Support to the anti-corruption strategy of Azerbaijan (AZPAC)

Technical Paper: Expert Opinion on various prevention-oriented laws related to the Republic of Azerbaijan's compliance with the United Nations Convention Against Corruption

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EXECUTIVE SUMMARY

This report provides comments on and recommendations of the Council of Europe expert on whether a number of Azeri laws required or recommended to be passed and implemented under the United Nations Convention Against Corruption are in general compliance with the Convention from a technical legal perspective.

The UNCAC provisions examined, at least in part, are UNCAC Articles (cross references are made, in part, to where some of the issues and laws related to the UNCAC can be found in Azerbaijan's Anti-Corruption Action Plan (ACAP) – gaps may indicate there are no current government plans to address issues in these areas, or that the issue in question is already covered by law or in other Azeri action plans):

A7.1a-c (Azeri ACAP -- A19-24)
A7.2 – 7.4
A8.2 (Azeri ACAP -- Article 19)
A8.4 -- 8.6 (Azeri ACAP -- A18)
A9 (Azeri ACAP -– A38-41; A45-46)
A10.a and A13.1.b (Azeri ACAP -- A10 & 14. 15)
A12.2e-f
A12.3
A12.4

The main related Azeri laws referenced and UNCAC articles cross-referenced in this report are:

The Law on Civil Service and the Law on Combating Corruption (UNCAC A7.1a-c)
The Law on Political Parties and the Law on the Election Code (UNCAC A7.2—7.4)
The laws on Rules of Ethical Conduct of Public Officials and on Submission of Financial Information of Public Officials (UNCAC A8.2)
The Draft Law on Prevention of Conflict of Interest in the Activities of Public Officials (UNCAC A8.8—8.6)
The Law on Public Procurement, the Law on the State Budget, the Law on Accounting, the Law on Internal Audits and the Law Administrative Infractions (UNCAC A9 and A12.3)
The Law on Obtaining Information (UNCAC A10.a and A13.1.b)
The Law on Internal Audit (and gaps in the law related to private sector conflict of interest rules (UNCAC A12.4)

For time and resource reasons, this report focuses only on certain prevention -oriented laws as requested in the Terms of Reference. It does not attempt to comment on the state of various institutions needed to implement and enforce the laws fairly and effectively, such as an independent impartial judiciary or an independent media, or on draconian Azeri laws, such as the law criminalizing defamation, that should be repealed under other international conventions and norms. These kinds of laws inhibit the development of democratic institutions, free speech and access to information and they promote self-censorship, all of which effectively limit the Azeri government's ability to prevent and address corruption.

It should be noted that some of these institutional issues, as well as other technical and implementation issues, are covered in the Council of Europe's October 2008 Compliance Report on Azerbaijan. In addition, provisions related to some of the criminal law mandates under the UNCAC are being prepared by another expert, which makes these two reports complementary.

The scope of this report is limited in other ways as well. It only attempts to offer selective comment on some of the technical aspects on the black letter law itself, and not on whether or the law in question is actually being implemented in practice. Whether the law is being applied in practice will be more of the focus during the next round of monitoring, which is scheduled for late

2009. Based upon the limited amount of information available, that the government has not provided a sufficient amount of resources to properly implement most of the laws covered in this report. Securing a sufficient budget to undertake a comprehensive anti-corruption assessment and to implement these laws, as well as the entire Anti-Corruption Action Plan is the first concrete step towards building the government's capacity and credibility in the anti-corruption arena.

Please also note that the report does not purport to examine all technical aspects of every provision of the laws reviewed. Rather, it focuses on several key provisions, with an eye towards identifying some of the laws major shortcomings. It also relies, to some degree, on the companion report prepared by the in-country expert, who examined the same set of laws. Hopefully, Azeri parliamentarians will then have some of the information they need to analyze and clarify the laws in question. Only then can the laws be fairly and effectively implemented and enforced in practice. Cross-references are made, when possible, between the UNCAC articles and the Azeri laws examined in this report and the Republic of Azerbaijan's Action Plan for the Implementation of the National Strategy on Increasing Transparency and Against Corruption (2007-2011).

Finally, because many of the UNCAC's mandates are written in fairly general terms, and because there is no official monitoring and reporting system or indicators of progress for the UNCAC, for purposes of analyzing and commenting on UNCAC compliance, considerable reliance is necessarily placed on UNODC's Legislative Guide (Guide).

In general, the Expert found that several of the laws as written have gaps or that they need to be clarified and/or revised. Some of the terms in them are vague and some contradict the letter or spirit of the UNCAC. These include the Law on Accounting, the Law on Ethics, the Law on Access to Information, the Public Procurement Law and the Law on the Budget. Another important related law, the Draft Law on Conflict of Interests, also needs to be passed and implemented as soon as possible.

In summary, the Expert believes Azerbaijan has certainly made progress in passing many laws mandated by the UNCAC in a relatively short period of time; however several have defects or gaps that need to be promptly remedied or filled. Moreover, based upon the limited amount of information obtained for this report, it is clear that a number of these laws are not being implemented in practice, either in whole or in part. One of the key reasons for this no doubt relates to the simple fact that a sufficient budget has not been developed or allocated for implementation purposes or for training civil servants. Considerable work lies ahead before Azerbaijan can demonstrate that it is in full compliance with most of the UNCAC articles examined in this report, from either a theoretical or practical implementation.

The Law on CIVIL SERVICE and the law on combatting corruption -- UNCAC Article 7.1(a-c)

In general, these articles provide that countries shall develop and maintain a career civil service system that is based upon adequate remuneration and equitable pay, merit and incentives, and one that is designed to promote an efficient, effective well trained professional workforce with integrity. This includes many policies and processes, including the hiring, retention, training, promotion and retirement of civil servants.

Elements of these mandates can be found in the Azeri Law on Civil Service or the Law on Combating Corruption. These core laws serve as two of the centrepieces of the government's overall governance reform and anti-corruption efforts. Their implementation is key to Azerbaijan's success on both fronts.

While the Azeri Law on Civil Service appears to be in general technical compliance with some of the provisions required under the UNCAC, there are several areas where the law could be clarified and amended to bring it into full compliance and to facilitate the law's implementation.

The first area relates to the government's hiring practices. The law only requires that civil servants within certain administrative pay grades and categories meritoriously compete for their positions based upon both written qualification examinations and interviews. The law exempts other categories of civil servants from the civil service rules and allows them to be hired solely through interviews. The percentage of those exempt from the civil service rules was estimated by some interviewed to be a large section of the government workforce.

The broad categories of civil servants exempt from the civil service law includes state bodies and officials such as those working in the prosecutor general's office, the national security and defence agencies, foreign affairs, internal affairs, customs, taxes and the National Bank, although it does state these officials are subject to other laws. Without having had the benefit of reviewing the other laws referenced, the Expert can not say for sure what the other laws provide and to what degree they are consistent with the Law on Civil Service and the UNCAC articles and principles.

However, exempting such a large segment of the government workforce from the Civil Service Law would seem to be incompatible with the spirit of the Law and the UNCAC principles. Thus, the Expert recommends that the Law on Civil Service and related laws covering other government officials be reviewed to determine if as many civil servants as possible are covered under the letter and spirit of the Civil Service Law and the UNCAC. If not, the Law on Civil Service and other relevant laws should be amended to accomplish this important objective as soon as possible.

A second area relates to the government's general recruitment and promotion practices. Insufficient information was unavailable to determine exactly what the recruitment and promotion procedures were within each State Body, although we were given anecdotal evidence indicating that in general the Law on Civil Service was not yet being fully applied or enforced in practice.

A third area relates to the government's training practices. As the GRECO/COE Report of October 2008 (article 95) notes, the statutory mandate to train all civil servants especially vulnerable to corruption does not yet exist in some key state bodies or it is not being carried out in practice. The GRECO report also notes that while the Civil Service Commission takes the position that the mandated training provisions of the law are self-executing, it seems pretty clear that a number of state bodies have not implemented this practice; nor have they requested or secured sufficient budgetary funding for this important activity.

Thus, in order to make it clear to all vulnerable state bodies that they must provide professional training to their respective workforce, as required by the UNCAC, the Civil Service Law and a Presidential Implementation Decree, the Commission should either issue clear guidance to all or each the relevant state bodies with specificity or the Commission should request that the civil service law be amended to specify which state bodies are considered to be the most vulnerably subject to corruption.

And a fourth area relates to the government's remuneration and equitable pay scale practices. The Expert was again not able to gain access to the necessary information and data to determine whether the Azeri pay scales were in compliance with the relevant UNCAC article. However, we did obtain anecdotal evidence that a large number of categories of government workers made less than the average cost of monthly living in Azerbaijan. If this is true, then the salaries and the law are not in technical compliance with the UNCAC. The Expert recommends that this issue be further investigated and that this report should be supplemented with a report on this issue.

In summary, the Expert believes while many aspects of the Law on Civil Service are in general technical compliance with the mandates of the UNCAC, that there is room for improvement in a number of important areas. At the same time, there also appears to be considerable room for improvement with regard to implementation of the Law on Civil Service. However, the implementation issues deserve and require further examination in another report. With regard to

implementation issues, all anecdotal evidence also indicates that there the current law can not be implemented because of insufficient resources and the lack of a trained civil service workforce.

The law on political parties and the law on the Election Code -- UNCAC 7.2 – 7.4

These articles generally require State Party's to consider prescribing qualifying criteria for candidates for public office and to take measures designed to enhance transparency of funding for political candidates and political parties. They also require them to have systems that promote transparency and prevent conflict of interest in within the civil service system.

For purposes of this report, this is another area where there are myriad inter-related laws, regulations and policies and too little time and resources to properly review, analyze and comment on their overall content or effectiveness. Thus, please note the comments below are necessarily limited in scope.

UNCAC Article 7.3 states that State Party's shall "consider" laws and administrative measure designed to enhance transparency in the funding of candidates for elected office and for political parties. This article is only one part of Article 7, which relates in general to a broad range of civil service issues, including conflicts of interest issues (7.4), as well as the qualifications of candidates for elected public office (7.2).

UNCAC, Article 7.4, requires State Party's to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest. It is just one section of Article 7, which contains a number of other important mandates related to recruitment, salaries, hiring, detention, promotion and retirement and the overall transparency, efficiency and integrity of civil servants. (The Azeri Law on Civil Service, particularly Articles 23-33, contain similar mandates, whether they pertain to recruitment, salaries, hiring, detention, promotion or retirement).

A number of Azeri laws covering a range of issues pertain to these UNCAC articles, including, Articles 93 – 95 and Article 156 of the Azeri Election Code, which contain a number of provisions compatible on paper with UNCAC 7.3. These articles fairly clearly set forth the procedures and regulations needed to promote the transparent receipt and expenditure of money by political candidates and political parties. Article 156 establishes maximum limitations on the amount of money that a candidate or political party should have in election funds and the maximum amount allowed through voluntary donations (500 times the conventional financial unit, or about $500 – 156.2). It also states that corporate contributions to parliamentary candidates and political parties can not exceed approximately $12,650. And Article 18 of the Law on Political Parties (2003) states that incomes of political parties can be the following: memberships, income from estate renting/sales, income from events, publications and articles.

While these laws are fairly clear, to the Expert's knowledge there is no law requiring political candidates or political parties to have their finances audited. There also is no law placing limits on a political party's overall expenditures, only what it spends for an election process.

Even though the laws and procedures in these areas establish limits on who can make donations, their amount and how this money can be spent, for both candidates and political parties, the best information available indicates they are not implemented or enforced in practice. (see: Global Integrity's 2007 Assessment). Similarly, provisions requiring the candidate and party to disclose their expenditures within a reasonable time are also not applied or enforced in practice.

The gaps in law noted above and the application and enforcement of the law in practice, are all incompatible with several key provisions found in the UNCAC as well as similar provisions in Recommendation REC(2003)4 (the Committee of Ministers on Common Rules Against Corruption in the Funding of Political Parties and Electoral Campaigns). REC(2003)4 incorporates by reference the Committee of Minister's 20 Guiding Principles for the Fight Against Corruption

(1997). Principle 15 of these Principles specifically promotes transparent rules for the financing of political parties and election campaigns to deter corruption.

Thus, the Expert believes the law on political financing needs to be clarified and amended, as discussed above, and that sufficient funds need to be allocated for its prompt and effective implementation.

The law on the CODE OF CONDUCT and the law on submission of financial information of public officials -- UNCAC 8.2

Generally speaking, this article requires State Party's to develop and apply codes of conduct that promote the public integrity and professionalism of all public officials.

The most relevant Azeri law to UNCAC Article 8 is the Law on Rules of Ethics Conduct of Civil Servants (passed May 31, 2007). This law essentially adopts and incorporates many of the model provisions found in the UN's International Code of Conduct for Public Officials (1996), which is referenced in the Guide. Notably, unlike some of the Azeri laws that will be examined here, the International Code's provisions pertain to all public officials, no matter what their career status or whether they are elected, unelected or appointed.

Even though various Azeri laws discussed in this report use different terminology to define which civil or public servants are covered under the scope of respective law, including different categories of government employees (for example the Law on Ethics states it applies to civil servants and the Law on Financial Information states it applies to public officials), a reading of these laws in their totality as well as the broader Law on Combating Corruption, makes it fairly clear that their overall intent is to cover all government employees, whether the law refers to them as public officials or civil servants.

While the Expert believes the Azeri laws are largely in compliance with the UNCAC mandates in this area, he also believes the that the terminology and definitions used referring to civil and public servants needs to uniform in all of the laws in and institutions in this area in order to avoid any confusion or problems in the future. This will ensure that all government workers know what their rights and responsibilities are under the law and it will promote both transparency and accountability across institutions, as the UNCAC mandates. The Expert also notes virtually all anecdotal evidence indicates that the Azeri Rules of Ethics are not being implemented in practice for many of the same budgetary and training reasons in other areas of the law.

The law on the prevention of CONFLICT OF INTEREST in the activities of government officials-- UNCAC 8.4--8.6

As noted above, UNCAC, Article 8, is the most comprehensive article related to ethics and conflict of interest issues. It includes a number of important provisions, including:

8.4, which recommends that State Party's consider establishing mechanisms and systems for purposes of facilitating reporting -- or what is otherwise known as blowing the whistle on government corruption;

8.5, which requires State Party's to endeavour to establish measures and systems that mandate that government officials file declarations that disclose their outside activities, employment, investments, assets and substantial gifts that may result in a conflict of interest (this disclosure list is the minimal amount of disclosure required -- according to the Guide-96);

8.6, which recommends that State Party's consider disciplinary measures against public officials who violate the codes of conduct or standards.

These three UNCAC articles primarily relate to provisions in three Azeri laws:

The Law on Rule of Ethics

The Law On Approval of Procedures for Submission of Financial Information by Officials (a Presidential Decree)

The Law on Combating Corruption (2004), as well as a Draft Law on Conflicts of Interest (however, comments on draft laws are not within the scope of this report)

Article 22.1.2 of the Azeri Law on Ethics requires all government ministries and agencies to create and maintain mechanisms and systems geared towards receiving information and complaints from civil servants and other persons for any breaches of the Ethics law. However, this provision, like most of the provisions of the Ethics Law, is of a very general nature, which makes its implementation and accountability highly problematic .

While the Law On Approval of Procedures for Submission of Financial Information by Public Officials sets many of the legal requirements of UNCAC 8.5 and incorporates elements of the Azeri Law On Combating Corruption, it can not be implemented in practice for several reasons. Even though it appears to apply to all public officials, including parliamentarians and judicial officials, no official has complied with the law since it was passed in January 2004 because the Cabinet of Ministers has not issued guidelines outlining how this is to be done in practice, even though the President issued a Decree directing the Cabinet to do so (June 24, 2005).

At the same time, it should not go unnoticed that no resources have been budgeted for purposes of implementing this law. Therefore, it would be impossible to implement the law even if the Cabinet of Ministers had taken action. Without clear guidance, including disclosure forms and resources to collect and analyze the financial declarations, it is impossible to implement this law. Moreover, because virtually all elements of Article 5 of the Law on Combating Corruption are very generally worded and this could be interpreted any number of ways, it also needs to be clarified itself. This fact will no doubt make it difficult for the Cabinet of Ministers, the Melli Mejlis or the Judicial Legal Council to issue clear guidelines or rules.

As noted in the COE/GRECO's recent Compliance Report (6-10 October 2008), declaration forms for public officials and implementation rules do not exist and no state bodies or mechanisms have been created to centralize and analyze the declarations (COE/GRECO 84-87). The Cabinet of Ministers has ostensibly not taken any action to implement this law at the ministerial or state body level, even though the Law and Presidential Decree ordering the Cabinet to operationalize the law is now over three years old. At the same time, the Milli Mejlis and the Supreme Legal Council have taken no action to operationalize the law for their respective institutions either.

After such a long period of delay, the Expert can only surmise that the Cabinet of Ministers is largely responsible for the law's inactive unenforceable status, since its failure to issue State Bodies the guidance and forms they need has effectively prevented its implementation and enforcement. The same must be true for the parliament and Judicial Legal Council, who are also obligated to implement this law.

The Expert believes the recommendations in COE/GRECO 84-87, which relate to the need to establish and fund an entity to collect, analyze, verify and monitor asset declarations, the need to develop and make the declaration forms available to all relevant officials and the need to amend the law so that the declarations are publicly accessible, are all still relevant and that they need to be implemented immediately.

With regard to effective sanctions and disciplinary measures, Articles 21 and 23 of the Ethics Law is probably most relevant to the UNCAC mandates. They relate to which state body is responsible for its implementation and enforcement and what the sanctions are for non-compliance.

The Expert believes these provisions are too general and somewhat vague. They do not clearly set forth the government body responsible for implementation and enforcement and it does not provide clear dissuasive disciplinary action or sanctions for non-compliance. Thus, their implementation and accountability is likewise highly problematic. Budgeting the resources necessary to implement the laws and regulations in this area will be an important good faith first step for the government and Melli Mejlis to take if their anti-corruption action plan and compliance with the UNCAC are to be taken seriously.

The law on public procurement; the law on the state budget; the law on accounting; the law on internal audit and the code of administrative sanctions -- UNCAC Article 9

UNCAC Article 9, states each State Party shall take the appropriate measures to promote transparency and accountability within the public finance system.

UNCAC 9(2) requires State Party's to promote transparency and accountability in the management of state finances. It requires States to:

develop clear procedures for the adoption of the national budget;
to make timely reporting on both revenues and expenditures;
to develop a system of accounting and auditing systems of risk management and internal control;
to provide effective and efficient systems of risk management and internal control and
effective sanctions for failure to comply with the above legal mandates.

Because even a cursory review and analysis of all the many laws that touch upon Azerbaijan's finances would take more time and resources than are available for this report. The main focus here is placed on two of the key laws in the area: the Law on the Budget System and the Law on Accounting. The Law on the Budget System determines the fundamental organizational, legal and economic principles for the development, adoption, execution, reporting and oversight of the budget. The law's basic provisions are outlined in the Country Expert's report.

The Law on Accounting, as well as closely related laws, including the Law on Auditor Services (1994) and the Law on the Internal Audit (2007), generally require State Body's, the private sector and some non-governmental organizations to adopt international auditing and accounting standards for purposes of reporting on their financial affairs. However, all of these inter-related laws require more time to review and analyze than is possible for purposes of preparing this report. It will be important for an accounting and auditing expert to review and comment upon these laws, regulations and policies in much more detail.

The Expert would also highlight recent findings and recommendations made in this area by the World Bank, in a report entitled the Report on the Observance of Standards and Codes for Auditing and Accounting (September 2006), as well as recent findings and recommendations made by two prominent Azeri NGO's, the National Budget Group and the Public Finance Monitoring Center.

In general, the report notes that various Azeri laws examined in this area, including the Law on Accounting, were deficient in that they continued to promote a fragmented accounting, financial reporting and auditing system in both the public and private sectors. This faulty legal infrastructure hindered the further development of an equitable, transparency, disclosure and accountability principles for State Bodies, State owned companies and private sector companies, as required under the IAS and the UNCAC. It noted that this framework has a number of legal and implementation shortcomings, with those related to auditing perhaps being most acute. The

report also recommended that the monitoring and enforcement roles of the Chamber of Auditors and the State Committee for Securities should be legally strengthened, as well as the qualification standards for the professionals working in this area.

Other recommendations included the adoption and implementation of international auditing standards by public and private entities, significant improvements in the Chamber of Auditor's structure, oversight, resources, independence and due process standards of review and strengthened legal rights, responsibilities of and safeguards for independent auditors. On the accounting side, recommendations included the need to clarify and strengthen the Law on Accounting and the independence and resources of the Advisory Council for Accounting. The report also recommended that the laws for enforcing the Law on Accounting needed to be developed.

Transparent Public Procurement System

A review of the Azeri Law and Decree on Public Procurement and previous analyses of it, as well as a review of the Country Expert's opinion, all reveals that the Azeri Law on Procurement is generally consistent with the UNICTRAL model procurement law and international norms, with three notable exceptions.

The first exception relates to Article 19.2.2, which literally requires that all tenders for defence and national security needs be closed. These blanket exemptions from the procurement law are inconsistent with international transparency and accountability norms and the competition principles of the UNCAC (9.1). It is also particularly problematic within Azeri context, since the defence and military budgets and the number of procurements within these sectors is growing each year. While the Guide notes that State Party's may take action necessary to protect its essential interest related to national security (Guide-82), it does not endorse, either expressly or implicitly, whole sectors from the transparent and competitive procedures of the country's public procurement process.

The second exception relates to the fact that there is a provision in the law stating that there can be no appeal on the methodology used to execute a tender. The law's provision disallowing appeals related to a tender's methodology is contra to the UNCITRAL principles concerning the bidder's inviolate right to appeal (and its counterpart in the UNCAC Article 9.1(d)). Azeri authorities also may want to note that the EU is also on the verge of finalizing a new UE Directive in this area, which requires member countries to open-up defence industry contracts to more competition (see EU Memo/07/547 and IP/05/1534).

The third exception relates to the fact that there are no clear provisions in the Law or regulations, to the best of the Expert's knowledge, regulating how to manage potential conflict of interest issues among procurement personnel, as required by 9.1(e).

The Expert believes the Law on Procurement should be amended to make all government bodies subject to the procurement law and to exempt only those procurements when essential to promoting national security and protect state secrets (UNCAC 9(1)). The law should also be amended to provide any aggrieved party the right to appeal issues related to the procurement methodology, since the right to an appeal is relevant to all phases of the procurement process under the UNCAC and model UNCITRAL law. The Law on Procurement also either needs to be amended or regulations need to be developed that establishes a system for regulating potential conflict of interest issues among public procurement personnel.

The Expert believes another amendment should be considered that would fully transform the current law into an electronic public procurement law. It is worth noting that a new European Union Directive, designed to promote more transparency, harmonization and competition among procurement systems across Europe, will soon be finalized in this area, if it has not been already.

This practice is consistent with international best practices and with the letter and spirit of the UNCAC mandates.

With respect to the law's implementation, a cursory review of various written and anecdotal reports reveals that the law is often not applied in practice, at either the central or local levels.

Implementation issues that appear to be particularly problematic include:

the small percentage of government contracts that go thru the public procurement process (it does not appear as though municipalities use the public procurement process at all);

procurement officials failure to disclose their income and assets to prevent potential conflict of interests(even though disclosure is required in the law there is no mechanism or system in place to implement this provision);

the sporadic and mixed announcement of numerous tender offers by various state bodies or whether certain ministries award contracts only to companies affiliated with ministry officials (which points to the need for passage and implementation of a conflict of interest law and implementation of the asset and income disclosure law)

the failure to make the procurement regulations accessible to the public within a reasonable length of time.

In conclusion, anecdotal evidence indicates that implementation of the law has been highly problematic within most State Bodies and that many implementation issues need prompt and serious attention. The Expert recommends that further attention is needed to determine the full extent to which the Law on Procurement is not being applied in practice and how to best address those issues, including the issue of whether there is sufficient funding and training to implement the law.

Transparency in State Finances and the State Budget

While there was only time for a limited amount of research and analysis of the many laws, regulations and policies related to all of these areas, they seem to be, in large part, generally compatible with many UNCAC requirements. However, it is important to note that the Expert did not have sufficient time or full access to all of the information needed to properly and fully analyze them.

Even so, a cursory analysis of the Law on Budget makes it clear that it and other related laws can not be implemented or enforced in practice. This is mainly because the systems, data and mechanisms do not exist with respect to many of the law's requirements, including timely reporting on budget revenue and expenditures, a coherent up-dated system of accounting and auditing standards or effective and efficient systems of risk management and internal control. The fact that government expenditures are not disclosed and organized in a way that allows them to be effectively and efficiently monitored, by either state bodies or civil society, is particularly problematic within Azeri socio-economic and budgetary context. All of these deficiencies contravene both the letter and spirit of the basic mandates of the UNCAC.

The dearth of information, data and mechanisms, as well as the lack of Web page information at either the national or ministerial levels and the lack of oversight mechanisms and publicly accessible revenue and expenditure information, and the slow degree to which international accounting and auditing standards are being adopted and implemented by State Bodies, amounts to only partial compliance with the UNCAC at best. This situation also means the Law, in large part, has not and can not be implemented in practice.

These problems and others are noted in a recent report published by the National Budget Group and the Public Finance Monitoring Centre in Baku (QB No 1-- 2007). The report states that the law needs:
to delineate, with more specificity, the accuracy, functions and responsibilities of various state bodies engaged in the budget, expenditure and oversight process, including a single institutional chart that outlines each institution's specific legal functions and responsibilities;

to clarify and define in the law the term "budgetary information" so that every State Body will know what kind of budgetary information and which documents must be publicly accessible;

to ensure that this budget information and documents are publicly assessable, including extrajudicial funds, both in writing and via Web-pages;

to clarify the exact process for the development, approval, execution and oversight of the budget, revenues and expenditures.

The Expert believes clarifying and amending either the Law on Budget or through related regulations in the areas outlined above are minimal requirements mandated under UNCAC 9.2. (also see the Guide— 83). Most importantly, its mandates, particularly those related to making budget revenues and expenditures more transparent, need to be fully funded so that all State Bodies can implement the laws in practice. This will then allow effective oversight, monitoring and reporting by both governmental and non-governmental entities.

Government Accounting and Auditing

Article 9.2 also requires State Party's to develop a system of public accounting, auditing and oversight standards that will promote transparency and accountability within public financial management context. This means that countries like Azerbaijan must adopt and implement international accounting, auditing and independent oversight policies and procedures with regard to all revenues and expenditures related to the national budget.

The Law on Accounting Law, passed in 2004, phases out by the end of 2008, the old Soviet-era accounting standards. They are being replaced by The International Accounting Standards (IAS) and the International Financial Reporting Standards (IFRS), which complements the IAS Regulation and the International Public Sector Accounting Standards for non-commercial enterprises.

Making this accounting transition in an emerging market economy requires a major mind shift, as the Soviet-era principles were rules-based whereas the IFRS are principles-based. It also requires considerable training and capacity building, since there are very few qualified accountants in Azerbaijan.

Transparent and reliable financial and ownership records that can be relied on for various purposes, including conducting independent audits, making investments, conducting investigations and undertaking prosecutions, depend to a significant degree on the adoption and implementation of international accounting standards. According to documents obtained by the Expert, The World Bank and CGA-Canada are providing Azerbaijan on-going technical assistance in this important area.

A review of the Law on Accounting makes it clear that the law applies to both the public and private sectors. (It is noted that the Accounting Law is discussed further in the next section of this report, which relates mainly to accounting standards mandated by the UNCAC for the private sector). Article 4 of the Azeri Accounting Law expressly states the gist of the law is to ensure the integrity of the government's accounting books, records, financial statements related to public expenditures and revenue and to prevent the falsification of these documents.

The Expert believes that many provisions of the law are in general compliance with UNCAC mandates. However, a number of legislative improvements need to be made, as outlined below, in order to bring it into compliance with the UNCAC. And it is also clear from publicly accessible reports, on-going donor programs and anecdotal evidence that the law has a long way to go before it can be applied in practice, although that issue deserves more attention in another report. As previously noted, until these standards are adopted and implemented it will be very difficult to detect or prevent corruption or to hold government officials accountable.

In summary, the Expert believes the Law on Accounting needs clarification and amendments in a number of places.

First, the overall structure of the law needs to be revised for purposes of clarity. It is not clear from reading Article 1, which outlines the purpose of the law, what the main purpose really is. The Expert recommends merging the language in Article 4.1, which is titled The State Regulation of Accounting, with Article 1. 1 and to make it clear that the law post-2008 relates to most enterprises, governmental bodies and organizations in Azerbaijan, unless expressly excepted in the law (mainly SMEs, municipalities, off-budget state funds, budget organizations and non-governmental organizations). Generally speaking, the language in and the rationale for the law are poorly worded, structured and confusing.

Second, there are simply too many categories of entities and too many undefined terms in Article 2, which is the Definitions section of the law. Some of the terms are used synonymously, which makes the categories and legal obligations of entities subject to the law even more confusing. Article 16 of the Azeri Law on Accounting seemingly attempts to state that those who prepare, maintain and submit financial statements are responsible for non-compliance. However, either the text of the law or the translation is so poor (or both), that both the intent and scope of this section is highly debateable and therefore problematic.

It is unclear exactly who is responsible for compliance and what the sanctions are for non-compliance. The Expert believes these entities and organizations should be clearly defined up-front in the law in Article 2 so that every entity or organization in Azerbaijan knows what its legal responsibilities are under the law. Unless the law is clarified it may not be clear to many enterprises, nor to non-governmental organizations, whether they are subject to the law, which standards are applicable to them or whether and where they are required to file their annual statements (as outlined in Articles 8-13). The latter issue is particularly problematic because the definitions of these various entities and organizations is not clearly defined or referenced in the Accounting Law.

Third, it would also be helpful to make general reference to the new standards being advanced in the law in this section, even though each are referenced in more detail in Article 6 of the law. This includes the International Public Sector Accounting Standards and the International Accounting Standards for Commercial Organizations. The Expert believes that without clarification of the law compliance and enforcement of this law will be uneven at best.

Dissuasive Civil and Administrative Sanctions

UNCAC 9.3 mandates State Party's to impose dissuasive civil and administrative sanctions necessary to promote the integrity of accounting books, records, financial statements or other documents related to public expenditures and revenues and to prevent their falsification.

The Expert notes that he does not have access to translations of all of the Azeri laws referenced in the Country Expert's report with regard to the sanctions issues; thus, reliance is necessarily placed on the Country Expert's review and report. His report states that these laws include general provisions that could be interpreted to cover all of the issues mandated in the UNCAC. However,

the International Expert would note that he has no information as to whether these laws are applied or enforced in practice and recommends that these laws receive closer examination and analysis in both law and practice.

The Azeri Law on Accounting also does not provide clear dissuasive administrative or civil penalties (sanctions) for non-compliance, as required by the UNCAC. As noted in the Council of Europe's recent Conference Report on Azerbaijan (6-10 October 2008), the Code of Administrative Violations refers to accounting infringements in very broad, vague terms, and that the only relevant sanctions are found in the Azeri penal code. Since the purpose of this section is to impose dissuasive civil penalties and fines for those in non-compliance, the Expert finds that a specific law needs to be passed to remedy this legal gap in the law.

In short, with regard to sanctions, the Expert recommends that this section should be completely redrafted in order to make it clearer and to properly capture the law's intent and legal scope and who is responsible and for what. It should also be amended to include dissuasive civil and administrative sanctions for non-compliance. The new text should apprise everyone covered under this law of their legal responsibilities and what the possible sanctions are for non-compliance.

In summary, with respect to compliance with UNCAC Article 9, the Expert believes that the findings and recommendations outlined in the recent World Bank Report (2006), which are summarized above, document the fact that the Azeri Auditing and Accounting system has a long way to go before it meets international standards, which is required under the UNCAC mandates. The Expert has also outlined additional elements that are not in compliance with UNCAC mandates or international accounting and auditing standards. Clarifying, amending and harmonizing these laws as soon as possible, so that Azerbaijan has the legal and regulatory infrastructure to support a transparent, disclosure-oriented accountable public finance and budgeting system, based upon international accounting and auditing standards, is critical. As the UNCAC notes, these laws, systems and standards are essential transparency and accountability tools needed to fight and prevent corruption and promote governmental and non-governmental oversight and access to information.

the law on obtaining information -- UNCAC 10(a) and 13.1(b)

UNCAC 10(a) and 13.1(b), from an anti-corruption prevention and enforcement perspective, are believed by some to be two of the most important UNCAC mandates. Their main purposes are to simultaneously promote transparent and accountable government processes and decision making and to ensure that civil society has the information necessary to participate in and monitor the governance process and to address and prevent corruption. As the Guide states, effective anti-corruption strategies necessitate the active participation of the general public (61).

It is useful to note that the Azeri Law on Access to Information was birthed by many legal mothers and grandmothers, including Article 50 of the Azeri Constitution (which establishes the fundamental right of the every Azeri citizen to access information from the government). Others include the UDHR, the UNCAC, the ICCPR, the OSCE and the COE Conventions. On the surface, most of its provisions appear to be in general compliance with international norms. However, there are several areas where the law needs to be clarified or amended in order to bring it into UNCAC compliance.

This article is closely related to Article 10 (a), the main purpose of which is to promote transparency in public administration and to make sure that the mechanisms exist to provide information to the public on the organization, functioning and decision-making processes. Other closely related UNCAC articles geared towards promoting civil society participation include Articles 5 and 6 (Guide -- 44-47).

Effective application of the access to information article, as well as participation of society in the governance and anti-corruption process depends, in large part, on whether the fundamental rights of freedom of expression and freedom of the press are implemented in both law and practice. The exercise of these rights requires government support for an independent media and investigative journalism.

At the same time, the enforcement of these rights and the access to information law, including the right to appeal denials related to information requests, is largely dependent on the independence of the judiciary. While an examination of these constitutional issues and Azeri institutions is not within the scope of this report, an examination of the implementation issue would necessarily require an examination of the institutional or legal enabling environment issues as well. With these institutions, the access to information law would not be implementable in practice.

In Azerbaijan, it can not go unnoticed that a number of journalists and advocates from Azeri civil society have been threatened for criticizing government officials or policies and for exposing corruption and that the judiciary is not generally seen as independent. Unless government officials and members of the private sector can be responsibly criticized without fear of jail, global experience tells us there is little hope of exposing corruption or fair and effective accountability.

The Law on Access to Information is deficient on its face in at least several important respects. While the following deficiencies are not meant to be all-inclusive, because time and resources do not allow for a such a review, they do point to some important areas where the law's clarification and redirection could make the effective implementation of the law at least possible as well as consistent with international norms. The International Expert recommends that more attention needs to be given to the reform of this important law and that more specific recommendations related to its practical implementation at both the national and local levels need to be developed and implemented as soon as possible. This should be done through a broad-based participatory process that includes the Melli Mejlis.

Some of the law's flaws simultaneously inconsistent with UNCAC mandates and various international obligations and norms (including those noted in a 12 April 2005 analysis of the draft law by the leading international NGO in this area, Article 19), include:

the fact that the law generally only applies to citizens and not everyone (see Article 5 of the Law);

the fact that standard for restricting the right to access information is too low, which makes rejection of a request too easy and too open to arbitrary action [Article 13.3 of the Law only says restricting access is legitimate when the disclosure "may harm" (the law lists 10 rather vague generally worded circumstances or exceptions when the request can be summarily denied) and when public interest to restrict prevails over the public interest to disclose – instead of only allowing restriction only under conditions when to do so would cause "substantial harm" to the protected interest];

the fact that some of the exceptions to the Law's and UNCAC's presumption of disclosure principle are generally or vaguely worded, including 13.2.10, which lists "unjust enrichment" as an area without defining or explaining its meaning (this exception is vague at best); 13.2.7, which lists outcome of state audits, investigations and control (this exception would stifle freedom of speech, citizen oversight and whistle blowing) and 13.2.5, which lists "private and public interests and other legitimate economic interests" (this very general exception could be used for virtually any request).

In short, under the UNCAC's international obligations, principles and norms there should be a limited number of very tightly worded exceptions to the principle of disclosure. This is simply not the case with respect to the current Azeri law. Therefore, the International Expert is of the strong opinion that the law on its face is not compatible with Azerbaijan's obligations and these legal

defects, unless corrected, have the potential to seriously inhibit the fair, effective and efficient future implementation of the law. Serious consideration should be given to also amending the law to require that information be accessible by the Internet by a date certain.

The Expert also believes the Azeri Law on Access to Information is not implementable in practice for a number of reasons. This includes the fact that no separate entity (in this case the Information Ombudsman) has been established to act as the centralized policy and implementation hub for the government, as required by law. Thus, there is no entity to resolve disputes and hear appeals from citizens and others when their information request has either been officially or effectively denied or unduly delayed. Another implementation problem relates to the fact that there is also little evidence that most government entities have posted the relevant and necessary information about their basic operations, personnel, policies, procedures and regulations on either their own entities or any other government entity's web-site, as required by the law. Perhaps most important, it is clear that neither the government nor the Melli Mejlis have budgeted the necessary resources to implement this law at either the national or local levels.

As a consequence of this overall situation, the public seldom attempts to exercise their legal rights under this law. Indeed, it appears the public does not know what their legal access to information rights are or how to exercise them. Even well-intentioned government employees have little choice but to ignore or dismiss any requests made because there are no clear implementation procedures or guidelines for them to follow within their respective ministry or State Body and they have received no training in how to implement it.

In general, there is little evidence and virtually no statistics illustrating that the public knows how to make a request for information or that they believe that the law will be enforced if they request it. Even though there are a few court cases in this area, most members of the public do not have the resources, time, knowledge or trust in the legal system to use it for purposes of enforcing their rights. Under the law and as is the case in most countries, the office of the National Information Ombudsman is seen as the first line of authority charged with enforcing the law, facilitating requests for information and resolving appeals. However, as previously noted, this office has not been established in Azerbaijan although the law itself mandates it.

While it is true, as some noted, that the court system can and has been used to enforce rights in this area in Azerbaijan, the judicial process is very lengthy and expensive. Under the law, the courts are only intended to serve as a forum of last resort. Moreover, a positive and efficient judicial outcome is also highly doubtful in Azeri context, given the degree to which the courts are seen as under the control of the government bureaucracy. In addition, neither the courts nor the civil servants charged with implementing the law have received training on this important new right.

Finally, global experience also lends strong support to the notion that implementation of the this law can facilitated by making as much information as possible readily accessible through governmental (and non-governmental) web sites, as already required by various laws discussed in this report, including the Law on Access to Information, and the government's own Anti-Corruption Action Plan. Global experience and best practice also informs us that if the Law on Access to Information were to be further expanded to require more government information on web sites, that it would then effectively become an electronic access to information law. This kind of legislative action, if implemented in practice, would solve many transparency and access to information problems throughout the Azeri government, parliament and judiciary, and it also would help bring Azerbaijan into compliance with the UNCAC.

The Expert must necessarily conclude that the government's inaction over such a long period of time in all of the above areas is clear evidence of non-compliance with the UNCAC. Such inaction sends an implicit but clear message to the public and the international community that the government is not serious about implementing the law on Access to Information and that compliance with the UNCAC is not a priority worth funding. It is recommended that the law be

clarified and amended in the areas outlined above and that the law's mandates be sufficiently funded so that the institutions and procedures necessary to implement it can finally be created.

The law on internal audit (AND gaps in the law related to PRIVATE sector CONFLICT OF INTEREST ISSUES -- UNCAC 12.2(e-f)

UNCAC, Article 12, states that each State Party shall take measures to prevent corruption involving commercial enterprises including requiring them to enhance their financial, accounting and auditing standards. It also requires that the law include effective sanctions, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with these standards. The Guide states that some of the main objectives of this legislative mandate are to promote financial transparency, clarify the operations of private entities, support confidence in the annual or other statements of private entities, and help prevent as well as detect malpractices.

It should be noted that there are several related articles in the UNCAC that attempt to set the overall ethical and legal standards of conduct for public officials and their employment relationship to government, as well as their potential subsequent employment in the private sector. These include Article 8, which relates to Codes of Conduct for public officials, Article 12.2(e), which relates to conflict of interest issues of former or current government officials seeking private sector employment and Article 7, which relates to conflicts of interest of current public officials.

Along with other civil service reforms, these articles provide government officials the incentives and disincentives needed to address and prevent corruption and promote a government of integrity and to prevent conflicts of interest in the transition to potential private sector employment.

UNCAC Article 12.2(e) relates to the professional activities of former or current government officials who are seeking or employed by the private sector. This article imposes restrictions on these officials or former officials for a reasonable length of time if their government activities are related directly to their proposed position in the private sector. The Guide-122/3, notes that cooperation between the private sector and the law enforcement community is key to addressing private sector corruption and that these codes help promote these kinds of public private partnerships. It also notes that the codes can be formal or informal and that State Party's may find it beneficial to sanction or support these kinds of private sector initiatives.

UNCAC Article 12.2(f) requires State Party's to have sufficient internal auditing controls to help prevent and detect corruption within the financial records of private enterprises.

UNCAC Article 12.3(e) requires State Party's to maintain books and records, financial disclosures and accounting and auditing standards that prohibit a number of practices, including: (i) the establishment of off-the-books accounts; (ii) not properly identifying financial transactions; (iii) the recording of false expenditures; (iv) falsely or inaccurately identifying liabilities; (v) using false documents and (vi) intentionally destroying financial and bookkeeping records as required by law.

Because there was insufficient time and resources to carefully review all of the Azeri laws related to these UNCAC articles, the Expert must necessarily place primary reliance on the review and comments in the in-country Expert's report. His report outlines the various tax and administrative and criminal laws that provide evidence of UNCAC compliance. However, it is not clear from his report whether all of the civil and administrative provisions required under the UNCAC articles are clear and dissuasive, as opposed to those that relate only to criminal liability. It is also not clear whether any of these laws or sanctions are being imposed or implemented in practice.

The Expert recommends that all of these laws be more carefully reviewed or if that has already been done that the in-country Expert report set-out more clearly which provisions of Azeri law apply to which UNCAC mandates.

TAX DEDUCTIBILITY OF BRIBES-- UNCAC Article 12.4

UNCAC 12.4 mandates that State Party's disallow the tax deductibility of expenses that constitute bribes or other expenses incurred during the course of a corrupt activity.

Even though the in-country Expert believes the Azeri laws in this areas evidence compliance with the UNCAC article, to the Expert's knowledge, this provision, as it relates to the civil or administrative law, does not appear to be part of the Azeri law at present. The Expert believes the in-country Expert is referring to provisions found in the Azeri criminal code, which criminalize bribery. However, this particular UNCAC article relates to the imposition of civil and administrative penalties for any attempt to take a tax deduction for expenses related to a bribe or other corrupt activity. This mandate expands sanctions to include both civil and criminal penalties, and is an additional incentive to further deter and prevent this kind of activity within the context of financial records, accounting and auditing perspective. Also, violations of civil and administrative law for some involved in this activity, rather than criminal law, may be more appropriate or more easily proven in some cases.

The Expert recommends that the Azeri civil and administrative laws be amended to make it clear that the law makes it illegal to deduct taxes for both bribes and other expenses related to corrupt transactions. The law should also be clear as to who is responsible for making sure bribes and expenses related to corruption are not deducted and what the civil and administrative penalties or sanctions are for non-compliance, consistent with the UNCAC.