

**UN CONVENTION  
AGAINST CORRUPTION  
CIVIL SOCIETY REVIEW:  
MONGOLIA 2011**

## Context and purpose

The UN Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in December 2005. It is the first legally binding anti-corruption agreement applicable on a global basis. To date, 154 states have become parties to the convention. States have committed to implement a wide and detailed range of anti-corruption measures that affect their laws, institutions and practices. These measures promote prevention, criminalisation and law enforcement, international co-operation, asset recovery, technical assistance and information exchange.

Concurrent with UNCAC's entry into force in 2005, a Conference of the States Parties to the Convention (CoSP) was established to review and facilitate required activities. In November 2009 the CoSP agreed on a review mechanism that was to be "transparent, efficient, non-intrusive, inclusive and impartial". It also agreed to two five-year review cycles, with the first on chapters III (Criminalisation and Law Enforcement) and IV (International Co-operation), and the second cycle on chapters II (Preventive Measures) and V (Asset Recovery). The mechanism included an Implementation Review Group (IRG), which met for the first time in June–July 2010 in Vienna and selected the order of countries to be reviewed in the first five-year cycle, including the 26 countries (originally 30) in the first year of review.

UNCAC Article 13 requires States Parties to take appropriate measures including "*to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption*" and to strengthen that participation by measures such as "*enhancing the transparency of and promote the contribution of the public in decision-making processes and ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.*" Further articles call on each State Party to develop anti-corruption policies that promote the participation of society (Article 5); and to enhance transparency in their public administration (Article 10). Article 63 (4) (c) requires the conference of the States Parties to agree on procedures and methods of work, including co-operation with relevant non-governmental organisations.

In accordance with resolution 3/1 on the review mechanism and the annex on terms of reference for the mechanism, all States Parties provide information to the conference secretariat on their compliance with the convention, based upon a "comprehensive self-assessment checklist". In addition, States Parties participate in a review conducted by two other States Parties on their compliance with the convention. The reviewing States Parties then prepare a country review report, in close co-operation and coordination with the State Party under review and finalise it upon agreement. The result is a full review report and an executive summary, the latter of which is required to be published. The secretariat, based upon the country review report, is then required to "compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organised by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group". The terms of reference call for governments to conduct broad consultation with stakeholders during preparation of the self-assessment and to facilitate engagement with stakeholders if a country visit is undertaken by the review team.

The inclusion of civil society in the UNCAC review process is of crucial importance for accountability and transparency, as well as for the credibility and effectiveness of the review process. Thus, civil society organisations around the world are actively seeking to contribute to this process in different ways. As part of a project on enhancing civil society's role in monitoring corruption funded by the UN Democracy Fund (UNDEF), Transparency International has offered small grants for civil society organisations (CSOs) engaged in monitoring and advocating around the UNCAC review process, aimed at supporting the preparation of UNCAC implementation review reports by CSOs, for input into the review process.

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of October 2011. Nevertheless, Transparency International Mongolia and the UNCAC Coalition cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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# Introduction

Mongolia signed the United Nations Convention against Corruption (UNCAC) on 29 April 2005 and ratified it on 11 January 2006.

This report reviews Mongolia's implementation and enforcement of selected articles in Chapters III (Criminalization and Law Enforcement) and IV (International Cooperation) of the United Nations Convention against Corruption (UNCAC). The report is intended as a contribution to the UNCAC peer review process currently under way covering those two chapters. Mongolia was selected by the UNCAC Implementation Review Group in July 2010 by a drawing of lots for review in the first year of the process.

**Scope.** The UNCAC articles that receive particular attention in this report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), illicit enrichment (Article 20), money laundering (Article 23), liability of legal persons (Article 26), witness protection (Article 32) whistleblower protection (Article 33), and mutual legal assistance (Article 46).

**Structure.** Section I of the report is an Executive Summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information; as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in Mongolia as well as access to information issues. Section III reviews implementation and enforcement of the Convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and Section V elaborates on recommended priority actions.

**Methodology.** The report produced with UNDEF funding was prepared by Transparency International Mongolia (TI-M). The group made efforts to obtain information for the reports from government offices and to engage in dialogue with government officials. In order for the views contained in the reports to be conveyed to government officials as part of this dialogue, a draft of the report was made available to them.

The report was prepared using a questionnaire and report template designed by Transparency International for the use of CSOs. These tools reflected but simplified the United Nations Office on Drugs and Crime (UNODC) checklist and called for relatively short assessments as compared with the detailed official checklist self-assessments. The questionnaire and report template asked a set of questions about the review process and, in the section on implementation and enforcement, asked for examples of good practices and areas in need of improvement in selected areas, namely with respect to UNCAC Articles 15, 16, 17, 20, 23, 26, 32, 33 and 46(9)(b) and (c).

The report preparation process went through a number of steps, with respondents first filling out the simplified questionnaire and then preparing the draft report. The report was peer reviewed by a national expert selected by Transparency International.

The draft report was shared with the government for comments before the final version. This final draft of the report was then sent to the government prior to publication, with the aim of continuing the dialogue beyond the first round of the country review process.

In preparing this report, the authors took into account the recent review of Mongolia carried out as part of the thematic review on the criminalisation of bribery published in 2010 by the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.<sup>1</sup>

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<sup>1</sup> The Criminalisation of Bribery in Asia and the Pacific. Framework and Practices in 28 Asian and Pacific jurisdictions - Thematic Review and Final Report, pp.343-354, <http://www.oecd.org/dataoecd/2/27/46485272.pdf>

# I. Executive summary

## Assessment of the review process

### *Conduct of process*

TI-Mongolia believes that the UNCAC review process was conducted with the appropriate transparency. The support of the governance officers of UNDP-Mongolia, along with the self-assessment developed by the team of national experts led by Professor O. Munkhbat, member of the TIM board, were instrumental in making the process a success. All of the information required for the report has been made available to TI-Mongolia.

**Table 1 Transparency and CSO participation in the review process**

Did the government make public the contact details of the country focal point?	Yes
Was civil society consulted in the preparation of the self-assessment?	Yes
Was the self-assessment provided to CSOs? Not published on website yet, as to date, the report is only a draft?	Yes
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	Yes
Was civil society invited to provide input to the official reviewers?	Yes
Has the government committed to publishing the full country report?	Unknown

### *Availability of information*

TIM sent written requests to the courts, prosecutor's office and the police, asking for information on corruption cases dealt with and the technical assistance that these authorities required. However, the responses received were considered insufficient and could not be assessed for the purposes of drafting this report.

### **Implementation and enforcement**

The Criminal Code in Mongolia establishes the offences of active and passive bribery of public officials (UNCAC Article 15). It also criminalises embezzlement, misappropriation or other diversion by a public official (UNCAC Article 17) and money laundering (UNCAC Article 23). The elements of these corruption offences do not fully meet the requirements of the UNCAC. While there are certain provisions in the Criminal Procedure Code of Mongolia that allow for the protection of witnesses, experts, victims and reporting persons (UNCAC Articles 32 and 33) and mutual legal assistance in the absence of dual criminality (UNCAC Article 46(9)), the existing legal provisions still do not fully meet the UNCAC requirements.

Mongolia does not criminalise the bribery of foreign public officials and public officials of international organisations (UNCAC Article 16) and illicit enrichment (UNCAC Article 20), and also does not impose criminal liability against legal persons (UNCAC Article 26).

Enforcement of legislation remains problematic because of unclear and insufficient provisions. The appointments of investigators, prosecutors or judges are politicised and are not always made based on merit. A lack of coordination between investigating and prosecuting authorities can lead to confusion. Insufficient resources and training also remain an obstacle to an effective fight against corruption.

## Recommendations for priority actions

1. Amend the Criminal Code to explicitly criminalise the bribery of foreign public officials and public officials of international organisations, either by amending the definitions of public officials or by introducing separate criminal offences.
2. Consider amending the Criminal Code to criminalise “illicit enrichment”, as defined by the UNCAC.
3. Amend the Criminal Code to create criminal liability of legal persons as one of the alternative forms of liability under UNCAC Article 26.
4. Adopt provisions allowing the rendering of assistance that does not involve coercive measures in the absence of dual criminality in accordance with Article 9 (b) of the UNCAC.
5. Not only should more criminal offences be introduced under the Criminal Code (illicit enrichment, insider trading, etc.), it is also essential that the already criminalised acts are made more specific to comply with the convention; at this stage, acts such as abuse of power, misappropriation of funds, and money laundering are being investigated by the police. But not a single person has been convicted of money laundering to date. The embezzlement of public funds is also under the jurisdiction of the police. Once the criminal offences are duly formulated (the definition of the crimes should be aligned with the UNCAC definition) and incorporated into the Criminal Code, it will be necessary to amend the Criminal Procedure Code to assign corruption offences to the Independent Authority against Corruption (IAAC). To date, there are around 20 prosecutors within the State Prosecutor’s Office who specialise in prosecuting corruption offences.
6. Amend the Criminal Law to allow the IAAC to investigate corruption-related offences (e.g. fraud and other economic crimes) when there are aggravating circumstances such as abuse of office. To date, these remain under police jurisdiction.
7. It is essential to change the text of the Criminal Law in relation to crimes committed against the environment through abuse of office (cases related to these types of crimes include among other, abuse of office in issuing licenses, illegal logging, dumping of waste water into rivers, construction activities at national reservations, etc.). Currently the law requires to specify the damage caused to the environment which is impractical.
8. The mindset of the general public, politicians and staff of the law enforcement agencies needs to change. The apparent socialist legacy of simply awaiting and accomplishing “orders” from above without proactively seeking results is problematic. The prosecution’s and IAAC’s regulations should allow for initiation of investigations at their own discretion, but at this moment, these organizations mainly initiate investigations on receipt of complaints. Only beginning January 2011, the prosecution started requesting police to investigate cases/accusations, referred to in local daily papers.<sup>2</sup>
9. The government should seek technical assistance from the UNODC and the IAAC to ensure training for investigators, prosecutors and judges. The government should allocate funds to upgrade the equipment and tools used by the Specialised Inspection Agency and law-enforcement agencies, especially equipment utilised in undercover activities and special technology required to protect victims and witnesses.

## II. Assessment of the review process for Mongolia

### A. Conduct of process

Mongolia formally launched the UNCAC review process on 17 March 2010 with a conference on implementation review process methods. The IAAC did its utmost to speed up the process, and the review team’s visit was conducted in November 2010 instead of February 2011 as had been scheduled. TI-M considers the review process a successful exercise.

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<sup>2</sup> The newly appointed General Prosecutor requested the prosecutors to apply the provision of the Law on Prosecuting Organization, which allowed prosecutors to request the police to investigate into accusations, published in daily papers. This provision was apparently there, but was not exercised due to lack of political will.

The newly elected president's motto during the election campaign was "fight corruption to bring justice into society". During the elections, the UNDP-Mongolia's governance officers discussed establishing and obtaining official legal status for a steering committee that would be responsible for supervising the self-assessment process (which consisted of MP's, civil servants and members of the civil society). The current de facto head of the committee is the chairperson of the Legal Standing Committee in Parliament. While there have been challenges, a team of national experts with backgrounds in the legal and social sciences was set up through competitive selection and has managed to successfully complete the self-assessment. These experts organised two workshops, one in March 2010 on private-sector corruption and one in November 2010 on inter-agency co-operation in law enforcement.

The Mongolian version of the self-assessment form and request for comments on UNCAC Chapters III and IV was received from the IAAC in the first week of November, 2010. The same day, IAAC Administration Department Head G. Badarch called the TIM office to announce that a meeting between TIM and the review group had been arranged for 24 November 2010. On 19 November, TIM sent an official letter to the head of the IAAC stating that TIM would not be able to provide comments on the draft because no English version of the draft was available.

In accordance with the agenda provided by IAAC, the review team met with representatives of various government entities and law-enforcement agencies from 22-25 November 2010, even though the visit by the team of experts had initially been scheduled for February 2011. Civil society was represented by TIM and the Mongolian Association of Employers, meetings with whom were scheduled for 24 November 2011. Under an MoU signed with the IAAC, the employers' association co-operates with the agency mainly in the area of preventing corruption in the private sector.

On 23 November 2010 Sukhee Dugersuren, the executive director of TIM, met with the review team of John Kithome and Jesse Wachanga from Kenya; Bilkis Abou-Osba, Yassin Abdu Saeed Noaman, Abdu Raduh Gradah and Suad Almarani from Yemen; and Annika Wythes and Tanja Santucci from the UNODC. TIM briefed the team on TIM activities, answered the review team's questions and then briefed the team on the challenges the country faced in tackling corruption. The issues raised by TIM during this meeting are presented below in the relevant sections.

It is very important to note here that TIM learned after the meetings with the review team that the Public Council, an independent body consisting mainly of representatives from the CSOs established to monitor the operations of the IAAC, was not included in the list of organisations to be interviewed by the reviewers. Members of the Public Council have exclusive rights to access information on the IAAC as long as it is not considered to be confidential under existing laws.

TI-Mongolia did not encounter problems in accessing information on the process. The process was conducted largely without TI-Mongolia's involvement. TI-M was informed of the progress of the process and provided the draft self-assessment report upon completion of the process. TIM had meetings with the officer from UNDP-Mongolia responsible for governance, with O. Munkhbat, the head of the working group on self-assessment, and with G. Badarch, the head of the IAAC Secretariat.

## **B. Availability of information**

TI-Mongolia also issued official letters to the courts, the prosecutor's office, and the police, requesting information on corruption cases dealt with and information on the technical assistance these authorities required. Unfortunately, TI-Mongolia considers the responses provided to be insufficient and therefore unsuited to assessment.

When putting together this report, TI-Mongolia assessed information obtained from participation in training courses, seminars, conferences and during discussions held with representatives of law-enforcement agencies.

# III. Implementation and enforcement of the UNCAC

## A. Key issues related to the legal framework

There has been some progress in developing the legal anti-corruption framework, but the legislative framework is still largely deficient. Some of the greatest hindrances to the proper implementation of the UNCAC are a lack of political will and a close inter-relation between business pressure groups and government in Mongolia, especially regarding the allocation of natural resources. Other issues include:

1. Lack of clarity in the provisions of laws and loopholes. Soviet-era lawyers seemingly lacking knowledge of the legal environment of the market economy and the challenges it brings continue to draft and amend laws.
2. Lack of political will to introduce new laws to regulate conflicts of interest in the public sector and to enhance transparency and improve accountability.
3. Lack of willingness by donor organisations to redesign their strategies to suit the country's interests. Because international donor organisations are bound by an agreement signed with the government, in some cases they are literally "fuelling" corruption.
4. Even though only a handful of corporate businesses are capable of carrying out large projects which are owned by politicians in power, and all parties are aware that the Law on Tenders has loopholes and unconstitutional provisions, the government continues to announce and award large projects. CSOs accuse donor organisations and international financial institutions of supporting the politicians: several weeks before leaving his post, a donor-country representative published several newspaper articles endorsing the signing of a mining agreement.<sup>3</sup> He returned to Mongolia to sit on the board of the mining company he supported.

**UNCAC Article 15: Bribery of national public officials.** UNCAC Article 15 requires coverage of bribery, including through intermediaries. The active bribery offences cited in the Mongolian Criminal Code clearly address this situation: Article 269 expressly covers the giving of a bribe in person or through an intermediary, while Article 270 creates a specific offence for a person who acts as an intermediary. The Anti-Corruption Law exceeds the UNCAC by including the bribery of electoral candidates.

However, Mongolia's active and passive domestic bribery offences only partially meet the requirements found in UNCAC Article 15. These offences could be strengthened by taking the following legislative measures:

1. Introduce provisions regarding the offer, promise or solicitation of a bribe in Articles 268 and 269 of the Criminal Code.
2. Make reference in anti-bribery provisions to any intentional element of the bribery offence.
3. Include incomplete bribery offences in anti-bribery provisions, such as when a bribe is offered but rejected or an official does not receive it.
4. Change the passive bribery offence in Article 268 of the Criminal Code to expressly refer to accepting or receiving a bribe through an intermediary.
5. Reference the giving of bribes and other advantages to third-party beneficiaries within the anti-bribery provisions.
6. Define the term "public official" for the purposes of the Criminal Code. This definition should also include officials performing legislative or judicial functions, all persons who perform public functions or who provide a public service, such as persons in non-governmental organisations performing state functions without being managers or executive officers of the organisation.

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<sup>3</sup> IAAC reportedly issued enquiries to the former employer of the country representative, requesting clarification as to whether an employee after leaving office had the right to be appointed to an entity whose interests that employee had pursued publicly.



7. Amend the Criminal Code bribery offences to cover acts outside an official's competence, i.e. situations where a bribe is given or taken in order to induce a public servant to use his or her position outside his or her authorised competence;
8. Expressly define the scope of a bribe within the Criminal Code, including the term "undue advantage", by encompassing both the pecuniary (monetary) and non-pecuniary (non-monetary).
9. Create defences for solicitation or small facilitation payments (i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits). The present Criminal Code does not provide additional defences for bribery in select cases. Offenders who rely on a defence of effective regret should be required to assist the authorities and to testify in proceedings against other offenders.
10. Criminalise the offering or receiving of a bribe to perform duties under the authority of a public official. Articles 268 and 269 of the Criminal Code refer to passive and active bribery in cases when a public official fails to perform a duty and/or performs a duty which is not under his authority, but do not yet criminalise bribes given or received while performing public duties.

**UNCAC Article 16: Bribery of foreign public officials and officials of public international organisations.** Mongolia has not adopted the measures required by UNCAC Article 16 regarding either the active or passive bribery of a foreign public official or an official of a public international organisation. Mongolian legislation does not define the term "foreign official", and the Criminal Code offences likely do not cover foreign public officials in cases of bribery. The Criminal Code only addresses foreign citizens and persons without citizenship committing a crime in the territory of Mongolia, and its jurisdiction is not extended to encompass foreign public officials (in cases of bribery), in order to ensure compliance with UNCAC Article 16(1).

Legislation should be adopted to ensure that the active and passive bribery of foreign public officials, members of foreign public assemblies, officials of international organisations, members of international parliamentary assemblies, and judges and officials of international courts is explicitly criminalised in accordance with UNCAC Article 16. In particular:

1. Legislation should define a "foreign public official". This definition should at the very least be introduced in the Criminal Code. Relevant amendments could also be made to the Law on Anti-Corruption and the Law on Public Service. The term "foreign public official" should encompass all officials holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.
2. The concept of "active bribery of foreign public officials" should be introduced in the Criminal Code and should cover the key elements of this offence.
3. The concept of "passive bribery of foreign public officials" should be introduced in the Criminal Code.
4. The Criminal Code should be extended to encompass foreign public officials (in cases of bribery), in order to ensure compliance with UNCAC Article 16(1).

**UNCAC Article 17: Embezzlement, misappropriation or other diversion of property by a public official.** Mongolian criminal legislation almost fully covers the requirements of UNCAC Article 17. However, the following amendments should still be made to the Criminal Code:

1. Article 150 of the Criminal Code should include instances where misappropriation or embezzlement by a business entity happens for the benefit of another person or entity and has been committed intentionally.
2. Article 150 must be further expanded to explicitly include embezzlement by public officials, as required by the UNCAC.
3. When addressing misappropriation or embezzlement of property, the Criminal Code should also include securities, other movables or the taking of the very broad category of "anything of value" as mandated by UNCAC Article 17.

**ARTICLE 20: Illicit enrichment.** The Mongolian Criminal Code has no provisions that directly and explicitly criminalise illicit enrichment as mentioned in UNCAC Article 20. It should therefore be modified as follows:

1. Criminalise the offence of illicit enrichment by introducing the relevant article in the Criminal Code.
2. Enact legislation that creates a principle of rebuttable presumption, where burden of proof can sometimes be transferred to the party in possession of the evidence, i.e. the accused official.

**ARTICLE 23: Laundering of proceeds of crime.** Mongolian legislation is not fully compliant with UNCAC Article 23. The Criminal Code's definition of money laundering implements the requirements of subparagraph 1(a)(ii) of UNCAC Article 23 and allows the competent authorities to investigate or initiate criminal proceedings with regard to alleged cases of money laundering. But the definition as given in the Mongolian Anti-Money Laundering (AML) Law is very limited and does not incorporate the capacity to infer the necessary mental element for the surrounding circumstances, as is required by UNCAC Article 23 and is stated in recommendations 1 and 2 of the Forty Recommendations of the Financial Action Task Force (FATF).

The AML law also does not cover the acquisition, possession or use of criminal proceeds, regardless of the purpose of such action, although the acquisition or sale of property knowingly obtained by way of crime is criminalised in Article 155 of the Criminal Code.

Subparagraph 2 of Article 23 discusses predicate offences. In general, the AML Law refers to predicate offences only by implication. Article 3.1.4 of the AML law defines "assets derived from illegal activities" as "assets derived from committing less serious, serious and exceptionally serious offences other than those described in the Criminal Code". Article 166.1 of the Criminal Code defines money laundering as relating to "assets obtained by illegal means" that include "less serious, serious, and exceptionally serious offences". While this definition is comprehensive and covers all "serious offences", the Criminal Code does not take a list-based approach to define predicate offences for money laundering and does not contain the list of offence types now advocated by UNCAC. Mongolia has therefore only partially implemented the provision on "predicate offenses" because certain acts required to be criminalised by the UNCAC are not criminalised in the Criminal Code; these include bribery of foreign public officials or officials of public international organisations, trading in influence, bribery in the private sector and illicit enrichment. In addition, criminal liability for money laundering is not extended to legal persons, and legal persons are not subject to effective or proportionate sanctions for money laundering.

The following measures are recommended:

1. Ensure compliance between the Mongolian AML Law (Article 3) and the Criminal Code (Article 166) regarding the definition of money laundering, by including the mental elements of this offence.
2. Amend the Anti-Money Laundering law to cover the acquisition, possession or use of criminal proceeds, regardless of the purpose of such action.
3. Amend the Criminal Code to define the predicate offences for money laundering and include the list of corruption-related offence types advocated by UNCAC. Bribery of foreign public officials or officials of public international organisations, trading in influence, bribery in the private sector and illicit enrichment should be criminalised and defined as the predicate offences for money laundering.
4. Define the term "asset" to include all property and funds.
5. Extend criminal liability for money laundering to legal persons.
6. Ensure that civil or administrative liability applies to legal persons.
7. Ensure that effective and proportionate sanctions are available for legal persons.
8. Pass legislation on criminal proceeds in order to consolidate the law and procedures on the seizure, freezing and confiscation of proceeds of corruption-related predicate offences. Items subject to confiscation should include proceeds from any money laundering as well as the instruments used or intended to be used in the commission of any money laundering or other predicate offences. The confiscation action should also clearly state that it applies to profits, income or other benefits generated from the proceeds of crime, as well as property of corresponding value.

**Article 26: Liability of legal persons.** Mongolia does not impose criminal liability against legal persons for corruption-related offences and does not establish any criminal sanctions. The Criminal Code of Mongolia (Article 8) specifies that only physical persons are subject to criminal liability. Article 8 of the Law on Administrative Liability provides that administrative liability is applicable to legal persons including business entities and organisations. Administrative sanctions applicable to legal persons include fines; deprivation of rights or licenses; confiscation of illegal profit and properties used in the administrative offence, including transportation, equipment and venue; and imprisonment. Article 32 of the Civil Code provides several grounds for liquidating legal persons. However, the above mentioned provisions are not sufficient to conclude that administrative responsibility will apply to legal persons for corruption-related violations.

The following measures are recommended:

1. Impose criminal liability against legal persons who commit the offences established in accordance with the UNCAC. The legislative approaches and techniques below could be used to amend the Criminal Code:
  - a. An “all offence approach” in which legal persons can be held liable for all criminal offences if all other conditions are met (criminal offence is committed on behalf or in the interest of the legal person, the purpose of the criminal offence was to acquire economic advantage/material benefit for the legal person, etc.)
  - b. A “specific offence approach” wherein legal persons can be held liable only in cases when a special part of Criminal Code explicitly sets out their responsibility for a certain criminal offence. For example, each article about a corruption-related offence in the special part of Criminal Code could be supplemented by a note stating that the given provisions are also applicable to legal persons.
2. Make the relevant amendments to Article 8 of the Criminal Code to specify that legal persons are subject to criminal liability.

**Article 32: Protection of witnesses, experts and victims and Article 33: Protection of reporting persons.** Mongolia does not have a special law on the protection of witnesses, experts, victims and reporting persons. In accordance with Article 18.4.12 of the Law Against Corruption, the IAAC may transfer witnesses and other persons who assist the IAAC in the exercise of its mandate for protection by the police, but there are no further provisions about the rules and regulations for witnesses, experts and reporting persons. According to Article 1.5 of the Law on the Prevention of Crime, the police have the duty to protect the secrecy of information and to take measures to protect informants when necessary. According to Article 8.1. of the Law Against Corruption, civil servants are obliged to report cases of corruption to the IAAC. Intelligence officials and central and local administrative officials are among the categories of officials required to report cases of corruption to the IAAC. Pursuant to Article 8.2 of the same law, issues of secrecy and confidentiality are not considered a bar to the obligation to report. However, because of a lack of rules for the implementation of the above provision of the Law Against Corruption and the Law on the Prevention of Crime, the respective provisions are not implemented in practice.

UNCAC Article 32(5) notes that victims should be allowed to present their views and concerns during the criminal proceedings. This of course relates only to victims of offences covered by UNCAC. Chapter 6 of the Criminal Procedure (Articles 45-48) encompasses witnesses and experts, but the provisions addressing the protection of victims in accordance with UNCAC Article 32(5) are lacking. Mongolian legislation does not establish any procedures for special physical protection measures for witnesses, experts and victims that are required under paragraph 2(a) of UNCAC Article 32. Procedures for the testimony and interrogation of victims and witnesses by the Criminal Procedure Law also do not explicitly address issues required by the UNCAC. Special courtrooms are not provided for special categories of witnesses, such as children and women, which would allow them to give evidence in a private, secure space. According to Articles 144 and 163 of the Criminal Procedure Code, victims and witnesses who give testimony are required to sign every page of an interrogation note. Testimony through the use of modern information and communication technology without a valid signature is impracticable in Mongolia.

To ensure compliance with Paragraph 2 (b) of UNCAC Article 32, Mongolia should consider amending the provisions in Articles 144 and 163 of the Criminal Procedure Law that require the signatures of victims and witnesses who give testimony in criminal cases. The amendments should allow electronic signatures or the submission of signatures through a third person.

The following measures are recommended:

1. Adopt a specific law on the protection of witnesses, experts and victims, which inter alia will cover a wide range of areas in corruption and will draw special attention to special categories of witnesses, such as children and women.
2. Implement special physical protection measures for witnesses, experts and victims, as is required under the Paragraph 2(a) of Article 32 of the UNCAC.
3. Amending procedures in the Criminal Procedure Law on the testimony and interrogation of victims and witnesses should be given attention. More attention needs to be paid to victims and witnesses by the courts. Their interests should be taken into account during court proceedings, before guilt is established (and thus before the actual status as victim is established) or after conviction, but in any event before the sentencing.
4. Provide special courtrooms for special categories of witnesses, such as children and women, where evidence can be given in a private, secure space outside the courtroom. Consider the adoption of provisions that allow a witness or expert to testify by video conference.
5. Amend the provisions in Articles 144 and 163 of the Criminal Procedure Law that require the signature of victims and witnesses who give testimony in criminal cases to allow for electronic signatures or the submission of signatures through a third person to ensure compliance with Paragraph 2(b) of UNCAC Article 32.
6. Enact legislation that gives protection to witnesses, experts and other persons who consent to give evidence in a requesting state party so that they are not subject to investigation, prosecution or judicial proceedings in the territory of the requesting state party.
7. Enact comprehensive legislation on whistleblower (reporting persons) protection.
8. Harmonise the provisions on the protection of reporting persons in the Law Against Corruption and the Law on the Prevention of Crime with the Criminal Procedure Code.

**Article 46(9)(b)&(c): Mutual legal assistance in the absence of dual criminality.** Mutual legal assistance (MLA) in Mongolia is covered by Article 398-409 of the Criminal Procedure Law. These provisions apply to all incoming and outgoing MLA requests that are made pursuant to applicable treaties. MLA in the absence of a treaty is not available. In general, Mongolia provides mutual legal assistance in the absence of dual criminality. However, the wording of corresponding provisions in Article 401 of the Criminal Procedure Law still leaves space for arbitrary interpretations. In particular, the Criminal Procedure Law lists few grounds for denying co-operation and does not prescribe detailed procedures for executing requests. Instead it stipulates that requests are to be executed in accordance with the applicable international agreement(s), thereby leaving most of the details to the provisions of the relevant treaty. Despite this, Mongolia has expanded its network of MLA treaties in corruption cases by ratifying the UNCAC. Permitting MLA in the absence of a treaty could further facilitate MLA with countries that are not state parties to the UNCAC. A law with detailed provisions on the procedures and requirements for co-operation would be essential for providing co-operation in the absence of a treaty.

Taking into consideration that Mongolia does not criminalise a number of corruption offenses requested under the UNCAC (e.g. bribery of a foreign official, illicit enrichment, trading in influence) and also does not recognise the criminal liability of legal persons, it is unclear how the country would deal with incoming MLA cases in which these offences are involved and a legal person is the target of a corruption investigation. Criminal Procedure Law also does not provide a specific definition of coercive actions.

It should be noted that even though there is no specific provision in the Mongolian Criminal Procedure Code requiring dual criminality in order to provide MLA, the constitution of Mongolia provides that “an international treaty to which Mongolia is a Party shall become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.” It may therefore be concluded that Mongolia will still consent to legal assistance requests based on the UNCAC.

All incoming MLA and extradition requests may be sent to the Foreign Relations and Co-operation Department (RACD) of the Ministry of Justice and Home Affairs (MOJHA), Mongolia’s central authority for extradition and MLA. The RACD also prepares outgoing requests. Bilateral MLA treaties are in force between Mongolia and 18 countries. In addition, requests for extradition and MLA in corruption cases may be handled through the UNCAC:

The following measures are recommended:

1. Consistent with UNCAC Article 46(9), Mongolia should consider amending its Criminal Procedure Law to expressly authorise the provision of mutual legal assistance in the absence of dual criminality, even though as a practical matter this is not viewed as a requirement in Mongolia. It should be clarified that dual criminality is not required for non-coercive mutual legal assistance, as mandated under the UNCAC.
2. Mongolian courts should adjudicate whether the dual criminality requirement is conduct-based.
3. Criminal Procedure Law should provide specific definitions of coercive actions.
4. Criminal Procedure Law should prescribe detailed procedures for executing mutual legal assistance requests.
5. Mongolia does not criminalise a number of corruption offences required under the UNCAC (bribery of a foreign official, illicit enrichment, trading in influence) and also does not recognise the criminal liability of legal persons. It is thus unclear how the country would deal with incoming MLA cases in which these offenses are involved and a legal person is the target of a corruption investigation. Therefore Mongolia may wish to ensure that it can provide MLA in cases involving these offenses.

It should also be noted that despite requests made by the IAAC to the Ministry of Foreign Affairs in June 2010 to re-translate the UNCAC and to formally approve it, the ministry has responded negatively so far, citing a lack of resources to cover the cost of translation and publication of the convention. This indicates a lack of priority given to corruption cases in law enforcement.

## **B. Key issues related to enforcement**

The IAAC commenced its operations in September 2007. The IAAC was established under the Parliament’s Resolution 03 of 11 January 2007, as an independent body to carry out the following three main functions:

- Investigation of corruption crimes
- Prevention of corruption and
- Supervision of the income declaration of public servants referred to in the Law Against Corruption.

G. Badarch is currently heading the office, but with powers to coordinate the activities of the authority only. It is unclear as to whether the detained Head of IAAC legally still maintains the right to hold the position or whether a new head of the organisation should be elected.<sup>4</sup> As of 1 July 2011 this position was still vacant, and politicians have been criticised for lacking the will to appoint a new head of this organisation in order to ensure the continuity of its operation.

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<sup>4</sup> Business Mongolia.com, 23 March 2011, <http://www.business-mongolia.com/mongolia/2011/03/23/chiefs-of-independent-authority-against-corruption-of-mongolia-have-been-jailed/>

The IAAC conducted a pilot self-assessment in 2009 and made it available on its website.<sup>5</sup>

As mentioned in this report, corruption offences are not formulated in accordance with the UNCAC. Misinterpretation of the legal provisions is a common issue. For instance, the misappropriation of funds may be considered to be an economic crime and therefore investigated by the police. When the IAAC was established, criminal offences were re-assigned to law-enforcement agencies, but there is still confusion about the competences to deal with offences under the Criminal Code. For instance, corrupt acts may be investigated by the NPA, the Special Investigative Unit (investigating wrongdoings by lawyers or staff in law enforcement agencies), the General Intelligence Authority, the prosecutor's office, and/or the IAAC.

There are still significant inadequacies in the enforcement system for UNCAC-related offences, including possibilities of procedural delays in processes and proceedings. These irregularities were publicly criticised at a forum organised by the president's office, and a set of recommendations to eliminate them is underway.<sup>6</sup>

TIM has endeavoured to obtain the statistics required below, but only partial information has been made available by the Supreme Court.

**Table 2 Statistics of cases**

	<b>Convictions</b>
Bribery of national public officials (passive) (Article 15(b))	12 cases and 20 people convicted Data for 2008 and 2009
Bribery of national public officials (active) (Article 15(a))	2008:13 cases, 16 convicted; 2009: one case and one conviction; 2010: nine people convicted in six cases

**Note:** No data was reported on settlements, acquittals, or dismissals and pending cases. No data was available on embezzlement, illicit enrichment and money laundering cases.

**Lack of data.** TI-Mongolia cannot provide much information on specific cases, as this information was not made available by the relevant organisations. It is essential to improve and comply with the Criminal Code and the Criminal Procedure Code in order to be able to monitor and assess information provided via the media or by the courts.

The police are currently investigating a probable misuse of power related to the privatisation of an old building located at the main square of the capital city. Members of municipality management, the deputy prime minister, the former president and a member of Parliament are being interrogated.<sup>7</sup>

**Evidence of independence of investigators, prosecution and judiciary.** The newly appointed Prosecutor General has announced that the supervision role of the prosecution over investigations will be enhanced to ensure that the police and IAAC investigate cases in a professional and impartial manner. However, even though legally bound, prosecutors do not appear to be yet able to undertake this responsibility, seemingly due to excess workload, mindset and lack of political will. Changes to the Law on Prosecuting Organizations are underway. The significance of this supervisory role of the prosecution was deliberately undermined by previous governments. TI-Mongolia was recently requested to organize a training for prosecutors with supervisory powers over corruption investigations, as the supervision role of prosecutors seems to have been deliberately undermined

<sup>5</sup>See <http://www.iaac.mn>

<sup>6</sup> The Mongolian version of the recommendations issued by the President's Office is available at his website: <http://www.president.mn>

<sup>7</sup> Daily paper "Daily News" of 14 April 2011, Article on co-operation of the police and the IAAC, <http://www.dailynews.mn>

during the last 20 years.<sup>8</sup> However, there are concerns about lack of full independence of the judiciary and IAAC and improper influences on law enforcement agencies.

**Adequate or increasing resources or training.** Resources allocated for the police have grown significantly over the past six years; some 20 bln MNT (approximately US\$ 15.8 Million) have reportedly been approved to allow the police to commence the reforms. These funds will procure equipment (lie detectors and labs) and re-allocate police forces to the areas most prone to criminal activities in order to prevent crime. However, skills and training to investigate corruption cases still seem to be lacking. Law-enforcement agencies still lack funds funding for training from international experts and/or participation in internationally organised events so that members can share and gain experience and establish working relationships with peers from other countries to co-ordinate efforts in the future.

**Good or increasing co-ordination:** In close co-operation with the police, the IAAC has begun investigating the forced bankruptcy of a bank that was allegedly approved by the Central Bank.<sup>9</sup> A newspaper reported that the governor of the Central Bank is currently being questioned about misuse of office and receipt of bribes.

But the lack of co-ordination between investigating and prosecuting authorities leads to confusion: these difficulties were publicly criticised at a forum organised by the president's office, and a set of recommendations to eliminate them is underway.<sup>10</sup>

**Requests for resignation and investigation of MPs:** Several MPs from the Democratic Party called on the finance minister and the minister for fuel and energy to resign. Both ministers played a major role in the development and approval of the agreement signed between Ivanhoe Mines-Mongolia and the government to exploit the copper/gold mine in the South Gobi province.<sup>11</sup>

The above developments are without precedent in Mongolia. In TIM's opinion, the media, the general public and independent CSOs have played a crucial role in accelerating these processes. As there is a danger of losing oversight of foreign mining companies' activities (reportedly more than 6,000 licences were issued and subsequently traded), we now see more government officials, MPs and other politicians and public servants expressing concern over the difficulty of controlling these types of activities due to loopholes in the laws and regulations. Voices from within the government and parliament are expressing the need to amend and improve the laws and reform the judiciary.

## IV. Recent developments

The newly elected president's campaign slogan was to "fight corruption to bring justice into society". After his inauguration in June 2009, the president issued a directive to further deepen the judicial reforms that had been initiated and partially implemented beginning in early 2000.

In May 2010 the prosecutor general resigned, reportedly for health reasons and after encouragement to do so from the president.<sup>12</sup> The prosecutor general had reportedly rejected further improvements to the law enforcement system. In October 2010, the chief justice of the Supreme Court, who reportedly sent out official letters to all judges in the court system to express his disagreement with the

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<sup>8</sup> This request was made during a meeting on 9 May 2011 between TI—M and the Assistant to Prosecutor General and Head of the Centre for Training, Research and Co-operation.

<sup>9</sup> Business-Mongolia.com, "Independent Authority Against Corruption questions top bankers", 15 April 2011, <http://www.business-mongolia.com/mongolia/2011/04/15/independent-authority-against-corruption-questions-top-bankers/>

<sup>10</sup> The Mongolian version of the recommendations issued by the President's Office is available at his website: [www.president.mn](http://www.president.mn)

<sup>11</sup> Investment Agreement Between the Government of Mongolia and Ivanhoe Mines Mongolia and Ivanhoe Mines Ltd and Rio Tinto International Holdings Ltd, <http://www.mmdaproject.org/presentations/MMDA%20Mongolia%20Ivanhoe%20Agrt-1.pdf>

<sup>12</sup> The Business Council of Mongolia, 10 May 2010, <http://www.bcmongolia.org/news/414-prosecutor-general-resigns>; The decree under which the General Prosecutor resigned is neither available on the website of the President nor in the Official Gazette issued by the Parliament which contains newly adopt laws, amendments, presidential decrees, etc.

president's reforms, resigned in 2010.<sup>13</sup> In November 2010 the Office of the President of Mongolia reported the appointment of a new chief justice.<sup>14</sup>

A newspaper covering a press conference at the Capital City Court in March 2011 reported that the head of IAAC had been convicted on charges of disclosure of state secrets, violation of the law on undercover work, defamation through the media, and abuse of power, and was sentenced to two years and four months imprisonment.<sup>15</sup> The deputy chief of the IAAC and another IAAC top official were also reportedly convicted of disclosing state secrets and violating the law on undercover works, and were each sentenced to two years of imprisonment.<sup>16</sup> The head of the IAAC and his deputy are reportedly in detention awaiting the ruling of the Supreme Court, which rejected the Capital City Court's verdicts of 23 May 2011.<sup>17</sup>

The following additional developments are also noteworthy in this context:

1. The Amnesty Law was adopted in 2010, allowing persons charged to obtain amnesty during the investigation phase. Criminals receiving amnesty are not prevented from continuing to serve in the public sector. A report of the IAAC on General Conditions and Implementation of Anti-Corruption Laws and Regulations of 16 March 2011, states that out of 24 defendants covered by this law, 18 returned to their workplaces, one defendant was promoted and one appointed to the management of a public organisation.
2. On 29 September 2009 the President issued Decree #120, in which the office improved the rules regulating the relationship between the IAAC and the Public Council and appointed new members, mainly from civil society organisations, who have proven to be efficient and sufficiently independent. The decree is available at [www.legalinfo.mn](http://www.legalinfo.mn).
3. On 14-15 April 2011, a forum called "Judicial Reforms and Justice", organised by the president's office, took place at the Government House. More than 1,600 people representing law-enforcement agencies, cabinet ministries, Parliament, the media and civil society took part in 15 workshops. Diplomats and representatives from donor organisations and guests from foreign countries participated in the general sessions of this forum. The recommendations were due to be released in May 2011.<sup>18</sup>
4. On 18 May 2011, the majority of the Parliament's Standing Committee approved the draft of the amendments to the Criminal Code, Criminal Procedure Code and the Law on Public Services recommended by the President's office. These amendments included such changes as criminalising illicit enrichment, including a provision on mitigating punishment for an accused person who provides substantial co-operation in the investigation of cases involving bribery, allowing the act of money laundering to be investigated by the IAAC, etc. TIM has advocated for full implementation of UNCAC; in co-operation with UNDP-Mongolia and IACC, TIM plans to undertake concerted advocacy works beginning in October 2011 and continuing until the adoption of amendments by the Parliament, which should be in mid-February 2012 at the latest.<sup>19</sup>
5. The Law on Transparency of Information and Right to Access Information was adopted in 16 June 2011. It will enter into force in December 2011 after the rules and regulations have been developed and approved. The law is made available on [www.legalinfo.mn](http://www.legalinfo.mn).

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<sup>13</sup>President's Decree #221 of 27 October 2010

<sup>14</sup> Office of President of Mongolia, "President appoints the Chief Justice of Mongolia"

<http://www.president.mn/eng/newsCenter/viewNews.php?newsId=407>

<sup>15</sup> This information was published in a "Daily News" following a press conference by the Capital City Court on 23 March 2011, <http://www.dailynews.mn>

<sup>16</sup> This information was published in "Daily News" following a press conference by the Capital City Court on 23 March 2011, <http://www.dailynews.mn>

<sup>17</sup> See "Daily News" of 24 March 2011, <http://www.dailynews.mn>

<sup>18</sup> See "Daily News" of 15 April 2011, <http://www.dailynewspaper.mn>

<sup>19</sup> See "Daily News" of 19 May 2011, <http://dailynews.mn>



6. A government strategy on co-operation with civil society is being developed by a working group formed by members of government and representatives of various NGOs. This strategy is scheduled to be finalised and adopted by end of 2011.
7. On 9 June 2011, Parliament approved an amendment to the law on public procurement: representatives of professional NGOs will now be included in bid evaluation committees. Amendments can be found on [www.legalinfo.mn](http://www.legalinfo.mn).

## V. Recommendations for priority actions

In addition to the recommendations set out in Paragraph 3 of Section A (among them criminalising illicit enrichment and trading in influence, imposing sanctions on legal persons and enhancing bilateral agreements to comply with MLA standards) the following actions would have a significant impact on the implementation of Chapters III and IV of the UNCAC:

1. Remove immunity of Parliament members.
2. Amend the Mongolian constitution to prohibit electing MPs to the cabinet, to ensure checks and balances between the branches of government.
3. Criminalise election fraud and assign this offence to the IAAC, allow IAAC oversight of political-party financing, and permit the IAAC to investigate cases involving election fraud.
4. Adopt legislation to regulate conflicts of interest in public organisations.
5. Adopt legislation on the Protection of Witnesses and Victims and on Whistleblower Protection.
6. Align the Criminal Procedure Law with the UN Convention against Torture to ensure that both physical and mental torture are described as “criminal offences subject to penalty” and that all parties to the investigation process are covered. Current laws give the surveillance workers the right to interrogate accused persons, giving state agents unlawful means to fight criminality. Such hypocrisy could lead to criminals going free and innocent people being jailed for acts they did not in fact commit, including corruption offences.
7. The Public Service Council should adopt a strategy aimed at depoliticising the appointment of public servants and imposing stronger sanctions for the violation of codes of ethics and conduct, in order to protect the public service.
8. Because the sovereignty of any state directly depends on the independence of its public officials,, the National Security Council should be allowed set priorities for budget allocation. Benefits would include appropriate remuneration, sufficient funds to provide law-enforcement agencies with up-to-date intelligence equipment, participation at international training events and the establishment of a working relationship with international peers, and access to international experts for training that would be specifically tailored to comply with the needs of the judges, prosecutors and investigators.
9. The Criminal Code should be amended to ensure that public officials convicted of corruption-related crimes (regardless of the type of crime) are denied access to public services for a period of 10 years.

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