

**Transparency International (UK)**

**Submission to the**

**House of Commons**

**International Development Committee**

**INQUIRY INTO CORRUPTION**

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## House of Commons

# INTERNATIONAL DEVELOPMENT COMMITTEE

## INQUIRY INTO CORRUPTION

### Introduction

#### Submission by Transparency International (UK)

This document is a response to the invitation issued by the International Development Committee (IDC) of the House of Commons to interested parties in the UK and elsewhere to discuss the relevance of corruption to the process of development. In particular the IDC invites memoranda which discuss the interface between corruption and the policies of the Department for International Development (DFID) and the multilateral and non governmental organisations to which it contributes.

Transparency International-UK (TI-UK) welcomes this opportunity to present its views on these issues to the Committee, which also for the most part reflect the views of TI's international network. TI-UK will be glad to discuss this and related material with the IDC.

This response is structured in accordance with the Terms of Reference proposed by the Committee. After a one-page summary three chapters follow the outline given in Press Notice No. 31, dated 20th June 2000.

#### **Transparency International (UK)**

is a non-governmental organisation dedicated to curbing both international and national corruption and, in this connection, to increasing government accountability. It is the only global non-profit and politically non-partisan movement with an exclusive focus on corruption. It was founded in 1993. It has an international secretariat in Berlin and national chapters in about 80 countries. Transparency International (UK) is the UK national chapter.

TI-UK's primary concern has been with fighting corruption in international trade and investment. It is also concerned, however, with the domestic law of corruption, both because of the need to curb corruption within the UK and because it is the foundation of any attempt to deal with the "supply" side of international corruption.

The UK chapter consists of individual members led by an elected Board supported by an Advisory Council consisting of people eminent in their fields, from a broad spectrum of both politics and business. Whilst recognising that corruption in international trade involves organisations in the business world, TI-UK is not an anti-business body. It has a Corporate Supporters' Forum and encourages the sharing of information and best practice amongst companies aspiring to operate with high standards of corporate integrity.

## Summary and Recommendations

(i) The text which follows ranges broadly over the subject of corruption, throwing some light on its origins, nature and importance in particular for the developing and transition economies. It discusses the various ways in which both large scale and small scale corruption can both separately and together sustain the phenomenon of mass poverty at a time of unprecedented growth in global GDP.

(ii) In discussing this it does not lose sight of the key responsibilities which OECD economies have for directly or indirectly facilitating a significant part of this corruption, regardless of whether corruption is an issue within their own societies. The UK, given its continuing outreach as an investor, trader and aid donor, with a prominent role in the Commonwealth, has as great a responsibility to roll back the effects of corruption as any other OECD country.

(iii) This submission argues that in order to fulfil this responsibility HMG should be seeking to mainstream an anti-corruption dimension in all of the UK institutions which interface with the problem. A strategy of this kind (as the IDC Terms of Reference recognise) is necessarily much wider than the aid programme delivered by DFID and the International Financial Institutions (IFIs) which DFID supports. It extends to export credits, the legislation which covers bribery, the regulatory system which governs the banks, the criminal intelligence system and the direct and indirect incentives which government may offer to the private sector.

(iv) A summary of specific recommendations follows. Their application requires the kind of integrated approach mentioned above. However in the view of TI-UK a further dimension is necessary if the UK is really to play a significant role in this area.

(v) The Prime Minister has been a party to several G-7 summits which have, *inter alia*, focused on corruption and organised (i.e. white collar) crime. The UK has become a signatory to several international instruments and conventions in this field. However the fact that the UK has not introduced new legislation to make overseas bribery a crime, and that such bribes remain deductible against tax, effectively undermines the role which the nation might be expected to play, *and which the rest of the world expects it to play*. The mainstreaming of anti-corruption measures can only be regarded as "strategy with effect" when the UK is seen to turn commitments into action.

## Recommendations

Section 3 contains many detailed **recommendations**. The principal items are summarised here for convenience under four headings.

We have followed the terms of reference closely in structuring the content of this submission. There are other aspects of the subject which are not covered specifically, such as the debate over conditionality of aid, in which a country's adoption of an effective anti-corruption programme is insisted upon as a pre-condition for official aid; also, the challenge of supporting entrepreneurs in the micro-enterprise and SME sectors, living and working in corrupt societies and struggling to develop as islands of integrity. We will be happy to discuss these matters, or to provide written material on them if requested by the Committee.

### *A. UK legislation and related issues*

1. In order to comply with the OECD's Anti-Bribery Convention the government should without delay enact legislation (either as a separate bill or as part of the Financial Crimes Bill) creating the offence of bribing a foreign public official and assuming extraterritorial jurisdiction as proposed in the Home Office paper (Cm 4759). [Para 3.g.4]
2. The Government should negotiate agreements on the return of confiscated assets similar to those applicable in drug trafficking cases [Para 3.d.2.3]
3. The Government should clarify the NCIS's policies and procedures for sharing intelligence in cases of requests to approve suspicious banking transactions involving possibly corruption-related laundering, including with whom in the UK and overseas they consult when deciding what to do with their intelligence; and tightening procedures for approval. [Para 3.e.1.2]
4. States that have signed the OECD Anti-Bribery Convention should prohibit corporations based in their own countries from making political party contributions in violation of the laws of the countries where the contributions are made. [Para 3.f.1]

### *B. Resources and processes for implementation/enforcement*

1. We make several recommendations regarding the improvement of international legal co-operation in cases of corruption and call for more effective linkage between the activities of the Financial Services Authority, the Serious Fraud Office and National Criminal Intelligence Service. Consideration could be given to a kind of hot line, channelled through DFID, which could present Mutual Legal Assistance requests to the Home Office and provide direct feedback to ACBs. The current arrangements are far too slow. [Paras 3.d.1; 3.d.2.1; and 3.e.1.2]

2. International financial institutions, donor agencies and export credit agencies should share information on organisations suspected of corruption, so that each can assess the quality of evidence and use it in its pre-qualification procedures. A second stage, when the validity of these is accepted, would be a mutually binding agreement to disqualify debarred companies from each others' tender procedures. [Para 3.h]
3. Greater effort needs to be given to the fight against money laundering, and to ensuring that money-launderers are prosecuted. High-profile convictions for laundering the proceeds of foreign corruption will help to change attitudes [Para 3.i(viii)]

### ***C. Overseas support***

1. Non-governmental organisations overseas can benefit from external funding when this is matched to specific objectives and is linked to clear commitments from the recipient organisation as to its internal structure, commitment to its membership and its general transparency. [Para 3.c.2]
2. DFID should support the development of anti-corruption bureaux and judicial systems, which will be highly beneficial where conditions of independence apply. [Para 3.a]

### ***D. Education & awareness***

1. Government should promote anti-corruption awareness among UK companies, possibly via the DTI, and should encourage companies (a) to develop, disseminate and implement codes of conduct; (b) to seek opportunities to associate with other businesses working in the same countries with a view to collective resistance of corruption; and (c) to publicise the problems of working with integrity in countries where it is very difficult and, in extremis, to consider withdrawal. [Para 3.j.4]
2. There needs to be a clear declaration by all relevant authorities, along with adequate publicity, as to the criminality of laundering foreign corrupt money, and clarity as to the fact that prosecution will follow discovery. [Para 3.e]
3. Encourage DFID to try to raise awareness amongst victim countries of the potential for civil remedies in cases of corruption. [Para 3.e.1.3]

## **1 The causes, nature and extent of corruption.**

### **1.a The delivery of development assistance, export credits guarantees and humanitarian aid by bilateral and multilateral official development agencies and by non governmental organisations.**

#### *1.a.1 Corruption and the delivery of development assistance*

It will be useful to approach this question from three angles: (1) aid funds made available to governments which are spent by them (2) aid funds spent in recipient countries through specific programmes controlled by donor agencies and (3) the nature of the aid dependency relationship and the extent to which the relationship itself can lead to subtle forms of corruption in countries which are heavily aid dependent.

##### *1.a.1.1 Donor assistance controlled by recipient Governments*

(i) The proportion of aid funds spent directly by Governments has been steadily falling but remains significant, especially in the case of multilateral lending. The proportion has been falling largely as a result of donor concern with questions of both efficiency and corruption. Corruption within this component of aid tends to occur where government departments and agencies are awarding contracts to local and international contractors, whether these are placed through competitive bidding or otherwise. The contract allocation process can easily be used to ensure that kickbacks are paid to the most influential personnel in the contract award process. This is particularly common in the construction industry and is financed either by an inflated price or by underfulfilment of the contract. In some cases no expenditure may have taken place or underfulfilment may be substantial. This form of corruption, however, is not limited to capital expenditure. It is equally likely to arise in, for example, the recurrent financing of medical supplies; inputs may be overinvoiced or medical supplies which were intended to be distributed free may be sold by doctors in senior positions, or by more junior medical personnel.

(ii) Corruption of this kind often involves senior staff of the relevant ministries and agencies, and this may well extend down departmental staffing layers in what might be termed complicit hierarchies (see 1c below). A manifestation of this is the issue of per diem payments where agricultural extension staff and similar personnel are eligible for payments at a standard rate to cover travelling expenditure; the travelling may not take place, or the funds may be co-opted by more senior personnel. In a related vein, where aid funds have been used to fund a public service (such as seed distribution) for which a modest price was to be charged the relevant product may be sold on a freelance basis by nursery operators or their immediate superiors, with no funds returned to the Exchequer.

(iii) Corrupt practices of these kinds have seldom been beyond public knowledge. For example the Auditors General of both Tanzania and Kenya have

produced effectively damning reports from the mid-1980s onwards which have covered many aspects of both government and donor funded corruption, which have generally been debated in Parliament. Donor reaction to these reports has been muted.

#### *1.a.1.2 Corruption and donor-managed assistance*

(i) Direct control of the expenditure of aid funds by donors has been given different emphasis at different times. In the 1970s the massive expansion of World Bank lending to the rural sector in Africa was characterised by semi-independent project management units, which were designed to achieve effective implementation and were more or less managed by the World Bank itself. In the 1980s programme aid, which was a form of balance of payments assistance linked to various conditionalities, was partly a reaction to this project-based approach. In the 1990s many bilateral donors, including DFID, have re-emphasised a project based approach where donors play a key role in project execution. Each of these strategies were (or are) designed to short circuit recipient government departments in the interest of effective development. However, whatever might be the other merits of such approaches, it is clear that none of them has prevented a significant degree of corruption.

(ii) Project management units of the type characteristic of the 1970s depended for their effective implementation on the intensive use of consultants for the purpose both of project design and implementation. Pre-qualification for a short list was usually controlled by recipient governments and in the interstices between a government and the Bank it was often possible for a corrupt payment to secure selection. One form of programme aid characteristic of the 1980s, at a time when currency exchanges had not been liberalised, involved the provision of hard currency by donors to fund a range of imports to be handled by private sector distributors. The latter were to provide an equivalent sum to the central bank in local currency when the imports had been sold. In Tanzania in the late 1980s a sum of more than \$300 million was made available in foreign exchange by donor consortia led by the World Bank, but local currency payments collected represented only a small proportion of this. Allocations were made by central bank personnel and the chosen distributors were effectively given a massive free injection of cash. Although this represents a particularly dramatic example, it is far from unique.

(iii) The strategy of even more direct donor involvement in project management in the 1990s has avoided some of these problems. This approach, however, is highly management intensive and places considerable strain on donor missions in recipient countries, often requiring an expansion of personnel. It is not sustainable in the long run, either in political terms or in terms of cost effectiveness, as it gives rise to the obvious contradiction of creating a parallel system to that of the recipient government itself.

### *1.a.1.3 Aid dependency and corruption*

There is an important argument that a high level of aid dependency is itself a motor of corruption. This view is held across a wide political spectrum. One of its perhaps more surprising supporters is Judge Warioba, a former Prime Minister of Tanzania, who chaired the 1995 report on Corruption in Tanzania. He and others argue that a high level of aid dependency (characteristic of, say, Mozambique where aid flows of \$1 billion in 1995 accounted for 75% of GDP) generates a set of assumptions about continuing inflows which come to be valued for the personal incomes and expenses they underwrite rather than for their value in raising GDP in the long run. Where whole Departments (such as education or health) derive more than half of their budgetary resources from aid flows, and where these are only loosely monitored, a syndrome is established in which additional resources are continuously sought (and often successfully acquired). In this context the anxiety of various donors to achieve their disbursement targets, and increase them over time, has often led to very light audit processes and has fuelled the kinds of small and not so small scale corruption discussed above. From the perspective of the donor agency it also leads to the creation of a class of aid bureaucrats who have a vested interest in the indefinite continuation of this process.

### *1.a.1.4 The specific role of Multilateral Financial Institutions (MFIs)*

(i) MFIs such as the World Bank play a special role in the international development system. The Bank in particular has been widely regarded as generating best practice, even as its strategies have undergone significant changes. Its position on corruption has evolved dramatically and very positively since James Wolfensohn became its President in 1995. Up to that time the Bank had tended to turn a blind eye to the sometimes corrupt award of contracts by recipient governments where that government controlled the short list of pre-qualifying contractors. Whilst in principle the recipient government had to submit the final short list of pre-qualified bidders to the Bank, this was frequently a formality. Furthermore, the pressure to increase the total volume of lending, or to accelerate disbursements as a percentage of commitments, which has been characteristic of the agency for some of its existence, led it to overlook cases where some form of corruption may have taken place. This appears to have characterised Bank dealings with the Lesotho Government in relation to the Lesotho Highlands Water Project where that Government was expressing concern about management financial discipline as early as 1994. Evidence presented to the High Court in Maseru by the Government of Lesotho in July 2000 appears to have vindicated its earlier position.

(ii) In similar vein, the letting of contracts by the Water and Power Development Authority in Pakistan in the mid 1990s apparently involved a chain of commission payments, allegedly including one made by a UK-based power utility. In this case the Government of Pakistan argued that a World Bank staff member had taken bribes from one of the bidding companies and brought a case in court against that individual.

(iii) Since 1995 James Wolfensohn has clearly established a path for the Bank which makes it a major player in the global anti-corruption struggle. The components of this strategy have included: (a) an intensive programme of research into the incidence and origin of corruption, (b) changes to procurement rules which facilitate special audits of ongoing projects outside the annual audit cycle, (c) the debarring of firms and individuals found as a result of such audits to have behaved corruptly, and (d) considerable funding for governance initiatives designed to deal with corruption within borrowing countries. By mid-October 2000 a total of 52 companies had been debarred by the Bank from future bidding on Bank funded projects (of these 38 were British, of whom the majority had been contracted to work on World Bank funded projects in Nigeria). We shall return to this later.

(iv) These positive anti-corruption initiatives by the World Bank have had a considerable impact on other MFIs, notably the regional development banks for Latin America, Asia, Africa and Eastern Europe. Each of these has adopted some part of the Bank's current approach. For example the African Development Bank has so far debarred six companies from bidding on its contracts; the Asian Development Bank is actively promoting governance programmes in a number of Asian countries; the EBRD is promoting a Code of Conduct for companies which wish to bid on its projects.

(v) Among multilateral agencies the European Development Fund (EDF) of the EU probably has the worst reputation for ignoring the corrupt award of contracts. The European Court of Auditors has expressed concern about this over a number of years. A large-scale example is the Turkwell Gorge Dam in Kenya where massive overruns beyond the project budget, partly funded by the EDF, occurred in the late 1980s, and where (according to the Auditor General of Kenya) no final audit has ever been completed. The problems associated with EDF aid partly arise from the fact that the EDF's obligations to ACP member states under the Lome (and now Suva) Conventions require it to earmark a certain proportion of its budget for each ACP state, and although the funds can be held up they cannot be transferred to another member state. Secondly, contracts for project implementation have to be awarded to companies in EU member states on a basis roughly proportionate to contributions by member states to the EDF itself. A premium is placed on companies which bid through a joint venture with an ACP-based company. In practice this has created a model which results in some projects of dubious validity being implemented by inadequately qualified consortia who may have won the contract by corrupt practices

(vi) The multilateral development agencies have a more important role as standard setters than any one bilateral agency, even though the latter are important contributors to their soft window or grant based programmes. The stronger stance which the MFIs are now taking on the corruption issue is therefore an important and positive development.

### ***1.a.2 Export Credits***

(i) The role of export credits in development finance is as a source of parallel funding for projects where aid flows also play a part. This role has been particularly significant in the context of larger scale construction and industrial development funding where a component of the project is eligible for funding by a national export credit agency. Export credit agencies also play a key role in (a) parallel funding of bilateral aid projects where a blend between loan funds and export credits is feasible and (b) funding the purchase of capital equipment by middle and higher income developing countries where the government is able to guarantee loans made either to itself or to the commercial sector. In the latter case both ECGD and the French COFACE have at least 15 per cent of their portfolios in the armaments industry.

(ii) Some part of export credits which play any one of these three roles may be used to fund bribes. In 1998 *Le Monde* reported that COFACE had funded about £2 billion in bribes in the previous three year period mainly in the armaments industry, a report which recent revelations in France concerning the sale of naval vessels to Taiwan make quite plausible. Sales to the oil exporting states in the Middle East often involve commissions which may be well in excess of 15 per cent, and may easily range up to 30 per cent.

(iii) It is not difficult to see that the funding of such payments is feasible where the deal is a bilateral arrangement between a buying and a selling country. The question requires further discussion in the context of parallel funding of either bilateral aid projects or of multilateral aid projects. In the case of a bilateral project the client country may be offered an indissoluble package: the aid will be made available for certain project components provided that another component is financed by an export credit. (Such types of "tied" aid are contrary to current UK policy, but are still favoured by some other countries). The recipient country may choose from a short list of the exporting country's manufacturers or contractors. In practice selection from this list may involve the solicitation or offer of a bribe, to be covered in the cost of that component. In a turnkey project the bribe may be costed to a large single component of a complex project which may in turn be supplied by a sub contractor (who will pay the bribe). In this case the export credit agency would find it very difficult to identify where the bribe is costed, still less to prevent it being paid.

(iv) In the case of projects funded by multilateral agencies there is less scope for export credits to be used in this way. However in the past the leading MFIs have generally welcomed export credits as a contributing source to the finance of large scale projects. The process has involved some negotiation with their member states who might have a capacity to supply a key project component. Where a member state has offered a contribution of this kind, albeit subject to a competitive bid from one of its own suppliers, it has frequently been accepted as a part of the project financing package. In such cases there has been significant scope for a particular supplier to arrange for a bribe to be paid to those awarding the tender.

(v) TI-UK welcomes recent changes to the ECGD's mission, and in particular the new emphasis on business principles. Provisions aimed specifically at bribery have just been introduced into proposals and application forms.

### ***1.a.3 Corruption and aid delivery via Non-Governmental Organisations (NGOs)***

(i) As an alternative strategy to working with governments or establishing direct management, donor agencies have, over the past thirty years, channelled an increasing proportion of aid flows via NGOs. The latter now account for more than ten per cent of all aid flows and donor agencies provide significant proportions of this. ODA and DFID have been at the forefront of this process, since the Joint Funding Scheme (by which the Department matches private contributions to NGOs) has been in operation since the late 1960s. More recently a pattern has emerged in the distribution of aid for famine relief by which UK-based NGOs may effectively act as agents for the distribution of food and other supplies. Both of these situations raise significant questions in relation to corruption.

(ii) Larger-scale NGOs based in the UK and elsewhere operate in recipient countries either through their own in-country management teams or through locally constituted NGOs, or a combination of the two. Where programmes are managed directly, or through a local affiliate which is effectively a subsidiary, NGOs run the normal risks of the failure of internal integrity systems.

(iii) Where they are working through local NGOs the problems are more severe since in many developing countries there is now a multiplicity of local NGOs, a significant number of which have been established primarily in order to access funding - both from bilateral donors and international NGOs. Assessing the financial and management capacity of such NGOs is not an easy task, especially where the positive charisma of a leader plays an important part in establishing the case for support. Where such NGOs are membership-based organisations the critical issues concentrate around the role of the leadership vis a vis the membership, and the extent to which the organisation is generating financial benefits to Board and staff members. In spite of the undeniably genuine motivations of the great majority, even church-based NGOs are not immune to this problem. In fact, because of their presumed altruistic motivations, they are less likely to have tried and tested integrity systems in place. The Bishop of Busoga Trust in eastern Uganda developed an integrated rural development programme in the 1980s which was subject to exposure in the Ugandan press in the early 1990s on the grounds of serious internal corruption.

(iv) As a result of problems of this type a number of international NGOs are now recognising the need for a form of compact with local NGOs in which both parties agree to a formal commitment to accountability, which may be mutually reinforcing. In 1997 the NGO movement in Zimbabwe organised a workshop on this topic; PACT has done good work in developing a best practice manual for NGOs; Christian Aid in the UK recently circulated a draft paper with a view to further developing its own principles in relation to the more than three hundred

NGOs with which it works internationally. However, it is clear that the temptations to corruption within local NGOs remain a threat to the effective delivery of their services, and to the cost effective expenditure of the money which they raise.

(v) Food aid and famine relief take many forms. There are schemes for input to commercial millers as a means of generating both flour and meal to the urban market. There is local currency support to rural communities, as pioneered by USAID under PL480 arrangements. The latter is more specifically concerned with direct relief of famine. Two key points occur in relation to both these operations: first, they face demands at customs posts and at port authorities for bribes in order to unload both routine and emergency supplies, which may or may not be resisted. Second, in areas where there is a degree of civil conflict the transport of supplies may be subject to financial extortion applied by one of the parties, which may have to be met if food supplies are to be delivered at all. A more general expression of this problem is that in some conflict situations the availability of famine relief may prolong the conflict. A key example of this is southern Sudan where a significant part of famine relief provided over more than fifteen years has been co-opted by the armed forces of the SPLA and its splinter groups, or by the Sudanese army, thus renewing the capacity of both parties to pursue the conflict. Similar dilemmas face or have faced the famine relief programmes in Sierra Leone and Angola.

(vi) It may be argued that NGOs engaged in famine relief need to be more open about these questions, and to recognise in public that a significant part of their supplies may be misused in response to extortion at the point of a gun. This may prove disturbing to the giving public, but should also add support to the efforts of the NGOs by increasing the weight of public opinion to do something effective against corruption in the relief processes.

## **1.b The public and private sectors in developing countries**

### ***1.b.1 The public sector***

#### ***1.b.1.1 Some history of public sector corruption in the developed world***

(i) Corruption in any society is clearly a dynamic phenomenon - either increasing or decreasing over time. Historical assessments would concur that corruption was a major phenomenon in eighteenth century England, but was on the decrease by the mid nineteenth century. The fact that the first legislation to criminalise the bribery of a public official was passed in 1889 confirms that by the end of the nineteenth century an anti-corruption ethos was in place which was strong enough to lead to specific legislation. In the US a comparable process was at work taking American society from the open municipal corruption of the mid to late nineteenth century to the tough legislation of the early to mid twentieth century. Italy provides a further example of the fact that corruption is never a stable phenomenon. The political situation in Italy after World War II was one in which the Christian Democratic Party was able to dominate party politics and developed an increasingly effective but complex

system of political and financial pay-offs which was eventually characterised as Tangentopoli (Bribesville). Not surprisingly there was eventually a reaction to this embodied in the Manu Polite (Clean Hands) campaign led by De Pietro which by 1996 had brought charges against 4,500 senior figures in Italian political life, including two former Prime Ministers (Andreotti and Berlusconi). Certain forms of corruption in Italian political life will certainly now be constrained as a result of these processes.

(ii) Formal analyses of the history of corruption over distant and more recent centuries do not really explain why these changes occur but recognise that they are linked to value changes in society which themselves may be linked to public outcry against a series of specific events. The introduction of the Foreign Corrupt Practices Act (FCPA) in the USA fits into this category since it had been preceded in the period from 1975-7 by a series of scandals linked to international bribery of which the Lockheed payments to Prime Minister Tanaka of Japan and Prince Bernhard of the Netherlands were the most conspicuous. However in the course of the Senate hearings which led up to the FCPA more than 30 US multinational companies tabled detailed information on the quantum of specific bribes which they had paid overseas in the preceding five years. Public opinion clearly felt, or was persuaded to feel, that it was time to establish new parameters of corporate behaviour in this regard. The hearings in 2000 in the Bundestag in relation to ex Chancellor Kohl and the manipulation of payments to the CDU may form a comparable phenomenon.

#### *1.b.1.2 The developing world*

(i) In the developing world the debate about corruption has likewise never been static. A good part of the justification for the communist revolution in China emanated from a reaction against the corruption of the regime of Chiang Kai Shek and its failure to eradicate corrupt practices at regional and local level which emanated from the previous imperial regime. The communist regime has maintained a nominal anti-corruption stance: in the early 90s the Ministry of Supervision received more than half a million complaints per year about corruption, of which 20,000 led to convictions.

(ii) In India corruption has never ceased to be an issue, both before and since independence. The series of events surrounding the Bofors case confirmed that armaments transactions were being used both by the Congress Party, and almost certainly by members of the Ghandi family, to attract bribes for both public and private purposes. At state level the rise and fall of political leaders is certainly partly linked to the public perception of their position on corruption.

(iii) In Latin America key political events in Argentina, Brazil, Venezuela and Mexico have been linked to corruption over the last ten years. In Brazil, Color di Mello was forced out of office for corruption-related reasons in 1996; in the same year Carlos Peres was indicted by the Venezuelan Congress and obliged to resign; in Mexico the money laundering scandals surrounding President Salinas and his brother in the late 1980s have led to the demise of the PRI.

(iv) The pattern of corruption in both central and eastern Europe, the countries of central Asia and nearly all of Africa is even more serious than in these cases. Whilst it does not follow that the poorest countries are the most corrupt it is true that many of the worlds poorest people live in very corrupt countries.

### 1.b.1.3 Categories and Causes

(i) Whilst it is very difficult to quantify the extent of corruption, there is a degree of consensus about the mechanisms which underlie the contemporary phenomenon. A useful approach to the phenomenon divides it into petty and grand corruption, with an increasing recognition of the links between the two. Grand corruption is used to describe large scale deals involving senior public officials and companies trading or investing on an international basis. Some of the key mechanisms surrounding this have been very fully described in George Moody-Stuart's book *Grand Corruption*. Petty corruption describes facilitation or grease payments sought and obtained by junior officials who are actually or ostensibly rendering a service to the public. In some cases these payments are made for the provision of a service which should be a free public good; in others they are for a largely fictitious service or relate to imaginary offences (as at many an army or police roadblock).

(ii) There is little doubt that grand corruption is occasioned largely by the greed of those who are already well off by local, and often by international, standards. The objective of the corrupt act is to make the key individuals even more wealthy and thus more powerful. This is true whether the corrupt act finances a political party or the individuals concerned (or both, as may often be the case). In the case of petty corruption the motivation is more frequently that of survival in societies where individual civil servants and others receive extremely low pay. Obviously there is a grey area between these two contrasting cases - notably of middle level officials who may have expectations about, say, the education of their children which prove increasingly unrealistic as real incomes fall or fail to rise.

(iii) A more complex point, however, is that there are often links between the two forms of corruption which may feed on each other. For example, in a police force, roadblocks and other forms of relatively minor harassment may be conducted at street level by a group of police constables. The participating constables pass a good part of their takings to their senior officer, who in turn passes a slice to his own senior, and so on up to the Chief of Police. The latter may have some arrangement with the Minister of Home Affairs who turns a blind eye to this in view of other deals in which the Chief of Police participates. In this case only a minority of the police force are participating; the links between the participants may be based mainly on ethnic lines and a common need to reinforce each others position. Such a minority-based system does not have to exclude a separate system being operated by an alternative network with a different ethnic base. In this case the link between petty and grand corruption is fairly close since middle and junior ranks of the police force may be allowed to

indulge in petty corruption whilst the most senior ranks take a slice of these proceeds and are party to a major deal orchestrated by a Minister.

#### *1.b.1.4 Significance of the cabal*

(i) This schema also provides a guide to the mechanism underlying various types of grand corruption. In most such cases there is a small cabal of individuals who are strategically placed in key government departments or agencies to ensure that a deal can be completed. In, say, the purchase of an armaments system where a big bribe is to be paid to the Minister of Defence the latter will have ensured that some combination of the central bank, customs and excise, his own Ministry and perhaps a well placed individual in the Ministry of Foreign Affairs are cut in on the deal. Whilst the Goldenberg case in Kenya did not involve the receipt of a bribe from overseas, evidence now in the public domain suggests that such a cabal existed, and was led by the then Minister of Finance (now Vice President) George Saitoti. The significance of this for an analysis of corruption is that in a cabal the individual who may be regarded as the potential bribee is actually part of a network with a vested interest in the project.

(ii) In Tanzania in 1994 elements within the Government of the then President Mwinyi were actively pursuing the possibility of the purchase of a £100 million civil and military radar system from Siemens Plessey of the UK to protect Tanzania air space. This was to be funded by Bankers Trust from London whose security would rest in a contract for the forward sale for ten years of gold purchased by the Central Bank of Tanzania at an agreed price. The deal was strongly resisted by the Governor of the Bank of Tanzania, eventually subjected to intense media scrutiny and to intense negative pressure from the Paris Club of donors at its 1995 meeting. Although it was eventually killed, or radically scaled down, members of TI-Tanzania observing the deal noted that the cabal promoting it remained active in its pursuance well after the new Government of President Mkapa came to power in late 1995. Amongst other factors it was the failure of that cabal to co-opt the Governor of the Central Bank which negated the deal.

#### *1.b.1.5 Privatisation*

(i) The process of privatisation which has occurred in the majority of developing and transition economies in the past ten years has provided important opportunities for corrupt deals based on insider cabals of this kind. There are many examples of individuals close to para-statal under privatisation being an integral party to the privatisation deal. The role of the oligarchs, such as Berezovsky in Russian privatisation has been widely recorded, with personal gain a more important consideration than the potential gain to state revenues.

(ii) On a much smaller scale the Parliamentary Accounts Committee in Uganda published a report in 1999 indicating that the total net proceeds to the State from privatisation were close to zero. Underlying this failure of the privatisation process is the effective rigging of the sale by collusion between members of the

tender board reviewing bids and either one of the bidding companies or the former management team of the para-statal in question. Sometimes the bidders may have links with the Head of State which are strong enough to negate the Board altogether. Thus in Zimbabwe, in 1996, the national power supply agency (ZESCO) was relieved by President Mugabe of the responsibility for awarding the privatisation contract for Hwange Power Station when a consortium including the Malaysian company YTL (which was in a joint venture with Siemens) was not selected.

#### *1.b.1.6 Grand corruption is not always linked to aid (at least not directly!)*

As the above examples show, grand corruption, even in very poor countries, is not necessarily directly linked to aid flows. In many cases, however, there is corruption associated with conditionalities of aid. An insistence on privatisation is one such. In other cases the process may be entirely domestic (as with Goldenberg); in yet others it may be facilitated by export credits or commercial banks (as has been alleged in the case of the Bank of New York personnel facing criminal charges for money laundering in London from Russia in 1999). It is likely that such cases are at least as common as those in which corruption can be directly attributed to aid flows.

### ***1.b.2 The private sector***

The domestic private sector in the majority of developing and transition economies has existed in symbiotic relationship with the role which governments have adopted, as partly described above. In the minority of cases where governments have taken a strong anti-corruption stance (such as Hong Kong, Singapore, Botswana) the private sector has responded by adapting itself to this stance. However, in the majority of cases it has responded to the perceived need to interact with the culture generated by key players in the Government. The ways in which multinational companies (MNCs) have interacted with this position are discussed in section 1.d below.

#### *1.b.2.1 Import permits and tariffs*

(i) Perhaps the most important single source of corruption in the domestic private sector, where this is taken to be medium sized manufacturing and distribution businesses, has been its interface with import licensing and the tariff structure. The most extreme example of this problem is certainly Nigeria where since independence the allocation of import licences has been an almost entirely corrupt auction based on who could pay most to the Ministers of Trade, Finance, Energy and Agriculture to provide authorisation for imports. Since the manufacturing and agri-business sectors (e.g. Fertiliser and feed mill inputs) in Nigeria have been highly import-dependant the country has provided a particularly dramatic example of the consequences of this auction approach.

(ii) This pattern of corruption being closely linked to import permits and tariff concessions has been particularly characteristic of West Africa and consistent across linguistic and cultural norms from Liberia to Ghana to Cameroun. The pattern has made nonsense of strategic decisions taken to afford a degree of protection to new infant industries, which might find overnight that their protected niche was henceforth to be undermined by the direct import of the their product.

(iii) However, west Africa is far from alone in this respect. The sugar industry in Kenya had been relatively successful since the first major estate at Mumias was developed in the mid 1960s. However in the course of the 1990s the viability of the five major estates, including the very successful Mumias, has been almost entirely undermined by sugar imports made by special Presidential authority and allocated to local distributors who are known to be major contributors to political funds controlled by the President. In 1996 the first casualty of the anti-corruption stance of President Mkapas new Government in Tanzania was Prof. Samuel Mbilyini, the newly appointed (and highly rated) Minister of Finance, who was found to have awarded a major import license for vegetable oil to two importers on the basis of a zero tariff. He was obliged to resign as a result of this case.

#### *1.b.2.2 Other licenses and arbitrary payments*

The allocation of other types of licences tends to follow this pattern and to extend to much smaller businesses. A recent study in Tanzania found that SMEs had to acquire 17 licences before they could operate, and that an integral part of this process was the prepayment of a year's income tax on their putative and projected turnover. Whilst in principle the Ministries of Trade and Finance could rationalise such licences in the course of one budget there is in fact a strong vested interest in their maintenance, particularly at local Government level. In many countries both larger private businesses and successful SMEs are obliged to make arbitrary payments to both income tax personnel and in some cases to the funds of the ruling political party. The strategy of imposing arbitrary assessments for income tax is based on the perception that many businesses will find it easier to pay up than to pursue an appeal; only part of the funds collected in this way will reach the Revenue Authority.

#### *1.b.2.3 Politically-based holding companies*

(i) Another aspect of corruption in the domestic private sector lies in the ownership of share capital in larger local companies. There is a history, extending over several decades, of companies being owned by the political party dominant in a one party state in order to generate funds for that party. Thus the Press Holding Company in Malawi, which developed in the era of President Banda and eventually controlled a significant part of the modern corporate sector, was essentially a mechanism for generating funds for the Malawi Congress Party.

(ii) In other cases such private companies are in practice owned indirectly by those very close to the Head of State. We have shown above that the process of privatisation has frequently enabled a cabal of 'insiders' to purchase formerly state owned businesses. An analysis published in Kenya in 1998 of companies controlled by President Moi and his closest associates indicated that these totalled four hundred firms. This figure has not been seriously disputed by those close to State House. Sometimes the complications arising from such arrangements are even more dramatic. In 1998, at a time when the world was being asked by the OAU to impose economic sanctions on Burundi as part of ex-President's Nyerere's peace building initiatives three senior politicians in office in three different East African countries established a sanctions-busting private transport company in which they are the main equity holders. In Angola, since the breakdown of the UN-brokered peace agreement in 1997, the purchase of arms for the government has been largely handled by SIMPORTEX, a company reported to be controlled by very close associates of President Dos Santos.

#### *1.b.2.4 A common theme - in all sectors*

The themes traced here (import licensing and tariff exemptions, business taxation and licensing, and the 'real' ownership of larger ostensibly private companies) may appear to be highly disparate. In fact, there is a common thread which fits well with TI's preferred definition of corruption: "*the misuse of public power for private gain.*" The underlying question is the perception of the responsibilities of public office, especially in small and vulnerable economies where the misallocation of resources controlled directly or indirectly by the State has a very high cost to the public.

### **1.c Government activity**

This topic has been largely covered under 'Public sector' in 1(b) above, but there are several additional points worthy of including here:

#### *1.c.1 Budget processes and misdirected revenues*

(i) In the case of a number of countries the existence of special accounts into which revenue is paid and never publicly declared has seriously undermined the budgetary process. This is a particularly acute problem in oil exporting countries where a small number of producers generate most of the revenue, a proportion of which is transferred to the state or its agents through revenue sharing agreements. Cameroun, Nigeria and Angola all provide examples of this. President Ahidjo of Cameroun established the special oil account when Cameroun's oil was first developed in the late 1960s. It remained completely off the budget and figures for its income and expenditure were inaccessible to both the Camerounian and international public. Inter alia it assisted in financing a complete Presidential village in the home area of the Beti, President Biya's ethnic group, in which there is a separate mansion for each of the (20) Cabinet

members. As a result of intense pressure from the IMF, and as part of conditionalities associated with a resumption of IMF lending in 1998, the special account was finally abolished in that year.

(ii) In Nigeria oil revenue flows accruing to Government have been handled by the Nigerian National Petroleum Company (NNPC). Its accounts have likewise not been published and it has certainly contributed to the massive fortunes attributable to former Presidents Bushari, Babangida and Abacha. The government of President Obasanjo is currently seeking the repatriation of \$5 bn from the Abacha family, a significant part of which has been gleaned from this account.

(iii) In Angola payments made to companies such as SIMPORTEX are the principal source of finance for the arms purchased to pursue the war against armed UNITA rebels who refuse to accept the results of a democratic election - in itself a legitimate process. However, the fact that these purchases are *not made through the state budget* but via SIMPORTEX, effectively controlled by close associates of President Dos Santos, is a glaring illustration of the scope for corruption offered by such special accounts [see para 1.b.2.3(ii)].

### ***1.c.2 Customs and Excise***

The administration of customs and excise is particularly prone to corruption in many countries. In smaller economies where the yield of corporation and income tax, even when collected, is projected to be less than that of import duty this is a particularly serious problem. The first individual to contact TI from Tanzania was in fact a retired Director of Customs who wrote that, "I no longer recognised the country in which I live." He had found the problem of corruption in his service to be very difficult to handle. Certainly the process of corruption within customs has been triggered by corrupt arrangements instigated by senior political leaders, including the individual tariff concessions which have been mentioned above. It is, however, a characteristic of many customs services, and another area where petty and grand corruption converge and 'facilitation payments' are commonplace. The experience of Crown Agents in reforming the customs administration in Mozambique provides very useful guidelines as to what may be done in this context.

### ***1.c.3 Defence***

(i) In nearly all countries defence procurement remains a relatively obscure process. A former Vice Chairman of the U.S. Joint Chiefs of Staff, Admiral Bill Owens, has recently published a book displaying the irrationality of procurement decisions made by the latter which states that the Joint Chiefs lacked the power to impose rational standards on the procurement decisions made by the services. In other national contexts, where corruption is widespread, it is not surprising that the dysfunctional nature of the procurement process is dramatically increased by the prevalence of bribery. The arms sector has been notoriously prone to corruption since its development as a large scale industry in the later

nineteenth century. Sir Basil Zaharoff was Vickers most effective export salesman at the turn of the century and firm evidence indicates that he was used to posting commissions to purchasers of at least ten per cent of the value of the sale. The Bofors case in India in the later 1980s is a model example of the ways in which large scale deals in the sector are often completed. TI's 'Active Bribery Index', published in 1999 found that the armaments industry was second only to construction in its propensity to pay bribes.

(ii) The implications of this process for small economies are huge, since individual items of equipment may cost as much as the budget of the Ministry of Health (or more) in any one year. In the current wars which are characteristic of some of the conflicts in Africa, or in Afghanistan, the cost of individual items may be less, but the total cost is high and procurement processes are equally prone to corruption, not least where sanctions are in place (as in Angola). The financial arrangements surrounding these purchases are complex and may well be funded off the budget through devices such as the special accounts discussed above, or through back-to-back equipment purchases made through the exporter of a high value product.

(iii) The pattern of sales of this kind is becoming more complex as new national suppliers enter the market, or as existing non OECD arms exporters expand. Thus both Belorussia and Ukraine have emerged as important arms exporters on their own account, and both China and South Africa have expanded their existing positions. Uganda bought four large-scale troop-carrying helicopters from Belorussia in a highly controversial deal arranged in 1998 by President Museveni's brother Salim Saleh, then Defence chief. South Africa has expanded sales by its arms industry both within Africa and to Iran, at the same time completing a large scale arms purchase from EU sources with a total value of £3 billion. The latter has proved highly controversial in the South African press and may attract a judicial inquiry.

(iv) However, while such exporters are increasingly important, by far the largest proportion of the \$20-30 billion per annum international arms trade is carried out by the traditional major exporters of the US, UK, France and Russia. Some of the practices associated with such exports have been briefly described above. The nature of such deals is clear from a review of the cases brought against US companies by the Department of Justice since the introduction of the Foreign Corrupt Practices Act in 1977. Many of the most important cases occurred within the defence industry, and have involved complex arrangements with middle men.

(v) It is rare to find details in the public domain in the United Kingdom regarding the terms of agency deals in the armaments industry. Although the action is understood to be strenuously defended, a writ issued at the end of 1997 in the High Court in London (1997 A No. 1828) may possibly, however, give something of a glimpse into this world. Aerospace Engineering Design Corporation, a company incorporated in Panama, but reported to have links with Saudi interests, sued Rolls Royce plc for alleged failure to pay commissions at contract rates on the sale of aero-engines to the Royal Saudi Air Force. The writ

refers to commissions at a rate of 15% up to certain base prices and of 100 per cent on prices above base. It states that the defendant had paid at a rate of only 8% on the whole price.

(vi) The removal of very high commissions as a factor driving the international arms market would be an invaluable contribution to developing greater integrity in world trade.

#### ***1.c.4 Drug dealing***

(i) The international trade in illicit drugs is a more valuable global business, in financial terms, than any other except tobacco. The trade is controlled by several international networks focused on particular markets, although there are strong links between these. The role which drugs play in determining the civil war(s) in Colombia is widely recognised and has triggered a number of major US initiatives largely designed to reduce the value of drugs imported into the US itself. Likewise the role which the 'golden triangle' plays in supplying cocaine to international markets is also well established. Both the UN agency, UNICE, and Interpol devote a great deal of energy to attempting to curb this trade.

(ii) However, the trade is a key source of revenue to some groups within various countries in the south, extending beyond those named above. The distribution system is also frequently controlled by groups operating from the south; Nigeria is regarded by both Interpol and H.M. Customs as the key original domicile of many of the most effective distribution gangs. These gangs now operate systems which are as far afield geographically as the US and the Czech Republic. Speaking in little known dialects of the Niger delta the gangs are able to avoid police detection on a wide front.

(iii) The drugs trade is an increasingly potent force particularly in southern Africa where the South African market has attracted considerable flows of cocaine and xxx from south east Asia. The South African market is partly an entrepot for forward distribution to Europe. A significant part of this material is channelled through East Africa, with Zanzibar playing a role in this process. Thus, when official donors withdrew their aid to Zanzibar following the rigged elections in 1995 the volume of the trade increased, with individuals close to Government taking a significant cut. This is a small but interesting case for the debate about the case for cutting off aid where corruption is rife. The net effect of the suspension of aid has been to increase the extent to which political leaders have resorted to abetting a criminal activity in order to strengthen their financial position. This in turn, has fuelled the growing tension in South Africa surrounding the drugs trade which has led to the emergence of the PRAHAD vigilante groups in Cape Town.

#### 1.d The dealings of transnational corporations and developed world companies in developing countries

(i) There can be little doubt that some multinational corporations (MNCs) have contributed to corruption in some developing countries over the past fifty years, and not least in the 1990s. The context in which this has taken place and the pressures which companies have faced have often been very similar to those described as relevant to domestic companies in 1(b). The extent to which US companies were bribing before the FCPA was introduced has also been noted. MNCs from other parts of the developed world have never been induced to declare the bribes they have paid on a comparable basis. It has been a common assertion of UK-based companies that companies originating from other OECD states are far worse culprits and that they are only responding to commercial necessity. This argument has been redoubled in the light of the growing role of companies from Asia (especially Malaysia, China, Indonesia and India) who are described as having an even higher propensity to bribe than the UK's traditional EU-based competitors.

(ii) In 1999, for the first time, TI was able to test the assertion of the proclivity of companies from different parts of the world to bribe in its 'Bribe Payers' Index'. This was carried out by Gallup in 13 larger 'emerging market' economies and surveyed the behaviour of companies from 19 larger exporting countries, including relevant exporters from Asia. The survey was based on interviews with 750 senior personnel in both government and the private sector in the 13 economies. It found the following ranking of the propensity to pay bribes (scores out of 10 with a zero propensity of 10):

Rank	Country	Score
1	China	3.1
2	South Korea	3.4
3	Taiwan	3.5
4	Italy	3.7
5	Malaysia	3.9
6	Japan	5.1
7	France	5.2
8	Spain	5.3
9	Singapore	5.7
10	USA	6.2
10	Germany	6.2
12	Belgium	6.8
13	UK	7.2
14	Netherlands	7.4
15	Switzerland	7.7
16	Austria	7.8
17	Canada	8.1
17	Australia	8.1
19	Sweden	8.3

(iii) The methodology and the findings of this survey have not been seriously questioned or disputed, and it may be taken as a fair assessment of the current situation. It clearly identifies the UK as a country with a lower propensity to pay bribes than some key competitors, but still as one whose behaviour is more or less in line with a group of larger OECD member states, in most of which, excluding the USA but including the UK, at the time of the survey it was not illegal to bribe a foreign public official provided that the bribe mechanism was "properly organised."

(iv) Two other sources appear to confirm the role of some UK companies in this regard. The case being brought by the Government of Lesotho in the High Court in Maseru indicts a long list of international contractors and consultants for bribing the Project Manager, Masupha Ephraim Sole, over the period 1992-6 to a total of \$3M in relation to the Lesotho Highlands Water Project (LHWP) (see 1.a.1.4 above). The LHWP has been financed by a consortium of financiers including the World Bank. Of those indicted at least one is specifically British (Alexander Gibb and Partners) and one of the two French companies has a UK connection through a substantial shareholding. All have pleaded not guilty, but the indictment cites evidence provided by the Swiss Banks of payments made by all the defendant companies into the Swiss Bank account of Sole. The World Bank has stated that it will consider the debarment of the companies in question from bidding for future World Bank contracts if they are found guilty.

(v) A second source relates to debarment procedures already executed by both the Government of Singapore and the World Bank. In the mid-1990s the Government of Singapore debarred five MNCs, including major UK, German and Japanese companies, from bidding for five years on power contracts in Singapore since a separate case had found that an agent close to the power authority had supplied information in return for a bribe to each of the companies.

(vi) In the case of World Bank debarment procedures it is very disquieting to note that of 52 companies to be debarred for fraud and corruption, the addresses listed for 38 were in the United Kingdom. The predominance of UK companies on the World Bank list, the inclusion of a British MNC in the Singaporean case, and the identity of the defendants in the Lesotho case, although still subject to trial outcome, tends to suggest that some UK businesses continue to indulge in the practice of securing international contracts by bribery. This is also confirmed by recent World Bank research, although the UK does not show up as by any means the worst offender amongst developed nations.

(vii) Some UK based MNCs have expressed very active concern on the issue and have taken steps to terminate or avoid the practice. This is in line with the position adopted by the International Chamber of Commerce (ICC) as reflected in its *Rules of Conduct on Extortion and Bribery in International Business Transactions*. In the UK, Shell and BP-Amoco are amongst the leaders in this regard, the former having in 1999 produced a staff manual entitled '*Fighting Bribery*.' BP also has had a strict policy of complying with the FCPA. However, the question of compliance becomes more difficult in the context of subsidiary companies and particularly of joint ventures.

## 2 The impact of corruption on development

(i) There has long been a school of thought which has argued that corruption is compatible with development since it is one of several means of capital accumulation, and such capital will be invested in ways which increase GDP and ultimately 'trickle down' to the lower income strata of the community. This argument has fewer supporters than twenty years ago for several reasons. These include the fact that

- ◆ few very corrupt countries as, say, measured in TI's Corruption Perception Index (CPI), are achieving significant rates of growth (3 to 4% or more) over sustained periods;
- ◆ the exceptions to this, largely concentrated in south east Asia, suffered a major setback in 1997/98 which was at least partly attributable to various forms of corruption;
- ◆ whilst in Asia much of the capital accumulated in this way is invested in the domestic economy, in Africa a high proportion is exported; and
- ◆ the trickle down effect is conspicuously absent from most countries where corruption is endemic. (A few oil exporting states might be regarded as the exception to this).

(ii) Nonetheless it is true that corruption of a certain type is compatible with development at least for a number of years. Two Harvard economists, Schleifer and Vishny, have argued that corruption is 'sustainable' where the going rate for commissions is known and is modest in relation to the capital cost of projects, where commissions do not greatly distort project costs, and where they are paid to a recognised and discrete entity - whether Presidential family or political party. They have suggested that Russia under Brezhnev and Indonesia in the earlier years of Suharto fall into this category. However, in both these cases there proved to be political and economic costs which were not sustainable.

### 2.a The impact of corruption on provision of services to poor people

(i) Regardless of the fact that some forms of corruption may be compatible with growth for limited periods, the question of the incompatibility of corruption with the provision of adequate services to the poor is hardly contestable. We have discussed above the effects which corruption has on the collection and allocation of government revenue, on the development of public policy and on the interface between service providers and the public. The distortion in government policy shaped by corruption minimises the extent to which senior civil servants are really motivated to ensure that services to low income groups are operational. At the level of service delivery the picture becomes very bleak. A surprising amount is known about just how bleak the picture is as a result of some work undertaken in Bangalore which has systematically surveyed low and very low income groups over the past ten years with a view to establishing how much an individual member of the public has to pay in the form of a bribe to secure a public service. The national chapters of TI in several countries, notably in

Bangladesh and Tanzania, have followed this example and produced valuable material on the topic.

(ii) The Bangladesh survey, based on a sample of 2500 households (both rural and urban) found that:

- ◆ 96 % of those surveyed agreed that it was impossible to get help from the police with out money or influence;
- ◆ 63% of households involved in court cases had to bribe court officials for the case to be heard (28% of these bribes were paid through lawyers);
- ◆ nearly 90% thought that it was impossible to get quick and fair judgement from a court without money or influence;
- ◆ over 40% found it necessary to make a special payment to school staff to obtain admission for their children; an additional 34% used an 'extra-regular' method to obtain admission;
- ◆ 70% agreed that unethical practices, involving some form of payment, were necessary to obtain admission to hospital and over 80% found this true when the patient was seeking treatment whilst in the hospital;
- ◆ about 33% of households paid money for electricity connections and accessories;
- ◆ 30% of households paid a bribe to the meter reader to reduce consumption assessments;
- ◆ about 65% of urban households found that it was almost impossible to get a trade license without money or influence.

(iii) These points relate to the provision of 'basic services' some of which may be regarded as primarily urban (although survey responses are divided between urban and rural). However, the allocation of land titles and bank credit, both of prime relevance to rural households, is similarly skewed. Seventy one per cent of rural households considered that it is 'impossible to register land without money or influence'. In the case of credit only 75% of those receiving loans received the amount which had been sanctioned, the remainder having been intercepted by bank officials before reaching them, though failure to repay the full amount led to confiscation of assets in 55% of cases.

(iv) The authors of the survey concluded that 'Bangladesh is suffering from endemic and chronic corruption and it has infested every nook and cranny of society'. The survey results from Tanzania were remarkably similar, and concur with the very extensive verbal evidence given to the Warioba Commission in each of Tanzania's fifty Districts. In contexts where this culture of corruption is endemic many, if not most, of the poor are excluded from the basic services of health, education and energy which may be regarded as the key building blocks of human development.

## **2.b Domestic sector private development (e.g. commercial banking and power development).**

(i) In 1(a) above we discussed some of the distortions in private sector development, especially of locally owned large and smaller scale businesses, which arise from widespread corruption. Here we will provide an additional comment on the banking sector and on power development.

(ii) In both south east Asia and many parts of Africa the 1990s have seen the collapse of a number of key commercial banks which have had actual or effective ties to the state. Thus in Indonesia it became clear in the course of 1997-8 that the large scale commercial banks were heavily overstretched in the finance which they provided to members of President Suharto's extended family and other close associates. These banks had in turn been heavily dependent on short term inflows from international banks; when these were withdrawn, the vulnerability of the local banks to their dubious portfolio became very clear, creating a major liquidity crisis.

(iii) In Cameroun, the 'liberalisation' programme of the late 1980s created a strong interest among international commercial banks in establishing a presence in Cameroun, and at least four banks did so. In fact the culture of non-repayment of loans, established over the previous twenty years, proved to be so deep that all of these have closed. Credit to the agricultural sector had been particularly prone to corruption during previous years and in order to re-establish effective agricultural credit systems a new Credit Agricole was established in the early 90s managed by an international team funded by GTZ, the main German technical assistance agency. Within five years, this too had closed. The combination of internal fraud, severe problems in project execution, and the culture of non-repayment proved decisive.

## **2.c The ability of developing countries to attract foreign direct investment (FDI)**

(i) What aspects of corruption are relevant to FDI ? A key aspect of transnational corruption is its role in relation to large scale investments in new projects or in privatisations. Whilst these investments may in principle occur in any sector they are particularly associated with, for example, power generation, telecommunications and defence. In the case of large scale projects the mechanism at work has been very well described by George Moody-Stuart, former chairman of TI-UK, whose book 'Grand Corruption' is perhaps the clearest description in print of this process, at least in relation to countries of the 'south'. The costs involved in the process of Grand Corruption are those derived from its nature. The need to provide large commissions, which may involve up to twenty five per cent or more of the cost of a project, to senior figures (either directly or through agents) tends to cause a serious and unjustified increase in project costs, a consequent increase in external debt (if there is an element of external finance - e.g. through export credits or multilateral or foreign banks), and may lead to capital flight or diversion of the commission to offshore financial

centres. Overall the rate of return to shareholders is lower than it would otherwise be, and the cost of the product to customers higher.

(ii) Furthermore, the manner in which the corrupt payments are arranged will frequently lead to surplus purchases, skewed specifications, substandard performance, and even unnecessary facilities constructed solely as a means acquiring commissions.

(iii) There is growing evidence that international investors build in an aversion to corruption in their calculations of where to place investment. If an investor knows that he can only develop a project - with or without a joint venture partner - on the basis that he will have to make a significant payoff, this is increasingly likely to dissuade him or her. If the investor is aware that not one but a series of payments - perhaps stretching over several years - will be necessary the level of dissuasion will be even greater. If these payments may have to be made to a series of currently unidentified people with influence over the outcome of the investment the negative signals may be decisive. Of course these factors may be offset if the national market in question is very large or medium scale but growing very fast.

(iv) A specific but related issue for investors is the question of dealing with bureaucracy which can cost both time and money. Daniel Kaufman at the World Bank has produced a set of data which shows a consistent relationship between an economy in which there are a large number of bureaucratic regulations and a high level of corruption (as measured by the TI Index); and also a close relationship between a high level of corruption and the amount of time which corporate management is obliged to spend with bureaucrats. Both of these analyses show how significant levels of corruption may act as a disincentive to FDI, when there is a choice of national location.

(v) Valuable related work on the broad impact of corruption on FDI has been published recently by Prof Shang Jin-Wei of Harvard University who has analysed the correlation between levels of FDI and a country's position on the TI Corruption Perception Index. He has found that as a country moves up the corruption perception index (i.e. becomes less corrupt) so it is likely to attract increasing quantities of FDI. Looking at the question from the investors' point of view he has equated a reduction in the level of corruption with a reduction in the rate of corporation tax. Thus he finds that if Mexico were to move up from its low position in the index (i.e. heavily prone to corruption) to the level of Singapore (in the ten 'least corrupt') its ability to attract foreign investment would increase as if it had reduced corporation tax by 20 per cent. One might question these findings on the grounds that China alone attracted \$40 billion in FDI in 1995, and is widely acknowledged to have a fairly high level of corruption (a score of less than three in the index). However, if the flows of FDI are shown on a per capita basis China attracted ten times less investment per head in 1995 than did Malaysia; and between 1994 and 1999 the Czech Republic received more than ten times as much FDI per capita as did Ukraine.

(vi) On a more empirical basis a survey was conducted by the UK NGO 'Worldaware' for the Commonwealth Secretariat and the Commonwealth Business Council in 1998. It was based on interviews with 38 UK based companies, each with significant trade or investment interests in Commonwealth Developing Countries. Respondents were asked to rank 22 factors in order of importance as obstacles to FDI. Corruption was ranked as the decisive constraint, ahead of political instability, inadequate infrastructure and problems of accessing foreign exchange. Whilst there are fifty developing (low or middle income) countries in the Commonwealth many receive virtually no new flows of FDI, including some, such as Kenya and Papua New Guinea, which in the past have received very significant flows. In fact flows have always been concentrated - in the early 1990s Malaysia and Nigeria together accounted for 75% of total flows to developing Commonwealth Countries. It is clear that corruption has been a major constraint on FDI in the recent past for which many countries are paying a high price given that formal aid flows now account for only about 15% of all flows to developing countries.

(vii) There is no doubt that a really valuable natural resource base, or a country with very high tourist potential, can overcome investors reluctance to commit funds. However in these cases the expected rate of return has to be exceptionally high: investment in the Tanzanian mining industry over the last three years has fulfilled these conditions because the costs of exploitation and the extent of the resource (particularly of gold) are expected to justify it. Investment in China fits into a special category of investment in a massive market, which is again large enough to offset the undoubted costs of corruption in that economy. However, as the World Bank Development Report for 1997 noted: 'No matter how high the degree of predictability of corruption in a country, its rate of investment would be significantly higher were there less corruption'.

## **2.d The distortion of decision making by developing country governments as a result of corruption.**

This has been largely covered under in 1(b) and (c) above. There is, however, another aspect of corruption which has begun recently to attract serious research attention - labelled "State Capture" - in which companies (either indigenous or foreign) go beyond the corruption of purchasing decisions and procurement processes to the "capture" of the legislative and regulatory process itself, bending the creation of laws and regulations to their own interest. World Bank researchers, in particular, are now looking at this closely.

### 3 Measures to combat corruption

#### 3.a The provision of support for the development of appropriate legislation and judicial capacity to deal with cases of corruption and effective anti-corruption commissions in developing countries.

(i) Assistance through aid mechanisms can only be effective when it is actively sought by the Government in question and is not simply a response to donor pressure for governance programmes. Additional conditions for the development of appropriate legislation are a willingness to confront difficult questions such as the reverse onus of proof which places the burden of proof on the defendant. The effectiveness of **Anti Corruption Bureaux** (ACBs) very much depends on:

- ◆ committed political backing at the highest levels of government;
- ◆ political and operational independence to investigate even the highest levels of government;
- ◆ adequate powers of access to documentation and to question witnesses;
- ◆ leadership which is perceived to be of very high integrity.

(ii) It is fairly self evident that without backing from the highest levels of government an ACB cannot be expected to make much progress. In Kenya at the present time the new ACB, brought into being by the anti-corruption legislation of 1999 is considered by many Kenyans to be basically flawed in that it shows no sign of tackling the largest of all Kenyan scandals - the Goldenberg case discussed above. The question of adequate powers to access documentation and the questioning of witnesses may seem an obvious provision, but in Zimbabwe the Anti Corruption Act specifically excludes investigation of the President's Office or of the army. Operational independence may seem an obvious condition for success, but in South Africa the Special Investigating Unit established under Judge Willem Heath must seek the State President's permission before proceeding to investigate any case.

(iii) Where an alternative strategy of involving the public more directly has been adopted there has been conspicuous success, as in Hong Kong. In this case, an oversight committee (with participants from civil society and the private sector) must agree to closing an investigation file before this action can be taken. Perhaps even more importantly it is generally agreed that it is crucial to sensitise the public to the issue of corruption and to be aware that office holders found guilty of corruption can be prosecuted. In Hong Kong the intensive preparation of public opinion has been the key to the success of the agency. In Malawi where a relatively successful ACB has been launched in the last two years a similar programme of sensitisation was conducted leading to the receipt of more than 5000 complaints. Successful ACBs generally also have the powers to freeze the assets of those under investigation (or those holding funds on their behalf); to seize and impound travel documents, to prevent a person from fleeing abroad, and to protect whistleblowers.

(iv) Where these and related conditions are met there is a good case for donor assistance being used to support ACBs, which in many cases are chronically underfunded. Even in South Africa the Special Investigating Unit is suffering serious budgetary cutbacks, even though it recovered a total of £130 million (equivalent) for the state in 1998/9. Three relatively successful examples of donor support to ACBs are those in Uganda, Botswana and Malawi, each of which has made valuable contributions to addressing corruption in the recent past. In the case of Uganda much of the material placed in the public domain by the Inspector General of Government (Director of the Equivalent of an ACB) has been used intensively by Parliament to criticise Ministers, at least three of whom have been obliged to leave office partly on corruption charges.

(v) In many countries there is inadequate judicial capacity to deal with cases of corruption, which are frequently complex and involve commercial law. This is especially true where countries are emerging from a legacy of one party state government in which much of the corporate sector has been in state ownership. In cases such as this, it may be very useful for a donor to fund one or two senior judges who are specialised in commercial law, so that cases can be heard. A positive consequence of this is that the need to refer cases to international dispute procedures (e.g. ICC, ICSID) outside the country in question would be reduced, and companies which may consider that they are the victims of extortion could have recourse to the courts.

(vi) Thus *support from the UK and other donors to ACBs and the judicial system is more than justified where the conditions discussed above apply.* However, this has to be offered in the context of a programme for strengthening judicial integrity and accountability. Where judges are appointed by the President, and can also be dismissed by the President, findings against senior members of government may still prove to be rare.

### **3.b Regional initiatives to combat corruption which takes place at borders between countries**

(i) In most regional free trade areas or customs unions (such as COMESA in southern Africa or the East African Community or Mercosur in the southern cone countries) the formal focus is on the abolition of tariffs on intra-regional trade and the harmonisation of external tariffs. However, in such blocs it is frequently the case that the effect of the formal tax regime is greatly distorted by the prevalence of consistent demands for bribes by customs officers. This may be in addition to, or instead of, the tax regime.

(ii) A recent study listed the following advantages to harmonising the tax system within the newly re-formed East African Community:

- ◆ a common taxation system will hold the common market together;
- ◆ operators will enjoy the complete absence of fiscal frontiers among countries;

- ◆ reduced border control will reduce the manpower required to manage movement of goods and people;
- ◆ there will be a reduction of smuggling problems among the three countries.

(iii) In practice each of these points will tend to reduce the levels of corruption prevalent border posts. As the Community becomes a zone in which trade is completely free the levels of this particular form of corruption are very likely to fall away. If this is matched by other forms of successful economic integration (such as a common external tariff and a common currency) corruption in the context of regional trade may be largely eliminated. However, it is equally likely that the rents which are generated by the status quo are sufficiently attractive to ensure that progress in this respect may be slower than Treaty obligations would suggest.

### **3.c The provision of support to civil society groups in developing countries to raise awareness about corruption and to build domestic demand for its eradication**

In reviewing the role which civil society can play in addressing the corruption issue it is essential to recognise that there are many different components of civil society, and each has its own needs. For the purpose of this analysis the three principal types of group can be categorised as follows:

#### **3.c.1 Different types of civil society group**

(i) **Existing advocacy groups, not corruption-specific.** Existing groups active in areas such as human rights and the environment which have chosen to recognise corruption as a factor which reinforces the negative effects of their main concern; in some cases, such as Lok Sevak Sangh in India and Poder Ciudadano in Argentina, they may have an existing large mass membership;

(ii) **Specifically anti-corruption groups.** All seventy national chapters of TI fall into this category but some other, single-country, anti-corruption groups predate TI - such as *Integrity* in Nigeria and *The Anti-Corruption Network* in South Korea;

(iii) **Professional associations:** These consist primarily of skilled professionals such as accountants and lawyers who may choose to focus on issues such as corruption and fraud either for broad social, economic and political reasons, or to achieve specific improvements across the profession in its general practice. The first objective is more typical of professional bodies in the south: the Kenya Law Society and the Cameroun Bar Association are both examples of professional organisations which have campaigned courageously on the corruption issue. On the other hand, in the UK, a Fraud Advisory Panel designed to improve governmental and corporate response to fraud, was formed through an initiative of the Institute of Chartered Accountants in England and Wales.

**3.c.2 Ways in which such civil society can be active:**

(i) **Awareness Raising:** moving the corruption issue up the national agenda through small scale meetings, demonstrations, conferences and placing material in the press;

(ii) **Political Lobbying:** direct lobbying of Government, and maybe of international organisations, to ensure that a particular route to redressing corruption is adopted;

(iii) **Prosecution or legal representation on corruption related issues:** mounting a prosecution against an individual or set of individuals as the Law Society of Kenya did with eight individuals allegedly associated with the Goldenburg case in 1998. Alternatively, direct legal assistance to individuals who may wish to bring a case against the authorities as the Cameroun Bar Association did in a series of Town Hall meetings in 1999.

(iv) **Civic Education:** can be regarded as part of moral education at school level and delivered through teacher training. TI Chapters in countries as different as Italy and Papua New Guinea have had active civic education programmes designed for school level and delivered through the orientation and training of teachers;

(v) **Monitoring the anti-corruption aspect of the Growth and Poverty Alleviation Programmes:** the linkage of debt relief to anti Corruption measures, as envisaged in the conditionality built into relief under the HIPC initiative, provides a key opportunity for civil society groups to measure progress in this regard.

(vi) The following matrix relates each of these activities to the three types of civil society group discussed above:

	Awareness Raising	Political Lobbying	Legal Initiatives	Civic Education	Media Placement	Monitor WB/IMF Programme
Existing Advocacy Groups	#	#				
Specifically Anti-corruption Groups	#	#		#	#	#
Professional Associations		#	#	#	#	#

(vii) It is clear that particular types of organisation are best placed to play specific roles and that it is not possible to generalise about civil society on a homogeneous basis. *Each category of organisation can benefit from external funding when this is matched to specific objectives. Such funding, however, should be linked to clear commitments from the recipient organisation as to its internal structure, commitment to its membership and general transparency.*

### **3.d The role and extent of legal co-operation between developing countries and between developing countries and donors in cases of corruption.**

#### ***3.d.1 Status of the problem***

(i) The legal framework for co-operation between states in regard to corruption, does not differentiate between developing and donor countries. In the area of grand corruption, there are broadly two types of relevant activity; bribing public officials and theft of state assets. Whilst both activities are almost certainly contrary to local laws, proceedings are unlikely to be brought in the victim state where the corruption involves a ruling elite. In practice, legal co-operation is improbable. The situation may change when that elite loses office, but difficulties remain, including immunities that may apply in respect of a period in office, and also with the possible abuse of corruption charges as a political weapon. In the more extreme cases of state looting, one thought has been for corruption to be brought within the jurisdiction of an International Criminal Court, as proposed in the UN initiated Rome Statute of 1998. This would involve having major state looting qualify as one of "the most serious crimes of concern to the international community as a whole" (currently these include genocide, crimes against humanity and war crimes). On the scale alleged in the cases of the deceased former presidents Marcos of the Philippines and Abacha of Nigeria, this could be appropriate. Without wider support for the Rome Statute, however, the initiative is unlikely to proceed.

(ii) In regard to bribery of public officials in a developing country, where corruption is widespread, including at the highest levels in the state, legal co-operation remains improbable and it is necessary to examine whether a donor state can unilaterally take action? If the corrupt official resides in the UK and/or transfers the proceeds of corruption to acquire assets in this country, could proceedings be brought here? The general rule in criminal cases is that if all the elements of the offence are committed abroad, no offence is committed under our law. This rule is subject to limited exceptions (e.g. in relation to murder, child sex offences and war crimes). The Home Office Paper of June 2000, referred to below, states that the Government proposes the assumption of jurisdiction over UK nationals for offences of corruption committed abroad, notwithstanding problems associated with prosecution in such cases. This is strongly supported by TI-UK.

(iii) It is common for states to think first of criminal charges for corrupt activities. It is not widely appreciated that corrupt activities will frequently give rise to civil liability under our law. The civil courts take a different approach towards jurisdiction. The place where the corrupt activities took place is of less importance than the place where the Defendant resides. If the corrupt official is residing in this country, civil courts may well have jurisdiction. Civil courts can have wide powers to order assets to be frozen and to order the corrupt official and third parties to provide disclosure of documents. These powers can be invaluable in corruption cases. For this and other reasons mentioned below, civil courts may provide much more effective remedies for victim countries than

criminal remedies. *Consideration should be given to encouraging DFID to try to raise awareness amongst victim countries of the potential for civil remedies in cases of corruption.*

### **3.d.2 Types of co-operation**

The main types of co-operation that can be provided by courts in this country in regard to corruption abroad, are the collection of evidence, extradition and confiscation of the proceeds.

#### **3.d.2.1 Collection of oral or documentary evidence in this country for use in criminal investigations and prosecutions abroad**

(i) This is known as a request for mutual legal assistance (section 4 Criminal Justice (International Co-operation) Act 1990). The UK does not limit this to countries with which reciprocal arrangements are in place. The central authority for requests to the UK is located in the Home Office and is known as the Mutual Legal Assistance Section in the Judicial Co-operation Unit. The Home Office requires requests to contain detailed information about the alleged offence etc. If the Home Secretary is satisfied that it discloses evidence of an offence having been committed under the law of the requesting state, he will nominate a magistrate's court to receive the evidence. The evidence is then returned to the Home Office for transmission to the requesting state.

(ii) Three years ago, the former government of Pakistan made such a request to collect evidence for use in the trial of Asif Ali Zardari, Benazir Bhutto's husband. Following criticism from the present military ruler, General Pervez Musharraf, that Britain was thwarting efforts to stamp out corruption, the Home Secretary agreed to provide the present regime with the evidence gathered. It was reported that the Home Secretary had received assurances that Zardari would not face the death penalty and that the evidence would only be used in the drug case for which it had originally been requested.

(iii) Various criticisms have been levelled against this system. The principal criticism is the delay in processing the request. Requests can take several years to process, as, for example, in the above case of Pakistan's request in relation to Zardari. This is partly because the Mutual Legal Assistance Unit is under-resourced and also because suspects are able to slow the system down with unmeritorious judicial review applications. Recent Home Office guidance aims to ensure that requests are handled faster. Further, the PIU (Performance & Innovation Unit) report states that a wide ranging review of mutual legal assistance is under way (para 11.51). *One solution to these problems might be for such requests to be referred to the Serious Fraud Office, which has recently issued guidance facilitating direct access from other countries to the SFO for assistance.*

(iv) Similar delays arise when an Anti-Corruption Bureau pursues a case with an international dimension and requires help from the UK. In fact, MLA from the UK can be difficult to secure. The Director of the Malawi ACB, Gilton

Chiwaula, speaking in London in July 2000 mentioned that he had requested MLA from the UK authorities in relation to seven separate cases but that up to that time he had not received even a single reply. *Perhaps, for ACBs in developing countries, consideration could be given to a kind of hot line, channeled through DFID, which could present these cases to the Home Office and provide direct feedback to ACBs*

(v) There can be further delays arising from duplication, as the UK comprises three jurisdictions (England and Wales, Scotland and Northern Ireland). If evidence is located in these different jurisdictions, it may be necessary to involve different courts. Further, separate requests for assistance will have to be made to the appropriate authorities in Jersey, Guernsey and the Isle of Man. Moreover, there are limitations on the use to which evidence obtained through mutual legal assistance can be put. Under relevant legislation, without consent of the Home Office, the evidence may not be used for any purpose other than that specified in the request. So, if the evidence reveals the commission of an offence not mentioned in the request, separate consent needs to be obtained to use the evidence to prosecute the suspect for the second offence.

(vi) Again, the position on civil claims is different. Civil courts can obtain evidence from persons who are not parties to foreign proceedings for use in those proceedings (Evidence (Proceedings in other Jurisdictions) Act 1975). Such requests are made direct to the High Court thus by-passing the Mutual Assistance Unit in the Home Office and considerably reducing delays.

### 3.d.2.2 *Extradition.*

Extradition is available if the corrupt official is living in this country provided (1) there is a reciprocal extradition arrangement with the requesting state or (2) the subject of the request has been accused or convicted of an extradition crime (which means it must be a crime under the laws of the requesting state and of this country). In cases of international corruption, extradition may be quite limited. Where all elements of the offence are committed abroad (the usual case), the UK might not extradite someone for bribing a foreign official, because no extradition crime would have been committed under UK law. Moreover, the UK would not extradite a suspect to some states where extortion and bribery are common, because of the risk of an unfair trial or inhuman punishments.

### 3.d.2.3 *Confiscation of the proceeds of corruption*

(i) Overseas authorities may request assistance to restrain or confiscate proceeds of corruption in this country (Part VI of the Criminal Justice Act 1988 and section 39 of the Drug Trafficking Act 1994). Such requests can be made before or after conviction. The request will only be granted if there is a reciprocal arrangement with the requesting country. Few developing countries, which have been victims of corruption, have the necessary reciprocal arrangements with United Kingdom in relation to all criminal offences (which would include corruption) as distinct from simply drugs trafficking. Furthermore, confiscated funds are retained by HM Government. No formal

mechanism exists for returning them to the victim countries. The PIU report foreshadows improvements to the whole confiscation regime, which should make the UK a less hospitable repository for the proceeds of international crime. The Report notes that "asset sharing" arrangements are being negotiated with the USA and Canada (para 11.54). *Consideration should be given to negotiating similar arrangements with victim countries to ensure the return of confiscated assets.*

(ii) Civil courts have power to make an asset freezing order ancillary to foreign proceedings. An early example is that of *Republic of Haiti v Duvalier [1989] 1 All ER 456* in which English proceedings were taken in support of French proceedings against Baby Doc Duvalier and others. In that case the Court granted a freezing and disclosure order in respect of the Duvalier assets worldwide.

### 3.e Tracking and return of the proceeds of corruption

This involves consideration of measures to combat the laundering of the proceeds of corruption. Deficiencies in this area have been highlighted recently in the US Senate Report on Private Banking and Money Laundering ("A Study of Opportunities and Vulnerabilities, a minority staff report for the Permanent Subcommittee of Investigations Hearing on Private Banking and Money Laundering (9 November 1999) available at [http://gov-affairs.senate.gov/110999\\_report.htm](http://gov-affairs.senate.gov/110999_report.htm)). This illustrates that the proceeds of corruption pass through banks and other intermediaries in this country. The Swiss Federal Banking Commission Report ("Abacha Funds at Swiss Banks") reveals very specifically that funds of the late General Sani Abacha were received from and transferred to banks in this country, which were clearly involved in handling the proceeds of corruption. *There needs to be a similar report prepared and published by relevant authorities in this country - to make a difference, there needs to be a clear declaration from the authorities, that laundering the proceeds of corruption is a serious offence, that cases will be investigated and prosecutions will follow. Offers of co-operation to the government of Nigeria to recover looted funds need to be backed by action.*

#### 3.e.1.1 Criminal and civil liability

(i) Intermediaries that handle the proceeds of corruption could face civil and criminal liability under our laws. It is an offence (sections 93A and 93B Criminal Justice Act 1988) to assist another to retain the benefit of criminal conduct, or to acquire, possess or use the proceeds of criminal conduct. For these purposes, "criminal conduct" includes corrupt activities that occurred abroad. There is a surprising lack of awareness of this. *Consideration should be given to encouraging authorities in this country to emphasise that proceeds of foreign corruption fall within the scope of anti-money laundering offences.*

(ii) The elements of civil and criminal liability are very similar; namely, if the handler can be shown to have known (or in the case of criminal liability,

suspected) that the funds represented the proceeds of corruption, liability will be incurred. Banks and other intermediaries are supposed to have procedures that ensure they "know their customer". If they followed these procedures and discovered the customer was a foreign official, and if the sums handled on behalf of that customer were large and out of proportion to the customer's legitimate wealth (see, e.g., the Abacha case study) the bank may be thought to have sufficient knowledge to give rise to liability.

(iii) TI will, on 30th October, present to a press conference some new "Know your Customer" guidelines agreed by a group of large international banks catering to wealthy individuals.

### 3.e.1.2 National Criminal Intelligence Service (NCIS)

(i) A bank that launders the proceeds of corruption will have a complete defence to criminal liability if it makes a disclosure to the police authorities and acts with the authorities' consent. Disclosures are made to the National Criminal Intelligence Service (NCIS). The PIU Report notes that reporting patterns are uneven (para 9.31) and modest (para 9.16). The PIU Report suggests that this is in part because of the low levels of prosecutions for money laundering in the UK. For example, in 1995, only 29 prosecutions were brought compared with 538 in Italy and 2,034 in US. The PIU suggests that the answer would be a few high profile prosecutions *pour encourager les autres*.

(ii) The disclosure report to the NCIS provides intelligence that could help investigation of the offence that produced the criminal proceeds in the first place. Where the offence has been committed in this country, the authorities here will have jurisdiction to investigate it further. Disclosures relating to foreign corruption will reveal offences committed abroad. This would fall outside the jurisdiction of the police here, under our present laws. The intelligence could be passed to the victim country through diplomatic channels. However, there may be no point in doing this if the authorities in that country are unlikely to investigate (because it reveals an offence committed by a member of the ruling elite), or worse, the intelligence is passed to the corrupt official. *Consideration should be given to finding out the NCIS's policies and procedures for sharing intelligence (including with whom in the UK they consult, when deciding what to do with the intelligence) in such cases.*

(iii) It is understood that the NCIS gives consent to a transaction as a matter of course unless they believe the party making the disclosure has been involved in any wrongdoing. *Consideration should be given to changing this procedure and only giving consent after consulting authorities in the victim state where international corruption is suspected.*

### 3.e.1.3 Promoting awareness of civil remedies

The fact that disclosure gives banks a complete defence to criminal liability means that civil liability is of greater significance to victim countries. Such claims could lead to recovery of all funds that have been laundered by the bank or

intermediary and could potentially be very substantial. We are not aware of any claims being brought, possibly because of a lack of awareness in victim countries of this remedy. We believe that if one such high profile claim were brought, the banking industry's perception of this problem would change. Again, as already recommended, *consideration should be given to raising awareness of civil remedies in victim countries.*

### **3.f International Instruments on the Elimination of Corruption**

#### **3.f.1 The OECD Convention on the Bribery of Public Officials**

(i) In recent years there has been a spectacular increase in the number and variety of intergovernmental measures to combat corruption, reflecting the developing perception of the damaging consequences of corruption. It is natural that states should prefer to proceed multilaterally, by international convention, rather than unilaterally and be criticised for disadvantaging its nationals. It was long the plea of US businessmen that they were unfairly restricted in competing internationally by the provisions of the Foreign Corrupt Practices Act 1977.

(ii) The most important of these measures are the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions (the Revised Recommendation) and the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) which came into force for all ratifying states (including the UK) on 15 February 1999.

(iii) The Revised Recommendation embraces many aspects of the fight against corruption including criminal and civil law, tax legislation, company and business accounting and internal control requirements, banking provisions, public procurement and international co-operation in investigation and other legal proceedings. The Convention seeks to move that Recommendation into hard law, by tackling the "supply side" of international corruption. It came into being in record time. It has been signed by all 29 OECD countries and 5 non-member countries. 24 countries have ratified the Convention.

(iv) The OECD Convention is the most important initiative in the fight against international corruption. The OECD acts by consensus and its resolutions therefore carry strong persuasive effect. The signatories represent approaching 80% of world trade. The Convention has achieved a remarkable impetus towards adoption and implementation to clean up transnational trade and investment. It has already achieved greater impact than any other comparable initiative.

(v) Each signatory is required to make it a criminal offence for any person to offer, promise or give any undue pecuniary or other advantage, whether directly or indirectly or through intermediaries, to a foreign public official (widely defined), in order to obtain or retain business or other improper advantage in the conduct of international business. The offence has to be punishable by effective, proportionate and dissuasive criminal penalties. The foreign official can be an official of any state in the world - it does not have to be an OECD or other signatory state.

(vi) Whether or not the Convention will be effective in practice, will depend on what each exporting country provides in its laws regarding jurisdiction to prosecute for the offence of bribing foreign officials and what measures are taken in practice to enforce the law. Finally and crucially, each country has to review its current basis for jurisdiction to see that it is effective in the fight against bribery of foreign public officials, and if it is not, it has to take remedial steps. The Convention is not trying to achieve uniformity of laws. It is looking for what is called "functional equivalence" among the signatory states.

(vii) In the interests of achieving a signed convention within a surprisingly short time, some subjects were left unresolved. Most important of these, was the omission as an offence, of bribe payments to foreign political parties or party officials. These provide an obvious way around the criminal offence. Some of the major recorded cases of bribe payments to secure contracts have been made precisely in this way. At Florence in October 2000, a very experienced and well-informed group of 28 representatives from the public and private sectors and civil society and researchers, meeting by invitation of TI, made recommendations specifically addressing this omission. The OECD should ensure that bribe payments to foreign political parties and their officials to obtain or retain business, are effectively prohibited through its instruments. Meanwhile, *states that have signed the Convention should prohibit corporations based in their own countries from making political party contributions in violation of the laws of the countries where the contributions are made.*

### **3.f.2 *The UN Declaration against Corruption and Bribery in International Commercial Transactions***

### **3.f.3 *The Interamerican Convention against Corruption of the Organisation of American States***

In addition to the above, there is a 1996 Inter-American Convention against Corruption and two resolutions (51/59 and 51/191) of the United Nations General Assembly of 1996. In terms of practical effect, it is necessary to take account also of measures adopted by the World Bank and other International Financial Institutions.

### **3.f.4 Other codes and conventions**

(i) Other important initiatives have been undertaken by the European Union (EU) and the Council of Europe (COE). There is a 1997 EU Convention on the fight against corruption involving officials of the European Communities or officials of the EU. This has been ratified by the UK. In January 1999, the UK signed the COE Criminal Law Corruption Convention, which has not been ratified. This convention ambitiously seeks to create a measure of legal harmonisation of laws governing corruption, public and private, domestic and foreign.

(ii) A strong feature of all these measures (OECD, EU and COE) which distinguish them from many conventions in other fields is that follow-up mechanisms are in place.

(iii) The International Chamber of Commerce has revised and reissued its Rules of Conduct to Combat Extortion and Bribery. These are intended as a method of self-regulation by international business. They now prohibit bribery for any purpose, not only for obtaining business. Progressive companies trading internationally, looking to secure their futures, need openly to embrace anti-bribery measures to safeguard their reputations. Companies that lack resources to devote to carefully designing their own codes of ethical business in the area of corruption, would do well to consider formal adoption and internal promotion of the ICC Rules.

### **3.g UK Legislation aimed at combating corruption in business dealings with developing countries**

There is no UK legislation aimed specifically at combating corruption in business dealings with developing countries. It would not be expected that UK legislation would distinguish between developed, emerging and developing countries in terms of laws to combat corruption. Legislation would deal with *all* transnational bribery. This is the purpose of the Revised Recommendation and the OECD Convention described above, which have accordingly drawn attention to the absence of UK legislation for this purpose. The UK was not unique in lacking legislation to criminalise the bribing of foreign public officials (FPO); indeed the USA was probably unique in having such legislation from 1977 until, after the OECD Convention came into force, signatory states (with the unfortunate exception of the UK and one or two others) started to introduce implementing legislation.

#### **3.g.1 It is not currently a criminal offence in the UK to bribe an FPO overseas**

(i) The UK government has consistently maintained, within the OECD Working Group on Bribery in International Business Transactions (the OECD Working Group), that the UK's existing laws are sufficient to enable the UK to comply fully with the obligations of the OECD Convention. It has also claimed that the

payment of bribes to FPOs is not tax-deductible. TI has throughout disagreed with both these views.

(ii) *The basis of the Government's opinion has never been made public*, so it has not been tested or reviewed; there has never been a prosecution for the offence of bribing a FPO. It is TI's case that the UK is non-compliant with the OECD Convention and will remain so until there is in our law a clear offence of bribing (FPOs).

(iii) Support for TI's view comes from the Law Commission whose paper concluded that corrupt conduct that occurs abroad is beyond the jurisdiction of the English courts.

(iv) Support also comes from within Government. Treasury advice to H.M. Inspectors of Tax, a document substantially in the public domain and available on the worldwide web states:

- ❖ "The UK does not have jurisdiction over a corruption offence merely because some preparatory action took place here provided the actual offer or payment of the bribe took place abroad:" and again
- ❖ "The UK Courts do not have jurisdiction over corruption offences which take place entirely abroad even if all those involved are British nationals".

(vii) The reality is that conduct amounting to the bribery of a FPO is likely to take place wholly outside UK. In our view, the Treasury opinion is to be preferred to that of the Home Office.

(viii) It follows from the Treasury opinion that bribes to FPOs, negotiated and paid wholly offshore remain deductible for tax purposes. It is scandalous that this continues to be the case. If a clear offence of bribing FPOs were to be enacted, then section 577A of the Taxes Act would automatically disallow the deduction as a payment, the making of which, constitutes the commission of a criminal offence. The Inland Revenue claim that in practice extravagant commissions or bribes may be disallowed on other grounds, such as a payment made without consideration. However, the Revenue is precluded from passing the information to prosecuting authorities under rules of confidentiality.

(ix) Those bribing overseas seem to have a rather comfortable regime in this country.

### **3.g.2 *Monitoring implementation of the OECD convention***

(i) The OECD Convention provides for a systematic follow-up to monitor and promote its full implementation. Phase I involved an examination of the laws of each state to see whether they complied with the Convention. Preparation for this process commenced with the completion of a questionnaire and was followed by a "peer review" (by France and the Netherlands in the case of the UK). The final stage was the adoption of a country report containing a review of

the country's relevant laws and an evaluation outlining the findings of the OECD Working Group.

(ii) TI assisted in the process for each country reviewed by submitting to the OECD a memorandum, substantially prepared by one of its local chapters, but reviewed by a TI specialist team of lawyers from the USA, Australia and Germany. TI-UK prepared such a memorandum to assist in the Phase I evaluation of the United Kingdom (copy annexed). The principal recommendation of that memorandum was:

*"TI considers that, to be compliant with the Convention and effective in countering international corruption, the UK should urgently enact a simple piece of legislation creating an offence of bribing a FPO, which would apply, even if the criminal activities take place wholly outside UK jurisdiction, provided the defendant is a UK citizen, or resident or a company incorporated in UK."*

(iii) The OECD monitoring reports were published in time for the OECD Inter-ministerial meeting last June. The Working Group found that the UK laws were not in compliance with the standards of the OECD Convention and urged the UK to enact appropriate legislation as a matter of priority, taking into account the observations of the Group, who will review the situation by the end of 2000 ( UK Review of Implementation of the Convention and the 1997 Recommendation). Having failed the "examination" at the first attempt, the UK delegation immediately made it clear that new legislation is very unlikely by this time and that it *actively proposes* to "fail" a second review!

### **3.g.3 The urgency of finding Parliamentary time to criminalise bribery of FPOs**

(i) There is real concern within the OECD at the UK's apparent lack of commitment to the implementation of the Convention. Bribery of foreign public officials (FPOs), is a serious international economic crime. To delay enacting this offence could severely damage the future success of the Convention, which rests on the basic assumption that the same rules will apply to all major exporters. It is particularly disappointing that the UK, a leading G7 nation, is now seen as one of the few laggards in curbing a practice that has devastated economies and at the very least aggravated in appalling poverty. The Home Secretary has rightly recognised corruption as a "deadly virus", that left unchecked, "weakens economies, creates huge inequalities and undermines the very foundations of democratic government". We have pointed out that it is normal practice to treat deadly viruses urgently and not "when parliamentary time allows"! Cannot a mature democratic process make parliamentary time for legislation that should surely be non-controversial?

(ii) The Government has chosen to deal with compliance with its international obligations in regard to corruption along with the reform of the domestic law of corruption and the removal of certain immunities from members of parliament. This seems likely to delay the entire process. There is no reason why there could

not be a separate short and simple Bill enacting the Convention offence of bribing FPOs, or why these provisions could not be included in another appropriate Bill that carries a higher priority - it is understood that the Government intends to introduce, early in the new session of Parliament, a Financial Crimes Bill that seems ideally suited to contain this offence and related provisions. Given the recognition that the offence constitutes serious economic crime, the proceeds of which feed into the money laundering cycle, it could be claimed that the Financial Crimes Bill is where it should be enacted. Only in one of these ways can the urgency of complying with the Convention be met.

### ***3.g.4 TI-UK's previous responses to the Government's discussion paper***

(i) The Home Office published a paper (Cm 4759), last June, setting out the government's proposals for the reform of the law of corruption. The paper contains some sound and useful proposals. Most importantly, it proposes to criminalise the bribery of foreign public officials and to take nationality based extraterritorial jurisdiction for this offence. The paper allows for a period of consultation. TI-UK submitted two papers commenting on the proposals (copies annexed). TI-UK broadly welcomed publication of the paper.

(ii) The following is the summary of points made in the first TI-UK submission.

- ◆ The proposed legislation needs to be clear and effective, especially to give effect to the UK's obligations under the OECD Convention.
- ◆ The equivalent laws in Scotland, Northern Ireland and the Crown Dependencies need to be brought swiftly into line.
- ◆ Legislation to implement the OECD Convention must be in place by the end of 2000.
- ◆ There remains a need to distinguish between public officials and others for the offences of trading in influence and bribery of foreign public officials.
- ◆ The reverse onus provision in the 1916 Act should be included in new legislation.
- ◆ There should be a separate section in the legislation for the offence of bribing foreign public officials.
- ◆ The requirement for the consent of the Law Officers for prosecution should be abolished.
- ◆ There should be an urgent and thorough high-level consultation to identify weaknesses in current investigation and prosecution procedures.
- ◆ The jurisdiction of the Serious Fraud Office should be extended to include corruption.
- ◆ Inland Revenue confidentiality rules should be relaxed to facilitate prosecution of corruption

*We believe that each of the above points could lead to a recommendation by the Committee.*

(v) In TI-UK's second submission, it warmly welcomed and strongly supported the Government's view (para 2.23 of the Paper) that the UK should assume jurisdiction over its nationals for offences of corruption committed abroad. In TI-UK's view, this is the only way to make the criminalisation of bribery of FPOs effective. The principal reasons for this were well summarised in the Paper (para 2.23) and stated by the Rt. Hon Jack Straw in his foreword to the Paper:

- ◆ Corruption knows no boundaries
- ◆ It is sometimes difficult to pin down the physical location at which a corrupt transaction has taken place
- ◆ The law has to catch up with the realities of modern technology in business
- ◆ Without this change, acts of corruption committed by UK nationals or UK companies wholly outside the jurisdiction (i.e. the normal practice for bribes to FPOs) would not be covered
- ◆ The UK's willingness to consider the extradition of its nationals is not an answer, because states where extortion and bribery are common will seldom prosecute and the unlikelihood of a fair trial and the risk of inhuman punishments would preclude extradition to many such states
- ◆ To assume nationality jurisdiction sends a strong deterrent message that the UK is determined to act against corruption, backs up existing codes of conduct and puts beyond doubt the UK's commitment to join forces with the international community in the fight against corruption.

(iv) Until there is fresh legislation in the UK, the OECD Convention has no direct and immediate impact on UK law, which remains as ineffective as it has been for the past century.

(v) In similar terms to our earlier paper to the OECD review process, we wrote: *In order to comply with the OECD's Anti-Bribery Convention the government should immediately enact legislation (either as a separate bill or as part of the Financial Crimes Bill) creating the offence of bribing a foreign public official and assuming extraterritorial jurisdiction as proposed in the Home Office paper (Cm 4759).*

### **3.h The exclusion from development projects of companies and individuals which have been disbarred by the World Bank, or have been subject to legal proceeding, on the grounds of corrupt or fraudulent practices**

(i) Disbarment of companies by IFIs on ground of corrupt and fraudulent practice is likely to be on a rising trend in the next few years. The possibility of disbarment without a court first finding the company at fault was adopted by the World Bank in 1998. The process by which debarment takes place includes a special audit and reference to a specialist committee constituted for this purpose. Other IFIs, including the AfDB, have subsequently adopted similar strategies.

(ii) As of mid-October 2000 more than 50 companies have been debarred by the World Bank, either indefinitely or for a period of five years. (Debarment applies

also to any company which owns the majority of the capital of a debarred company). Most are thought to have been small consultancy businesses, several operating in Nigeria. One was a company understood to have employed around 500 people (Case Technology Ltd. of Watford) which was involved in a bid to supply a banking telecommunications network for the Central Bank of Turkmenistan.

(iii) TI-UK welcomes the initiation of this procedure, recognising that a range of instruments is necessary if corrupt practices are to be curbed. The risk of disbarment from important contracts should be an important deterrent to companies who might otherwise accept the risk of paying a bribe as manageable.

(iv) There are of course dilemmas associated with this process. One is the need for a right of appeal by a company which may consider that it has been unjustifiably debarred. A second is the dilemma posed by a divergent view of whether corruption has occurred between a court and an IFIs internal procedure. It is possible that the finding of a court may not be substantiated by an internal assessment. It appears that the World Bank is trying to guard against exactly this possibility in its response to the Lesotho Highlands Water Project case in Maseru.

(v) However the disbarment instrument should prove a very powerful one. In order to strengthen this process *the next stage could be an information sharing agreement between IFIs, donor agencies and export credit agencies so that each could assess the quality of evidence and use it in its pre-qualification procedures. A second stage, when the validity of these is accepted, would be a mutually binding agreement to disqualify debarred companies from each others tender procedures.*

### **3.i Measures to combat money laundering of the proceeds from corruption**

(i) TI has maintained for several years that money laundering is as relevant to the proceeds of corruption as it is to the drugs trade. The large sums associated with commissions paid through grand corruption frequently find their way to haven financial jurisdictions, whether these are on or offshore. The fact that the commissions paid on the Lesotho Highlands Water Project were paid into Swiss Bank accounts is a perfect illustration of this. The City of London may also be described as a haven given the case in 1999 involving funds syphoned from Russia but held in the Bank of New York in London, and the report in 2000 of the Swiss Federal Banking Commission on the funds held by the Abacha family in Switzerland, over half of which had been channeled through a miscellany of London-based banks.

(ii) The role of these havens has been explored in depth by three reports published in 2000: the latest report of the Financial Action Task Force (FAT-F) of the G7, and new specific reports by the OECD and the Financial Stability Forum (also a G7 instrument). These collectively identify a total of between 25 and 35 havens whose regimes are attractive to those wishing to launder funds

derived from a series of illegal activities, one of which is large scale corruption. The reports grade the centres by degrees of lack of regulation, focusing particularly on the question of whether secrecy is easily obtained, and how difficult it is likely to be for a request to freeze assets in the event of a criminal charge being brought against a depositor. Unfortunately the OECD report also chose to focus on the issue of differential tax rates, which the centres can legitimately claim is a sovereign choice, and on this basis a group of OFCs have lodged a claim with the WTO against unfair discrimination by the OECD.

(iii) The UK has been seeking to use its influence with the Crown dependencies to correct the lack of adequate regulation in their regimes, and has threatened to exercise more political control if such improved regulation is not adopted. This is an important step and in fact several of the OFCs in question have changed their regulatory regime in a positive direction in the recent past and the Financial Stability Forum report in fact described Jersey, Guernsey and Isle of Man as being in the top bracket which includes Luxembourg, Switzerland and Singapore. However there is no doubt that the UK should continue to exercise its leverage with other centres in its quasi jurisdiction, notably the Bahamas, the BVIs and the Cayman Islands.

(iv) The role of banks and professionals within the UK remains controversial, especially after the Lesotho and Abacha cases. We have found that there is a surprising lack of awareness that anti-money-laundering legislation extends to the proceeds of foreign corruption. *This ignorance needs to be addressed.* We suggest that the Financial Services Authority (along with professional bodies such as the Institute of Chartered Accountants and the Law Society) should take responsibility for this. It fits with the FSA's statutory responsibility for reducing financial crime, which includes crime such as corruption committed abroad.

(v) The fact that banks and professionals in this country may have laundered the proceeds of corruption is more due to lack of enforcement than to deficiencies in the anti-money-laundering legislation. The PIU report recognises this in paragraphs 9.16 and 9.31. This lack of enforcement is because the offence of money-laundering is considered to be difficult to prosecute; and this is chiefly because of the need to prove the underlying offence. Authorities invariably prosecute the underlying offence rather than the money laundering offence. (In fact, prosecution should not necessarily be all that difficult, as the sums involved are usually out of all proportion to an accused official's legitimate wealth).

(vi) The problem is compounded by a lack of coordination. As a result there have been few prosecutions for money-laundering generally. As far as we're aware, there have been no prosecutions specifically for laundering the proceeds of foreign corruption. The PIU report suggests that NCIS should work with the FSA to tackle institutions suspected of money-laundering (see para 9.40, etc.). We endorse this but it only goes part of the way to achieving a coordinated approach.

(vii) The FSA itself will only have power to prosecute for breach of the money-laundering regulations, which require procedures to be put in place to

detect and report money laundering. Its powers will not extend to prosecution in connection with the offence of money-laundering per se. We recommend that a suitable, adequately resourced authority should be given unambiguous responsibility for prosecuting such offences, working in liaison with the FSA.

(viii) *Generally, it is our view that greater effort needs to be given to the fight against money laundering, and to ensuring that money-launderers are prosecuted. High-profile convictions for laundering the proceeds of foreign corruption will help to change attitudes.* See also our submissions in relation to 3(e) above.

### **3.j The role of companies**

#### **3.j.1 Corporate "best practice" codes and conduct**

(i) As discussed in Sections 2.b and 2.c, the perception of some MNCs of the role they can play in providing significant leadership in the fight against corruption has been heightened in the late 1990s. The opportunity for companies to do more in this respect is probably greatest where an incoming government has made a commitment to step up or initiate a fight against corruption, but where it needs the effective support of the corporate sector to do this. Nigeria is a key example of this in the recent past, but in fact there has been little proactive response from either local or international companies. In practice such Governments are left to work with public sector initiatives focused particularly on Anti-Corruption Bureaux, reform of the judicial system and procurement.

(ii) A number of companies are now leading the way with meaningful corporate codes which are more than mere pieces of paper. The International Chamber of Commerce rules have already been mentioned in 3.f.4. Companies may consider, in the short term, adopting those as they stand if they do not at present have their own purpose-designed code covering wider ethical issues. Best practice, which could be more widely shared, includes:

- ◆ ensuring that corporate Codes of Conduct which are formally issued at headquarters are not only circulated within overseas subsidiaries but also disseminated locally amongst their people, accompanied by practically oriented training as to their application; with the public being requested to bring any breaches to the attention of senior management;
- ◆ ensuring that the principles which underlie such Codes are understood and adopted by Joint Venture partners and that such joint venture relationships are not used by any party as a way of circumventing the principles;
- ◆ ensuring that companies' own systems of local procurement are free of corruption and that any culture of backhanders is resisted;
- ◆ taking action against employees found to be engaging in corrupt business practice, and ensuring that this becomes widely known; and

- ♦ withdrawing, in extremis, from business environments which are so corrupt that continuance is only possible by compromising basic principles of business integrity, and publicising the reasons (Unilever's withdrawal from Bulgaria, "because it was impossible for us to do business without getting involved in corruption," is a good example);

### **3.j.2 Integrity Pacts**

In relation to procurement procedures, TI has since its inception been promoting the concept of an Integrity pact to be applied to the bidding procedures surrounding major capital projects or privatisation projects. The essence of this approach is that companies, in order to prequalify for a particular tender, commit to not paying a bribe either to obtain the contract or during its execution. Those against whom they are bidding have a means of redress if they have reason to believe that the process has been subverted. The process is monitored by civil society groups, including TI chapters. It has been applied with success to privatisation in Panama, to the current extension of the underground in Buenos Aires, and is about to be applied by the City government in Milan. The most important application in the near future will be in the context of the Millennium road project in Colombia which links Bogota to the Venezuelan coast and is financed to a total value of \$1Bn. Experience to date suggests that this approach may have an increasingly important role in the next three to four years. In practice the active support of companies which are key to the bidding process is necessary for the approach to be successful.

### **3.j.3 Corporate transparency processes**

Looking beyond this approach, recent discussions in which TI-UK has been involved have focused on the opportunity for MNCs operating in corrupt environments where government budgetary information is minimal and obfuscatory, to state publicly the total amount of payments they make to the state through taxes and other forms of fiscal transfer. Such an unequivocal statement would make it very difficult for governments to maintain special accounts or for significant fiscal revenues to be diverted to private ends. In doing this, companies would be doing no more than declaring information which is routinely in the public domain (via Companies House) in the UK and it is difficult to see why one standard of transparency should apply in the OECD world and a different one in the developing and transition economies.

### **3.j.4 Private sector recommendations**

*We recommend that the Government, possibly via the DTI, should strongly encourage companies (a) to develop, disseminate and implement codes of conduct which cover bribery and extortion explicitly and with practical guidance; (b) to seek opportunities to associate with other organisations working in the same countries with a view to collective resistance of corruption; and (c) to publicise the problems of working with integrity in countries where it is very difficult, and in extremis to consider withdrawal.*



# Appendices

## Appendix 1

TI Working Paper:  
Convention on Combating Bribery of Foreign Public Officials in International  
Business Transactions (OECD)

Evaluation of Implementation by the United Kingdom  
*November 1999*

## Appendix 2

RAISING STANDARDS AND UPHOLDING INTEGRITY: THE PREVENTION  
OF CORRUPTION

The Government's Proposals for the Reform of the Criminal Law of Corruption in  
England and Wales

COMMENTS OF TRANSPARENCY INTERNATIONAL (UK)  
*July 2000*

## Appendix 3

RAISING STANDARDS AND UPHOLDING INTEGRITY: THE PREVENTION  
OF CORRUPTION

The Government's Proposals for the Reform of the Criminal Law of Corruption in  
England and Wales

SUPPLEMENTAL COMMENTS OF TRANSPARENCY INTERNATIONAL  
(UK)  
*August 2000*



**TI Working Paper:**

**Convention on Combating Bribery of Foreign  
Public Officials in International Business  
Transactions (OECD)  
Evaluation of Implementation by the United Kingdom**

November 1999

This memorandum evaluating the implementation of the OECD Convention by the United Kingdom is submitted on behalf of Transparency International, International Secretariat Berlin, by the TI Working Group on the OECD Convention; Fritz Heimann, TI USA, Peter Rooke, TI Australia and Michael H. Wiehen, TI Germany.

Questions on this document may be addressed to Graham Rodmell, TI UK

## Introduction

1. This paper comments primarily upon the text of the OECD Convention, but takes account, where appropriate, of the Commentaries on the Convention adopted by the Negotiating Conference on 21 November 1997 ("the Commentaries") and the Revised Recommendation of the Council on Combating Bribery in International Business Transactions adopted by the OECD Council on 23 May 1997 ("the Recommendation"). It will be referenced to the numbered articles of the Convention.
2. No attempt has been made at this stage to analyse differences between the laws of England and Wales and those that apply in Scotland and Northern Ireland. Undoubtedly there will be differences, but for the purposes of the Phase I evaluation only, assumptions will be made that the principles applying in each country are broadly the same.

## General

3. The UK Government has consistently maintained that the UK's existing laws are sufficient to enable the UK to comply fully with the obligations of the OECD Convention. TI disagrees with this view. The basis of the Government's opinion has not been made public. It is thought to be based upon an interpretation of the Prevention of Corruption Act 1906, supplemented by recourse to English common law. The 1906 Act now appears rather antiquated and outmoded. The common law offence of bribery is of uncertain effect and scope. Reliance cannot be placed upon the combined effect of the 1906 Act and the common law offence to found an international corruption offence. Reference to the Hansard report of proceedings in Parliament relating to the Bill that became the 1906 Act, indicates that the principal purpose was to deal with private to private corruption; nowhere is it suggested that the Act was intended to deal with bribery of foreign public officials (FPO). It should be noted that the UK Law Commission, set up for the purpose of promoting the reform of the law in England and Wales, has recommended the abolition of the separate common law offence of bribery.
4. Even if, by deduction of highly technical argument, it could be demonstrated that some component or components of action leading to the bribing of a FPO amounted to an offence, there would remain insuperable hurdles to successful prosecution because of the UK's traditional adherence to territorially-based jurisdiction. Currently, a corruption offence cannot be committed under UK law unless there is a territorial connection between an element of the offence and the United Kingdom. TI regards jurisdiction as the key issue to make the Convention effective. The reality is that conduct amounting to the bribing of a FPO is likely to take place wholly outside UK. The purpose of the Convention will not be achieved unless the UK assumes for this offence a jurisdiction based on nationality.
5. The Government may seek to excuse the lack of clarity in the law and practice in regard to corruption by referring to the fact that the Law Commission recommended in January 1998 that the present law should be replaced by a modern statute. An inter-departmental working party has been considering its proposals and it is intended to publish a policy paper, which would allow a period of consultation. Whilst there is a superficial attraction in only legislating once in regard to a single area of law, rather than twice within a short period, the fact is that the Government can give no assurance as to when legislation might be introduced into parliament with time allowed for its processing. Law Commission proposals can remain unimplemented for many years. To legislate to implement the Convention should be uncontroversial and command all-party support and could be accomplished swiftly. The Government is intent on dealing in a single piece of legislation with UK's domestic law of corruption, the bribing of members of parliament and the creation of a new offence of the abuse of public office. Some of these proposals are likely to be controversial and demanding in their requirement of parliamentary time. It is therefore unlikely that these proposals will be

enacted even in 2001/2002. Implementation of the Convention merits much higher priority (see para 7 below).

6. The Law Commission in its report described the current legislation as "obscure, complex, inconsistent and insufficiently comprehensive". That legislation, comprising the Prevention of Corruption Acts 1889 to 1916, has been on the statute book for approaching a century. So far as TI-UK can ascertain, there has never been a single prosecution, still less a conviction, for bribing a FPO, neither under the legislation, nor for a common law offence. Although the Government's view for, the purposes of OECD compliance, is as stated in the opening of paragraph 3 above, there is a more generally held view that where the offer and payment of a bribe takes place outside of the UK, no offence is committed in the UK. This is also, for example, the view of another part of Government, as can be seen from the published advice given to HM Inspectors of Taxes (see paragraph 26 below).
7. **TI considers that, to be compliant with the Convention and effective in countering international corruption, the UK should urgently enact a simple piece of legislation creating an offence of bribing a FPO, which would apply, even if the criminal activities take place wholly outside UK jurisdiction, provided the defendant is a UK citizen, or resident or a company incorporated in UK.**

#### **Article 1 - Offence of Bribery of FPOs**

8. There is a need for clear legislation to create this offence (see paras 3 through 7 above). Help cannot be derived from the 1889 and 1916 Acts. References in this legislation must be presumed to refer to public bodies in UK. It would have been beyond the intention of parliament that non-UK bodies would have been included. There is an argument, but no more, that the wider concept of agency in the 1906 Act would enable some components of an offence of bribing a FPO to be caught, but there would need to be evidence of some parts of the offence having been committed in UK. The consent of the Attorney General would be required before a prosecution could be implemented. The hurdles to bringing international conduct involved in bribing FPOs within the 1906 Act offence, are such as would deter most prosecutors.
9. If the Convention offence were to be clearly stated in new legislation, it would be simple to ensure that complicity and conspiracy were also covered. Given the complexity and obscurity of the existing legislation, it is less clear that complicity is necessarily covered. It is noted that the 1889 Act (unhelpful for present purposes see para 8 above) provides expressly for acting in conjunction with another person to constitute criminal behaviour, whilst the 1906 Act (on which the Government purports to rely) contains no equivalent provision. The ability of UK law enforcement authorities to prosecute for conspiracy to commit offences in general outside the UK, has been strengthened as a result of a provision in the Criminal Justice (Terrorism and Conspiracy) Act 1998, but this is subject to numerous conditions and would be more readily applied to bribery of FPOs if there was a clear new offence of bribing FPOs.
10. In terms of the Convention definition of FPO, it is by no means clear that all categories would be covered under current legislation. An official or agent of a public international organisation would not seem to be included.

#### **Article 2 - Responsibility of legal persons**

11. Companies or other "legal persons" are understood to be generally subject to criminal liability

#### **Article 3 - Sanctions**

12. TI has the impression that the domestic law of corruption works in a generally satisfactory manner and that there are severe sanctions in place. It is not clear that the bribe to, and the

proceeds of the bribery of, a FPO, or property the value of which corresponds to that of such proceeds, would be subject to seizure and confiscation. There is a provision covering some aspects of this in the 1889 Act, but for reasons stated in para 8 above, this is not necessarily helpful. Whether or not the sanctions would be effective, proportionate and dissuasive in the case of bribery of a FPO requires some informed evaluation. Sanctions could not be effective however, unless the law governing the offence itself is effective. TI believes that this is demonstrably not the case.

13. In terms of additional sanctions, so far as TI is aware, there are no such provisions in UK law. There are some provisions in the domestic law disqualifying holders of public office found guilty of accepting bribes, but this is not the mischief at which the Convention is directed. Nor, so far as TI is aware, has the Government given this matter any open consideration in accordance with Article 3 (4). There is much that could be done administratively (without any new legislation). For example, steps could be taken to strengthen the anti-corruption assurances required of applicants for ECGD (publicly funded) export or investment credit insurance. Where a company, firm or individual has been sanctioned by an international financial institution (such as the World Bank) for bribery or other illicit activity, steps could be taken to ensure that no other institution that has UK membership, accepts their contracts for funding without there being a full investigation of the previous alleged activity. Similar considerations could apply to funding from the Department for International Development and other government departments.

#### **Article 4 - Jurisdiction**

14. As stated in para 4 above, it is TI's view that the only way in which the Convention can be made **effective** is by the UK adopting nationality-based jurisdiction, in addition to its territorial basis, for this offence (see also para 7 above). The Law Commission has proposed that the new offences of corruption should be included in the list of Group A offences for the purposes of Part I of the Criminal Justice Act 1993 (CJA), which extends the jurisdiction of the English courts over offences of fraud and dishonesty committed abroad. The Government's position on this proposal is not known. Even under this legislation, there has to be one component act of the offence committed within the jurisdiction. The reality is that in significant cases of bribery of FPOs, very great care will be taken that no action occurs in the UK. There may be evidence of payment of a bribe to or for the benefit of a FPO, the potential economic benefit of which would pass back to a company based in the UK. However, there may be no evidence of any act in the UK and no prosecution could, therefore, be brought. The CJA would not therefore assist.
15. Likewise, it is no answer to the UK's failing to adopt nationality-based jurisdiction, that it can prosecute for conspiracy to commit a crime abroad. This merely highlights the weakness of the UK's armoury to deal with the Convention offence itself. Again there may be evidence of the substantive offence, but not of conspiracy.
16. Nor is it an answer to claim that the UK is more ready than many countries to extradite its nationals. Even if true, it does not deal with many cases where there has been major corruption. Countries where corruption is a tolerated practice are less likely to be inclined to prosecute for corruption offences. The UK would not extradite to countries where a defendant would be unlikely to receive a fair trial or where inhuman punishments are imposed.
17. The concept on which territorial jurisdiction is founded is that UK law is intended to preserve the Queen's peace. The notion that law and order can be breached only by activity within the territory of a state is no longer sustainable. Immense political and economic damage flows from international corruption. The offence is one surely meriting equal consideration with homicide, drug trafficking, terrorism and sex tourism, for which extra-territorial jurisdiction is

taken. The **same principles** should be applied in relation to corruption offences, in accordance with Article 4 (2) of the Convention.

18. The preamble of the Convention, to which the Government has subscribed, states that international bribery raises serious moral and political concerns, undermines good governance and economic development and distorts international competitive conditions. These concerns merit the Government's taking nationality-based jurisdiction along the lines of para 7 above. Nothing less will render UK jurisdiction **effective** for the purpose of Article 4 (4) of the Convention, which required the United Kingdom to "review whether its current basis for jurisdiction is effective in the fight against the bribery of FPOs, and, if it is not, to take remedial steps." The development of information technology and speed of communication in a global economy, with corresponding criminal misuse of systems, demand enforcement systems in the UK equal to the criminal activity involved.

#### **Article 5 - Enforcement**

19. It should be noted (see para 8 above) that approval of the Attorney General is required before a prosecution under the UK's current legislation. There is therefore scope for the decision, whether or not to prosecute, to be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. This would be contrary to Article 5 of the Convention and para 6 of the Annex to the Revised Recommendation. The Law Commission has recommended that the requirement of the Attorney General's approval should be abolished in the proposed new law of corruption. TI would support this recommendation.

#### **Article 6 - Statute of Limitations**

20. TI is not aware of any limitation.

#### **Article 7 - Money Laundering**

21. Bribery of UK officials is thought to be a predicate offence for the purpose of the UK's money laundering legislation. Under the amendments to the UK Criminal Justice Act 1988 designed to incorporate money-laundering provisions, if the bribery of a FPO in England would constitute an offence, then it constitutes "criminal conduct" for the purpose of the money laundering provisions. If so, the place where the conduct constituting the offence of bribery occurs should be irrelevant. It would be much clearer however, if there were a separate offence as discussed above (see para 7). Moreover, the operation of the relevant provisions is impaired because they include a blanket defence where disclosure is made to the National Criminal Intelligence Service (NCIS). There is such a high volume of disclosures under this provision that it seems very doubtful whether effective action could follow on a disclosure made in respect of an offence of bribing a FPO.

#### **Article 8 - Accounting**

22. Most of the accounting devices listed in the Convention would probably be caught technically by the relevant provisions of the UK Companies legislation in dealing with false accounting, although considerations of materiality in accounting and reporting practice may sometimes undermine this. It is also to be hoped that a current review of company law will call for strengthened accounting and reporting on wider issues including internal controls. Significant progress will be made in auditing guidelines and professional guidance, only when there is an appreciation that to bribe a FPO is a criminal offence. This will not occur until specific legislation is enacted.

23. Moreover, Article 8 of the Convention needs to be read with para 29 of the Commentaries and Recommendation V of the Revised Recommendation. Without specific legislation, UK companies will not appreciate that they may be required to include in their financial statements, when dealing with contingent liabilities, information as to potential liabilities arising under the Convention. Recommendation V requires the UK to do more than has until now been accomplished, particularly in regard to internal company controls. The UK is making some progress in regard to reporting on internal controls for listed companies, which could include standards of conduct, through listing requirements, guidance and voluntary action. However, this does not have the force of law and does not apply to unlisted companies. In view of the growth internationally in considerations of corporate governance, it is important that the UK implements Recommendation V in full.

#### **Mutual Legal Assistance (MLA)**

24. A legal framework for MLA is in place, but consideration needs to be given to whether it is **effective**. TI is aware of concerns from authorities abroad when investigations are required to be directed formally to the UK, that delay frustrates progress.

#### **Extradition**

25. Although a legal structure is substantially in place, it is advisable for the Convention offence to be expressly legislated.

#### **Income Tax Deductibility**

26. The present position is unsatisfactory. Tax legislation is in place to disallow as deductions payments that are a criminal act for the payer. One of the most damaging consequences of the Government's view of the adequacy of the existing laws is that there is no clear offence of bribing a FPO. Therefore the tax legislation in this respect is ineffective. The manual of advice to HM Inspectors of Taxes states that the UK does not have jurisdiction over a corruption offence where the actual offer and payment take place abroad. Tax inspectors may be able to disallow the deduction of bribes on other grounds (for example, payment for hospitality, payment for inadequate consideration amounting to a gift), but not specifically because it is a bribe of a FPO. Moreover, where a payment is disallowed in circumstances that the Inland Revenue may suspect amount to a bribe to a FPO, it is understood they would be precluded from passing that information to law enforcement authorities because of strict rules of confidentiality. They are subject to a duty not to disclose information to any other authority, except in cases of homicide, treason, terrorism or drugs trafficking. TI would urge the Government to legislate to give international corruption equal status with these offences.

Prepared by

Graham Rodmell, TI-UK & Jeremy Carver (Head of International Law at Clifford Chance, London, honorary solicitors to TI-UK)

Reviewed and adopted by the

**TI Working Group on the OECD Convention**

Fritz Heimann, TI USA

Peter Rooke, TI Australia

Michael Wiehen, TI Germany

**RAISING STANDARDS AND UPHOLDING INTEGRITY:**

**THE PREVENTION OF CORRUPTION**

**The Government's Proposals for the Reform of the Criminal Law of Corruption in  
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**COMMENTS OF TRANSPARENCY INTERNATIONAL (UK)**

**Summary**

The following are the principal points to emerge from the comments of TI-UK

- Proposals for amendment of the domestic law of corruption and those relating to Members of both Houses of Parliament are broadly supported.
- The proposed legislation needs to be clear and effective, especially to give effect to the UK's obligations under the OECD Convention.
- The equivalent laws in Scotland, Northern Ireland and the Crown Dependencies need to be brought swiftly into line.
- Legislation to implement the OECD Convention must be in place by the end of 2000.
- There remains a need to distinguish between public officials and others for the offences of trading in influence and bribery of foreign public officials.
- The reverse onus provision in the 1916 Act should be included in new legislation.
- There should be a separate section in the legislation for the offence of bribing foreign public officials.
- The requirement for the consent of the Law Officers for prosecution should be abolished.
- There should be an urgent and thorough high-level consultation to identify weaknesses in current investigation and prosecution procedures.
- The jurisdiction of the Serious Fraud Office should be extended to include corruption.
- Inland Revenue confidentiality rules should be relaxed to facilitate prosecution of corruption.

## Transparency International (UK)

- 1.1 Transparency International is a non-governmental organisation dedicated to curbing both international and national corruption and, in this connection, to increasing government accountability. It is the only global non-profit and politically non-partisan movement with an exclusive focus on corruption. It was founded in 1993. It has an international secretariat in Berlin and national chapters in about 80 countries. Transparency International (UK) (TI-UK) is the UK national chapter.
- 1.2 TI-UK's primary concern has been with fighting corruption in international trade and investment. However, it is also concerned with the domestic law of corruption, both because of the need to curb corruption within the UK and because it is the foundation of any attempt to deal with the "supply" side of international corruption.

## General Views of TI-UK

- 2.1 TI-UK welcomes the publication of the Government's policy paper (the Paper) and is broadly supportive of the proposals made. However, it does have a number of concerns, which are referred to in the remainder of these submissions. TI-UK thinks it is right that evidence in relation to alleged corruption by Members of Parliament and members of the House of Lords should be admissible notwithstanding the Bill of Rights of 1689 and offers no comments on this part of the Paper.
- 2.2 TI-UK made submissions to the Law Commission in respect of the original consultation paper (No 145). It was apparently due to TI-UK's intervention that the final report contained some proposals for dealing with the international dimension. Unlike the Law Commission's report (No 248) "Legislating the Criminal Code: Corruption" (LCR), the Government's Paper does not include a draft Bill. The Paper indicates that it accepts in principle the proposals made by the Law Commission. Some of the points addressed in these submissions can only be fully developed when the text of proposed legislation is available. TI-UK is willing to co-operate in the process of briefing parliamentary counsel or to work with Government in whatever way may be thought most helpful in securing the common objectives expressed by the Home Secretary, the Rt. Hon Jack Straw MP, in his foreword to the Paper.
- 2.3 TI-UK's criteria in commenting on the proposals in the Paper, are consistent, whether considering domestic or international corruption. Will they be **clear**? Will they be **effective**? Unless the legislation is clear, it certainly cannot be effective. Effectiveness however embraces other factors, especially the will, mechanisms and resources to detect and prosecute offences covered by the new legislation.
- 2.4 Clarity and effectiveness may call for statutory measures not yet included in the Paper or the LCR (see the proposals below regarding the jurisdiction of the Serious Fraud Office (SFO) and the limited lifting of confidentiality restrictions on information supplied to the Inland Revenue).
- 2.5 In examining how the Paper's proposals may fulfil the UK's international obligations, TI-UK looks especially at the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), the

OECD 1997 Recommendation and the Country Report for the UK issued by the OECD on 27 June 2000 (OECD Review).

- 2.6 For that purpose, as for other commitments made on behalf of the UK in this field, it is imperative that substantially similar legislation to that proposed for England and Wales is enacted for Scotland and Northern Ireland and that the Crown Dependencies and the UK Overseas Territories can be brought within the scope of satisfactory anti-corruption laws to tackle international corruption without delay. The UK must not, by default, embrace its own "haven jurisdictions" for corrupt dealings.
- 2.7 As a starting point, the enactment of proposed legislation for England and Wales is **VERY URGENT**. The OECD Working Group on Bribery in International Business Transactions (the Working Group) found that the UK laws were not in compliance with the standards of the OECD Convention and urged the UK to enact appropriate legislation as a matter of priority, taking into account the observations of the Working Group, who will review the situation by the end of 2000. TI-UK urges the Government to follow-up a "fast-track" consultation on the Paper, with a commitment to legislate in the Queen's Speech at the opening of the 2000/2001 session and to construct a "fast-track" for the legislation to be in place by December 2000. This is a measure that should command all-party support and Government should contrive to demonstrate that the UK is capable of using its parliamentary machinery to meet the well-founded concerns of the Working Group within the generous time allowed.
- 2.8 Failing this, there remains a strong case for enacting a short and uncontroversial Bill, to create the offence required by the OECD Convention, together with the proposals for extra-territorial jurisdiction in the Paper. This offence, the bribery of foreign public officials (FPOs), is a serious international economic crime which can logically either stand apart from, or be part of, the UK's domestic anti-corruption law. To delay enacting this offence could severely damage the future success of the Convention, which relies on the basic assumption that the same rules will apply to all major exporters. It is particularly damaging that the UK as a G7 nation is still seen as one of the few laggards in curbing a practice that has devastated economies and resulted in appalling poverty.
- 2.9 The Home Secretary has rightly recognised corruption as a "deadly virus", that left unchecked, "weakens economies, creates huge inequalities and undermines the very foundations of democratic government". **It is normal practice to treat deadly viruses urgently and not "when parliamentary time allows"!**

### **Proposals for Reform of Domestic Law of Corruption**

- 3.1 In broad terms, the Paper's proposals to abandon the present distinction between private and public sector corruption, to introduce the "agency" concept and to have a definition of acting corruptly are logical and welcome. In theory, they should simplify our domestic law. This, combined with the repeal of the current statutory offences and the abolition of the common law offence of bribery, should certainly remove present uncertainties as to their scope and overlap.

- 3.2 However, there are aspects of "agency" in the draft Bill published in the LCR that are untested, notably the concept of a person being "an agent performing functions for the public if the functions he performs are of a public nature". One recognises the factors that have resulted in the concentration on functions rather than bodies, with the increasing number of public sector functions that have been privatised or contracted out in recent years. The legal concept of "the public" being a principal in an agency relationship, separate and apart from relevant public bodies, is quite difficult and will depend on judicial interpretation. The impossibility of "the public" giving consent to an agent is already noted in the Paper (para 2.7). A review of clauses 10 and 11 of the LCR Bill suffice to show the complexity and difficulties that may be encountered in applying this novel concept in the law of corruption. Moreover, with the passage of time, and less recent memory and recognition of services now in the private sector as having once been in the public sector, it will become more difficult to determine whether functions are "of a public nature".
- 3.3 For reasons stated in the Paper (para 2.15) and in these submissions (paras 5.1 and 6.4) there will remain a need to distinguish between public officials and others.
- 3.4 As the Government recognises (para 2.6 of the Paper), it is important not to criminalise legitimate business activity. In the LCR Bill this depends on the definition of acting corruptly and the exception of remuneration or reimbursement. In dealing with "tips and gratuities", it might be helpful to introduce into the Bill the concept of remuneration or gratuities which are fair and reasonable and openly and fully accounted for in appropriate business records. Transactions that are open and transparent are unlikely to amount to corrupt activity.

### **Corruption in the Public Sector**

- 4.1 On grounds of effectiveness, it is regrettable that the Paper proposes to abolish the presumption (at present in the 1916 Act) that money or gifts or other consideration paid to public servants from those having or seeking contracts in the public sector are given or received corruptly. Whenever a reward is received in these circumstances, it is reasonable that the recipient should have to demonstrate that it was received innocently. This is because the briber and the agent will be the only people who know the real purpose of the reward. Under the proposals, the prosecution will have to prove beyond reasonable doubt that the briber believed the agent would act primarily in return for the reward, which may prove very difficult without the existing presumption. This reverse onus provision does not amount to a presumption of guilt and, notwithstanding the provisions of the European Convention on Human Rights, is thought to be reasonable. Its removal could present an additional hurdle to successful prosecution. To preserve the presumption would require the distinction between public and private officials to be maintained.

### **Trading in Influence**

- 5.1 TI-UK endorses the proposal in the Paper to criminalise "trading in influence" in a manner required to comply with the Council of Europe Criminal Law Convention on Corruption. The Government recognises the need for this purpose for the Bill to deal separately with public officials (para 2.15).

## Bribery of Foreign Public Officials

- 6.1 The OECD Convention affords governments and business the best opportunity so far to make a real difference in achieving competition in international trade and investment based on quality, efficiency and price, rather than the ability to bribe. The more widely this is promoted, the greater the progress that can be made in isolating the extortioners, driving down the level of corruption and theft of national resources and improving integrity in national governance programmes.
- 6.2 The Paper's proposals, when finally implemented, will substantially comply with the OECD Convention, but TI-UK has reservations as to the legal solutions proposed. However tidy and comprehensive the drafting of the legislation envisaged by the Paper, if this is to be modelled on the LCR Bill, it will present problems to those charged with ensuring compliance with the Convention and to those detecting and prosecuting an offence of bribing a FPO. The LCR Bill may work well in the context of the law and practice within England and Wales, with the common law tradition of Courts interpreting statutes and building over time a system of precedents. However, in the international context, for our laws to be **effective** in combating the bribery of FPOs, they need to be instantly recognisable from their language as addressing this offence.
- 6.3 Working on the basis of the LCR Bill, in order to establish the single offence of a bribe having been paid by or on behalf of a British national to an FPO in another country, it will be necessary to refer to and interpret clauses 1, 3, 4, 6, 8, 9 and possibly 10. The concept of an agent performing functions for "the public" (based on function rather than on some agency for a government or public body with a constitutional or legal *persona*) will have to be related to the OECD Convention wording. Reliance will need to be placed on the rather indirect approach adopted in the Bill (clause 9(4)) that "Subsection (3) has effect even if the person has no connection with the United Kingdom, and "public" is not confined to the public of the United Kingdom or of any part of it." This approach seems to endure in the Paper's Summary (para 6) which says that "the corruption of, or by, a public official is not confined to the public of the United Kingdom." Rather than an indirect approach, it would surely be clearer and more effective to declare the offence more positively, as will be needed for the offence of trading in influence (para 5.1 of these submissions).
- 6.4 TI-UK advocates that the legislation to implement the Paper's proposals should contain a separate section worded along the lines of Article 1 para 1 of the OECD Convention, so that a person commits an offence under the Act if he intentionally offers, promises or gives any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business. This section would contain its own definition of "foreign public official", "foreign country" and "act or refrain from acting in relation to the performance of official duties", substantially along the lines of Article 1 para 4 of the Convention. It would not be necessary to follow the Convention's words slavishly and parliamentary counsel will know best how to incorporate this offence into the draft

legislation. It would leave no doubt at all that the OECD Convention had been incorporated into the laws of England and Wales. It would not rely on future interpretation. It would not replace but merely supplement the other new offences to be created by the legislation.

- 6.5 A section as suggested in the preceding paragraph would create a clear "Convention offence". This would strengthen the laws on related issues of money laundering offences, mutual legal assistance in the form of search and seizure, extradition and disallowance of tax deductibility, which are linked to the existence of a criminal offence under our law. Such an offence might exist from the interpretation of a combination of sections in the LCR Bill, but to enact the "Convention offence" would place this manifestly beyond doubt. The definition subsection would ensure that the offence applies to foreign members of parliament and foreign judges, which is by no means certain under the LCR Bill. In this way, all the valid objections of the Working Group expressed in paras 1.1, 1.2 and 2 of the Evaluation in the OECD Review would be met.
- 6.6 The Section discussed in paras 6.4 and 6.5 of these submissions would be the core of the separate Bill referred to in para 2.9, supplemented by the widening of powers referred to below in paras 8.4 and 8.5.

### **Consent to Prosecution**

- 7.1 The Law Commission recommended that the requirement under corruption statutes for the consent of a Law Officer for prosecution should not apply to the offences to be created by the new legislation (para 7.26 of the LCR). This followed careful consideration of most of the relevant issues and the views of respondents following the earlier consultation paper. The Paper, following discussion with the Law Officers, proposes not to adopt this recommendation. It claims that a consent provision remains necessary because corruption is an offence which creates a high risk that the right of private prosecutions will be abused and the institution of proceedings will cause the defendant irreparable harm (paras 5.2 and 5.3 of the Paper). The same could be said of fraud offences, but no consent of the Law Officers is required for those offences. The LCR had already dealt with the extensive remedies that already exist for dealing with this circumstance (see para 7.25 of the LCR). In the area of private/private corruption, the parties may be expected to be sufficiently resourceful to prevent abuse of the judicial system.
- 7.2 All prosecutors are obliged to view matters dispassionately and to take account of questions of public interest. To preserve the Law Officers' consent therefore amounts to needless duplication.
- 7.3 The one very important factor that the Law Commission did not consider in this context was the need to comply with Article 5 of the OECD Convention. Investigation and prosecution of the bribery of a FPO is not to be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. TI-UK would not suggest that any particular Law Officer would exercise his or her powers improperly. However, the Law Officers are members of the Government and in considering a case

objectively, could give different weight to different aspects than might prosecutors outside government. Thus in theory, consent to prosecute could be withheld to protect people or transactions for considerations fully within the ambit of Article 5 of the OECD Convention. It is for this reason that the Working Group recommended the UK to reconsider this requirement (para 5 of the Evaluation in the OECD Review)

- 7.4 The Government proposes to disregard the considered recommendation of the Law Commission, the views of respondents and the recommendation of the Working Group for an insufficient reason. TI-UK would reinforce the recommendations and urge the Government to abandon this proposal.

### **Effectiveness of Enforcement**

- 8.1 Para 2.8 of these submissions referred to the finding of the Working Group under Phase I of the review of performance of the UK under the OECD Convention. Phase I deals only with legal implementation. The proposals in the Paper with the modifications suggested in these submissions would enable the UK (or at least England and Wales) to fulfil its Convention obligations. Phase II of the monitoring process will evaluate enforcement programmes in each country. It will be thorough and involve country visits. Unless there are radical changes in the UK's enforcement agencies, procedures and priorities, the outcome of the Phase II evaluation is likely to be as negative as that for Phase I. Some of the necessary changes may require amendment of our laws and these should be included in the legislation to follow the Paper's proposals.
- 8.2 Preliminary enquiries undertaken by TI-UK reveal a disturbing uncertainty as to which agency or agencies would investigate and prosecute the offence of international corruption, particularly one where all significant components of the offence take place outside the country. There has of course been no directly relevant experience. The OECD Convention came into force for the UK on 15 February 1999. So far as is known, no additional financial or human resources have been applied to the investigation of cases giving rise to the new offence, although there have been reports in the public domain of cases that would merit investigation. For example, the majority of companies and individuals debarred, for fraud and corruption, by the World Bank are British.
- 8.3 The difficulties of detecting the offence and gathering evidence cannot be over-estimated. TI-UK recommends that senior officials from within the various law enforcement agencies, with experienced criminal law practitioners, should consult with the Home Office as a matter of urgency to consider current procedures and their likely effectiveness right from first report, through investigation and evidence gathering to trial, to highlight weaknesses, especially those that could be corrected or minimised by the proposed legislation. This consultation would also prepare the UK for Phase II of the OECD Convention monitoring process.
- 8.4 Many cases of bribery of FPOs are likely to fulfil the current criteria of the SFO for the acceptance of cases as set out in the SFO Annual Report for 1999/2000. The investigation should be in the hands of those who would be responsible for the prosecution. The sum involved would frequently be at least £1 million. The case

would be likely to give rise to national publicity and public concern. The investigation would require highly specialist knowledge and would obviously have a significant international dimension. There would be a need for legal, accountancy and investigative skills to be brought together as a combined operation. The suspected bribe would frequently be complex and one in which the use of the powers in Section 2 of the Criminal Justice Act 1987 (CJA) might be appropriate. TI-UK recommends that the jurisdiction of the SFO should be expressly widened to include the new offences of corruption. Many cases of corruption could include fraud and so would already fall within the SFO's jurisdiction. Many cases could equally not amount technically to fraud and therefore a very small amendment should be made to the CJA to confer jurisdiction.

- 8.5 There should be no barrier to the Inland Revenue's passing information to those prosecuting the new offences of corruption; rather there should be an obligation to pass to the relevant agency any information tending to show that the crime of corruption has been committed.. The proposed legislation, or the first available Finance Bill (if considered more appropriate by those responsible), should include whatever is necessary to achieve this. Prosecution of bribery, particularly with an international dimension, will be difficult enough without artificial barriers such as exist in the current rules of confidentiality that apply to the tax authorities. This would also meet the recommendation of the Working Group in Part II of the Evaluation in the OECD Review.



**RAISING STANDARDS AND UPHOLDING INTEGRITY:**

**THE PREVENTION OF CORRUPTION**

**The Government's Proposals for the Reform of the Criminal Law of Corruption in  
England and Wales**

**SUPPLEMENTAL COMMENTS  
OF  
TRANSPARENCY INTERNATIONAL (UK)**

21 August 2000

## **RAISING STANDARDS AND UPHOLDING INTEGRITY: THE PREVENTION OF CORRUPTION**

### **The Government's Proposals for the Reform of the Criminal Law of Corruption in England and Wales**

#### **SUPPLEMENTAL COMMENTS OF TRANSPARENCY INTERNATIONAL (UK)**

##### **Jurisdiction - Territorial and Nationality Based**

1. TI-UK warmly welcomes the Government's proposal to accept the Law Commission's recommendations to include the new corruption offences within Part I of the Criminal Justice Act 1993, or otherwise by way of the proposed legislation, to place beyond doubt the UK's ability to prosecute offences where part only of the offence occurs within the UK. Please refer to paragraph 2.6 of the TI-UK July 2000 submissions document, when distinguishing between the laws of the UK and those of England and Wales.
2. TI-UK also warmly welcomes and strongly supports the Government's view (para 2.23 of the Paper) that the UK should assume jurisdiction over its nationals for offences of corruption committed abroad. TI-UK would feel able to express this view more strongly than it appears in the Paper, because in TI-UK's view, it is the only way to make the criminalisation of bribery of foreign public officials (FPOs) **effective**.
3. The principal reasons for this are well summarised in the Paper (para 2.23) and stated by the Rt. Hon Jack Straw in his foreword to the Paper. For convenience, these are set out below:
  - Corruption knows no boundaries
  - It is sometimes difficult to pin down the physical location at which a corrupt transaction has taken place
  - The law has to catch up with the realities of modern technology in business
  - Without this change, acts of corruption committed by UK nationals or UK companies wholly outside the jurisdiction (i.e. the normal practice for bribes to FPOs) would not be covered
  - The UK's willingness to extradite its nationals is not an answer, because states where extortion and bribery are common will seldom prosecute and the unlikelihood of a fair trial and the risk of inhuman punishments would preclude extradition
  - To assume nationality jurisdiction sends a strong deterrent message that the UK is determined to act against corruption, backs up existing codes of conduct and puts beyond doubt the UK's commitment to join forces with the international community in the fight against corruption.
4. The preamble of the OECD Convention states that international bribery raises serious moral and political concerns, undermines good governance and economic development and distorts

international competitive conditions. These concerns merit the Government's taking nationality-based jurisdiction. Nothing less will render UK jurisdiction **effective** for the purpose of Article 4 (4) of the Convention, which required the United Kingdom to "review whether its current basis for jurisdiction is effective in the fight against the bribery of FPOs, and, if it is not, to take remedial steps."

5. The concept on which territorial jurisdiction is founded is that UK law is intended to preserve "the Queen's peace". The notion that law and order can be breached only by activity within the territory of a state is no longer sustainable. Immense political and economic damage flows from international corruption. The offence merits at least equal consideration with homicide, drug trafficking, terrorism and sex tourism, for which extra-territorial jurisdiction is taken. The **same principles** should be applied in relation to corruption offences, in accordance with Article 4 (2) of the OECD Convention. Nationality jurisdiction is required for the UK to be fully compliant with the Convention and is entirely consistent with the position adopted in regard to other serious international crime.
6. It is understood that civil law states generally feel less constrained than the UK and other common law states in prosecuting their nationals for offences committed abroad. It should be noted that the **USA** have taken the view that they needed to assume nationality jurisdiction in order to be compliant with the OECD Convention and their Foreign Corrupt Practice Act was amended accordingly in 1998. **Australia** has also adopted full nationality jurisdiction. The purpose of the Convention will not be achieved unless the UK also assumes jurisdiction based on nationality for this offence.
7. Both territorial and nationality jurisdiction are required. Even under Part I of the Criminal Justice Act 1993, there has to be one component act of the offence committed within the jurisdiction. The reality is that in significant cases of bribery of FPOs, very great care will be taken that no action occurs in the UK. There may be evidence of payment of a bribe to or for the benefit of a FPO, the potential economic benefit of which would pass back to a company based in the UK. However, there may be no evidence of any act in the UK and no prosecution could, therefore, be brought.
8. As with the July 2000 submissions document, TI-UK is willing to discuss any of these issues with the Home Office or other Government departments if this would be helpful.

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