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

Executive summary

Note by the Secretariat

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II. Executive summary

Brunei Darussalam

1. Introduction

Overview of the legal and institutional framework of Brunei Darussalam in the context of implementation of the United Nations Convention against Corruption

Brunei Darussalam signed the United Nations Convention against Corruption (UNCAC) on 11 December 2003 and ratified it on 2 December 2008. The instrument of ratification was deposited with the United Nations Secretary-General on 9 December 2008. The Convention entered into force on 1 January 2009.

The criminal justice system of Brunei Darussalam is based on the English common law system. The relevant anti-corruption provisions are found in the Penal Code (PC) and Prevention of Corruption Act (PCA). Criminal procedure regulations are found in the Criminal Procedure Code (CPC), as well as other specific laws such as those on money-laundering, which are currently under review.

The provisions of the PCA, PC and CPC were deemed to complement each another. If there is an inconsistency, the PCA will prevail, unless it is silent on the matter, in which case the PC and CPC are to be considered.

The independent Anti-Corruption Bureau (ACB), established on 1 February 1982, is the specialized anti-corruption body in the country. Other related anti-corruption entities include: the Commercial Crime Investigation Unit under the Police; and the National Committee on Anti-Money Laundering and Combating Terrorism Financing (NAMLC).

The Public Service Commission is an independent body, established in 1962, to deal with matters pertaining to the appointment, transfer, promotion, termination and imposing disciplinary punishment against public servants. The Commission has the authority to deal with the immunities or jurisdictional privileges of any public servant.

2. Implementation of chapters III and IV

2.1. Criminalization and law enforcement (chapter III)

2.1.1. Observations on the implementation of the articles under review

Bribery offences; trading in influence (arts. 15, 16, 18 and 21)

Active and passive bribery in the public sector are criminalized through sections 6 (b) and 6 (a) of the PCA, respectively. The active bribery provision refers to the conduct of “giving or agreeing to give or offering”. During the country visit, it was confirmed that “promise” falls under the umbrella of “agreeing to offer”. The passive bribery provision makes reference to “any agent [who] corruptly accept[s] or obtains, or agrees to accept or attempts to obtain”. Seemingly, this covers solicitation or acceptance.

The review team raised concerns about the manner in which the term “corruptly” as foreseen in section 6 (b) of the PCA is interpreted. In response, the national

authorities brought to the attention of the reviewing experts two judicial decisions where this term was further specified.

The law does not require the advantage to be undue, but instead refers to “any gratification”. In this connection, the review team noted the broad definition of the term covering all sorts of undue advantages, whether tangible or intangible and pecuniary or non-pecuniary (section 2 of the PCA).

With respect to “duties”, the law refers to the “principal’s affairs or business”. It was confirmed that this would be equivalent to “official duties”, as set forth in subparagraph (a) of UNCAC article 15.

Section 6 (b) of the PCA describes the conduct of bribery without specifying whether the gratification is for the agent himself or herself, or a third party. Nonetheless, the element of a third-party beneficiary is foreseen in other parts of the legislation.

Section 6 of the PCA uses the term “agent”. This is further defined in section 2 and refers to a person “employed or acting for another”. The national authorities confirmed that the term “agent” is widely used, even in cases of bribery of certain categories of public officials specifically foreseen in the law. In addition to “agent”, it was noted that other terms are also employed, such as “public servant” and “public officer” in both the PCA, PC and Constitution. This raises concerns of a potential inconsistent use of terminology regarding public officials as perpetrators of a corruption-related offence.

Brunei Darussalam has no specific legislation in place that would explicitly address the issue of active or passive bribery of foreign public officials and officials of public international organizations. Reference was made to section 5 of the PCA, but this was deemed to not provide a clear link to such offences.

Bribery in the private sector is criminalized through section 5 of the PCA. The Brunei Association of Banks (BAB) and Chamber of Commerce provided that facilitation payments are not tolerated.

There is no specific provision on trading in influence. Apart from legislatively enacting this offence, a discussion was had on the possibility of using the wide definition of “gratification”, contained in section 2 (f) of the PCA when applying *mutatis mutandis* section 5 of the Act on “punishment of corruption”, in cases on trading in influence.

Laundrying of proceeds of crime; concealment (arts. 23 and 24)

Money-laundering is criminalized in the Anti-Money Laundering Act and Criminal Conduct (Recovery of Proceeds) Order. Section 23 (1) of the latter refers to “his [perpetrator of the predicate offence] proceeds of criminal conduct”, which limits its scope.

There is a high threshold used for predicate offences (i.e. 5 years imprisonment). A new law was suggested with a view to expanding, *inter alia*, the scope of predicate offences by reducing the threshold to define such offences from 5 years to 1, and also include offences committed outside the national jurisdiction.

No fundamental principles of domestic legislation were reported, prohibiting the commission of money-laundering and predicate offences by the same person. It is

possible that both the money-laundering act and the predicate offence are committed by the same person (self-laundering).

Brunei Darussalam has not furnished copies of its laws to the Secretary-General.

UNCAC article 24 on the criminalization of concealment is implemented in section 23 (2) of the Criminal Conduct (Recovery of Proceeds) Order. The law requests knowledge or reasonable grounds for suspecting the illicit origin, the intent to assist and person avoiding prosecution or confiscation.

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

Section 403 of the PC criminalizes the misappropriation or conversion of any movable property for “own use”, whereas sections 405, 406 and 409 of the PC focus on the “criminal breach of trust”.

The Public Officers (Conduct and Discipline) Regulations in the Public Service Commission Act address abuse of functions and, in particular, deal with conflict of interest and abuse of public position for private use. A breach of this Act entails disciplinary and not criminal liability.

Illicit enrichment is criminalized through section 12 of the PCA. The Attorney-General’s Chambers (AGC) confirmed that it is still the task of the Prosecutor to prove the possession of the property, and then it is the responsibility of the defendant to prove the legitimate origin of such property.

Obstruction of justice (art. 25)

There seems to be no specific provision criminalizing obstruction of justice, per se. Section 503 of the PC was reported to be the provision of general application. It may be broadly interpreted to cover the “use of physical force, threats or intimidation”, as required by UNCAC article 25 (a). However, it was noted that “the promise, offering or giving of an undue advantage” was not provided for in section 503.

Liability of legal persons (art. 26)

The liability of legal persons is not clearly provided for in the domestic legislation. It would not be possible to extend the definition of “person” under section 5 of the PCA to both natural and legal persons. The PCA was enacted primarily to criminalize various forms of corrupt transactions concerning individuals.

Participation and attempt (art. 27)

Sections 13 and 15 of the PCA contain basic regulations on abetment and criminal conspiracy. On meaning of abetment and criminal conspiracy, the general provisions of the PC are of relevance.

Section 14 of the PCA and section 511 of the PC provide for the punishment of an attempt to commit an offence. The provisions criminalizing attempt are also applicable to the preparations of offences.

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

In general terms, the sanctions foreseen in the legislation for corruption-related offences and for natural persons, as their perpetrators, were deemed adequate.

The constitutional provisions on immunity (section 84B) stipulate that “Any person acting on behalf, or under the authority, of His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him in his official capacity”. With regard to criminal proceedings, doubts were raised as to whether the Public Prosecutor, acting by virtue of section 31 of the PCA, could initiate proceedings in cases where it is not certain whether the perpetrator acted under or on behalf of His Majesty, or His Majesty was not informed correctly about the factual circumstances of the matter.

For a corruption-related offence to be prosecuted, the Public Prosecutor has to provide his or her consent. The Public Prosecutor enjoys independence and has the absolute discretion to institute or discontinue any criminal proceedings except for cases heard by the Military or Syariah (Islamic Religious) Courts. The Criminal Justice Division of the AGC carries out the responsibilities of the Public Prosecutor. Officers of the Division conduct prosecutions before the Magistrate, Intermediate and High Courts, and appear in criminal appeals before the High Court and Court of Appeal. The separation of investigative services to be provided by ACB and the cases to be handled by the AGC before the competent courts raised concerns with respect of the efficiency of the prosecution.

Where an accused person provides substantial cooperation in the investigation and prosecution of an offence, the Court may consider this factor as a mitigating factor when imposing his or her sentence.

There are procedures in place to remove, suspend or reassign public officials accused or convicted. It is, however, within the discretion of the Head of a Department to remove an accused official. Once convicted, the Public Service Commission, acting as disciplinary authority, will hold disciplinary proceedings and will decide whether or not to dismiss an officer.

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

Section 30 of the PCA refers to the non-disclosure in any civil or criminal proceeding of the name or address of any informer, or any matter which might lead to his discovery. The identity of an informer is protected and can be revealed only in exceptional circumstances.

Section 30 of the PCA was viewed as an initial step towards establishing a comprehensive witness protection system.

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

The domestic legislation on freezing, seizure and confiscation foresees special powers of investigation to secure the proceeds of crime for confiscation. The Permanent Secretary of the Ministry of Finance has the power to regulate the administration of “realisable property” after a confiscation order has been filed.

Nonetheless, the Permanent Secretary also has the discretion to determine who would otherwise be the competent authority to administer such property.

Banking or any other professional secrecy seems not to be an issue hindering the prosecution of corruption-related offences.

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

The reviewing experts noted the non-existence in the domestic legislation of a statute of limitations period for corruption-related offences. They also noted, in this regard, that this stems from general principles of criminal law in Brunei Darussalam and is not a specific anti-corruption measure with ad hoc symbolic connotations and practical ramifications. However, the review team underlined the impact that this general feature of the domestic criminal justice may have on the prevention of corruption.

A criminal record request can be made through mutual legal assistance (MLA), pursuant to section 3 (a) of the Mutual Legal Assistance in Criminal Matters Order (MLA Order).

Jurisdiction (art. 42)

Jurisdiction principles, including rules of territoriality, and passive and only active personality, are established in section 37 of the PCA and section 7 of the CPC. Domestic prosecution in lieu of extradition where the latter is denied on grounds of nationality, is an available option in the legislation (section 55 (2) (a) of the Extradition Order). No clear answer was provided on the establishment of jurisdiction of offences committed against the State.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

There are no obstacles to making corruption a relevant factor in legal proceedings with respect to UNCAC article 34.

The CPC provides for the possibility of obtaining compensation within the criminal procedure at the discretion of the Court. The adjudication of compensation also does not prejudice the rights to initiate civil procedures.

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

The ACB is the specialized body in Brunei Darussalam for combating corruption. The Bureau opens and conducts investigations on corruption-related matters under the PCA. It is independent from any other authority with the exception of His Majesty the Sultan.

The Commercial Crime Investigation Unit under the Police can also investigate corruption-related matters (i.e. embezzlement) under the PC. However, the ACB can also investigate such offences that would fall under the mandate of the Police (section 19 of the PCA).

The ACB and Police cooperate with respect to investigations and no issue has arisen regarding their respective mandates. Criminal matters, including those pertaining to corruption, are referred to the Public Prosecutor who can exercise his or her discretion to prosecute or dismiss the case.

Further to its investigative functions, the ACB is actively promoting social awareness and combating corruption through their lecture programmes, exhibitions, media publicity and promotions to encourage the public to report matters pertaining to corruption. There is also an existing memorandum of understanding (MOU) with the Brunei Association of Banks.

A framework of cooperation exists between the national law enforcement agencies. Joint operations and investigations are being conducted frequently. The National Committee on Anti-Money Laundering and Combating Terrorism Financing (NAMLC) is an example of inter-agency cooperation nationally, regionally and international relating to UNCAC article 23. Members include, inter alia: the ACB, AGC, FIU and Police. NAMLC is also the advisory and coordinating committee on matters relating to Anti-Money Laundering/Counter-Financing of Terrorism (AML/CFT) issues. Another cooperation framework is the National Security Committee which brings together officers from the ACB, Police and AGC. Cooperation is further promoted between the FIU, ACB and Police, on the one hand, and the financial institutions, on the other, to promote financial investigations, including through the freezing of bank accounts.

2.1.2. Successes and good practices

The review team welcomed the following good practices geared towards increasing the effectiveness of criminalization and law enforcement in the anti-corruption field:

- The wide definition of the term “gratification” covering undue advantage, whether tangible or intangible and pecuniary or non-pecuniary; and
- The lower evidentiary standards used in confiscation proceedings.

2.1.3. Challenges in implementation [where applicable]

While noting the considerable and continuous efforts of the authorities in Brunei Darussalam to achieve full compliance of the national legal system with the UNCAC provisions in the criminalization and law enforcement area, the reviewers identified some grounds for further improvement and made the following recommendations for action or consideration by the competent national authorities (depending on the mandatory or optional nature of the relevant UNCAC requirements):

- Continue to clarify the interpretation of the term “corruptly” with a view to ensuring further clarity when implementing section 6 of the PCA;
- Address, for purposes of legal clarity and certainty, the inconsistent use of terminology describing public officials as the perpetrators of corruption-related offences (“agent”, “public servant”, “public officer”);
- Extend the scope of application of the bribery and embezzlement offences to cover instances where the undue advantage is intended for a third party;
- Ensure that more focused and specific legislation is in place to expressly cover the offence of active and, taking into account the optional nature of the offence, passive bribery of foreign public officials and officials of public international organizations;

- Explore the possibility of including in the domestic legislation ad hoc provision(s) to criminalize trading in influence, in line with UNCAC article 18;
- Explore the possibility of addressing instances of abuse of functions by public officers through criminal sanctions and not only disciplinary measures;
- Widen the scope of application of the money-laundering provision to cover proceeds of crime of not only the perpetrator of the predicate offence, but also other people;
- Ensure that the envisaged expansion of the scope of predicate offences through the enactment of new money-laundering legislation is efficiently and effectively implemented;
- Ensure that copies of the money-laundering legislation and future amendments of such legislation are sent to the United Nations Secretary-General;
- Ensure that more focused and specific legislative provisions are in place to expressly cover and criminalize conducts falling within the scope of obstruction of justice, as prescribed in UNCAC article 25;
- Pursue the establishment of criminal liability of legal persons in a manner that specifies the terms and conditions for triggering such liability; the exact nature of the acts for which such a legal person might be held criminally liable; and an adequacy and deterrent effect of sanctions against legal entities. Moreover, ensure that the liability of legal persons be without prejudice to the criminal liability of the natural persons who committed the offences, and the sanctions for legal persons be effective, proportionate and dissuasive;
- Take legislative and other measures to establish effective witness protection procedures, in line with UNCAC article 32, including the consideration of witness protection issues within the scope of bilateral agreements and arrangements with other countries;
- Bearing in mind the optional nature of UNCAC article 33, take further steps towards protecting whistle-blowers, as well as collaborators of justice, in line with paragraph 4 of UNCAC article 37, by means of including these persons under the same protective status as witnesses, when such status is to be recognized and enforced;
- Include in the envisaged new money-laundering legislation certain provisions to define the concept of property and proceeds of crime as subjects of confiscation proceedings and delineate the concept of good will of third parties in confiscation proceedings, unless such matters are dealt with exclusively in case law;
- Continue to clarify the interpretation of existing legislation, including jurisdiction over offences committed against the nationals and/or against the State, taking into account the optional nature of these jurisdictional principles; and

- Consider ways and means to use available resources, including, where necessary, synergies among investigative and prosecutorial authorities, to ensure more efficient and effective management of corruption cases, including through the establishment of case management systems and reconsidering the placement of liaison AGC officers in the ACB.

2.2. International cooperation (chapter IV)

2.2.1. Observations on the implementation of the articles under review

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

Substantive and procedural requirements for extradition are set forth in the Extradition Order, 2006. This also allows for extradition on a case-by-case basis, including with countries with which Brunei Darussalam has no extradition treaty. Apparently Brunei Darussalam does not make extradition conditional on the existence of a treaty and can also use the UNCAC as a legal basis. To date, no extradition request, based on UNCAC, has been received.

Pursuant to section 3 (1) of the Extradition Order, all UNCAC-related offences can, *prima facie*, be deemed to be extraditable offences. However, the principle of dual criminality is required, noting that it is not necessary to use the same terminology (section 3 (2)).

No extradition request would be refused based on the offence involving fiscal matters.

A *prima facie* case needs to be established in domestic extradition proceedings. Such an evidentiary standard may lengthen the proceedings.

The transfer of prisoners is regulated by the International Transfer of Prisons Order. Sections 54 and 56 of the Extradition Order are applicable to the transfer of criminal proceedings.

Mutual legal assistance (art. 46)

Brunei Darussalam has been a State party to the Association of Southeast Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters since 2006. The enabling legislation is the MLA Order that entered into force on 1 January 2006. The reciprocity principle can also be used as an alternative legal basis for MLA (section 22 (1) (c) (i) of the MLA Order).

It was confirmed that law enforcement agencies transmit information to their counterparts on criminal matters that: could assist them in undertaking or successfully concluding inquiries and criminal proceedings; or could result in a formal MLA request. Such transmission of information can be done on a case-by-case basis and through the use of informal channels of communication, reported to exist mainly with other neighboring countries.

The grounds for refusing MLA requests are stipulated in section 24 of the MLA Order, and include both mandatory and optional grounds. The absence of dual criminality is listed among the optional grounds for refusing an MLA request, pursuant to section 24 (2) (c) of the MLA Order. This optional requirement in the domestic legislation may well serve the purpose of effective implementation of

UNCAC article 46, if the discretion to require dual criminality is only limited to assistance involving coercive measures.

The central authority for matters pertaining to MLA requests under the UNCAC is the Attorney General. Brunei Darussalam notified the Secretary-General that MLA requests under the Convention should be made in, or accompanied by a translation into, the English language.

The average time needed to respond to MLA requests, not related to corruption and focused on documentary evidence, was 2 weeks.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Law enforcement cooperation, including the exchange of information and coordination of certain investigations regarding corruption-related offences, is pursued through, inter alia, the membership and participation of the ACB in the South East Asia Parties against Corruption (SEA-PAC). The ACB also works closely with counterparts from Singapore and Indonesia, as well as organizes bilateral meetings on an annual basis with counterparts from Malaysia. However, Brunei Darussalam does not have a database through which information can be shared with such counterparts.

Brunei Darussalam cooperates with INTERPOL on matters related to law enforcement cooperation.

There have been numerous general joint investigations carried out by the Police with other States, such as Malaysia, the Lao People's Democratic Republic and Singapore (also on a case-by-case basis). The ACB has conducted one corruption-related joint investigation with Indonesia.

"Controlled delivery" is one of the investigation techniques already used by the ACB. Electronic surveillance equipment is deployed mainly for the purposes of monitoring. The admissibility of evidence is determined in Court on its relevance, regardless of how it was obtained.

2.2.2. Successes and good practices

The review team identified the following good practices to strengthen international cooperation mechanisms:

- The existing channels of cooperation with counterparts in the same subregion;
- The links and cooperation with INTERPOL on matters related to law enforcement cooperation; and
- The existing practice, based on bilateral agreements or arrangements, of "visiting judges" from Australia; Hong Kong, China; Singapore; and the United Kingdom of Great Britain and Northern Ireland to adjudicate domestic cases. Although not directly linked to international cooperation, this practice demonstrates the familiarity with a tradition of utilizing international expertise and therefore, the readiness to engage in agreements to accept "liaison officers" for purposes of enhancing the efficiency of international cooperation.

2.2.3. Challenges in implementation [where applicable]

The following is brought to the attention of the national authorities as recommended action for further enhancing international cooperation mechanisms that may be taken or considered (depending on the mandatory or optional nature of the relevant UNCAC requirements):

- Consider notifying the Secretary-General of Brunei Darussalam's readiness to use UNCAC as a legal basis for extradition;
 - Explore the possibility of taking legislative measures to allow for extradition in the absence of dual criminality, in order to facilitate international cooperation, in line with paragraph 2 of UNCAC article 44;
 - Amend the extradition legislation with a view to simplifying the evidentiary requirements in domestic extradition proceedings, in line with paragraph 9 of UNCAC article 44;
 - Seek to expand the country's extradition treaty network to enhance the effectiveness of extradition and MLA; in doing so, make best use of existing resources and/or consider increasing such resources;
 - Expand the practice of spontaneous transmission of information that could assist in undertaking or successfully concluding inquiries and criminal proceedings, or could result in a formal MLA request;
 - Amend the domestic legislation to expressly provide for the exclusion of fiscal offences from the grounds of refusal of MLA requests, rather than relying on the discretionary powers of the Attorney General to do so on a case-by-case basis;
 - Make efforts to put in place a case management system within the central authority for MLA requests to facilitate, inter alia, the regular monitoring of the length of MLA proceedings for purposes of improving standard practice; and
 - Make efforts to put in place a database through which information can be shared with law enforcement counterparts in other countries.
-