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IBA Anti-Corruption Committee
Submission to United Nations Special Session of the General Assembly against
Corruption 2021

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Introduction

On 17 December 2018, the General Assembly of the United Nations (UNGA) adopted Resolution 73/191 entitled “*Special session of the General Assembly against corruption*”, and decided to convene in the first half of 2021 a special session on challenges and measures to prevent and combat corruption and strengthen international cooperation, at the end of which a concise and action-oriented political declaration shall be adopted.

According to Resolution 74/276, adopted by UNGA on 1 June 2020, the General Assembly decided that the aforementioned meeting shall be convened from 26 to 28 April 2021 at United Nations Headquarters, in New York.

The Conference of State Parties (COSP) was invited to hold up to three intersessional meetings, which, meanwhile have been scheduled for June, September and November 2020.

With a view to an inclusive preparatory process, including substantive consultations, in preparation of the special session in 2021, the International Bar Association (IBA) – in accordance with the relevant rules of procedure and established practice– welcomes the opportunity to fully contribute to this preparatory process and consultations in order to continue providing its support to advance the global fight against corruption. To that effect, this first submission focusses on the topics of the June 2020 intersessional meeting on prevention and criminalisation. The IBA’s Anti-Corruption Committee (ACC) intends to provide separate further submissions for the intersessional meetings scheduled for the intersessional meetings in September and November 2020. State Parties should consider to adopt ACC’s proposals outlined below and adopt them in the form of an additional protocol to UNCAC.

The Role of the International Bar Association and its Anti-Corruption Committee in the Fight against Corruption

The International Bar Association, *the global voice of the legal profession*, is the foremost organisation for international legal practitioners, bar associations and law societies. Established in 1947, shortly after the creation of the United Nations, it was born out of the conviction that an organisation made up of the world’s bar associations could contribute to global stability and peace through the administration of justice. Its present membership is comprised of more than 80,000 individual international lawyers

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from most of the world's leading law firms and some 190 bar associations and law societies spanning more than 170 countries.

Prior when international bribery was elevated as a major concern in the international arena, the IBA adopted the **Resolution on Deterring Bribery in International Business Transactions** in 1996. The **[Anti-Corruption Resolution](#)**, adopted on 7 October 2010 by the IBA, expressed a clear and strong message of its strong commitment to support the global fight against corruption.¹

¹ Both documents are available on the ACC's [website](#).



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The driving force behind IBA's commitment against corruption has been the Anti-Corruption Committee (ACC), which consists of members who are anti-corruption and compliance lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants from around the world.

Over the years, the IBA and the ACC have, in addition to the documents mentioned before, provided multiple contributions toward the fight against corruption, including the examples cited below:

- I. In 2010, the IBA, in cooperation with the OECD and UNODC commenced the **Anti-Corruption Strategy for the Legal Profession**, a project focussing on the role lawyers play in fighting corruption in international business transactions and the impact on the legal practice of international anti-corruption instruments and associated implementing national legislation with extraterritorial application. Over a five year period, the IBA (with the support of the OECD and UNODC) hosted workshops in over 30 countries, calling out the corruption risks facing lawyers and their clients, and advancing the anti-corruption message to hundreds of lawyers.
- II. From 2015, the IBA promoted its **Judicial Integrity Initiative**, focussing on promoting structural changes in the administration of judicial systems and the support of judges across the world to address bribery and corruption risks in national judicial systems.
- III. On 24 August 2015, the ACC filed a **Submission to the Australian Senate Economics Reference Committee on Australia's Foreign Bribery Laws**, supporting substantial proposed reforms to tackle foreign bribery under Australian law.
- IV. Between 2015 and 2017, the ACC worked with the **German Government International Development Authority and the Afghanistan Independent Bar Association**, to formulate a series of anti-corruption guidelines for the Afghanistan legal profession. Subsequently a series of education and training workshops were held in Dubai, the UAE, with senior representatives from the Afghanistan Government and legal system participating.
- V. On 26 April 2017, the ACC presented a **Submission to the Australian Attorney General's Department on Considerations of a Deferred Prosecution Agreement (DPA) Scheme** in Australia and on 17 November 2017 filed a **Submission to the Canadian Government's Deferred Prosecution Agreements consultation**. In March 2020, the Australian Parliament Legislation and Constitutional Committee published its report which recommended all the reforms supported by the ACC for reforming Australia's foreign bribery and other laws and introducing a DPA scheme be enacted.

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- VI. In May 2017 the ACC issued a report ‘**Anti-Corruption Law and Practice Report 2017: Innovation in Enforcement and Compliance**’ which examined the developments in law and practice in the international anti-corruption field. Seven key areas were identified: negotiated/structured settlements; corporate criminal liability; corruption and human rights; reporting persons; internal investigations; collective action; corporate compliance and behavioural regulation.
- VII. In 2016, the ACC’s Structured Criminal Settlements Subcommittee (SCSS) commenced a two-year project entitled ‘**Towards Global Standards in Structured Settlements for Corruption Offences**’ and in December 2018, released a [report](#) mapping the evolving settlement practices for corruption cases of countries across the globe. The project hopes to add to the growing discussion on whether, and to what extent, there is a need for global standards.
- VIII. Following the previous initiative, the ACC launched the [Roll Out Project](#) with the objective of (i) contributing to the guidelines that the Working Group on Bribery of the OECD is developing for non-trial resolutions of foreign cases and (ii) participating in the national implementation of those guidelines.
- IX. On 9 December 2019, the ACC’s Asset Recovery Subcommittee (ARSC) together with the UNODC-World Bank Stolen Asset Recovery Initiative (StAR) published the jointly authored book [Going for Broke](#), outlining often underutilised means to pursue the restitution of corrupt funds.

The International Fight against Corruption

Corruption is a transnational phenomenon that affects all societies and economies, making international cooperation essential to prevent and control it. With a view to address the corrosive effects corruption has on societies, UNCAC was adopted by the General Assembly of the United Nations on 31 October 2003 at United Nations Headquarters in New York and entered into force on 14 December 2005.

Since then, UNCAC has played a key role in the worldwide anti-corruption efforts and is well positioned to forcefully advocate for a change in various anticorruption systems focusing on prevention, investigation and prosecution of corruption, freezing, seizure, confiscation and return of the proceeds of bribery and corruption offences as key areas to effectively prevent and criminalise corruption.

Since 2005, the UN continues to address the seriousness of the threats corruption poses to the stability and security of societies, undermining the institutions and values



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of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.

The IBA's ACC supports UNCAC and UNODC efforts as well as the framework provided for by other international conventions and intergovernmental organizations. The ACC further recognizes the added value provided by the G20 Anti-Corruption Working Group and its various High Level Principles. The ACC is also mindful of the important role played by institutions like the International Monetary Fund and the World Bank as key practical implementers of the fight against corruption in practice.

Although the ACC acknowledges that the State Parties to the various Conventions, organizations and groupings are not homogeneous, and that the language adopted in the various anti-bribery Conventions differs, the ACC urges all organizations and institutional bodies to be mutually supportive and to increase synergies in a spirit of cooperation rather than competition. The ACC invites UNGASS to specifically recognize the importance of this point and include it in the political declaration, to underscore the necessity for the international community to speak with one voice and to deliver a coherent and consistent message against bribery and corruption, independent from where and how it occurs.

Moreover, as of 6 February 2020, 187 States signed and ratified the UNCAC and in view of the UNGASS Special Assembly, the IBA is of the view that all UN members should become parties to the Convention. The words used in Resolution 58/4 adopted by the General Assembly on 31 October 2003 remain appropriate to date. The IBA remains concerned about “the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law” as expressed in UNCAC. Therefore, State Parties should commit to close the implementation gap and take appropriate action to support their commitment in practice.

After these introductory remarks, the ACC turns to the two thematic focus of the first intersessional meeting, namely (I) Prevention of Bribery and Corruption and (II) Criminalisation of Bribery and Corruption.

I Prevention of Bribery and Corruption

a) Developing awareness: ethical code

Despite the efforts made by public and private institutions, the awareness of corruption has not reached all sectors of society to a satisfactory level. Private employees across the board should be educated to raise their awareness of (i) the highly unethical nature of corruptive practices; (ii) the anti-competitive consequences of corruption in the marketplace; (iii) the severe adverse consequences for corporate

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entities and individuals, including financial liability, debarment, imprisonment, and reputational damage, and (iv) and the broader corrosive effect of corruption on society.

The implementation of a well-integrated ethical code is an appropriate tool to draw attention to proper commercial practices and to **the need to manage a responsible business** in full compliance with the international and domestic anti-corruption and anti-bribery laws. Such a code or business guidelines need to be imbedded in business, seen and regarded as something of indispensable value and proactively supported from the CEO to the mailroom clerk. Sustainable ethical business is of value to everyone, every stakeholder in a business and society more generally.

b) Compliance Programs & Anti-Corruption Policies

Article 12 UNCAC addresses the prevention of corruption in the private sector. The ACC recalls the importance of two Handbooks, in particular (i) "An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide" published by the UN and (ii) "Anti-Corruption Ethics and Compliance Handbook for Business" published by the OECD, the World Bank and UN. The ACC urges better dissemination and awareness within the State Parties of the learnings from these publications.

The ACC also urges State Parties to acknowledge the importance to actively involve the private sector in the fight against corruption. To that effect, State Parties should adopt incentive-based regulations to support the implementation of robust and effective compliance programs.

The prevention of corruption is predominantly achieved through the development, maintenance, and implementation of anti-corruption policies. An internal body should undertake the task of periodically reviewing policies and procedures to ensure they comply with current legal standards, address any gaps, and are consistently tailored to on-going risks within the organization. The principal focus of anti-corruption policies should be on (i) third party risk management, including due diligence, adequate controls in contracting, monitoring, and training; (ii) educating the workforce about the laws and standards applicable in each jurisdiction where an organization operates, and (iii) promoting disclosure of potential misconduct through various reporting lines, while fully respecting the right against self-incrimination.

Concerning training, UNCAC provides for training on anti-bribery and anti-corruption policies and procedures of public officials only. For the private sector, the ACC has considerable experience in working with the OECD, UNODC, StAR, multilateral agencies and other bodies to provide experienced practitioners (and others)



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to help educate and train those companies and businesses that are or might be vulnerable to corruption or at high risk of bribery, based on their experience.²

When addressing compliance programs and anti-corruption policies, the following important matters should also be taken into consideration: contract provisions with third parties, representations, warranties, prompt notice of any potential violation, cooperation, and remedies (including termination without compensation, where appropriate).

c) Auditing, Risk Assessment, Investigations

Article 12 lit. f. UNCAC addresses the internal auditing controls to prevent bribery and corruption.

A critical component of a robust and proactive anti-corruption program is a strong internal audit function that assists with identifying and addressing corruption risks. However, it would be helpful to provide rules on the auditing to be conducted by an independent body or, at least, by the internal auditing department but with the assistance of external experts. It is equally important to develop an investigative protocol designed to address reports of potential corruption. An effective internal investigation will not only serve to identify and assess potentially corrupt conduct but will also place a company in a better defensible position in the event of any regulatory or enforcement scrutiny. Many State Parties' anti-corruption regimes provide mitigating credit to companies that effectively identify, investigate and remediate corrupt conduct. While this credit varies in form (and is subject to Member State sentencing principles), it serves a very useful goal – promoting a responsive, proactive attitude to tackling corruption.

d) Conflicts of interest

Article 8 UNCAC addresses the code of conduct of public officials and specifically provides measures to prevent conflicts of interest of any public official from arising. However, the topic of conflicts of interest should also be addressed in private companies amongst employees.

Effective measures should be promoted to address conflicts of interest. First, it is recommended that each State Party adopts a legal definition of conflict of interest applicable in each legal sector (i.e. civil, commercial and criminal). Second, over the years, it has been demonstrated that potentially illegal conduct may occur due to a conflict of interest between one person (often an employee or representing another) and

² Besides the Anti-Corruption Strategy for the Legal Profession, two practical examples of this training work are reflected in two Handbooks: "An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide" published by the UN and "Anti-Corruption Ethics and Compliance Handbook for Business" published by the OECD, the World Bank and UN.



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another (a government official or commercial rival). In other cases, a conflict of interest in the private sector may only give rise to civil remedies between the parties.

In order to prevent the risk of bribery and corruption, even if this is only potential or perceived, it is important that companies establish policies and procedures to identify, monitor and manage conflicts of interest in order to prevent civil and/or criminal liability issues arising.

e) Disclosure

Private companies should carefully consider **financial statement disclosures and comply with accounting and auditing standards**, thereby increasing the transparency of the financial system. These actions could safeguard the integrity of the public sector. The transparency of the financial system also requires robust **financial analysis and investigations** in order to effectively trace illegally obtained assets.

f) Reporting Persons and Reporting of Misconduct

Article 33 UNCAC provides for the protection of reporting persons. Many State Parties have developed measures to protect reporters of misconduct. One notable development was the European Directive adopted on 7 October 2019, which aimed to **protect persons who report breaches of EU law**, thus exposing and preventing such breaches and safeguarding the welfare of society. This Directive introduces minimum standards for the protection of reporting persons in the EU, which are binding for companies and authorities and which is to be implemented throughout the EU by domestic State law. Protecting reporting persons from unfair treatment, including retaliation, discrimination or disadvantage and promoting anonymous reporting can embolden people to report wrongdoing and increase the likelihood that the wrongdoing is uncovered and penalised.

One important question is whether the reporter of misconduct should be required to act in “good faith” as contemplated by Article 33 UNCAC. This has been seriously challenged as an inappropriate test in many quarters as it turns the spotlight away from the misconduct and on the motives of the reporting individual. From the ACC’s perspective, this approach is not adequate. In the reforms implemented in Australia, the ACC advocated strongly for the abolition of the “good faith” test, to be replaced with a test that the reporting person must have reasonable grounds to suspect the misconduct. The approach was supported by the Australian Government and adopted in its legislation in Part 9.4AAA of the Corporations Act 2001 (Cth). The ACC proposes that the COSP considers to support reforms that do not require a “good faith” test where protections are proposed for reporters of misconduct.

It is important that legislatures, government agencies, and private businesses in the State Parties to UNCAC incorporate similar provisions into their domestic laws and

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policies. In order to make these reporting systems as effective as possible, they should include incentives to encourage individuals to report all instances of illegal behaviour. These laws and policies should also outline specific provisions on how the resulting reports of corruption and other improprieties will be handled, as well as provide appropriate levels of protection for reporting persons.

Therefore, **national legislators as well as public and private entities should be encouraged to support individuals who report misconduct and have clearly identified systems in place to handle reports of alleged misconduct and finally, appropriate levels of protection for reporting persons are in place.**

Relatedly, as the degree of reporting has increased and the various sources of reports have expanded, for example, competitors, terminated or former employees and contractors and the media, it should be noted that this creates a corresponding increase in the likelihood of detection of potential misconduct, thus promoting greater transparency and the voluntary disclosure of misconduct to companies and/or to authorities.

Taking into account the High Level Principles adopted by G20 Anti-Corruption Working Group, the ACC encourages the UN to develop general guidance on the protection of reporting persons, based on this document and on other relevant international texts on this topic. The ACC also suggests that a program or guidance, including training modules, on the protection of reporting persons should be developed in collaboration with UNODC.

II Criminalisation of Bribery and Corruption

If the prevention system implemented by a State Party fails to ensure the avoidance of bribery or corruption cases, each State Party should fight those events by implementing a **strong, clear and uniform legal framework to criminalise bribery and corruption.**

a) Corporate liability

The legal sanction framework of each State Party should set forth the corporate liability of legal entities, including parent companies and their subsidiaries.

It would be helpful if State Parties enhance their legal framework by taking into account the G20 High Level Principles on the Liability of Legal Persons for Corruption.

b) Basic Crime of Bribery

Article 15 UNCAC points at criminalising “the promise, offering of giving (and the solicitation and acceptance) ... of an undue advantage ... in order that the official act or refrain from acting in the exercise of his or her official duties”.



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This definition can create difficulties in practice given the wide variety of definitions of “bribery” that appear in the criminal laws of common law, or civil law or other laws of State Parties. It is a matter for each State Party to enact laws to criminalise bribery (both direct and indirect bribery) and clear language should capture conduct that identifies the criminal behaviour of a person seeking a bribe as much as the person who offers or gives the bribe.

c) Effective Deterrence

Article 30 (3) UNCAC calls for maximization of the effectiveness of law enforcement and deterrence. In many countries, this has resulted in a tendency towards aggravating the sanctions for bribery. Only in a few countries an effective imprisonment is applied to convicted individuals. But even a short period of imprisonment is a much more effective sanction, especially from a special deterrence point of view, because – frequently the public official will not commit bribery again, because he or she will no longer be an officer.

d) Inclusion of private bribery and foreign public bribery amongst the corruption offences

Article 21 UNCAC sets forth bribery in the private sector. However, many State Parties do not punish private bribery, but focus instead on punishing bribery involving public officials. Private bribery is detrimental to fair competition. It is therefore essential that all State Parties be encouraged to enact laws punishing private bribery in a manner that allows them to pursue such cases in their individual jurisdiction.

e) Implementation of the obligation to criminalise the bribing of a foreign public official

Article 16.1 UNCAC requires State Parties to criminalise bribery of foreign public officials. The ACC reiterates the importance of enacting and implementing domestic provisions on the bribery of foreign public officials as an effective instrument to globally fight bribery and corruption. In particular the ACC calls on all G20 countries and major emerging economies to lead by example and fully implement the provisions of article 16.1 UNCAC.

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essential that all State Parties be encouraged to enact laws punishing private bribery in a manner that tackles the problem in their individual jurisdiction.

Additionally, as expressly stipulated by article 16 UNCAC, the ACC reiterates the importance of enacting and implementing provisions on the Bribery of Foreign Public Officials as an effective instrument to globally fight bribery and corruption.

g) Clear definition of the individuals susceptible to be bribed

Articles 15 and 16 UNCAC do not provide any distinction on the individuals susceptible to be bribed, which may lead to loopholes, hampering general awareness of what may constitute bribery.

Legal systems should therefore clearly define the individuals who are susceptible to be bribed and should align their legislation on this point and ensure that anti-bribery and anti-corruption laws apply equally to all persons in a jurisdiction.

h) Non-trial resolutions of bribery and corruption cases

A significant component of anti-corruption enforcement is balancing the interests of deterrence and rehabilitation, particularly for corporate entities subject to enforcement.

Some countries have put in place systems which encourage self-disclosure or voluntary disclosure by companies having identified a problem of corruption. Most commonly these include non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs), which are designed to promote the interests of rehabilitation and minimise unwarranted collateral consequences for non-culpable employees and shareholders. These types of agreements also incentivise corporate entities to cooperate with enforcement authorities and achieve a mutually-beneficial outcome. State Parties may consider the adoption of these agreements and enable their authorities to use them in circumstances where the public interest can be satisfied in relation to the transparency and accountability of such agreements and the system that offers them is not open to abuse or misuse by any person, company or institution.

The ACC considers that all NPAs or DPAs should be independently vetted and published by courts, in order to increase their deterrent effect, to promote accountability and transparency, and to ensure public acceptance of these agreements.

i) Adoption of a Moral Code by States

One of the defining tools for driving ethical practices and compliance is the adoption of representations and warranties by institutions and companies in contractual transactions. These tools have now become common practice and also serve to satisfy KYC requirements, amongst others. To this end, State Parties should be encouraged to develop social moral or ethical codes which can be easily understood by all citizens on



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the ethical and anti-corruption stance of the country. Whilst elements of these codes or expected behaviours can be seen in national anthems, legislations and various mottos, a simple document setting out expected moral behaviour regarding corruption will be clear and easily accessible to all. In the same vein, companies should be required to adopt any relevant moral code in the countries where they undertake business.

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