State;
- Provide a foundation for evidence-based action plans;
- Establish measurable performance indicators; and
- Monitor the implementation of the anti-corruption action plan.

Country assessments are one of a number of specific research and analysis methods that could be used to develop programmes for the implementation of the United Nations Convention against Corruption and to assess implementation as it proceeds. Several provisions of the United Nations Convention against Corruption call indirectly for research into corruption, but it is silent as to specific methodologies or areas for research. Generally, the Convention calls for a number of measures which may well depend on research to gather the information needed to make them work, but leaves to the States Parties themselves the development of specific research programmes. Article 5, paragraph 3 calls on States Parties to periodically evaluate relevant legal instruments and administrative measures, and Article 6, subparagraph 1(b) calls for anti-corruption bodies which increase and disseminate knowledge about corruption, which could include various forms of research. Article 60, paragraph 4 calls on States Parties to assist one another, on request, in conducting "evaluations, studies and research" into the "types, causes, effects and costs" of corruption. Article subparagraph 4(a) then mandates the Conference of States Parties to facilitate a range of activities, including research and the mobilization of voluntary contributions. The extent to which the Conference will become involved in such activities and how it will draw upon the work of other bodies is left to the Conference itself.[484]

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DESCRIPTION

Country assessments resulting in a corruption monitoring protocol could be issued regularly (once every two to four years) to document levels and locations of corruption as well as progress by a Member State in fighting it. Such country assessments can be conducted by the United Nations Office on Drugs and Crime (Crime Programme),[485] in collaboration with the United Nations International Criminal Justice Research Institute (UNICRI) and various other research institutes, such as Gallup.

TYPES, LEVELS AND LOCATIONS OF CORRUPTION.

The assessments monitor trends regarding the three main types of corruption:

- Corruption in public administration and "street-level" corruption;
- Business corruption (especially in medium-sized businesses); and
- High-level corruption in finance and politics.

In order to assess the types, levels and locations of corruption, various techniques are combined into an integrated and comprehensive approach. Some of the techniques include:

Desk Review.

The initial step is to conduct a desk review by compiling all relevant anti-corruption information already available.

Public Opinion Surveys.

Such surveys help to determine the types, levels and locations of corruption, based on both concrete experiences and perceptions. Significant efforts are undertaken to help guarantee the quality of data by choosing a representative sample and sample size, by ensuring that the survey is implemented according to the terms of reference and by cross-checking the survey data. The sample size is chosen to produce quality data at both the national and sub national levels. As an example, in Uganda, the survey data for each of the 46 districts of the country would be compared with the national average. Such a survey was requested by the Inspector General of Government who felt that the only way to fight corruption was to have information about corruption levels across sub national units.

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the Conference when it convenes, but does not speak of research, which is thereby left to the Conference itself.

[485] Formerly the United Nations Centre for International Crime Prevention (CICP), which was merged with the U.N. Drug Control Programme to form the U.N Office on Drugs and Crime (UNODC) in August 2003. The adopting resolution for the Convention against Corruption calls on the Secretary General to designate the new UNODC as the secretariat for the Conference of States Parties to the new Convention. Within UNODC, the anti-corruption unit will deal with substantive anti-corruption programmes, while matters relating to the Convention, including pre-ratification assistance, will be handled by the Treaty and Legal Affairs Branch. For information about the Office, see: http://www.unodc.org/unodc/en/about.html.

Focus Groups.

Another diagnostic technique used in country assessments is focus groups, whereby targeted interest groups in Government and society hold in-depth discussion sessions. The technique often produces extremely detailed information concerning views on corruption, precipitating causes, as well as valuable ideas on how Governments can fight it. The focus group sessions usually concentrate on the following issues:

- Extent of the corruption problem;
- Types and locations of corruption;
- Negative effects of corruption;
- Root causes;
- Effectiveness of current laws and programs;
- Possible solutions; and
- Prioritizing issues

Case Studies.

Local experts use case studies to describe typical corruption cases in great detail. The exercise can help everyone to understand how corruption actually takes place. Carefully documented practical case studies also help anti-corruption agencies to fine-tune their efforts and can assist in educating the public and potential whistleblowers.

Legal Assessment.

The entire anti-corruption framework is assessed, including criminal and civil procedure codes, civil service laws (standing orders), public procurement regulations, anti-money laundering statutes, codes of conduct and other relevant codes and rules. Where appropriate, inefficiencies and inconsistencies between various laws are analysed with a view to integrating a comprehensive solution to strengthen the legal system.

Assessment of the Institutional Framework.

The capacity and resources of the relevant institutional anti-corruption framework is analysed. That includes an assessment of the effectiveness of control mechanisms and oversight bodies responsible for monitoring and guaranteeing the quality and integrity of the relevant institutional framework. The objective is to evaluate to what extent the judiciary, executive and legislative bodies are already active in preventing and fighting corruption. Particular attention is paid to the balance of powers, and an assessment is made of the independence of the judiciary, the legislative and the media (often called "the fourth estate"). The aim is to identify the specific problems faced by each body and agency as well as their root causes. The United Nations country assessments concentrate in particular on "process mapping" to analyse the functions, procedures, reporting relationships, access to information and incentives within the institutional framework. Such mapping specifies how the organization carries out its mission, identifies efficiencies and inefficiencies, assesses potential for conflict of interest and identifies hazards for extortion (bribe taking) and bribe giving.

Assessment of Civil Society.

The sixth and last technique used is the assessment of civil society and the media. For civil society and the media to hold the Government accountable, they must have access to information. The media must also enjoy freedom from political influence and be independent. With respect to access of information, country assessments do more than merely confirm that some form of freedom of information law exists. They also assess to what extent journalists or citizens do, in fact, have access to certain information in a timely and free fashion.

PRECONDITIONS AND RISKS

While international surveys tend to be conducted by outsiders for use outside the country, national or subnational surveys are ideally performed by local people (in some cases with the assistance of outsiders) and for local use.

International surveys help trigger public debate in the countries with the most problems. They also help to place the issue on national agendas and to keep them at the forefront of public debate. Public awareness regarding the levels, types, causes of and remedies for corruption have improved dramatically over the last five years, and collecting data about corruption will increase the accountability of the State towards its public by establishing measurable performance indicators that can be transparently monitored over time

TOOL #40

MIRROR STATISTICS AS AN INVESTIGATIVE AND PREVENTIVE TOOL

The purpose of Tool #40 is to uncover corruption levels by assessing secondary indicators such as the extent of the grey economy, which includes such commodities as illegally imported cigarettes, liquor and other items. The link between corruption and the grey economy is especially important as corrupt practices usually "enable" the inflow and outflow of resources to and from the sector. Where the economic environment in a country is tightly regulated with effective import regulations and other measures, it would be difficult for the grey economy to operate profitably without resorting to corruption to defeat existing enforcement of regulations.

DESCRIPTION

The use of mirror statistics to track the flow of "resources" of the grey economy and to estimate the size of the sector in the economy is not new, having proved to be an important analytical instrument that can target economic sectors suffering from corrupt practices.

TWO METHODS FOR USING MIRROR STATISTICS INFORMATION

Method One

The basic information resource is statistical information about the import and export of commodities between two or more countries. The objective is to compare data for exports and imports from country X to country Y and from country Y back to country X. In principle, the mirror (export/import) figures should match. There should be no discrepancies between the volume of export from country X to country Y and the volume of import in country Y from country X. The basic precondition is access to accurate data. Using such methodology, comparisons could be made, inter alia, of commodity groups, branches of the economy and periods of time.

The interpretation of results should be made with care and should take into account several important factors that could contribute to the result. First, an analysis should be made of the accounting methodologies used by different countries. Adjustments should be applied to equalize the data. Secondly, careful examination of the import/export customs rules and regulations in the mirrored countries and methods of their implementation must be understood. That step helps to equalize the data. Once all of the contextual factors have been identified and accounted for, any imbalances in the statistics could be interpreted as illegal flows of resources (import and export), and further analysis could be performed using a more detailed structure of resources flows.

Method Two

Another method for using mirroring information compares customs import data with market research information. In countries where comprehensive research on

the volume and structure of different markets exists, the data provide fairly accurate estimates of the actual volume of imported goods for a certain commodity group. The information may be compared directly to import information from the customs authorities. Differences in the volumes can point to possible illegal import and could be explored further in greater detail.

Use of the information obtained

There are at least two ways of using the information obtained through the methods described above:

- ***As an investigative (intelligence) tool.***

  Results obtained could be used to target the efforts of specialized law enforcement agencies. Although the information obtained is "depersonalized", it provides clues as to the main areas of illegal export and import, as well as the probable volume of illegal trade. Thus, specific plans for investigation and preventive work could be designed. Furthermore, mirror statistics could act as an evaluation tool that helps assess the effectiveness of the measures that have already been taken.

- ***As a preventive tool.***

  The results could also be used to analyse and redesign the legal and institutional framework. The existence of substantial discrepancies continuing over time is an immediate indicator that existing rules and regulations are failing to work. That could be because of deficiencies in the legal or the institutional framework. Both should therefore be subjected to closer analysis and inspection. In-depth analysis could provide solid evidence that existing systems fail because of the very regulations designed to support legitimate economic activity or for other reasons. Efforts can then be focused on rehabilitating the regulations so that they can function to maximize the economic activity of the country.

TOOL #41

MEASURABLE PERFORMANCE INDICATORS FOR JUDICIARY

A key element in developing and implementing reforms to the judiciary is the need to develop measures which will be effective in bringing about changes which will serve to prevent corruption by modifying practices and procedures to enhance transparency and accountability and reduce opportunities for corruption, while at the same time preserving the high degree of independence and autonomy which is essential for the judiciary to function in its assigned role. One means of doing this is to assist judges in developing and implementing measures in programmes which are formulated and fully implemented by the judiciary itself. Generally, this will entail the development of performance criteria, and review and transparency mechanisms in which judges review the performance of their peers and of the judiciary in general, and in which the general population is made aware of both the performance expected and the performance actually delivered by its judges.

This is one of several tools which could be used to implement Article 11 of the United Nations Convention against Corruption, which calls for anti-corruption measures within the judiciary and in prosecutory institutions where these enjoy a similar degree of independence to judges. Article 11, paragraph 1 calls for the preservation of judicial independence and general measures to strengthen integrity and prevent opportunities for corruption, which may include rules with respect to the conduct of judges.

Basic goals of anti-corruption reforms include the following:

- Improving Access to Justice;
- Improving the Quality of Justice;
- Raising the Level of Public Confidence in the Judicial Process; and
- Improving efficiency and effectiveness in responding to public complaints about the judicial process.
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- Improving efficiency and effectiveness in responding to public complaints about the judicial process.

DESCRIPTION

A series of steps may be taken to develop basic goals, performance indicators and a mechanism for performance review to see if the indicators prove valid and have been met in practice. Groups of judges should be convened, under the auspices of the appropriate governing body, association, or Chief Justice of the country where possible. Groups of judges, with each group containing a representative cross-section of judges as to trial and appeal judges and judges responsible for specific subject-matter where applicable, can then be asked to consider basic goals, with a view to developing strategies and methods for achieving the basic goals and a series of performance indicators that, when observed, would help establish whether the goals have been met. As with anti-corruption efforts in other sectors, participating judges and facilitators should bear in mind that indicators which fall under specific goals are often linked with other indicators. Factors such as increases in the number of cases heard and reductions in pre-hearing delays would indicate better access to justice, for example, but might not signify overall improvements if other reviews suggest that the quality of adjudication has fallen as a result.

Judicial independence requires that all stages of this programme must be primarily controlled and driven by the judges themselves, and that oversight be primarily through general public transparency unless action against specific judges is required as a result of specific malfeasance by the judge. Other personnel often bring significant insight and a different perspective, however, and should also be incorporated into the process wherever possible. These include representative samples of lawyers, including prosecutors, defence counsel and legal counsel in civil proceedings; court workers and support staff; and the litigants themselves.

Lists of some of the possible performance indicators are as follow.[486]

ACCESS TO JUSTICE

Measure 1 Implementation of a relevant and up-to-date code of conduct for judicial officers

Impact indicators:

1. Date of most recent review of code of conduct;
2. Number of complaints received under the code of conduct;
3. Percentage of complaints received that were investigated;
4. Percentage of complaints received and investigated that were disposed of;
5. Code of conduct complying with best international standards;
6. Percentage of officers trained on code of conduct.

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[486] These were developed by UNODC and a Federal Judicial Integrity and Action Planning Meeting for Chief Justices of Nigeria, held in Abuja October 27-28 2001. The meeting was attended by all 36 Chief Justices in Nigeria, was chaired by the Chief Justice and facilitated by UNODC's Global Programme against Corruption (GPAC).

Measure 2 Enhance public understanding of basic rights and obligations dealing with court-related procedural matters

Impact indicators:

7. The number of judges involved in public information programmes offered to the media and to the general public;
8. Availability of the judicial code of conduct to the public.

Measure 3 Ease of access of witnesses in civil/criminal procedural matters

Impact indicators:

9 Number of instances in which witnesses provide evidence without attending court;
10. Average time and expense for a witness to attend a case.

Measure 4 Affordable court fees

Impact Indicator:

11. Percentage of fees set at too high a level.

Measure 5 Adequate physical facilities for witness attending court

Impact Indicator:

12. Adequate Witnesses and Litigants waiting room.

Measure 6 Itinerant judges with the capacity to adjudicate cases outside the court building reaching distant rural areas

Impact Indicators:

13. Number of itinerant judges
14. Availability of necessary transport

Measure 7 Level of informed citizens (and court-users in particular) on the nature scale, and scope of bail-related procedures

Impact Indicator:

15. Number of courts offering basic information on bail-related aspects in a systematic manner.

Measure 8 Use of suspended sentences and updated fine levels

Impact Indicators:

16. Passage of empowering legislation;
17. Existing number of cases where suspended sentences were applied;
18. Number of cases where fine penalties were applied

QUALITY OF JUSTICE

Measure 9 Timeliness of court proceedings

Impact indicators:

19. Level of cooperation between agencies;
20. Prioritization of old outstanding cases;
21. Number of adjournment requests granted;
22. Percentage of courts where sittings begin on time;
23. Percentage of judges whose performance is monitored;
24. Levels of consultations between judiciary and the bar;
25. Procedural rules that reduce the potential abuse of process;
26. Number of judges practising case management;
27. Type of case management being practised;
28. Regular congestion exercises undertaken;
29. Regular prison visits undertaken with Human Rights NGOs and other stakeholders
30. Level of access to books for judicial officers;
31. Functioning criminal justice and other committees (including NGOs).

Measure 10 Courts exercising powers within their jurisdiction

Impact Indicators:

32. Number of judges/registrars trained/retrained in last year
33. Extent to which bail jurisdiction clear and implemented
34. Percentage of weekly court returns made and reviewed
35. Number of court inspections
36. Number of files called up under powers of review

Measure 11 Consistency in sentencing

Impact indicator:

37. Availability of criminal records at time of sentencing
38. Development of and compliance with sentencing guidelines

Measure 12 Performance of individual judges

Impact Indicators:

39. Percentage of cases where sits on time;
40. Backlog of cases? Going up? Down?
41. Number of errors in procedures;
42. Number of appeals allowed against substantive judgements;
43. Conduct in court;
44 Number of public complaints;
45 Level of understanding of code of conduct;
46 Percentage of sentences imposed within the sentencing guidelines.

Measure 13 Compliance with requirements of civil process

Impact Indicators:

47 Number of cases where abuse of ex parte injunctions;
48 Number of non-urgent cases heard by vacation judges;
49 Number of instances of proceeding improperly in the absence of parties;
50 Number of chambers judgements (not given in open court).

Measure 14 Ensuring propriety in the appointment of judges

Impact indicator:

51 Level of confidence among other judges

Measure 15 Raising level of public awareness of the judicial Code of conduct

Impact indicators:

52 Availability of code of conduct
53 Number of complaints made concerning alleged breaches

PUBLIC CONFIDENCE IN THE COURTS

Measure 16 Public confidence in the courts

Impact Indicators

54. Level of confidence among lawyers, judges, litigants, court administrators, police, general public, prisoners, and court users;
55. Number of complaints (see above);
56. Number of inspections by ICPC;
57. Effectiveness of policies regarding formal and social contact between the judiciary and the executive;
58. Nature, scope and scale of involvement of civil society in court user committees

IMPROVING EFFICIENCY AND EFFECTIVENESS IN RESPONDING TO PUBLIC COMPLAINTS ABOUT THE JUDICIAL PROCESS

Measure 17 Existence of credible complaints mechanisms

Impact Indicators:

59. Complaints mechanisms that comply with best practice
60. Extent to which public are aware of and willing to use the complaints mechanisms
61. Readiness to admit anonymous complaints in appropriate circumstances

POSSIBLE NEXT STEPS IN IMPROVING JUDICIAL PERFORMANCE IN THE FOUR AREAS

Access to justice

Code of conduct reviewed and, where necessary, revised in ways that will impact on the indicators agreed at the Workshop. That includes comparing it with other more recent codes, including the Bangalore Code. It would also include an amendment to give guidance to judges about the propriety of certain forms of conduct in their relations with the executive (for example, attending airports to farewell or welcome Governors). Ensure that anonymous complaints are received and investigated appropriately. (Measure 1.1; 1.6; 16.4; 17.3) Action: Chief Justice of the Federation.

Enforcement of code of conduct. Consider how the judicial code of conduct can be made more widely available to the public (for example in handouts, posters in the courts) (Measure 2.2) Action: individual chief justices)

*Increase public awareness***.** Consider how best chief justices can become involved in enhancing public understanding of basic rights and freedoms, particularly through the media. (Measure 2.1) Action: individual chief justices

Court fees to be reviewed to ensure that they are both appropriate and affordable. (Measure 4.1) Action: all chief justices

Review the adequacy of waiting rooms for witnesses and others, and where these are lacking establish whether there are any unused rooms etc. that might be used for this purpose. Where rooms are not available explore other possibilities to provide shade and shelter for witnesses in the immediate proximity of courts (Measure 5.1) Action: all chief justices

Review the number of itinerant judges with the capacity to adjudge cases away from the court centre. (Measure 5.1) Action: all chief justices; Chief Justice of the Federation

Review arrangements in their courts to ensure that they offer basic information to the public on bail-related matters. (Measure 7.1) Action: All chief justices Revise sentencing and fine levels. Press for empowerment of the court to impose suspended sentences and updated fine levels. (Measure 8.1) Action: Chief Justice of the Federation

Quality of Justice

Increased cooperation. Ensure high levels of cooperation between the various agencies responsible for court matters (police, prosecutors, prisons) (Measure 9.2) Action: all chief justices

Review of efficiency. Criminal justice and other court user committees to be reviewed for effectiveness and established where not present, including participation by relevant non-governmental organizations. (Measure 9.13; 16.5) Action: all chief justices

Prioritize old cases. Old outstanding cases to be given priority and regular decongestion exercises undertaken. (Measure 9.2; 9.10) Action: all chief justices Adjournment requests to be dealt with as more serious matters and granted less frequently. (Measure 9.3) action: All chief justices; Chief Justice of the Federation

Review of procedural rules to be undertaken to eliminate provisions with potential for abuse. (Measure 9.7) Action: all chief justices and Chief Justice of the Federation

*Time management***.** Courts at all levels to commence sittings on time. (Measure 9.4) Action: all chief justices

Reduce delays. Increased consultations between judiciary and the bar to eliminate delay and increase efficiency. (Measure 9.6) Action: all chief justices

Increase number of judges. Review and, if necessary, increase the number of judges practising case management. (Measure 9.8) Action: all chief justices

Ensure regular prison visits undertaken together with Human Rights NGOs and other stakeholders. (Measure 9.12; 16.5) Action: all chief justices

Clarify jurisdiction of lower courts to grant bail (for example in capital cases). (Measure 10.2)

*Court inspections***.** Review and ensure the adequacy of the number of court inspections. (Measure 10.4) Action: all chief justices

Review and ensure the adequacy of the number of files called up under powers of review. (Measure 10.5) Action: all chief justices

Examine ways in which the availability of accurate criminal records can be made available at the time of sentencing. (Measure 11.1) Action: all chief justices and Chief Justice of the Federation

Develop sentencing guidelines (based on the United States model). Measure 11.2) Action: Chief Justice of the Federation

Monitor cases where ex parte injunctions are granted, where judgements are delivered in chambers, and where proceedings are conducted improperly in the absence of the parties to check against abuse. (Measure 13.1; 13.3; 13.4) Action: all chief justices and Chief Justice of the Federation

Ensure that vacation judges hear only urgent cases by reviewing the lists and files. (Measure 13.2) Action: all chief justices and Chief Justice of the Federation.

Public Confidence in the Courts

Introduce random inspections of courts by an independent credible institution (Measure 16.3) Action: Independent Commission for the Prevention of Corruption.

CASE STUDY #36

DISSEMINATION AND USE OF DATA IN UGANDA: IMPROVED DECISION-MAKING AT THE SUB-NATIONAL LEVEL

INTRODUCTION

In 1998, the Inspector General of Government (IGG) in Uganda requested a National Integrity Survey to be conducted among more than 18,412 households. (96) The survey results were then discussed among 348 focus groups with more than 5,000 participants across 46 districts. Households were asked in particular about their experiences with services such as: primary education, health, police, local administration, judiciary and the Uganda Revenue Authority (URA). The survey was part of an integrated approach to measure corruption in Uganda.

SURVEYS INCLUDED

The following surveys were included:

Integrity Survey.

An integrity survey, in which randomly selected households were interviewed by locally trained and internationally supervised consultants, was developed and pilot tested in Uganda by CIET international, in close collaboration with the Office of the IGG. (97) The sample size was large enough to obtain specific findings for each of the 46 districts in Uganda. The sentinel survey method was used, whereby the same households are surveyed every two to three years, to allow progress to be monitored against the baseline established in the first survey.

Focus Groups.

Professionally facilitated focus groups were organized, and allowed respondents to clarify the reasons for the survey percentages in terms of "real" pain and concerns. During the group sessions, the respondents were asked about their perceptions of problems and possible solutions. One quote was collected from each focus group as evidence of the real "pain level" caused by corruption.

Service Provider Survey.

A service provider survey was conducted among 1,500 civil servants to obtain their perspective on the problem.

Opinion-maker Focus Groups.

Focus groups with key opinion makers reviewed the problematic areas and prioritized causes of corruption. More importantly, the groups assessed the viability of the changes suggested by the citizens, the focus groups and the service providers; in other words, a "reality test" was performed on the recommendations made.

Workshops.

Integrity workshops and meetings became a cornerstone of the participatory process to curb corruption at all levels of Government. It became the key tool for moving from awareness raising to action. Central to the workshops were the small working groups that developed action plans, using visioning to shift

discussion from complaint to action. Participatory workshops were also used to develop broad-based participation to maintain momentum. The broader the base of participation, the wider the degree of ownership of the action plan in all its stages, the more likely it was to be carried out and sustained.

USE OF THE DATA AND OUTCOMES OF THE PROCESS

Investigative Journalism Workshops.

The role of the media in raising awareness has been critical to the strategy for developing accountability in Uganda. The work of newspaper journalists, who credibly investigate malfeasance at the highest level, has led to the censuring of political figures at the highest level of Government, with strong support from an active parliament. Since fewer than 15 per cent of Ugandans get their news from print, training for radio journalists began in 1999, at a time when the number of district-level radio stations, often broadcasting in local dialect, began to increase. As much as print journalist training proved a key ingredient in spurring the national debate, radio journalist training proved instrumental in buttressing the participatory process to curb corruption at the district level.

Censuring of Corrupt Ministers.

During 1998, the Ugandan Parliament was involved in four cases in which ministers close to the president were censured for illicit enrichment or resigned as a result of a motion of censure. Such actions would have been unthinkable previously. Since 1997, however, the strengthened media, parliament and IGG were able to make grand corruption a lower-profit and higher-risk proposition. The three institutions complement each other in addressing corruption at the highest levels. They foster insecurity among the corrupt and fuel a national debate on transparency and good governance. The key challenge for any parliament seeking to reduce corruption is to ensure that its own house is in order. Preventive measures in Uganda have included monitoring and publishing the declared assets of parliamentarians and strengthening the parliamentary ethics committee. So far, the process of censure appears to have been largely transparent and based on facts. Nevertheless, there has been some criticism of the process.

Judicial Commission of Inquiry.

Pressure was put on the police by the more than 30 district integrity workshops disseminating the survey. The findings indicated that an average of 63 per cent of the people surveyed had experienced corruption when dealing with the police. The findings, coupled with another finding that more than 50 per cent of the citizens had experienced corruption in dealings with the courts, created anger among the public who demanded change (83) In response, the Government was obliged to come up with a credible response. A three-person commission, headed by a judge, decided to travel across the country to listen to complaints about police corruption. As a result of that process, more than 400 senior police officers were suspended. In response, the police commissioner attacked the credibility of the survey. The media then reported on his illicit wealth and he was forced to resign.

One of the challenges that continues to face the qualitative approach in Uganda is in assisting the IGG staff to help the local district administration to follow up and implement the action plans resulting from the process. Although that is a different and probably more demanding skill to develop, it is crucial if the districts are to have any chances to curb corruption.

The second country assessment was scheduled for late 2000 or early 2001. With the first survey as a benchmark, the real accountability will be in place the moment the results from the second survey are disseminated broadly across all 45 districts.

CASE STUDY #37

DISSEMINATION AND USE OF DATA TO IMPROVE QUALITY OF DECISION-MAKING IN HUNGARY

INTRODUCTION

A comprehensive country assessment is in the final stages of completion in Hungary. Supported by the United Nations, the assessment examines the levels, locations, costs, causes of and remedies for corruption, and the effectiveness and credibility of the efforts of the Government to contain corruption. The country assessment includes surveys of the general public, private sector and civil servants, as well as case studies and focus groups, both at the national and municipal level. An international meeting was organized at Vienna on 26 October 2000 to discuss the outcome of the comprehensive country assessment and to elicit the comments of other international experts and United Nations Member Countries. A national integrity meeting was held on March 20-21 2003 in Budapest, where between 100 and 150 representatives from key stakeholder groups (Government, parliament, private sector, civil society, media and others) prioritized the issues and designed a national integrity strategy and an anti-corruption action plan, based on:

- The country assessment (findings from the surveys and the focus groups);
- The case studies;
- Inputs from international experts in certain strategic areas; and
- The 25-point programme of the Minister of Justice

The Hungarian Government has also appointed an independent National Integrity Steering Committee (NISC) with representatives from the international community, civil society, academe, media, Government, parliament and the private sector. It oversees the development of the national integrity strategy and the implementation of a credible anti-corruption action plan for the criminal justice system.

SURVEY FINDINGS FROM GALLUP

A short summary of the surveys performed on population samples in Budapest and in the whole country

Description of the research

Following preliminary survey of corruption in 1999, the Hungarian Gallup Institution, within the framework of the Global Programme Against Corruption organized by the United Nations Office of Drug Control and Crime Prevention (UN ODCCP) and its Interregional Crime and Justice Research Institute (UNICRI), performed a corruption assessment survey in 2000. The survey was performed among the population of Budapest, the national population, the population and employees of five municipalities and among small and medium-sized enterprises, with questionnaires and focus group discussions in several areas of employment.

In 2003, as a follow-up to this research, Gallup performed a survey among the population of Budapest and among the national population. For its researches Gallup used the questions of the standardized questionnaire used in many capitals of the world for UN's victimization surveys and some other questions, too. The survey of 2003 in Budapest and the national survey of 2003 have repeated certain questions of the previous Budapest and national surveys so in these cases we could make comparisons.

Main findings of the research

In its surveys Gallup characterizes corruption as those cases where a citizen offers or is requested to offer money or payments during a given procedure so that he/ she can use a service to which he/she is legally entitled or so that he/she can get help.

1. The survey conducted in 2000 showed that the various behaviour forms falling within this sphere are considered as corruption by the population to a varying extent. For example, almost everyone considers it corruption when officials or politicians, for a fee, tolerate the activities of organized crime or when people bribe the decision-makers to gain employment, or win orders and contracts. On the other hand, gratuities to physicians are considered as corruption only by just over one quarter of the population while tips are considered as corruption by one fifth.

2. Compared with the situation 10 years ago the population does not feel there have been comprehensive changes in the transparency or culture of the public administration or that the tendency of officials to accept bribes has increased or decreased. The proportion of those who feel it is harder to get proper treatment today is higher than the proportion of those who feel the opposite, but the difference is within the margin of error. As for the question as to whether it is easier or harder today to get an official to do a favour, the

proportion of those who did not know or who did not want to answer was very high (38 per cent); the proportion of those who think it is harder was higher (21 per cent) than of those who think it is easier (19 per cent); but the difference is again within the margin of error. Some 21 per cent thinks nothing has changed in this regard.

3. If an individual wants to get the matters to which he/she is legally entitled handled properly, he/she has to bribe. Out of 12 employment groups, there were five in which a greater proportion felt this statement to be true in 2003 than in 2000. Suspicions of requesting bribes or extra payments have grown in the following five areas: medicine, private sector, customs offices, Members of Parliament, and ministry officials. No increase was perceived among police officers, the tax authority, excise office officials and judiciary members. The proportion of people believing that special payments are required has increased within the margin of error for municipality representatives and officials and has decreased within the margin of error for supervisors and teachers. The growth of mistrust against the various groups differs from the change in the perceived corruption situation.

4. It cannot be stated that the rate of corruption has changed between 1999 and 2002. In 2000, nine per cent and in 2003 ten per cent of those questioned said that in the previous year a public official or public servant had asked or expected bribes from him/her for services to which he/she was entitled. We do not know whether corruption actually occurred in these cases or not. The one percentage point difference falls within the statistical margin of error.

5. There were two areas of employment where a relatively large proportion of the population has experienced or sensed a corrupt situation in both 2003 and 2000: in the case of police officials and in medicine. Because of the low number of cases we cannot determine whether there was any change in tendencies.

6. Of the 29 public office and public service areas there was only one area, the hospitals, where a larger proportion of the clients felt that extra payments were expected of them for services to which they were legally entitled in 2003. This growth was within the statistical margin of error so we cannot declare that the expectation of extra payments has increased.

7. Not counting medical gratuities, of the 640 clients (or clients' relatives) of 10 public office and public service areas 25, or four per cent, said they gave bribes or extra payments; this is four per cent of all families having any contact with the institutions (but not of all client contacts!) This means that in the non-medical part of the public sphere every 25th person who (or whose relatives) was a client of a public institution actually took part in corruption at least once last year (but the proportion of corruption cases must be much lower when compared to the total number of client contacts.)

8. Less than half of the population (43 per cent) would know where to go to report an experience of corruption. The remaining 57 per cent of the population do not know where to go

9. Nearly two thirds of the population (62 per cent) would be ready to report corruption if they experienced it. Some 37 per cent of the population would also provide their name while 25 per cent would report it anonymously. Just over every fifth person (22 per cent) would not report corruption and 16 per cent do not know what they would do. The proportion of the population claiming to be ready to report corruption is larger than the proportion knowing to go to report it.

10. The population reports only an insignificant part of all corruption cases. Of the 1016 persons asked, 101 claimed to have perceived a situation of corruption but only four of them have reported it: three to the police and one to the chief public prosecutor's office. The number of reports is very much lower than the number of cases and also than the number that might be expected on the basis of the proportion of the population claiming to be ready to report corruption or even knowing where to go to report it.

11. Most of the persons not reporting the corruption they have experienced claim that "it was not worth making a report." The other most frequent explanations were, in descending order: because the bribed party was the police; because they are afraid of retaliation of the bribed party; and because bribery was a way of solving their problems.
During its surveys Gallup considers as corruption those cases where a citizen offers or is requested to offer money or payments during the procedure so that he or she can use a service that he or she is legally entitled to use or so that he or she can get help.

SUMMARY

- The proportion of persons presuming corruption in certain areas has increased in the past three years but no increase can be demonstrated in the number of perceived situations of corruption.

- The population does not perceive more situations of corruption than they did three years ago. Some nine to ten per cent of the population perceived a situation of corruption in the last year.

- The population did not perceive a comprehensive increase in expectation of extra payments by public officials and public servants. (The proportion of those saying that it is now harder to get an official to do a favour is three percentage points higher.)

- There are two areas where a relatively large proportion of the population has experienced or perceived a situation of corruption both in 2003 and in 2000: in the police and in the medical sphere.

- In spite of the foregoing, there are five areas where a somewhat higher proportion of the population presumes that there is a tendency towards corruption than they did three years ago. Mistrust has increased against people working in medicine, in the private sector, in the customs offices and among Members of Parliament and ministry officials.

- More than two per cent of the population admitted that he/she or a relative has actually given extra payment lays year in the public sphere for taking measures, starting procedures or the provision of services (excluding medicine).

- Only a very small number of all cases of corruption are reported by the population. A lower percentage of the population knows where to report cases of corruption than claims to be prepared to report. However, the proportion of those who actually report corruption is much smaller than of those who know where to report it.

Methodology

Between February 6th and 9th, 2003 the Hungarian Gallup Institute asked 1016 Budapest residents (at least 16 years of age) by telephone about certain corruption-related matters. Between February 6th and 13th, 2003 the Institute asked 1009 adult (at least 18 years of age) persons living in 67 different Hungarian communities about certain other corruption-related matters. The statistical sampling error for such sample sizes is less than +/– 3.2 per cent of the whole of the sample.

In March 2000 we conducted a phone survey among 1513 Budapest residents (at least 16 years of age) and in April 2000 we conducted a survey on a nationwide representative sample of 1839 adults (at least 18 years of age). The statistical sampling error for such sample sizes is less than +/– 2.3 percent of the whole of the sample.

The composition of the samples was in accordance with the national gender, age-group and type of community distribution. The smaller deviations from the properties of the total population due to the sampling process were corrected by using a multi-aspect weighting.

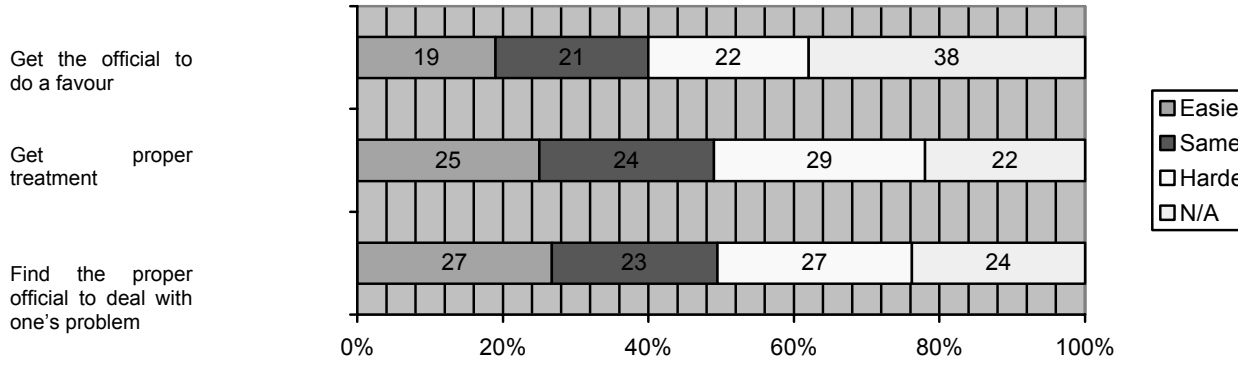
Cases considered as corruption[487]

Percentage of population considering the given situation as obvious corruption

[487] Nationwide research, 2000; N=1839

- If public officials or politicians tolerate the operation of organized crime for a fee: 94 per cent
- If during the filling of posts, the awarding of State or municipality orders or contracts those who bribe the decision-makers win: 93 per cent
- If an official deals with a case only for a gratuity or bribe: 92 per cent
- If instead of paying a fine a sum is handed over to the traffic policeman without a receipt being given: 82 per cent
- If during the filling of posts, the awarding of State or municipality orders or contracts nepotistic considerations prevail: 81 per cent
- If people use acquaintances or "godfathers" when they want to have their cases dealt with: 75 per cent
- If a public official or public servant violates small rules for the benefit of his or her relatives: 63 per cent
- If a public official or public servant accepts small gifts from his/her clients: 45%
- Physician's gratuity: 28 per cent
- Tipping: 20 per cent

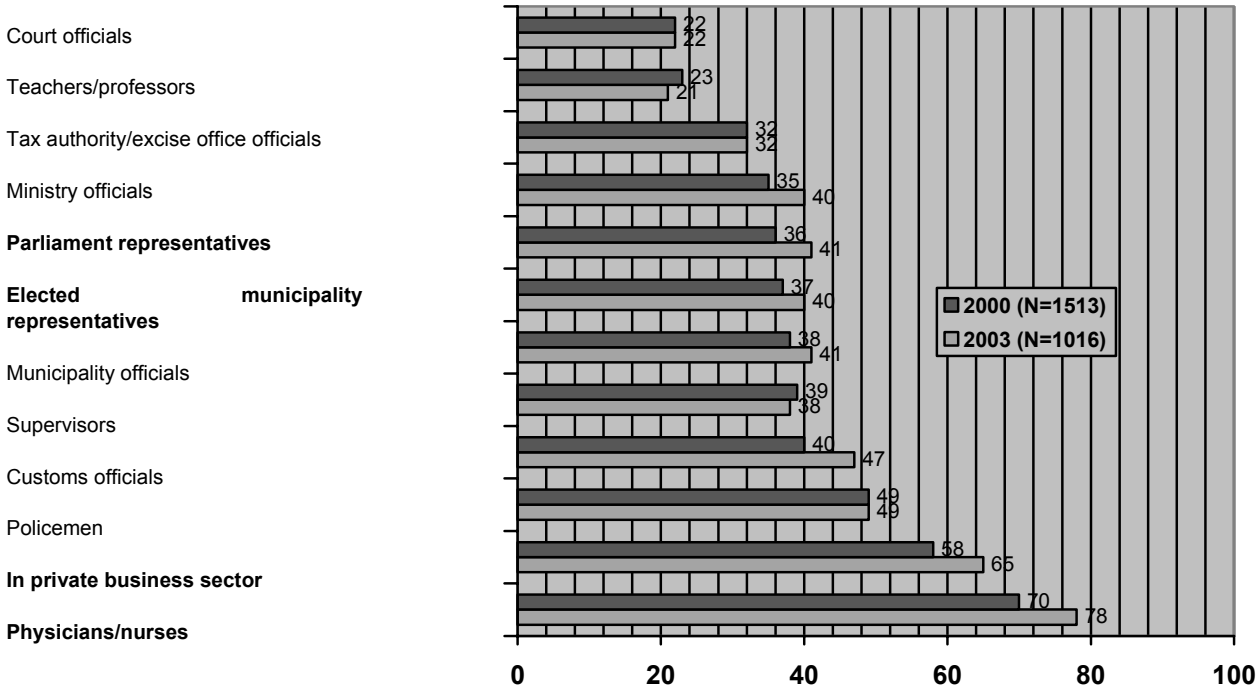
Compared with ten years ago is it now easier or harder to:



Budapest research 2003… N=1016

Presumption of corruption

It is likely that one will have to offer gifts or favours to...



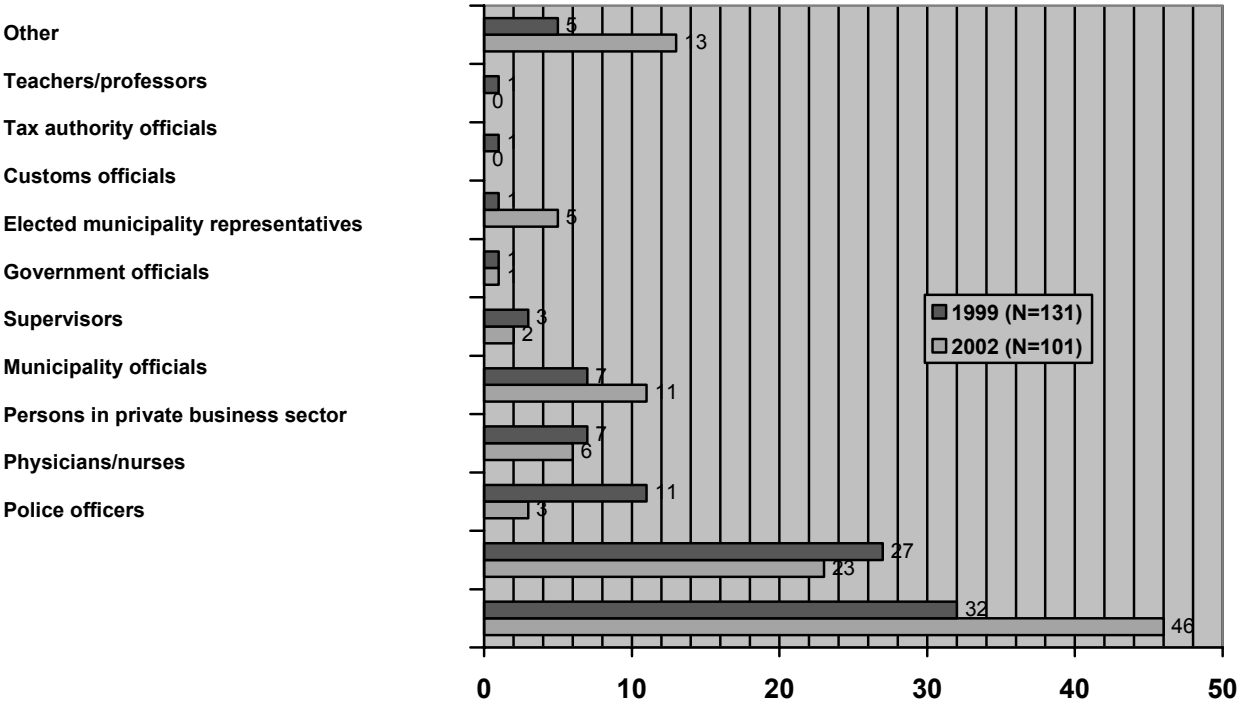
Budapest research, 2000-2003

"Perceived" situation of corruption

We do not know whether there was ACTUAL corruption or not

Budapest research, 2000-2003

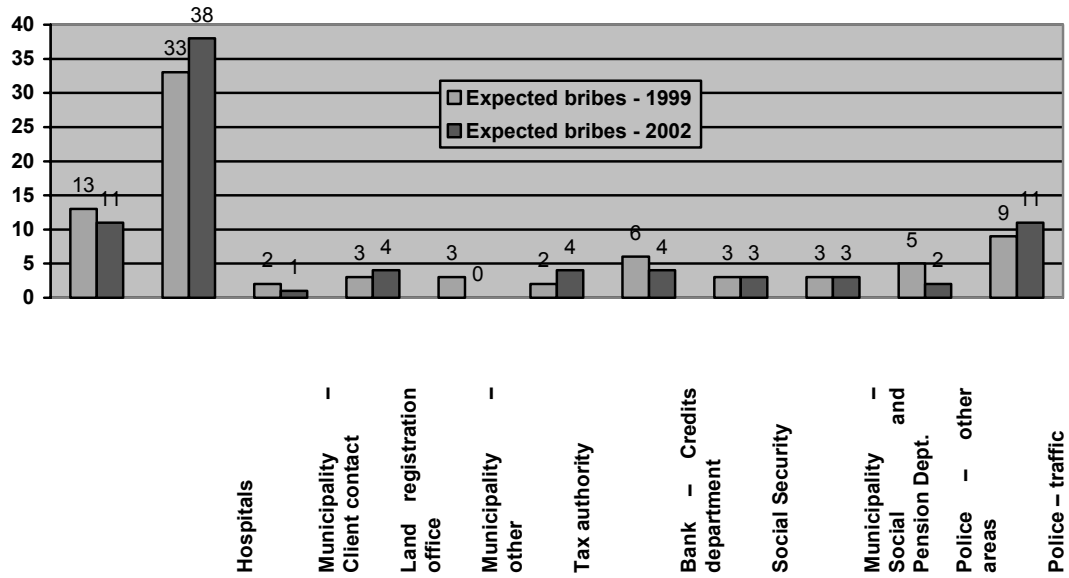
Officials expecting extra payments
As a percentage of those who have perceived the situation of corruption



Budapest research, 2000-2003

Perception of situations of corruption
as percentage of the clients

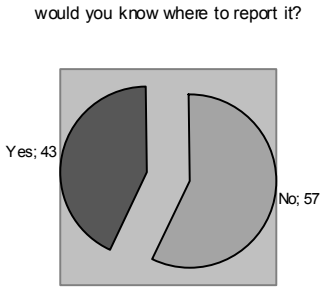
National research, 2000-2003

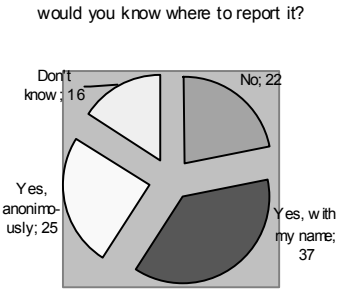


Cases that were uncovered only in the course of the survey

	Number of clients in sample	*Number of those who felt that bribes were expected*	*Number of those who said they gave bribes*
Police – traffic	**99**	**11**	**5**
Tax authority	**152**	**6**	**4**
Traffic Inspectorate/Chief Inspectorate	**36**	**2**	**4**
Municipality – Technical Department	**42**	**5**	**2**
Social Security	**132**	**4**	**2**
Public Areas Inspectorate	**27**	**4**	**2**
National Public Health Office	**42**	**2**	**2**
Police – other areas	**73**	**1**	**1**
Municipality – Assets Department	**36**	**0**	**1**
Market Inspectorate	**3**	**1**	**1**

If you were faced with corruption... ***(Budapest research 2003; N=1016)***





Why did you not report the corruption to the police?

As percentage of the unreported cases

It was not worth it	**35%**
The police was the bribed party	**16%**
I did not dare because I was afraid of retaliation by the bribed official	**14%**
Because it helped me solve my problem	**12%**
The police would not have done anything/would not have been interested	**7%**
I could not make thing work any other way	**5%**
I did not want the public to learn about the matter	**5%**
I could not prove it	**4%**
I did not know where to go	**2%**
In my opinion it makes no sense	**2%**
I was afraid/I did not want to get the police involved	**2%**
I had no time/I did not want to take the trouble	**1%**

Budapest research 2003; N=1016

Gallup Monitor – http://monitor.gallup.hu

After the four decades of the single-party regime it became gradually clearer and clearer that a multi-party system in itself does not ensure democracy. A key question is the quality of the public sphere, the public offices and the public services: do these serve the interests of the public, of each and every man or just that of certain people or groups of people. How do the public persons, the participants of public life, the public officials and the public servants use the power entrusted on them, how do they use their entitlements and decision-making rights? Are their actions governed by the public interest – even by pushing into the background their own interests – or do they subordinate the public interest – violating moral and/or legal rules – to their own interests?

From this consideration the Hungarian Gallup Institute has started an online periodical publication in the fall of 2000 as a part of its public service quality control activities. With its informing activities the Gallup Monitor should serve the cleanliness and transparency of public life and public services, the accountability of the decision-makers and the observance of law. At the current status of the development of the public services its chief theme is anti-corruption work and in this it keeps contact with UN's Global Programme Against Corruption.

CASE STUDY #38

MIRROR STATISTICS: SURVEY INSTRUMENT

A1. AS YOU SEE IT, WHICH ARE THE THREE KEY PROBLEMS YOUR COUNTRY IS FACING TODAY?

Show card A1. Mark up to three answers.

A1A	1	Political instability
A1B	1	Ethnic problems
A1C	1	Corruption
A1D	1	Low incomes
A1E	1	Crime
A1F	1	Unemployment
A1G	1	Health care
A1H	1	High prices
A1I	1	Education
A1J	1	Poverty
A1K	1	Donor's approach to development
A1L	1	Other, please indicate
A1M	1	Don't know/no answer

A2. TO WHAT EXTENT HAVE YOU SEEN PUBLIC OFFICIAL MISUSE THEIR PUBLIC POWERS FOR PRIVATE GAIN ?

One answer only.

1. Almost all officials are involved
2. Most officials are involved
3. Few officials are involved
4. Scarcely anyone of the officials is involved
5. Do not know/no answer

A3. WHEN DEALING WITH A PUBLIC OFFICIAL, HOW LIKELY IS IT THAT A CITIZEN HAS TO DO ONE OF THE FOLLOWING IN ORDER TO BE SUCCESSFULLY SERVED?

1. Very likely
2. Rather likely
3. Rather unlikely
4. Not likely at all
9. Do not know/no answer

A3A	To give cash to an official	1	2	3	4	9
A3B	To give a gift to an official	1	2	3	4	9
A3C	To do a favour for an official	1	2	3	4	9

A4. IN YOUR VIEW, TO WHAT EXTENT WOULD YOU EXPECT TO FIND THE MISUSE OF PUBLIC POWERS FOR PRIVATE GAIN AMONG THE FOLLOWING GROUPS:
One answer per line
1. Almost everybody is involved
2. Most are involved
3. Few are involved
4. Scarcely anyone is involved
9. Do not know/no answer

A4A	Journalists	1	2	3	4	9
A4B	Teachers	1	2	3	4	9
A4C	University professors or officials	1	2	3	4	9
A4D	Officials at ministries	1	2	3	4	9
A4E	Municipal officials	1	2	3	4	9
A4F	Administration officials in the judicial system	1	2	3	4	9
A4G	Judges	1	2	3	4	9
A4H	Public prosecutors	1	2	3	4	9
A4I	Investigating officers	1	2	3	4	9
A4J	Lawyers	1	2	3	4	9
A4K	Police officers	1	2	3	4	9
A4L	Customs officers	1	2	3	4	9
A4M	Tax officials	1	2	3	4	9
A4N	Members of the legislature	1	2	3	4	9
A4O	Ministers	1	2	3	4	9
A4P	Municipal councillors	1	2	3	4	9
A4Q	Business people	1	2	3	4	9
A4R	Doctors	1	2	3	4	9
A4S	Political party and coalition leaders	1	2	3	4	9
A4T	Local political leaders	1	2	3	4	9
A4U	Representative of non-governmental organizations	1	2	3	4	9
A4V	Representatives of international donor agencies	1	2	3	4	9
A4W	Representatives of international business	1	2	3	4	9
A4X	Bankers	1	2	3	4	9

A5. BASED ON WHAT DID YOU COME UP WITH YOUR ASSESSMENT REGARDING LEVELS OF CORRUPTION IN THE COUNTRY?
One answer only.
1. Personal experience (you have had to provide cash, gifts or favours)
2. Talks with relatives and people you know
3. Media information
4. Officials' living standard differs from what they receive as personal incomes
5. Other (Please indicate).....
9. Do not know/no answer

A6. AS YOU SEE IT, WHICH OF THE ACTIVITES LISTED BELOW FALLS UNDER YOUR DEFINITION OF CORRUPTION

One answer per line.

		Yes	No	DK/ NA
A6A	Gift to a doctor to take special care of you	1	2	9
A6B	Extending a favour to be allowed to take sabbatical	1	2	9
A6C	Unsing connections to exempt somebody close to you from military service	1	2	9
A6D	Interceding before a high-ranking official to employ a relative of yours	1	2	9
A6E	Personal request before a municipal councillor to obtain contruction permit	1	2	9
A6F	Giving cash to police man not to revoke your driving licence	1	2	9
A6G	Abuse of official position for private business purposes	1	2	9
A6H	Providing official information to people you know for purpose of private benefit	1	2	9
A6I	Accepting of cash by officials for purposes of tax concealment or reduction	1	2	9
A6J	Pre-election grants for political parties	1	2	9
A6K	Additional reimbursement for a lawyer who assists a suspect in terminating his case	1	2	9

A7. IMAGINE SOMEONE WHO HAS EXTENDED CASH OR A GI AN OFFICIAL AND HAS OBTAINED WHAT THEY WANTED. HOW, IN YOUR VIEW, IS THIS CITIZEN MOST LIKELY TO FEEL?

One answer only.

1. Angry
2. Indignant
3. Embarrassed
4. Content
9. Do not know/No answer

A8. IMAGINE YOURSELF IN AN OFFICIAL LOW-PAID POSITION. YOU ARE APPROACHED BY SOMEONE OFFERING CASH, GIFT OR FAVOUR TO SOLVE THEIR PROBLEM. WHAT WOULD YOU DO?

One answer only.

1. I would accept it if everyone is doing it
2. I would accept, if I can solve their problem
3. I would not accept it, if the solution to the problem involves law-breaking
4. I would not accept as I do not approve of such acts
9. Don't know/no answer

A9. IN YOUR VIEW, HOW ACCEPTABLE ARE THE FOLLOWING IF DONE BY A PARLIAMENTARIAN OR MEMBER OF CIVIL SERVICE?

One answer only.
1. Acceptable
2. Somewhat acceptable
3. Somewhat unacceptable
4. Unacceptable
9. Do not know/no answer

A9A	To accept an invitation for a free lunch/dinner to solve a personal problem	1	2	3	4	9
A9B	To resolve a personal problem and accept a favour in exchange	1	2	3	4	9
A9C	To accept gifts for the solution of personal problems	1	2	3	4	9
A9D	To accept cash for the solution of personal problems	1	2	3	4	9

A10. AS YOU SEE IT, TO WHAT EXTENT ARE THE FOLLOWING ACCEPTABLE DONE BY OFFICIALS AT MINISTRIES, MUNICIPALITIES AND MAYORALTIES?

One answer only.
1. Acceptable
2. Somewhat acceptable
3. Somewhat unacceptable
4. Unacceptable
9. Do not know/no answer

A11. IF, IN THE LAST YEAR YOU HAVE BEEN EXPECTED TO PROVIDE SOMETHING (CASH, GIFT OR FAVOUR) IN EXCHANGE FOR A PUBLIC SERVICE, IT WAS BY A(N):
One answer per line:

A11A	Doctor	1	2	9
A11B	Teacher	1	2	9
A11C	University professors or officials	1	2	9
A11D	Officials at ministry	1	2	9
A11E	Municipal official	1	2	9
A11F	Administration official in the judicial system	1	2	9
A11G	Judge	1	2	9
A11H	Public prosecutor	1	2	9
A11I	Investigating officer	1	2	9
A11J	Police officers	1	2	9
A11K	Customs officer	1	2	9
A11L	Tax official	1	2	9
A11M	Member of the legislature	1	2	9
A11N	Municipal councillor	1	2	9
A11O	Business people	1	2	9
A11P	Banker	1	2	9
A11Q	Other, please indicate	1	2	9

A12. WHENEVER YOU HAVE CONTACTED OFFICIALS IN THE PUBLIC SECTOR, HOW OFTEN IN THE LAST 3 YEARS DID THEY

One answer per line.
1. In all cases
2. In most cases
3. In isolated cases
4. In no cases
5. Do not know/no answer

A12A	Directly demand cash, gift or favour	1	2	3	4	9
A12B	Did not demand directly but showed that they expected cash, gift or favour	1	2	3	4	9

A13. IN THE LAST YEAR, WHEN YOU HAVE CONTACTED OFFICIALS IN THE PUBLIC SECTOR, HOW OFTEN DID YOU

One answer per line.

1. In all cases
2. In most cases
3. In isolated cases
4. In no cases
5. Do not know/no answer

A13A	Give cash to an official	1	2	3	4	9
A13B	Give gift to an official	1	2	3	4	9
A13C	Do official a favour	1	2	3	4	9

A14. IF YOU HAD AN URGENT NEED FOR A SERVICE AND AN OFFICIAL DEMANDED CASH, WHAT WOULD YOU DO?

One answer only

1. I would pay
2. I would pay if I could afford it
3. I would not pay if I had another way of solving the problem.
4. I would not pay at all
5. Do not know/ no answer

A15 IN YOUR OPINION, TO WHAT EXTENT IS THE GOVERNMENT PUTTING SERIOUS EFFORTS INTO FIGHTING CORRUPTION AMONG:

One answer per line

		Yes	No	DK/ NA
A15A	Influential business people	1	2	9
A15B	High-ranking public sector officials	1	2	9
A15C	Lower-ranking officials in direct contact with ordinary people	1	2	9

A16. IN YOUR OPINION, WHICH ARE THE THREE MOST IMPORTANT FACTORS INCREASING CORRUPTION IN YOUR COUNTRY

Show Card A16. Mark up to three answers.

A16A	**1**	**Low salaries of officials in the public sector**
A16B	**1**	**Crisis of morale in the period of transition**
A16C	**1**	**Imperfect legislation**
A16D	**1**	**Communist past legacy**
A16E	**1**	**Inefficiency of the judicial system**
A16F	**1**	**Those in power trying to make "a quick buck"**
A16G	**1**	**Lack of strict administrative control**
A16H	**1**	**Peculiarities of our national culture**
A16I	**1**	**Office duties interfering with personal interests of officials**
A16J	**1**	**Other (please indicate)**
A16K	**1**	**Badly designed donor projects n(privatization)**
A16L	**1**	**International business**
A16M	**1**	**Do not know/no answer**

One answer per line.

1. Fully agree
2. Rather agree
3. Neither agree, nor disagree
4. Rather disagree
5. Fully disagree
9. Do not know/no answer

A18. REGARDING CORRUPTION IN YOUR COUNTRY; WHICH OF THE FOLLOWING STATEMENTS IS CLOSEST TO WHAT YOU THINK?

One answer only.

1. Corruption cannot be curbed
2. There will always be corruption in our country, yet it can be limited to a degree
3. Corruption in our country can be substantially reduced
4. Corruption in our country can be eradicated
9. Do not know/No answer

A19. IN YOUR OPINION, WHAT IS EXTENT OF CORRUPTION IN THE FOLLOWING INSTITUTIONS

Not proliferated at all				Proliferated to the highest degree
1	2	3	4	5

9 = Do not know/no answer
One answer for each line in column A19 of the table opposite
Show card 19

A20. IN YOUR OPINION, WHICH OF THE LISTED INSTITUTIONS ARE MOST CORRUPT; One answer only. Put answer in column A21 of the table opposite. Show card A20.

A21. IN YOUR OPINION, WHICH OF THE LISTED INSTITUTIONS ARE LEAST CORRUPT One answer only. Put answer in column A22 of the table opposite. Show card A21.

		A19						A20	A21
A19A	Presidency	1	2	3	4	5	9	1	1
A19B	Legislature	1	2	3	4	5	9	2	2
A19C	Government	1	2	3	4	5	9	3	3
A19D	Industry line ministries	1	2	3	4	5	9	4	4
A19E	Municipal government	1	2	3	4	5	9	5	5
A19F	Municipal Administration	1	2	3	4	5	9	6	6
A19G	Army	1	2	3	4	5	9	7	7
A19H	Customs	1	2	3	4	5	9	8	8
A19I	Tax offices	1	2	3	4	5	9	9	9
A19J	Judiciary	1	2	3	4	5	9	10	10
A19K	Police	1	2	3	4	5	9	11	11
A19L	Committee on Posts and Telecommunications	1	2	3	4	5	9	12	12
A19M	Committee on Energy	1	2	3	4	5	9	13	13
A19N	Privatization Agency	1	2	3	4	5	9	14	14
A19O	Agency for Foreign Investment	1	2	3	4	5	9	15	15
A19P	Commission for the Protection of Competition	1	2	3	4	5	9	16	16
A19Q	Securities and Stoxk Exchange Commission	1	2	3	4	5	9	17	17
A19R	Audit Office	1	2	3	4	5	9	18	18
A19S	National Bank	1	2	3	4	5	9	19	19
A19T	National Institute of Statistics	1	2	3	4	5	9	20	20
	Do not know/no answer							99	99

A23. IN YOUR OPINION, WHAT IS EXTENT OF CORRUPTION IN

THE FOLLOWING INSTITUTIONS

1. **In all cases**
2. **In most cases**
3. **In isolated cases**
4. **In no cases**
9. **Do not know/no answer**

A23A	I am willing to report corruption	1	2	3	4	9
A23A	I am willing to report corruption without giving my name	1	2	3	4	9
A23A	I am not willing to report corruption	1	2	3	4	9
A23A	Do not know/no answer					

A24. TO WHAT EXTENT DO YOU TRUST THE FOLLOWING INSTITUTION WITH INFORMATION ABOUT CORRUPTION

A24A	Police	1	2	3	4	9
A24B	The Government in general	1	2	3	4	9
A24C	The media	1	2	3	4	9
A24D	The courts	1	2	3	4	9
A24E	Municipal government	1	2	3	4	9
A24F	Anti-corruption agencies	1	2	3	4	9
A24G	International donors (ombudsmen)	1	2	3	4	9
A24H	International NGOs (Transparency International)	1	2	3	4	9
A24I	Do not know/no answer					

CASE STUDY # 39
CORRUPTION SELF ASSESSMENT

What types of corruption would you expect to find in the country?
(1) virtually none ← → large extent (5)

Q1a: Grand Corruption (large bribes to decision makers)

1	2	3	4	5	Don't Know

Q1b: Petty Corruption (small payments to junior officials)

1	2	3	4	5	Don't Know

Q1c: Active Corruption (extortion, i.e. demanding a bribe)

1	2	3	4	5	Don't Know

Q1d: Active Corruption (offering a bribe)

1	2	3	4	5	Don't Know

Q1e: Offering or receiving improper gifts

1	2	3	4	5	Don't Know

Q1f: Private sector bribery

1	2	3	4	5	Don't Know

Q1g: Abuse of power

1	2	3	4	5	Don't Know

Q1h: Abuse of Discretion

1	2	3	4	5	Don't Know

Q1j: Conflict of Interest

1	2	3	4	5	Don't Know

Q1k: Self-enrichment

1	2	3	4	5	Don't Know

Q1l: Nepotism

1	2	3	4	5	Don't Know

Q1m: Clientelism

1	2	3	4	5	Don't Know

Q1n: Improper political contributions

1	2	3	4	5	Don't Know

Public Trust in Anti-Corruption Institutions

(1) always yes ← → always no (5)

Q2: Is failure to report corruption an offence in the country ?

1	2	3	4	5	Don't Know

Q3a: If witnessing corruption to what extent is the public willing to report corruption giving their names?

1	2	3	4	5	Don't Know

Q3b: If witnessing corruption to what extent is the public willing to report corruption anonymously?

1	2	3	4	5	Don't Know

The level of integrity of the following institutions

(1) low level of corruption ← → high level of corruption (5)

Q4a: Presidency

1	2	3	4	5	Don't Know

Q4b: National or State Assembly

1	2	3	4	5	Don't Know

Q4c: Judiciary

1	2	3	4	5	Don't Know

Q4c: Customs

1	2	3	4	5	Don't Know

Q4d: Police

1	2	3	4	5	Don't Know

Q4e: Prisons

1	2	3	4	5	Don't Know

Q4f: Media

q1	2	3	4	5	Don't Know

Q4g: Health System

1	2	3	4	5	Don't Know

Q4h: Education

1	2	3	4	5	Don't Know

Q6an: Ministry of public works

1	2	3	4	5	Don't Know

Q6an: Local Administrations

1	2	3	4	5	Don't Know

Q8d: Grade the integrity of the overall domestic institutions

1	2	3	4	5	Don't Know

International Institutions

Q6ba: World Bank

1	2	3	4	5	Don't Know

Q6bb: United Nations (UN)

1	2	3	4	5	Don't Know

Q6bc: International Monetary Fund IMF

1	2	3	4	5	Don't Know

Q6bd: European Union (EU)

1	2	3	4	5	Don't Know

Q8d: Grade the integrity of the overall international institutions

1	2	3	4	5	Don't Know

Effectiveness of the following institutions

(1) no need to improve, very effecdtive ← → high need to improve, very ineffective (5

Q6aa: Presidency

1	2	3	4	5	Don't Know

Q6ab: National or State Assembly

1	2	3	4	5	Don't Know

Q6ac: Judiciary

1	2	3	4	5	Don't Know

Q6ac: Customs

1	2	3	4	5	Don't Know

Q6ad: Police

1	2	3	4	5	Don't Know

Q6ad: Prisons

1	2	3	4	5	Don't Know

Q6ae: Media

1	2	3	4	5	Don't Know

Q6ag: Health System

1	2	3	4	5	Don't Know

Q6ah: Education

1	2	3	4	5	Don't Know

Q6aj: Electricity Provider

1	2	3	4	5	Don't Know

Q6an: Ministry of public works

1	2	3	4	5	Don't Know

Q6an: Local Administrations

1	2	3	4	5	Don't Know

Q8d: Grade the effectiveness of the overall domestic institutions

1	2	3	4	5	Don't Know

International Institutions

Q6ba: World Bank

1	2	3	4	5	Don't Know

Q6bb: United Nations (UN)

1	2	3	4	5	Don't Know

Q6bc: International Monetary Fund IMF

1	2	3	4	5	Don't Know

Q6bd: European Union (EU)

1	2	3	4	5	Don't Know

Q8d: Grade the effectiveness of the overall international institutions

1	2	3	4	5	Don't Know

What types of corruption would you expect to find in the country?

(1) virtually none ← → large extent (5)

Q11a: Grand Corruption (large bribes to decision makers)

1	2	3	4	5	Don't Know

Q11b: Petty Corruption (small payments to junior officials)

1	2	3	4	5	Don't Know

Q11c: Active Corruption (extortion, i.e. demanding a bribe)

1	2	3	4	5	Don't Know

Q11d: Active Corruption (offering a bribe)

1	2	3	4	5	Don't Know

Q11fb: Offering or receiving improper gifts

1	2	3	4	5	Don't Know

Q11fg: Private sector bribery

1	2	3	4	5	Don't Know

Q11h: Abuse of power

1	2	3	4	5	Don't Know

Q11i: Abuse of Discretion

1	2	3	4	5	Don't Know

Q11j: Conflict of Interest

1	2	3	4	5	Don't Know

Q11ja: Self-enrichment

1	2	3	4	5	Don't Know

Q11jb: Nepotism

1	2	3	4	5	Don't Know

Q11jc: Clientelism

1	2	3	4	5	Don't Know

Q11a: Improper political contributions

1	2	3	4	5	Don't Know

Experiences

Q13aa: Have you ever been asked of paying bribes to access health services?

Yes	*No*

Q13ab: Bribes necessary to access education services

Yes	*No*

Q13ac: Bribes necessary to get access to justice

Yes	*No*

Q13ad: Bribes necessary to get a drivers license, or other documents

Yes	*No*

Q13af: Bribes necessary to get through a police roadblock

Yes	*No*

Q13ag: Bribes necessary to get through customs

Yes	*No*

Q13ai: Bribes necessary to get electricity

Yes	*No*

Q13aj: Bribes necessary to get a telephone

Yes	*No*

Just for Business community

Q13ba: Bribes necessary to get a business license

Yes	*No*

Q13bb: Bribes necessary to avoid inspection

Yes	*No*

Q13bc: Bribes necessary for government contracts

Yes	*No*

Q13bd: Bribes necessary to get a building permit

Yes	*No*

Q13be: Bribes necessary to get an honest tax assessment

Yes	*No*

Q13ca: Contract rigging

Yes	*No*

Q13cb: Procurement

Yes	*No*

Q13cc: Influence peddling in Legislature

Yes	*No*

Q13cd: Embezzlement/abuse of power by political leaders

Yes	*No*

Q13ce: Embezzlement from the Central Bank into banks abroad

Yes	*No*

Q13cf: Corruption in connection with military procurement

Yes	*No*

Q13cg: Kickbacks on large aid donor projects

Yes	*No*

This part for Qualified categories (Judges, Lawyers, Prosecutors, Academics)
Areas which would rate as a priority:
(1) low priority ← → high priority (5)

Q10b: Improved court infrastructures

1	2	3	4	5	Don't Know

Q10c: Prompt treatment of bail applications

1	2	3	4	5	Don't Know

Q10d: Increase coordination between various criminal justice institutions

1	2	3	4	5	Don't Know

Q10e: Reducing delays / increasing timeliness in the courts

1	2	3	4	5	Don't Know

Q10f: Reducing prison population awaiting trial

1	2	3	4	5	Don't Know

Q10g: Increase consistency in sentencing

1	2	3	4	5	Don't Know

Q10h: Establishing and monitoring performance indicators for the criminal justice system

1	2	3	4	5	Don't Know

Q10i: Abuse of civil process – ex parte orders

1	2	3	4	5	Don't Know

Q10j: Increase public's confidence in the CJS

1	2	3	4	5	Don't Know

Q10m: Inadequate funding of the Criminal Justice System

1	2	3	4	5	Don't Know

Q10o: External monitoring of the courts (court user committee)

1	2	3	4	5	Don't Know

Q10p: Establishing a credible and effective Complaints mechanism

1	2	3	4	5	Don't Know

Q10q: Enforcement of the Code of Conduct

1	2	3	4	5	Don't Know

Q10r: Training in judicial ethics

1	2	3	4	5	Don't Know

This part for Qualified categories (Judges, Lawyers, Prosecutors, Academics)
Are adequate measures in place in the following areas:
(1) Extremely adequate ← → Extremely NOT adequate(5)

Q14i: Anti Corruption Legislation

1	2	3	4	5	Don't Know

Q14ea: the judiciary

1	2	3	4	5	Don't Know

Q14eb: the police

1	2	3	4	5	Don't Know

Q14ec: corrections

1	2	3	4	5	Don't Know

Q14ed: prosecutors

1	2	3	4	5	Don't Know

Q14d: Empowerment of civil society

1	2	3	4	5	Don't Know

Q14g: Public and Professional Education and Awareness

1	2	3	4	5	Don't Know

Q14j: Reform Oversight: Monitoring and evaluation

1	2	3	4	5	Don't Know

Q14k: International cooperation

1	2	3	4	5	Don't Know

Q19: State what in your opinion are the three most important improvements/interventions needed to fight corruption in the country

1._____

2._____

3._____

Information on the Respondent, please write in the box:

Age:

Gender:

M	*F*

Your Profession:

Businessmen
Private sector
Finance&Banking
Public Sector
International Organization
Student
Unemployed

Years of Experience in your current job:

CASE STUDY #40

ARGENTINA: THE USE OF DATA IN EFFORTS AGAINST CORRUPTION

INTRODUCTION

The Department of Transparency Policies of the Anti-Corruption Office of Argentina has carried out a preliminary study of transparency within the Argentine public administration. The objective of the survey was to inquire about the factors enabling and encouraging irregular practices within the national public administration. The study did not aim to look into existing cases of corruption. Instead, it attempted to "map" the practices and routines by which irregular behaviours are brought about. In short, it was intended to look into the causes, and not the symptoms, of corrupt behaviour.

In the case of Argentina, as well as in other emerging democracies, a particular institutional framework provides corruption with windows of opportunity. In Argentina, the institutional design has been imported from societies where public and private relations are organized in different and more complex cultural and economic patterns. Thus, the rewards (incentives) and punishment mechanisms that usually discourage irregular behaviour do not work in Argentina.

If one assumes that institutions shape individual behaviour, then regular and/or irregular behaviour must be a consequence of particular institutional design. Corruption should therefore be approached through an institutional point of view and should adopt a systemic perspective.

Such a conceptual framework was chosen because the Department of Transparency Policies considers corruption to be "a set of practices that diverts the behaviour of public organisations and social actors from their ultimate goal" (organizational perspective). From the individual perspective, corruption is the misuse of institutional resources for private benefit, or for the benefit of third parties.

In deciding upon such a strategy for the study, due attention was paid to other existing initiatives in the same field. The experience developed by the World Bank Institute (WBI) was used as general input. The WBI team successfully carried out similar studies and exchanged information with officials of the United Nations Interregional Crime and Justice Research Institute (UNICRI) during the preliminary stage of the study. The study carried out by the Department of Transparency Policies focused on the organizational perspective of the public administration, as a facilitating condition for individual behaviour. Generally speaking, behaviour was found to be a consequence of the following institutional failures:

- Absence of controls, including absence of proper control agencies, and of precise role definitions and norms; vague regulations; norms and regulations that were created on an ad hoc basis to cover up irregular practices.

- Discretion, understood as the capacity to dispose of or solicit public resources without an adequate framework of rules or control; and
- Absence of transparency and visibility defined as the non-application and/ or absence of a system allowing general and timely access to public information at given stages.

The study was concerned with certain specific institutional functions (stages) of the public management process. Such stages were:

- **Demand detection and definition**, including defining the quantities, conditions, qualifications, quality for contract goods, services and personnel;
- **Elaboration of patterns/criteria to satisfy demand,** including the production of rules and norms promoting certain criteria/qualities that deviate from the needs of the organization, possibly for personal or third party benefit;
- The level of **publicity and access to information** regarding the actions described in the previous two points;
- The **selection of suppliers** that will satisfy the requirements; and
- **Effective contract compliance**.

The chosen strategy and methodology attempted to achieve the following goals:

- To analyse, from an organizational perspective, the conditions that facilitate certain practices generally termed as corruption;
- To carry out the first experience of this kind within the national public administration. Several studies currently exist in Argentina on transparency, corruption, fraud, business environment. None, however, has been conducted by the national administration itself;
- To produce a report that can be used by political actors, particularly the president and ministers, as useful information for defining public policies to increase transparency;
- To avoid the negative effects that some studies on the subject can produce, by focusing on individual behaviour; and
- To develop future methodologies for research on transparency in the public sector.

DESCRIPTION OF THE STUDY

The study was carried out in the executive branch: in the Presidency, in the office of the Chief Cabinet Minister, and in nine ministries. It was divided into two components. The first comprised a set of personal interviews with high-ranking public officials. The second was a self-administered questionnaire for a group of public employees, intended to check the information provided from the upper echelons of the organization.

The study focused on the analysis of two basic functions of the public administration management process: human resources management and budget management, including procurement. Those particular functions were selected because they are common to every area of the administration covered by the study; and because they are particularly sensitive in terms of corrupt practices.

In terms of the hierarchical levels of the study, the following public officials were selected for the interviews:

- 10 under-secretaries of management; and
- 34 of the 48 principal directors of the departments of human resources, financial administration and legal administration.

The above persons were given semi-structured interviews, the results which were used to design a closed self-administered questionnaire that was administered to some 158 lower ranking officers.

The specific objectives of the survey were to:

- Search for current perceptions, recognition and information about the occurrence of irregular practices in the management of the two functions identified above; and
- Search for perceptions and opinions about the factors that enable/are more sensitive to increasing and encouraging irregular practices in the public administration management process.

The Interviews

The interviews were conducted using a guide containing questions about the public administration management process. The instrument was tested among agents who shared similar characteristics to those selected for the sample. During the analysis, problems such as the overflow of information and the difficulty in comparing one interview with another were encountered.

Adjustments had to be introduced in order to obtain a homogeneous approach to information from the subsequent interviews. The new instrument allowed a codification of the answers for a quantitative type of analysis.

The Questionnaire

The questionnaire was closed and structured, and divided into two parts. The first part defined different scenarios where irregular behaviour is described. The variable under analysis was unidimensional. The basis for the analysis was to test whether a certain practice was deemed irregular or not by the respondent. For example, the use of the official car for personal needs might not be considered irregular. The questionnaire also tried to evaluate the level of acceptance of such practices.

The second part measured the frequency of certain behaviour corresponding to each stage of the public administration production process. The respondent was also asked to choose factors promoting irregular conduct irrespective of whether it occurred at their place of work.

The instrument was tested and adjusted by Gallup Argentina, prior to fieldwork. Personnel from Gallup Argentina collected the information and guaranteed the its confidentiality. To gather the information, the Ministry of Justice and Human Rights convoked 304 public officials (the universe of the study). Over 50 per cent of the interviewed people agreed to be interviewed (158 cases: 95 persons from financial administration and 63 from human resources management areas).

CASE STUDY #41[488]

MONITORING INTERNATIONAL ANTI CORRUPTION MEASURES[489]

INTRODUCTION

The corruption of one person by another is as old as human nature itself, and efforts to regulate its perpetration by individuals, governments and industry, span the centuries. In very recent years the fight against its deleterious effects have taken on a dynamism hardly credible a decade ago. This accomplishment is particularly apparent in the OECD initiative against bribery in international business transactions which culminated in the Recommendation and Convention of 1997. The path leading to these instruments became something of a high speed track during its evolution with several interesting – and unique – features en route to the final instruments. The first part of this case study will describe this journey and examine how this Convention has developed bite. The second part outlines the latest developments that complement international law with a review of recent initiatives taken by key industries in their efforts to take a proactive stance on the issue of bribery and corruption within their particular spheres of influence.

THE OECD REVISED RECOMMENDATION AND CONVENTION

The OECD initiative against bribery in international business transactions developed out of the pledge by industrialised nations (representing around 70% of world exports and 90% of foreign direct investment world-wide) to combat the *supply side* of bribery. The approach is aimed at reducing the influx of corrupt payments into relevant markets by sanctioning the active bribers and their accomplices as well as by providing for a preventive framework. It is dependent upon other action being taken from the demand side and it is in a sense a *narrow approach* and unilateral - even if collectively unilateral: The concepts also apply to the bribery of officials of non-participatory countries. One of the motivational aspects of the OECD approach is the recognition – in the Preamble to the Convention - that bribery distorts international competitive conditions. The aim of creating a *level playing field for commerce* backed by tough supervision, may in its turn, wreak a significant change on the situation of a 'victim country', obliging it to prosecute the recipients of bribes.

Comprising two main documents, the OECD Revised Recommendation of May 1997[490]contains a list of agreed preventive and repressive measures that are

[488] The OECD Recommendation and Convention on Bribery as an example of a new horizon in international law

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[490] *Revised Recommendation of the Council on Bribery in International Business Transactions,* 23 May 1997

both criminal and non criminal in nature. The Convention of December 1997[491] focuses on the criminalisation issue and puts it into legally binding form. The history of these documents is summarised as follows.

In the aftermath of the Watergate scandal the Carter administration passed legislation to combat 'illicit payments in international business transactions'[492] this development was followed a few years later by a UN attempt to move the agenda forwards, but these efforts failed due to political problems. In 1989 the catalyst for the preparatory work leading up to the Convention was the US suggestion that the OECD work on an anti-corruption instrument that would tackle the criminalisation of foreign corrupt practices world wide. Up until that time the private sector in the US had felt it was at a trade disadvantage and was pressing for change. In addition the political developments in eastern Europe and galloping globalisation increased the prospects for a successful collective approach which hitherto had eluded other international attempts to combat bribery. The result of the OECD deliberations was embodied in the 1994 Recommendation, a 'soft law' document that mapped out the issues for the future.[493] The ensuing years involved the participants in a detailed examination of the items contained in the Recommendation and marked the transition from unilateral to collective action. Once again the result was another 'soft law' instrument but this time the growing confidence of the actors was perceptible with language couched in more prescriptive terms. This Revised Recommendation of May 1997 provided for a follow-up procedure for monitoring progress in implementing the Recommendation by Member States. Hard on its heels came the Convention itself, signed by Ministers in December 1997, and entering into force in February 1999 through ratification by six of the major economic powers. As of October 2001, 34 countries have signed and ratified,[494] and 29 countries have had their implementing legislation evaluated. The rapidity with which the Convention has been ratified and implemented is unprecedented in international law.

THE METHODOLOGY OF 'FUNCTIONAL EQUIVALENCE'

This rapid implementation was facilitated by the specific methodology of the Convention in its use of 'functional equivalence'. This principle relates to the measures taken by the Parties to sanction bribery of foreign public officials. Functional equivalence is not unlike the Directive in EC law in that it does not require countries to unify their laws but rather seeks harmonisation through defining goals and offering a choice of means tailored to local legal traditions and fundamental concepts. Functional equivalence also draws and expands on a

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[491] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* 21 November 1997, signed on 19 December 1997, in force since 15 February 1999

[492] Foreign Corrupt Practices Act 1977, as amended in 1988.

[493] Recommendation of the Council on Bribery in International Business Transactions, 27 May 1994.

[494] In addition to the 30 OECD Members, four non-OECD states are Parties to the anti-bribery initiative, namely Argentina, Brazil, Bulgaria, Chile.

technique developed in comparative law and demands a holistic approach to the examination of a law or legal concept within an individual legal system. In practice this means that the on-site visits - that are an obligatory part of the monitoring system for all countries that are party to the Convention - take on an even greater significance as they present the opportunity for country examiners to get to grips with the nuances of a judicial system through discussions with a broad cross-section of participants on the ground.[495]

Looking at some examples of functional equivalence drawn from the 1997 Bribery Convention may help to illustrate the flexibility of its application. On the issue of corporate liability the 1997 Bribery Convention gives Parties a degree of latitude on how to deal with sanctions against an offending company. Article 2 requires countries to introduce the 'responsibility of legal persons', whilst Article 3 paragraph 2 goes on to say however, that non-criminal sanctions against a corporation are also acceptable, provided that they include monetary sanctions and that they are when taken together, 'effective, proportionate and dissuasive'. The question of criminal as against administrative sanctions is of less relevance here than the more contentious issue of the scope of responsibility as it relates to a corporate entity. The question of strict or vicarious liability is raised - and is responsibility attributable to employees or compliance structures. Among the many questions that need to be considered in this context is the adequacy of sanctions and specifically whether forfeiture of profits should be an available sanction.[496]

Article 3, paragraph 3 of the Convention requires Parties to take appropriate measures to ensure that bribery and the proceeds of bribes as defined in the Treaty, or their value be subject to seizure and confiscation '...*or that monetary sanctions of comparable effect are applicable'*. Following the requirements of the Council of Europe Convention 141 on Money Laundering, Search, Seizure and Confiscation[497] and the Vienna Convention of 1988[498] on illicit trafficking in drugs, European countries have introduced sweeping confiscation laws, the Unites States and Korea would seek to realise a comparable result through a substantial fine. Considering that confiscation depends on the source of the funds and a fine is related to the gravity of the offence and the culpability of the offender, the two options ostensibly have no correlation in legal terms. However in the context of the OECD both approaches are viable if their effects are comparable, which will be the case if a straightforward, objective proportionality to earnings is used as the criterion. Where judges have a greater margin of discretion in lieu of confiscation, the level of comparability will have to be reviewed. And this sort of

[495] In addition to the 30 OECD Members, four non-OECD states are Parties to the anti-bribery initiative, namely Argentina, Brazil, Bulgaria, Chile

[496] For details see Albin Eser/Günter Heine/Barbara Huber (editors) , Criminal Responsibiltity of Legal and Collective Entities, Freiburg 1998.

[497] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990.

[498] United Nations Convention Against Illict Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1998.

evaluation may occur in the second phase review of the OECD procedure which is described below.

Whilst 'functional equivalence' is an essential tool in the assessment of a countries' approach to implementing the Recommendation and Convention, it is not without its problems. Its main disadvantage in the monitoring process is - of course - the lack of uniformity of implementing legislation, making a straightforward review or comparison between countries well nigh impossible. Another temptation is to a tendency to compare what -superficially at least – appears instantly comparable, such as maximum penalties or statutes of limitations. Thus the challenge facing commentators and country examiners is to avoid an over simplistic application of functional equivalence and instead to understand it to demand a holistic perspective of legal systems using an appropriate comparative approach combined with a sensitivity to the legal culture and attitudes to sanctioning in the country they are evaluating.[499] In addressing the adequacy of laws in a particular country the level of an applicable standard may also be problematic, the goal cannot be to set minimum levels nor should a law necessarily be considered replete only when it contains the minutiae which some countries take for granted. A balance has to be struck so that the process continues to develop and move forward, with effective implementation as the goal. Overall, functional equivalence is both an inclusive, flexible principle essential to the evaluation process, as well as a pragmatic concession that respects special circumstances, differing legal traditions and constitutions.

HOW PEER REVIEW WORKS IN PRACTICE

The country evaluations, already briefly touched upon, are one of the crucial elements of monitoring the implementation of the Recommendation and Convention. These peer reviews are formal, systematic, detailed appraisals and judgements by the entire Membership of the Convention (including the non-OECD member states that are party to the Convention) of aspects of each Members country's policies and their implementation. The OECD Working Group has developed its own procedural rules to apply this technique, drawing on experiences gained through OECD accession procedures, UN human rights audits and Financial Action Task Force mutual evaluation procedures in relation to anti-money laundering efforts.

In terms of procedure, the country evaluations are conducted by experts from two different examining countries chosen from a rotational list who in the first phase of monitoring examine the legal implementation of the 1997 Bribery Convention and the Recommendation. The examiners use descriptive texts drafted by the OECD Secretariat that are based on the countries' answers to a questionnaire as well as on legal materials submitted by the countries. The examiners give the Group (namely the participants in the Working Group) their opinion on the standard of implementation. Before the actual hearing in the Group the

[499] See Pieth, Mark ''*Funktionale Aequivalenz': Praktische Rechtsvergleichung und internationale Harmonisierung von Wirtschaftsstrafrecht*, Zeitschrift für Schweizerisches Recht, Band 119, 2000, pp.477-489.

procedures ensure a thorough exchange between the examiners and the examined: Written representations by the country evaluated and a pre-meeting of examiners and country experts to answer questions, to clarify misunderstandings and develop a focus for the Group's discussion of specific topics takes place. The phase one evaluations of countries that have implemented the international standards completed to date have been published as reports on Internet.[500] In a follow up phase termed 'phase 1 plus' adaptation of laws based on the critique of the group are evaluated and the phase 1 reports supplemented (such amendments have been signalled to the Group so far by Bulgaria, Iceland, the Czech republic, Italy and Japan).

The second phase of evaluations differs from the first in that it concentrates on the application in practice of the implementing legislation, this involves looking at the structures in place capable of dealing with this type of case, the level of resources deployed, personnel training and so on. Questionnaires are sent out as a preliminary to an on-site visit. Whilst in the country itself the evaluating teams will look at decided cases, meet with industry, trade unions, civil society as well as government officials and practitioners. The aim of phase two review is to be fact based and evaluative, identifying potential problems in the effective prevention, detection and prosecution of foreign bribery cases. The examiners may also look at the efficiency of sanctions but this may be difficult at the current stage of developments in this area and given the cultural diversity on this issue.

THE OECD PROCEDURES

With regard to both phases of peer review the OECD Working Group holds two hearings per country on two consecutive days. In the first, the Group discusses question raised by the examiners and the answers given by the country. During the evening of the first day, the examiners in phase 1 draft a short evaluative text to be attached to the report itself, in phase 2 they re-examine the suggested conclusions and recommendations. They immediately test the text with the examined country on the same evening. The second hearing, on the following day, concentrates on the text parts carrying a value judgement which may be modified if necessary then adopted word for word by the Group. Whereas the text is adopted by unanimity by the Group, the Country under examination is requested to abstain from voting. To ensure fair treatment, unanimity of the rest of the group is called for, and the examined country has the right to express a dissenting opinion in the report. The evaluation in phase 1 is appended to the descriptive part of the report, which is itself amended on the basis of the discussions and adopted in a written procedure. The procedure is open to participation by members of civil society who can, and have, contributed written comments. There is an appellate procedure 'that gives the Ministers of the OECD Council a final decision', which so far has not been resorted to. The publication of the reports is mandatory and they will also be available on the Internet.[501]

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[500] See www.oecd.org

[501] See Procedural Order for Phase 1 DAFFE/IME/BR (98)8/REV 1 and Procedural Order for Phase 2 DAFFE/IME/BR (99)33

Finland is the first country to have undergone both phase one and two evaluations. The phase two review was conducted by experts from the Czech Republic and Korea as well as OECD Secretariat members. What emerges from the Finland review may well turn up as a phenomenon in other jurisdictions too. Finland has been named by Transparency International (TI) as the least corrupt country out of about 90 countries studied for two years in a row (2000 and 2001) according to the TI 'Corruption Perceptions Index'.[502] This Index measures the level of perceived corruption in the public service of each particular country. However, it does not measure the extent to which a country's businesses are prone to bribing foreign public officials. If the review in phase one was to ensure that laws were enacted or amended to conform to the Convention, then phase two could be said to ensure that the substance of those laws are also realised. Thus taking a critical view of how businesses conduct themselves abroad - as oppose to domestically, especially when operating in neighbouring states or other regions where certain environments are known to be corrupt, will require prosecutors to take a fresh look at the behaviour of their highly respected local companies when operating outside their home market. And this will involve a reappraisal of investigative techniques, in particular with regard to the collection of evidence from abroad. In addition, governments and industry will have to increase efforts to inform and educate their business communities regarding culpability under new or revised legislation relating to the bribery of foreign officials. At the very latest, business will take cognisance of such changes to the law when criminal prosecutions are undertaken by the authorities.

OTHER MEASURES TO EFFECT CHANGE

To continue with Finland as an example, the Finnish authorities have not as yet handled a criminal case concerning the bribery of a foreign public official, and it will clearly take some time for law enforcement practice to have an impact, in Finland as well as everywhere else. However, at this stage of developments in the international arena much depends on rapid change taking effect, not least to sustain the credibility of the industrialised countries on this issue in the eyes of their counterparts in the less developed countries of the South and eastern Europe.

Thus the need for additional action within key industry sectors is of paramount importance to sustain and enhance the impetus of change. In practice this will entail the protagonists having to change *internally* which again will be a development that will occur over time. But for change to be effective and visible a co-ordinated approach within specific industry sectors is required - especially where competition is fierce.

[502] See 'Global Corruption Report 2001', Transparency International, pp 232-236.

DEVELOPING INDUSTRY STANDARDS

The development of the Wolfsberg Principles on Anti-Money Laundering[503] stand out as an example of what can be achieved by major players (in this instance the eleven largest banks in terms of private clients) who are normally rivals in a highly competitive market. These Principles were developed by the banks together with civil society over a relatively short period of time. They are continuing to develop the details of best practice and also to respond to unforeseeable challenges such as how to deal with the identification of terrorist funds. Since their implementation by these eleven banks, it is apparent that these Principles have been adopted by other banks who are not formally members of the Wolfsberg Group and that they are also used for compliance training purposes. Although the Wolfsberg Principles do not deal with the issues of bribery and corruption directly, the analogy of what can be achieved through intra industry co-operation on sensitive issues is patently clear. To take another example, the integrity standards developed by the International Federation of Consulting Engineers (FIDIC)[504] aimed at reducing corruption in aid-funded public procurement from the private sector side are a similarly dynamic set of principles that commit the industry to a standard of behaviour from which there is no going back.

The concept of industry standards is gradually gaining ground with new efforts discernible in various sectors; such as the oil and gas industry and its supply chain industries, the power sector, the mining industry and contract engineers.[505] All are either contemplating the idea of getting together or are in the process of discussing the issues involved and the consequences of revealing their innermost secrets regarding the issue of bribery as it relates to their international business transactions. Dealing for instance with such touchy areas as agents contracts and comparing their approaches and possibly even developing a common solution to prevent the use of agents as a conduit for bribery. The motivation for these industries is, on the one hand, the changing international legal framework and, on the other, growing concerns about the costs of competitive advantage obtained through corruption and not least the attendant risks to reputation that can arise if a company rides roughshod in its business practices over its customers or the countries in which it conducts business. The prospects for self-regulation through industry standards lend themselves to this risk scenario and will be increasingly deployed by a variety of industries in the future.

METHODOLOGY OF INDUSTRY STANDARDS

The obstacles to bringing together rival companies to address these issues are by no means insignificant. The whole process is very delicate if there are serious issues of subsisting bribery within the particular industry. In order for there to be an impact on the problem by industry it is essential that the composition of the group that comes together is of the right balance. This means major companies

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[503] See www.wolfsberg-principles.com

[504] See www.fidic.org

[505] See Pieth, Mark, *Staatliche Intervention und Selbstregulierung der Wirtschaft* in 'Festschrift für Lüderssen', Baden-Baden, 2002 (forthcoming)

in the sector in question having a significant world market share, who are active internationally and for whom the importance of a level playing field in competitive terms is of economic significance and for whom the risk to reputation is of overriding importance. Timing is also of the essence, bringing the right people together at the right time; this requires recognising and seizing the moment when an individual company has taken - or is well on the way to taking -the decision to confront the problem of corruption head on.

Once a group of companies wants to tackle the risks facing their business, the way forward is best achieved through a frank and forthright approach. The optimal size of a group of companies to attain the goal of a comprehensive pact is in the region of ten to twelve companies who are represented by the top echelons of each participating company so that the decision making capacity of the group is maximised. This lends momentum and weight to the whole process and is of crucial importance to the procedure. This whole process is undoubtedly a novel experience for most of the participants and may be outside their usual business experience, in these circumstances the use of external facilitators playing a positive role in nurturing the process can be invaluable. In the longer term, the issues of how to control and monitor the implementation of the standards need to be considered, either by adapting the peer review principle in an appropriate fashion or through external agencies. After having achieved an industry standard the participants might either want to keep the whole process 'secret' and monitor each other or they may want to make their document public and promote its implementation and encourage the participation of others. This alternative may include the involvement of other companies either directly (by 'subscription' as the Wolfsberg process was in the initial phase) or indirectly via regulators (the current state of the Wolfsberg Group). The question of when and how other companies within the industry can join the 'club' must also therefore be considered by the Group.

The advantages of industry standards are the speed and flexibility with which they can be brought into being and the fact that they can be adapted to address specific aspects of corruption facing any given sector of industry. The acknowledgement by major companies that they are confronting issues related to bribery will, in turn, bolster government efforts to tackle the issues, making it harder for anyone to shy away from their responsibilities, judicial, legislative or legal. The down side of industry standards relates to the question of monitoring and how best to achieve it. So far the Wolfsberg group, for example, have not pursued the option of monitoring each other. A possible risk in the long term for the participating banks may be a diminishing of their credibility externally; the lack of transparency in the verification of how the banks have actually implemented the Principles may negate the public relations effect of the exercise and dilute the prestige of being a founding member of the Group. Instead the issue falls to external regulators to pick up[506] with the possibility of developing monitoring mechanisms internally and this variation is currently under

[506] cf. Basel Committee for Banking Supervision and for example, the new 'Customer Due Diligence' standard of October 4, 2001, with reference to Wolfsberg.

examination. The development of industry standards is of course subject to all the advantages and pitfalls of self-regulation. At its best it can act as a dynamic spur to policy makers and achieve a complementary status to existing legislation.

How does all this fit together?

Where do international and national laws and industry standards converge? The focal point here must be on companies: Whilst the Convention criminalizes bribery when committed by a natural person it leaves the issue of criminal liability as it pertains to companies open and only requires that monetary sanctions be 'effective, proportionate and dissuasive'. Whether the profits of a company can be forfeited is an unresolved question in many jurisdictions and not one that is likely to be determined in a uniform way in the near future.[507] As for non-criminal sanctions against an offending company there is for example the risk of disbarment from public contracts under World Bank regulations.[508]

Criminal law has always been selectively applied and it does not need a large number of cases to promote a deterrent effect, at the same time the drive to change behaviour can also be influenced in the future by the hands-on efforts of companies involved in developing industry standards by taking things a step further and building a grid-like structure of action. This rather abstract notion would in practice entail key industrial sectors coming together to develop an intra industry standard - this would constitute the horizontal axis (such as oil, defence, pharmaceuticals industries) whilst the vertical axis would comprise the supply chain of each sector and cut across industries and include suppliers, sales agents and joint venture partners for example. In the longer term this sort of approach may even lead to comprehensive integrity pacts.

Looking at the results so far, it is apparent that change is possible and entrenched behaviour in this area can be altered, political and economic factors as well as risks to reputation all combine to create a climate of change. It may well be that once 20% of multi-national enterprises are involved in agreements relating to industry standards a swing around world-wide can be expected to occur.

[507] Even though Article 3, sec. 3 of the 1997 Convention does require the confiscation of profits also with regard to companies.

[508] See Para.1.15 of the World Bank's Procurement Guidelines.

CASE STUDY #42

AVOIDING INVOLVEMENT IN BRIBERY AND RELATED PRACTICES: DEVELOPING INDUSTRY STANDARDS

BACKGROUND

Over the past decade the environment in which international business is conducted has changed dramatically. Many parts of the private sector have been particularly affected in that challenges, as well as opportunities, have grown considerably as a consequence of the opening up of eastern Europe. New, unconsolidated government structures are constituting themselves as trading partners and the temptations for politicians, government officials and local businessmen to «cut corners» are considerable. In an already competitive industry, operating sometimes in conditions of extortion, representatives of multi-national enterprises have been involved in questionable payments. In so doing they not only create legal risks but also – and above all – jeopardise the reputation of the company. In response to this new environment, international organisations in the 1990's developed harmonised standards for governments that are aimed at combating corruption. The OECD in particular has attempted to ban foreign corrupt practices world-wide with a series of instruments (the Revised Recommendation of 1997, and the Convention of 1997). Regional organisations have followed suit (especially the COE, EU, OAS etc.). The international financial institutions have adopted their own anti-corruption policies, including the disbarment of companies caught bribing in the context of aid-funded contracts. The private sector, notably through the ICC, has developed corresponding standards for companies. Currently the intergovernmental organisations are struggling to enforce the implementation and application of the standards in their Member States. Since 1997, 34 out of 35 members of the OECD initiative have ratified the Convention, 34 have implemented corresponding laws and 33 legislations have so far been evaluated by the Working Group on Bribery. Currently, practice of law enforcement agencies in these predominantly industrialised countries is under detailed scrutiny in a second phase of evaluation (so far 4 countries evaluated). Although the discrepancy between international obligations and the reality of the business environment in many regions of the world may seem immense, there is no question that the private sector has to deal with the new situation. The following sketch explores ways of developing an industry-wide answer to this challenge. It is based on the experience of auto-regulation in specific sectors (most notably the banking sector, confronting the risks of money laundering).

Towards an Industry-Wide Standard

Managers and companies are confronted with local officials who have expectations regarding bribes and for the use of which they will not be held accountable. Faced with the increased risk of criminal, administrative and civil sanctions against managers and companies, the need for clear and unambiguous in-house policies becomes evident. The hesitation to tackle these

issues in a straightforward way, may however, be fuelled by the suspicion that competitors are continuing to effect covert payments. Therefore, it would be beneficial for such in-house rules to be implemented within the same timeframe and industry wide and possibly with an option for monitoring. There are several reasons why this is a difficult endeavour. Apart from the natural doubts about whether all employees of a competitor will play straight if pushed hard enough, many issues are by no means as clear cut as they may seem and need to be studied in greater detail (take such touchy topics as «social payments » or agents contracts and fees). In addition, companies adhere to differing management styles and ways of organising compliance to in-house rules and they may be reluctant to part with them. Experiences gained in other sectors and related topics have however, proved that the harmonisation of industry standards is possible and beneficial to the business environment: The «Wolfsberg AML Principles» (cf.www.Wolfsberg-Principles.com) may be cited as a success story in this respect: The 12 largest «private banks» in the world have – with the help of facilitators – joined efforts to unify their money laundering prevention strategies on a corporate level, thereby surmounting national regulatory differences and motivating other competitors to join, be it explicitly or implicitly. There is the potential for a similar «rapprochement», in my view, in the other sectors, even though the specific needs have of course to be analysed and the approach to such a goal should be tailor-made to the circumstances of the sector and pre-existing structures.

Developing the Process

It would be most appropriate to use a «top-down» approach to develop industry wide standards, this would comprise a risk analysis as the first step, after which an exchange of external compliance rules of the participating companies could be used as a basis for developing a joint denominator. It is foreseeable that some participants would be hesitant to share this sensitive information with their competitors. However, experience has shown that there are ways of respecting diverging corporate cultures and still reach a common goal (use of the principle «functional equivalence» applied in harmonising rules amongst countries to company rules). A further – and particularly sensitive – issue to be considered would be the topic of a possible monitoring mechanism amongst members of the Group. This is an issue that in my experience arises very far down the road and needs to be approached with due care.

Role for Facilitators

As Chairman of the OECD Working Group on Bribery a facilitator[509] has the role of «referee» between countries in making sure the standards are implemented. However, the «swing around» will not be achieved quickly through law enforcement alone, therefore key industries have come together to change the «rules of the game» through positive action. To date the facilitator has acted as facilitator to various initiatives, such as the Wolfsberg process, mentioned above, and in the development, of integrity standards for FIDIC, the Worldwide Organisation of Consulting Engineers. In many instances a fruitful co-operation in

[509] Professor Mark Pieth has played the role as a facilitator

the facilitation process has been established with the NGO Transparency International. Several of the initiatives mentioned have been facilitated jointly. For the purposes of secretariat services the facilitator has in the past used the BASEL INSTITUTE ON GOVERNANCE, an independent institution with which the facilitator is involved. This Institute could provide services to facilitate the meetings of the Group as well as deploying its experience in nurturing the process through to a successful outcome. At the very least it could serve as a resource centre. Regardless of the approach adopted, the ownership of the process needs to lie with the industry.

CASE STUDY 43

THE PRIVATE SECTOR BECOMES ACTIVE: THE WOLFSBERG PROCESS[510]

'There is a tide in the affairs of men, which taken at the flood leads on to fortune. Omitted, all the voyage of their life is bound in the shallows and in miseries. And we must take the current when it serves or lose our ventures.'

(Wm. Shakespeare, Julius Caesar)

INTRODUCTION

This Case Study examines how the Wolfsberg Anti-Money Laundering Principles[511] came into being, charts their subsequent development and also looks at what the Group may tackle in the future. The prospects for the expansion of the Group itself are also addressed and some of the possible implications this might have on its workings are posed. But before looking ahead, the first part of this section deals with the placing of this industry lead initiative into its recent historical context. The background to these developments is therefore sketched, as well as the interaction that has emerged between the various legislative and 'soft-law' initiatives that continue to contribute to the growing body of anti-money laundering rules.

THE PRIVATE SECTOR GETS ACTIVE - BUT WHY NOW ?

One aspect of the critical discourse on multi-national enterprises has long maintained that conglomerates, major industrial groupings and the financial services industry may have larger turnovers than the GDP of many a small state and wield even greater power, not only within the countries where they operate, but also on the world stage. At the national level the clout of MNE's has traditionally been channelled through lobbyists with the aim of influencing legislative initiatives that impact their businesses. But the question of taking a more proactive approach in influencing regulations and defining their own rules would, given the dynamism of globalisation, certainly be a logical undertaking for the private sector and particularly at the international level. In the context of the development of anti-money laundering initiatives this question however is even more acute: Why did companies only get active in the last couple of years and why, for more than a decade, did they leave the definition of the rules against money laundering entirely to regulators?

It is surprising because in 1988 it was the banks themselves that had requested the movers of G7 countries and others to clamp down on illegal drug markets.

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[510] Professor Mark Pieth and Gemma Aiolfi, Juristische Fakultät Universität Basel

[511] See www.Wolfsberg-Principles.com for the full text of the Wolfsberg Principles and the Wolfsberg Statement on the Financing of Terrorism. The original Principles were made public on October 30 2000 in Zurich, Switzerland.

US banks in particular had already learned to live with routine cash reporting (CTR)[512] which dated back to the provisions of the Bank Secrecy Act of 1970, and were regarded as the acceptable price to pay for being involved in the fight against organised crime. Although 'know your customer' (KYC) policies were not unknown to US securities firms from the New York Stock Exchange Rules, banks were not however, prepared to engage in serious KYC policies and customer due diligence (CDD). These concepts were regarded as both intrusive, costly and over burdensome and also because they were perhaps looked upon more as European notions that did not fit the American banking tradition. It is appropriate to recall in this context, that the original US delegation to the Financial Action Task Force in the Autumn of 1989, had no desire to promote KYC policies or suspicious transaction reporting. At that time their primary interest was focused on creating world-wide control mechanisms over money flows, both in cash and - insofar as it was possible - over electronically transferred funds. And there is nothing to suggest that banks themselves held different opinions to their regulators at this time. By focusing on the transfer of cash the emphasis was placed on the so-called placement stage of money laundering, namely the initial depositing of currency into the financial system. The complexities of the subsequent layering and integration stages were thus not tackled directly. This approach may have been adopted for various reasons, perhaps because measures to counter money laundering in the latter stages were regarded as too costly, or because the tracking of cash would, theoretically at least, solve the problem at source, thereby rendering any further controls at later stages redundant.

The developments in the late 1980s appear to have caught the banking world unawares not least because the supervisors of the UK, France and Switzerland teamed up and managed to strike a deal with the US regulators in the context of developing the FATF 40 Recommendations[513] and into which the Europeans introduced their own concepts, which included attaching to the process one of the most rigorous enforcement mechanisms known thus far in international law. The CDD rules in the FATF 40 Recommendations were created by taking a combination of national strategies and an early international Recommendation of the Basel Committee, (the Basle Statement of Principles (BSP) of 1988[514]). The KYC provisions in the Recommendations drew on Swiss law and the BSP's increased diligence in unusual circumstances, reporting obligations had their roots in UK guidance notes. In return, the US essentially obtained in the FATF Recommendations, the endorsement of what had been achieved in the Vienna Convention of 1988[515], namely the commitment of the international community to criminalise money laundering, to forfeit ill-gotten gains and the agreement to

[512] In the period 1987-1996 US banks filed 77 million CTR 's leading to 3000 money laundering cases with 7,300 people charged; of which 2,875 were found guilty.
[513] http://www.1.oecd.org/fatf/
[514] Bank for International Settlements: Basel Committee on Banking Supervision: Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering, Statement of Principles, December 1988.
[515] UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 concluded in Vienna on 20 December 1988.

share information, even though at that time it was still restricted to the topic of drugs.

Throughout the following decade bank supervisors at the national level struggled with their banking communities (and later on also the non-banks) to implement these regulations. The outcome was the creation of a patchwork of rather diverse rules which had the effect of immediately increasing both regulatory competition and regulatory arbitrage, thus enabling the money launderer to profit from these discrepancies between the various financial centres. The 1990s saw the progressive extension of anti-money laundering legislation to the transfer of proceeds of other serious crimes but in relation to CDD at the international level things quietened down and nothing happened for nearly a decade on this area (almost up to 1999). This was particularly disquieting for internationally active banks because they had to apply all these diverse standards concurrently - and at the same time they constantly risked losing clients to competitors operating under a more flexible regulatory framework elsewhere.

The need for greater harmonisation became ever more apparent, yet banks waited for regulators to make the next move. However, eventually the banks realised that this move would probably not be made for the foreseeable future not least because between 1996 and 2000 the FATF had developed other priorities, and was focusing on offshore centres and specifically on the so called non-co-operative countries and territories (NCCT's) rather than further refining its own standards and its own performance.

It was again the Basel Committee of Banking Supervisors and also to some extent the Working Group on Bribery of the OECD, both of which - independently of the other - increasingly took the view that more work on CDD should be done. Supervisors and central bankers world-wide had become increasingly concerned about the risks offshore havens posed to global financial stability, although concrete evidence for these concerns is difficult to ascertain let alone quantify. The issues were addressed on a macro-level by a specialised group in the Financial Stability Forum (FSF)[516]. The BCBS picked up the direction given by the FSF but pursued its analysis on a micro-level in that they looked at the need for the regulated banking area to fend off risky clients. In a sense this initiative mirrors the efforts of the FATF in relation to NCCT's, but gives it a different thrust - cleaning up one's own house and controlling the entry points rather than picking on the non compliant with the aim of getting them to toe the line.

The OECD's Working Group on Bribery - which had just concluded a far reaching Convention on combating bribery in business transactions[517] - had started to expand its scope of work by looking at the abuse of financial centres for bribery. This development proved to be important because in the same context the non-governmental organisation specialised in combating corruption, Transparency

[516] Financial Stability Forum, Working Group on Offshore Financial Centres Report, April 2000.
[517] Convention on combating Bribery of Foreign Public Officials in International Business Transactions, 21 November 1997, signed on 19 December 1997, in force since 15 February 1999.

International launched an initiative with some of the key private banks to recruit their help in preventing the misuse of financial centres for the creation of slush funds, bribe payments and bribe money laundering. The timing seemed particularly apposite as abuses of private banking by corrupt officials had been revealed in the 1990's, with highly placed political officials being found to have laundered large amounts of cash through US and European banks who had displayed a lax attitude to AML. The damage to the reputations of the banks involved was serious as is apparent in the report by the US sub-committee on private banking[518] which levied criticism by pointing to specific failings and weaknesses not only with respect to the banks involved but also with regard to the nature of global private banking. These developments contributed to the creation of a climate of change - with the notable difference that this time the affected banks themselves decided to grapple with the issues.

DEVELOPING THE INDUSTRY STANDARD

At an early stage in the Wolfsberg process, facilitators talked to key US and European banks to convince them that getting together and defining a common AML standard could be beneficial both for the banks as well as wider society. It was also clear that such a development could help to create a level playing field for banks in competition terms. A common standard could also, if picked up by regulators help reduce the diversity and uncertainties - a net effect of which would be to cut risk management costs. From the perspective of combating corruption and graft as practised by 'potentates' in particular, the banks' effort to review their procedures and internal rules could make it harder for clients to circumvent the new (at that time) anti-corruption laws by engaging in offshore transactions.

The participating banks were very cautious in the early days of the initiative, and after all it was a novel process, the outcome of which was not certain. The criteria for extending invitations to banks to join the group were on the basis of the significance of their private banking activities and also to ensure a geographic spread as far as it was possible. Some banks needed intensive convincing to join the process - especially by their peers. The initiative really took off after the two leading banks at the first meeting in October 1999, decided that as a first step they would exchange their internal corporate AML compliance rules. Working from this basis the Group subsequently decided to extract a common denominator on which to build a standard. The original 'Wolfsberg Principles' are the result of these early efforts. The first revision of the Principles was published in May 2002 and came about partly as a result of the usual internal updating that Group members had undertaken in the intervening period, as well as in response to new developments at the international level such as the Basel Committee's 'Customer Due Diligence for Banks'.[519] This process indicates that the

[518] Minority Staff Report for Permanent Subcommittee on Investigations; Hearings on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities (see www.senate.gov/gov_affairs/110999_report.htm).

[519] Bank for International Settlements: Basel Committee on Banking Supervision Working Group on Cross-border Banking, Customer Due Diligence for Banks, October 2001.

development of the Principles was clearly not an end in itself, and that further evolutions in the Principles are to be expected. The working dynamics of the Group have similarly progressed as the expeditious drafting of the Wolfsberg Statement on the Suppression of the Financing of Terrorism showed: The Statement was published in early 2002. An integral part of the process has also been the Group's efforts to make the Principles accessible and practical to other financial institutions who may want to apply them. To assist these institutions, the Group has tackled some of the details of the Principles in the 'frequently asked questions' section of their web site, these guidance texts and commentaries are formulated by sub-working groups composed of experienced and senior personnel drawn from the participating banks.

To round off the initial process, the Wolfsberg Group held a media conference in October 2000, to publish and publicise the Principles. The international press was intrigued and many journalists as well as regulators not surprisingly asked, 'so what's new? And will these Principles defeat money laundering?' It also raised - and continues to raise - questions about the message this Group is sending to regulators: In taking the initiative are the banks reacting against further regulation in an already highly regulated industry, or is it a move by the private sector to complement the regulatory framework?[520]

What is the reasoning behind this initiative?

As a voluntary code of conduct that focuses on private banking the Principles are specific to this business segment - at the same time however - they are also broadly drawn and in certain areas downright vague. It is also correct that the first version of the standards does not revolutionise CDD, it builds on some advanced but well established concepts of identification, and increased diligence in unusual cases. It addresses the issue of how to identify beneficial owners, remains however hazy on the matter of delegating CDD to third parties, be it to agents or other financial institutions (especially correspondent banks).

Whilst they are not a panacea for combating money laundering, the Principles do have the potential to bridge the 'transatlantic gap', bearing in mind that up until quite recently the US had a hard time toughening up its AML laws: Proposals by President Clinton to tighten the regulatory regime were rebuffed by the republican dominated Congress who were opposed to meaningful change at the time.[521]

The real strength of the Wolfsberg Principles however, lies in the fact that the participant banks commit to apply the rules to all their operations at home and abroad, including in offshore centres. If it may be assumed that the Group members make up more than 60% of the world market in private banking, with

[520] For examples of press comment see; The New York Times, editorial 11.6.2000, American Banker, 11.6.2000, Financial Times, 23.10.2000, The Banker, 01.10.2001, for further references see also the press comments section of the Wolfsberg Principles web site.

[521] See International Counter-Money Laundering and Foreign Anti-Corruption Act 2000, House of Representatives Report 106/2728, Committee on Banking and Financial Services, Chairman Leach.

perhaps 50% of the market share in each key offshore destination - these rules in practical terms - have great potential for becoming the leading principles throughout the industry.

Although it is difficult to second guess the motivation of the individual participants to join this initiative, there can be little doubt that the various risk elements (that are actually described in the Basel CDD paper[522]) must have been uppermost in the minds of the bankers invited to attend the initial sessions. It should moreover, be remembered that the requirements set out in the Basel CDD paper and the FATF Recommendations are aimed at national supervisors and are guidelines for minimum regulatory standards. But the implementation of rules takes time, and any subsequent amendments often even longer. This time lag was perhaps one factor that prompted the banks to get active on their own behalf: The need to counter risk in a comprehensive manner had become a paramount question of credibility for some banks, and they could not wait for piecemeal legislation. It is also the case that although the aforementioned guidelines are essentially aimed at regulators the banks also recognise that influence can be exerted at the national level, because governments will always look at what has been going on in terms of self-regulation. And given that the private sector have adopted best practice whilst drawing on a variety of traditions, the Principles will almost certainly impact any proposed legislation at national level in this area.

It has also been correctly observed by critics that these Principles lack a specific enforcement mechanism. However, monitoring is indirectly provided by Supervisory institutions, with whom the Wolfsberg Group meet on a regular basis: The standards have provoked regulators, if not into action then to be substantially more specific than they had been over the last decade.

PLAYING 'PING-PONG' WITH REGULATORS: ESTABLISHING A 'RISK BASED APPROACH'

Even if the CDD rules prepared by the Basel Committee were already well advanced in their preparation when the Wolfsberg Principles were published, and even though the CDD paper makes only brief mention of Wolfsberg in terms of it being a voluntary code of conduct that may underpin regulatory guidance but is no substitute for it, it is nevertheless virtually certain that these papers mutually influence each other.[523] The Wolfsberg Group is continuing the self-critical process in the light of the Basel Committee text and will make further amendments to the Principles in due course. This reciprocal process could also be ascertained in subsequent meetings between the banks and regulators in the years following the publication of the Principles. And this 'dialogue' is perhaps most apparent in the final paragraph of the Wolfsberg Statement on the Financing of Terrorism. The list of areas for further discussion with governmental agencies is not only a response by the banks indicating what they consider as feasible to assist in the fight against terrorism, it also takes the offensive by

[522] Ibid. Paras. 8-17.
[523] Ibid. P.5 footnote 4.

highlighting areas where regulators themselves should be active and taking responsibility - a role that would normally be associated with rule makers themselves. For example, the requests that regulators ensure that national legislation be in place to permit financial institutions to play their part in the fight against terrorism. There is no question that the banking community is committed to fighting terrorism although this open 'lobbyist' approach may in part also have been a reaction against the apportioning of responsibility in the aftermath of September 11th, and it reveals the level of confidence the Group has developed when it comes to interacting with regulators.

In some areas there are tensions between the views of regulators and bankers: The banks are increasingly uneasy about the extension of rules, which, whilst they may make sense in private banking may not be appropriate to retail banking or other sectors of the industry. To counter this tendency to generalise, the banks are trying to indicate to 'Basel' what is realistic and where a more flexible risk management approach would be more effective. It could be said that one of the main achievements of the banking industry during these last two years has been to win the regulators over to follow a 'risk based approach' when developing their norms, as opposed to one that is rule based. [524]

What though are the differences between these 'risk' and 'rule' approaches? The latter is the preserve of the State acting autonomously at national level, be it in response to international obligations or in self interest. The risk management concept also involves the making of rules and procedures but at the micro-level of the individual company although they too may also be in response to legislation or international recommendations - so thus far there appears to be common ground between the two approaches. But the rule based approach deploys abstract, prescriptive norms and is reactive in the sense that it takes account of past failures in the system. Risk management on the other hand tends to be practice based and is rooted in both past and ongoing business experience. Thus one of the characteristics of risk management is its flexibility: Whilst there are internal compliance procedures to be followed, there are also systems that enable the risk parameters to be altered by the individual company - and this can manifest itself in clashes between those at the business front-line and those responsible for the management of risk, particularly in highly competitive markets. This sort of tension may be the downside of the risk based approach but at the same time it seems that those companies that actively promote and develop their risk management systems are also typically in the top quartile in performance terms and exhibit the best in class governance and control capabilities[525] - perhaps the traditional view of compliance as a costly burden may gradually be revised.

Other characteristics of risk management in this context take into account the components of business risk and certain aspects of operational risks in an inter-linking strategic and policy network. This means that the management of risk has

[524] Ibid. Para. 20.
[525] PA Consulting Global 'IRM'Survey 2001.

fully evolved from a back office function into a CEO concern: The strategy aims to ensure that risk management is embedded in the organisation through a framework that is specifically designed and implemented in which risk is identified, quantified, controlled and reported.[526]

In terms of outcome there are also differences between the two approaches. Following the rules may still leave the onus of the outcome on the State, because those that comply with the law cannot be held responsible for shortcomings that were not envisaged by the regulations. This though is not particularly constructive in the changing environment in which private banking operates. Traditionally risk management has focused on controlling large losses which have historically been associated with credit and market risks. Whereas it is increasingly the case that large losses come from business and operational failures (and private banking is particularly exposed to certain types of operational risk).[527] Thus it is not an adequate response for banks merely to comply with legal obligations; strategies that address the risks have to be adopted - and here the banks take the responsibility upon themselves to meet this challenge.

In practical terms the banks have been given the green light to start monitoring customers with simple (and relatively cheap) means, unless risk indicators are detected. Once risks manifest themselves the financial institutions can activate a highly differentiated and graded approval of further investigation - a system that is far more efficient than the standardised ticking of boxes of the early days of AML compliance. Just as an illustration of this 'risk based approach' are the new procedures applied in cases of so called 'PEPs' (politically exposed persons), identifying officials, legislators members of the government, high ranking military and their entourages and establishing bona fide / legitimacy of the acquisition of their funds.

On the other hand banks need to be ready to do more on the identification of beneficial owners, which would include understanding the structures related to corporate entities that may be used by natural persons to open anonymous accounts.[528] To date banks did enquire and take note of the information they received, rarely did they, however require documentary evidence for the beneficial ownership. As part of the risk based approach - the Basel CDD paper encourages the banks to go beyond their current standard - here Wolfsberg needs to be adapted to the Basel recommendation which states that a banking relationship should only be established once the customer's identity has been satisfactorily verified.[529] Of course as mentioned above, the contents of the Basel paper are not automatically law but are recommendations to supervisors of member states that might still be watered down at a national level. Therefore it is crucial what the Group defines as best practice.

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[526] Ibid.
[527] Tim Shepheard-Walwyn, Operational risk Management in Private Banking, Association of Foreign Banks in Switzerland, Zurich 21 June 2002.
[528] Basel Committee on Banking Supervision, paras. 32-33.
[529] Ibid. Paras. 21-23.

The convergence by regulators and bankers on the risk based approach has resulted in the empowerment of financial institutions to develop far reaching new concepts in areas such as correspondent banking and agents, and these are briefly previewed at the end of this case study.

Recent Developments

Of course the Wolfsberg Group has not been left untouched by the events of September 11th 2001. It was impressive to realise how quickly the Senior Compliance and risk officers of the key banks grasped what the impact of the terrible events could have on their institutions. Already on the evening of the fateful day their systems were in a position such that they were ready to hunt for names. Although searching on the basis of lists of names and organisations is part of the pattern of preventing and tracing the finances of terror, it is not an area that would typically come within the domain of private banking. The focus of terrorists has not usually been comparable to large scale economic crimes - and far smaller sums are involved. Such amounts typically fall in the sphere of retail banking rather than private banking. This has implications for the standards of awareness that banks should maintain - by necessity they have to be lower in routine business - the example of payments to 'students' who perpetrated the attacks in the US, is only one of the most striking to illustrate the difficulty. Therefore expectations that banks may autonomously be in a position to detect funds primarily destined to finance terrorist activities should not be high. This difficulty is accentuated by the unwillingness of many national regulators to define 'terrorism', leaving banks without abstract guidance, rendering it difficult for them to translate such concepts into risk management mechanisms. As has already been mentioned this problem clearly has influenced the Wolfsberg Statement on terrorist financing, and whilst the banks have unequivocally pledged co-operation, they have also requested information - similar to the way in which they are used to dealing with embargo cases.

FUTURE MOVES

Wolfsberg as a key partner in developing the new FATF recommendations
The most significant current text - apart from the Basel paper - is without doubt the Consultation Paper of the FATF.[530] Much of what has already been addressed has been picked up by the FATF review: And the FATF is once again ready to discuss the range of entities covered by its CDD rules. It is also interesting that for the first time it concentrates on actual CDD procedures including such issues as the reliance on third parties to perform identification and verification obligations.

It is to be expected that the Wolfsberg Group will be a valuable contributor in the consultation process since it can credibly argue which measures are practicable. On top of this the Wolfsberg sub-working groups have developed some very original concepts in specific areas, especially on 'correspondent banking' and on 'agents and introducers'. The major contribution lies in its concrete elaboration of what risk based due diligence means in these areas, namely what questions need to be asked about 'respondent banks' in relation to the status of their supervision which may differ greatly according to company domiciles.

WILL WOLFSBERG GROW?

The Wolfsberg Group currently comprises twelve banks, all of which have a significant private banking business segment. There are obvious advantages and attractions of being part of a small group - and to name a few - include the way the decision making processes function, the practicalities of drafting, the development of trust amongst the participants and ensuring active participation in the meetings. The down side of remaining a small group is that accusations of elitism and exclusivity may be levied - although a place in the Group is not a prerequisite for an institution to adopt the Principles and to implement them within their own organisation. Also if the scope of topics that the Group examines in the future overlaps into other areas of business that their banks are engaged in, then this may also have implications both for existing and potential members.

One commentator, in looking at the potential of the Wolfsberg Principles, has picked up on their global application, and has suggested that the disbursement of funds by international financial institutions (such as the World Bank) should be given to financial institutions that are transparent and apply the very highest standards of AML policies and procedures. This 'white listing' of banks that impose standards on their operations world wide would combat the problem of regulatory arbitrage and draw on the best features and practices of the FATF, the Basel Group and the Wolfsberg Principles.[531]

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[530] Financial Action Task Force on Money Laundering : Review of the FATF Forty Recommendations Consultation Paper 30 May 2002.
[531] Jonathan M. Winer, Globalization, Terrorist Finance, and Global Conflict Time for a White List?, EJLR Special Edition on Terrorist Financing, 2002 forthcoming.

The role of facilitators and consultants who played a pivotal role in the early part of the process in getting the initiative up and running will continue to be important - not least to counter anti-competition regulations. Moreover, in a situation where there is no formal monitoring mechanism the presence of civil society does at least provide an external presence that increases the Group's credibility in the wider world. On the question of expansion, the non-governmental organisations that chart the developments of the Group would like to see the Principles as widely adopted as possible and would perhaps therefore prefer to see some sort of expansion plan. On the other hand they may take the view that now that the banks have shown their willingness to confront the risks of money laundering, then why not address other areas of concern as well - and thus regard expanded membership as less of an issue than the fact of having established an entrée into the senior echelons of some of the largest banks.