

NEW AND EMERGING FORMS OF CORRUPTION AND THE EFFECTIVE COUNTERMEASURES

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I. INTRODUCTION

This paper will discuss the new and emerging forms of corruption and the effective countermeasures from the perspective of a practitioner with the Operations Department of the Independent Commission Against Corruption (ICAC) of the Hong Kong Special Administrative Region of the People's Republic of China (PRC). For a better understanding of the approach taken by the ICAC, this paper will set out the brief history of the ICAC, the anti-corruption strategy adopted by it to stem out the then widespread corruption, the transformation of the corruption scene in Hong Kong in recent decades, and finally outline the corresponding countermeasures in response to the new and emerging forms of corruption.

II. BRIEF HISTORY OF THE ICAC

In Hong Kong in the late 1960s and early 1970s, corruption was rampant and was a way of life. Public services, such as nursing care at hospital, were provided on condition that the patient was willing to pay the bribe. Corruption seriously undermined the legitimacy of the public administration, and, therefore, distrust grew substantially between the public and the then administration. The administration sensed the alarming distrust and pressed for the establishment of a new watchdog – the ICAC.

In late 1970 when moving the second reading of the Prevention of Bribery Bill – the very weapon with which the ICAC was equipped to crack down on corruption – the then Attorney General made a remark that succinctly outlined the acute situation in Hong Kong as follows:

Sir, it is impossible to assess with any accuracy the extent to which society in Hong Kong is affected by corruption... But... corruption does exist here to an extent which not only justifies, but demands, that the utmost efforts be made to eradicate it from our public and business affairs...

It was against such backdrop that the ICAC was established. In March 1974, the ICAC became the new organization charged specifically with the responsibility to combat corruption. It was given extensive special investigative powers that changed the way corruption had been tackled in the past. Most importantly, to underscore its independence, the control of the ICAC was shifted from the Attorney General to the Commissioner who was appointed by and accountable to the then Governor. In fact, after the resumption of the exercise of sovereignty over Hong Kong by the PRC, the accountability system remained, save that the Commissioner is now held accountable to the Chief Executive. Its independence is further entrenched into Article 57 of the Basic Law, which provides:

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A Commission Against Corruption shall be established in the Hong Kong Special Administrative Region. It shall function independently and be accountable to the Chief Executive.

Independence aside, the accountability of the ICAC is seen in the set-up of the Operations Review Committee (ORC) which, comprising 13 non-official members, monitors all ICAC investigations. The ORC, appointed by the Chief Executive, meets regularly to receive status reports on all cases and monitors investigations, people on bail and court cases. The ORC directs follow up investigations and referrals of cases which can include advice for internal disciplinary actions or administrative reform. Its purpose, among others, is to ensure that there are no cover-ups and failures of the ICAC to pursue matters that should be investigated. It is a bold innovation in terms of the check and balance regime that can rarely be seen in other foreign counterparts to allow such substantial involvement of civilians in the daily operational matters of an anti-corruption watchdog. The set-up of the ORC by itself underlines the value of independent oversight and review of the operational aspects of the ICAC's work.

III. THREE-PRONGED APPROACH

It should be noted that at the outset the ICAC was intended not only to combat corruption by means of enforcement, but also in a holistic manner by prevention and education. Such approach was codified in section 12 of the Independent Commission Against Corruption Ordinance, Cap. 204, Laws of Hong Kong which provides:

- It shall be the duty of the Commissioner, on behalf of the Chief Executive, to –*
- (a) receive and consider complaints alleging corrupt practices and investigate such of those complaints as he considers practicable;*
 - (b) investigate –*
 - (i) any alleged or suspected offence under this Ordinance;*
 - (ii) any alleged or suspected offence under the Prevention of Bribery Ordinance (Cap. 201);*
 - (iii) any alleged or suspected offence under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554);*
 - (iv) any alleged or suspected offence of blackmail committed by prescribed officer by or through the misuse of his office;*
 - (v) any alleged or suspected conspiracy to commit an offence under the Prevention of Bribery Ordinance (Cap. 201);*
 - (vi) any alleged or suspected conspiracy to commit an offence under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554);*
 - (vii) any alleged or suspected conspiracy (by 2 or more persons including a prescribed officer) to commit an offence of blackmail by or through the misuse of the office of that prescribed officer;*
 - (c) investigate any conduct of a prescribed officer which, in the opinion of the Commissioner, is connected with or conducive to corrupt practices and to report thereon to the Chief Executive;*
 - (d) examine the practices and procedures of Government departments and public bodies, in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Commissioner, may be conducive to corrupt practices;*
 - (e) instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;*

- (f) *advise heads of Government departments or of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such departments or public bodies which the Commissioner thinks necessary to reduce the likelihood of the occurrence of corrupt practices;*
- (g) *educate the public against the evils of corruption; and*
- (h) *enlist and foster public support in combatting corruption.*

Organizationally, the ICAC comprises the Operations Department, the Corruption Prevention Department, the Community Relations Department as well as the International Cooperation and Corporate Services Department. The former three departments were charged with the respective responsibilities as per the ICAC Ordinance detailed above.¹ This in a way reflected the three-pronged approach the ICAC has been employing since its establishment. Looking back, it was quite a novel approach especially in comparison with the then foreign counterparts who largely intended their anti-corruption watchdog to be an investigatory body only. The rationale for such a broad and novel approach to the problem of corruption was explained by the then Colonial Secretary on the occasion of the second reading of the ICAC Bill:

It is the intention of the Commission to concentrate much of its energies on the prevention of corruption. In the past our efforts in dealing with the problem have tended to be concentrated mainly on the punishment of it and I believe honourable Members will support the organisation of the Commission into three complementary departments for if the problem of corruption is to be tackled successfully, our efforts must not only be directed at the detection and punishment of offenders but also at the social causes and administrative sources of corruption.

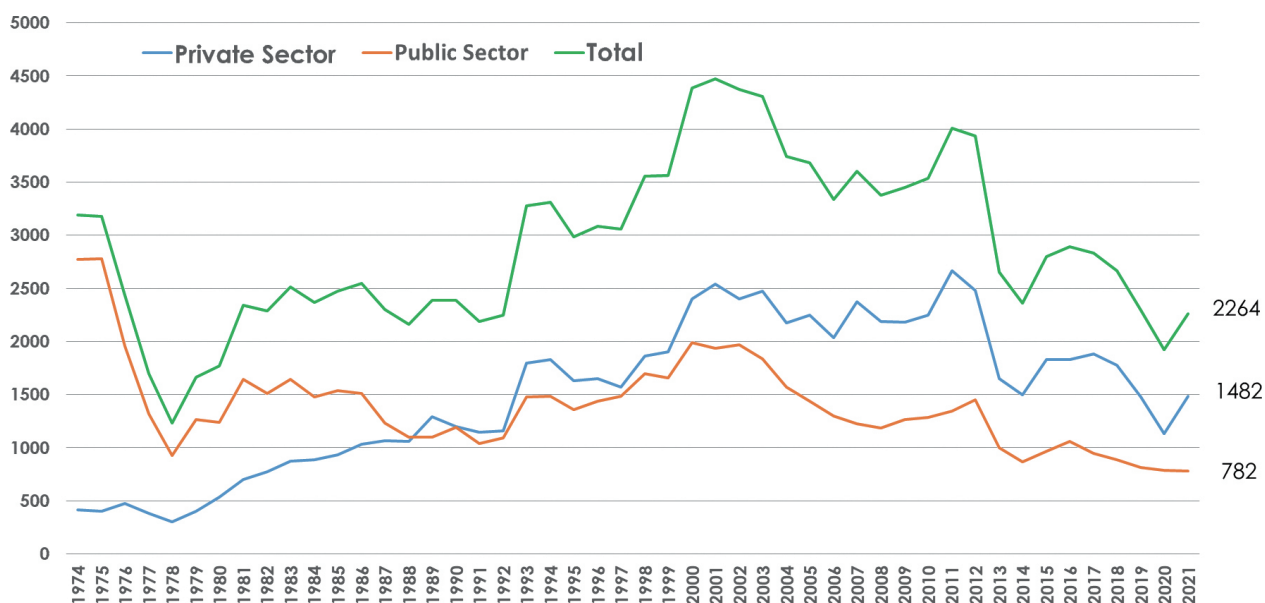
Shortly after the establishment of the ICAC, corruption in Hong Kong was substantially cut down. Not only were the corrupt criminals brought to justice but the seeds of anti-corruption were sowed in the public administration and the civic society, much thanks to the excellent work by the prevention and education arms of the ICAC.

In fact, the three-pronged approach is also in line with requirements of the United Nations Convention Against Corruption (UNCAC), which urges the States parties to tackle corruption using a comprehensive approach comprising enforcement, prevention and education measures.

IV. CHANGES IN THE CORRUPTION SCENE

From 1974 till now, the ICAC has been actively enforcing the anti-corruption laws and witnessing the shift of the corruption scene in terms of, inter alia, the case figures in the public and private sectors, as well as the case typologies in recent years. The following table outlines the figures of corruption complaints in the public and private sectors:

¹ Points (a), (b) and (c) correspond to the works of the Operations Department; (d), (e) and (f) to the Corruption Prevention Department; and (g) and (h) to Community Relations Department.

Figures of Corruption Complaints

Note: A corruption report may contain multiple complaints against different government departments / public bodies / industries. Commencing 2010, corruption statistics have been compiled on the basis of complaints instead of reports

Corruption complaints against the public sector took the largest share in the first few years following the establishment of the ICAC. This trend should be read in the context that the creation of the ICAC was a direct response by the then administration to dismantle the deeply rooted corruption syndicates in the then civil service in Hong Kong, and, therefore, the general public would be eager to come forward to the ICAC to lodge corruption complaints against the civil service.

1977 was a watershed year for the ICAC. The huge success in cracking down on the corruption syndicates in the first few years had been won at huge cost to the police. Police morale was low and there was building resentment over the way that the ICAC used accomplices as prosecution witnesses in its investigation. The prevalent use of accomplices turned colleague against colleague and created an atmosphere of suspicion and mistrust between police officers. Given the sentiments, coupled with an operation in late 1977 resulting in the mass arrest of over 140 police officers for alleged involvement in syndicated corruption, a group of police officers marched to and raided the office of the ICAC with a view to protesting against the latter's rigorous enforcement. The crisis did not end with the demonstration – it escalated further because the police demanded an outright response by the then administration to abort the corruption investigation against the police. Since the matter had been elevated to a security issue threatening a breakdown of law and order, the then administration promulgated a partial amnesty that was subsequently inserted into the ICAC Ordinance as section 18A.

It is against the above backdrop that Hong Kong saw corruption complaints against the public sector plummet in 1977. After a decade's time of vigilant enforcement against public sector corruption, the pleasing result was seen in the year of 1988 when the number of private sector corruption complaints outnumbered that of the public sector for the very first time since the establishment of the ICAC. And such a bifurcated trend remains as of today.

A. Case Typologies

In terms of case typologies, those in the public sector and private sector are different in nature, complexity and modus operandi. Before illustrating their respective trends in recent decades, it is helpful to first set out their legal principles.

The workhorses of the ICAC in prosecuting corruption in the public and private sectors are sections 4 and 9² of the Prevention of Bribery Ordinance (POBO), Cap. 201, Laws of Hong Kong, respectively.

In regard to public sector corruption, section 4 of the POBO provides:

- (1) *Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's –*
- (a) *Performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;*
 - (b) *Expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or*
 - (c) *Assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,*

shall be guilty of an offence.

- (2) *Any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –*
- (a) *Performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;*
 - (b) *Expediting, delaying, hindering or preventing, or having expedited, delayed, hindered, or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or*
 - (c) *Assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,*

shall be guilty of an offence.

In regard to private sector corruption, section 9 of the POBO provides:

- (1) *Any agent who, without lawful authority or reasonable excuse, solicits or accepts an advantage as an inducement to or reward for or otherwise on account of his*

² Sections 3 (Soliciting or accepting an advantage), 5 (Bribery for giving assistance, etc. in regard to contracts), 6 (Bribery for procuring withdrawal of tenders), 7 (Bribery in relation to auctions) and 8 (Bribery of public servants by persons having dealings with public bodies) of POBO are also other offences used to prosecute bribery. For illustration purpose, the present discussion would focus on sections 4 and 9 of POBO.

(a) *Doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or*
(b) *Showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or businesses,*
shall be guilty of an offence.

(2) *Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's –*
(a) *Doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or*
(b) *Showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or businesses,*
shall be guilty of an offence.

A person can be guilty of the above offence if he offers an advantage to an agent, or being an agent, he solicits or accepts an advantage. However, there is no mention of the word “corruption”, or variants of it, in these offences. Proof of corruption comes from establishing that the advantage was offered, solicited or accepted “as an inducement to, reward for or otherwise on account of” the agent doing an act in his capacity as a public servant (section 4); or an act in relation to his principal's affairs (section 9).

Notwithstanding the slight variances in the words employed by sections 4 and 9, the core requirement of the need to establish the purpose, be it “as an inducement to, reward for or otherwise on account of”, of the advantage being offered, accepted or solicited stands the same. Such purpose is an element of the offence which makes the conduct of the offering, soliciting or acceptance of the advantage corrupt, and hence it is essential that it be proved.

One can imagine the proving of such linkage would rely on the utterance of at least one party to the crime to tell the investigators how the corruption scheme is orchestrated. When the ICAC was established, the initial scepticism of the public towards its effectiveness soon turned to unswerving support because of both the positive case results and complete convictions exhibited by the investigators. Therefore, quite a number of offerors, especially those who had succumbed to the undue requests by the corrupt public servants, were willing to come forward and lodge complaints with the ICAC to testify against the corrupt public servants. As a result, the ICAC yielded a number of successful prosecutions concerning public sector corruption, and dismantled the deeply-rooted corrupt syndicates in a very quick and effective manner.

B. The Prevalent Use of the Common Law Offence “Misconduct in Public Office” to Prosecute

After almost two decade's rigorous enforcement, the corruption situation in the public sector stabilized. But it does not mean that corruption was completely rooted out; instead, there were cases where public servants abused their position and powers for the benefit of themselves or others, used their discretionary power improperly, showed favours to a particular contractor for personal interest, and wilfully neglected to perform their duties. All such behaviours undoubtedly exhibited signs of deviation from integrity and fidelity; however, they did not

involve the solicitation or acceptance of advantages, and hence escaping from the reach of sections 4 and 9 of the POBO.

This became a problem, namely that there was no statutory crime targeting the aforementioned misbehaviour. So, attention inevitably turned to the common law offence in the hope that it might complement the existing bribery laws by filling a gap left by an ordinance that otherwise exhaustively dealt with all possible permutations of bribery by and of public officials.

C. Private Sector Corruption

As compared to public sector corruption against which the legislature had created several offences³ to combat, section 9 is the only offence in the POBO dedicated solely to corruption in the private sector, but it is limited in its scope by the requirement that there exists a principal/agent relationship and that the principal's interests are prejudiced or at risk of being prejudiced by the secret actions either of his corrupt agent or by a person with whom he is having dealings who seeks to corrupt his agent. This is the traditional narrow view of corruption which is typically found in anti-corruption legislation and is even reflected in Article 21 of the UNCAC, which proscribes the offering, solicitation or acceptance of undue advantages to or by the employees of private sector entities "in order that he or she, in breach of his or her duties, act or refrain from acting". Thus, the focus of UNCAC and other similar offences is on conduct which undermines the integrity of the agent in his relationship with his principal. But a caveat must be added here that not all acts that undermines the integrity of the agent in his relationship with his principal are subjected to criminal sanctions. The very act that section 9 is intended to address is one of "secret commissions". Thus, in order that the offence can be established, the principal must be unaware of what is taking place, or otherwise a defence of the principal's consent, be it express or implied, would be pleaded by the corrupt agent.

Those who make their living by earning agency commissions on sales or other transactions, which account for a large portion in the commercial world nowadays, are under the radar of section 9. Given the rapid economic development in Hong Kong over the last half century, the prosperous economic activities naturally brought about a higher number of cases of corruption in the private sector.

Although the corruption-complaint figures in the private sector remained steady over the past two decades, there is an uprising trend of prosecution of s.9 offences *in conjunction with* other common dishonest offences, such as fraud, deception and theft (both in their substantive and inchoate forms), as well as serious and organized crimes, such as money-laundering, the trafficking of dangerous drugs, illegal gambling and smuggling. In many instances, corruption is a predicate offence that facilitates the commission of the underlying substantive crime. Therefore, in the majority of corruption investigations nowadays, the scope of the investigation very often goes beyond corruption to include crimes that are connected with or facilitated by corruption.

Rapid change in technology plays a highly influential role in driving how corruption investigation, especially in the private sector, is undertaken. The continuing advances in science and technology undoubtedly have a far-reaching impact in all areas of human endeavour. Insofar as corruption is concerned, when nowadays communication goes largely

³ Please refer to note 2 for the list of provisions dealing with public sector corruption.

virtual, the chance of collecting direct evidence to prove the corrupt negotiation of the parties becomes slimmer than that in the past, not to mention the fact that most instant messaging platforms are now designed with message self-destruction function. The situation was aggravated by the outbreak of Covid-19. The daily life of people has been changed and many of them worked from home, and avoided or were prevented from meeting with others due to social distancing measures and travel restrictions. Investigators are to exhaust all conceivable means to collect more and more circumstantial evidence than ever in the past to prove to the court of law that the accused is beyond reasonable doubt guilty of corruption offences.

The increasing trend of globalization requires investigators to look beyond the traditional concepts of physical locations and territories. In this day and age, businessmen handle multinational projects and need to deal with cross-border transactions. And many are engaged in transactions in cyberspace with no physical boundaries. This global development means that law enforcement agencies, including corruption investigators, are required to tackle cross-border criminal activities. Under the current complicated geopolitical climate, investigators would come to a standstill on occasions when the investigation in question involves an adversarial foreign jurisdiction, rendering informal law enforcement cooperation and mutual legal assistance unfeasible and inviable. This in a way makes cross-border investigation counterproductive.

V. MEETING THE NEW CHALLENGE

To meet the aforementioned challenges, first and foremost we must ensure that there is and continues to be a solid and effective infrastructure that consists of a sound legal framework, an effective enforcement agency, an independent judiciary to uphold the rule of law, and equally important, a supportive community. These have been covered in the previous paper submitted by a participant from the ICAC,⁴ and thus are not intended to be repeated here.

In the fight against corruption, an anti-corruption watchdog can never afford to be complacent regardless of how much remarkable progress has been made to reduce and minimize the risk of corruption. Every era gives rise to fresh challenges, and thus investigators need to be alert to new trends and new types of corruption-related activities, and must adapt and update their skills and knowledge in combating corruption. In addition, investigators also need to respond to changing circumstances promptly and appropriately, and have to anticipate changes and devise strategy to cope with the problems.

Over the years, the ICAC has been sparing no efforts in sharpening investigative capabilities. During the past decade, in order to improve work efficiency and streamline work procedures, the ICAC implemented the new Operations Department Information System (OPSIS), which serves as the one-stop-hub to digitalize the corruption investigation process. OPSIS also acts as a centralized database that stores the information on the parties involved in the case. This lays one core pillar of the infrastructure supporting the efficient conducting of corruption investigation in the ICAC because it allows investigators to identify the otherwise undetectable linkage between the relevant corrupt parties.

To further strengthen investigative capabilities, the ICAC invented the Records Digitalization System (RDS) that consolidates and analyses the usually voluminous case data

⁴ https://www.unafei.or.jp/publications/pdf/RS_No105/No105_16_IP_HongKong.pdf

such as bank transactions, greatly facilitating the corruption investigation and unearthing the intricate relationships of the corrupt and their associates.

As mentioned before, the scope of corruption investigation extends to many other offences that intermingle with the underlying corruption. Their effective crack-down needs a context-specific understanding of a wide variety of issues, for example the product knowledge of relevant industries and the legal principles emanating from recent judicial decisions that dictate the way investigators collect admissible evidence. A thorough understanding of such issues is thus of paramount importance to successful corruption investigation. However, learning takes time, so a systematic self-help repository substantially promotes efficiency. To close the gap, the ICAC rolled out the Information and Knowledge Management System (IKMS) – a platform which identifies, captures and retains valuable information, knowledge and experience related to the work of the investigators. It turns disparate information, knowledge and experience into a structured system to train, inform and assist investigators to better discharge daily investigative duties. Now, investigators no longer need to spend time on figuring out who to talk with and learn from; they look up in IKMS and locate the answers to their questions conveniently.

There are many other technological tools and systems in place in the ICAC to facilitate the daily work of the investigators. But law enforcement agencies, especially those who are predominantly involved in combating white-collar crimes like the ICAC, shall stay vigilant about the technological know-how to make sure that they are always one step ahead of the criminals.

Further, as Hong Kong is an international financial centre, ICAC's expertise in tackling corruption in the financial market must be continuously developed given the rapidly evolving nature of the financial system. To this end, in 2019 and 2021, respectively, the ICAC entered into Memorandums of Understanding (MoUs) with the Securities and Futures Commission and the Financial Reporting Council to formalize and strengthen cooperation in fighting against corruption, illicit activities and malpractice in the financial market. The MoUs cover a range of matters including referral of cases, joint investigations, exchange and use of information, mutual provision of investigative assistance, as well as capacity-building.

VI. THE WAY FORWARD

In the era of big data, a corruption watchdog shall make good use of the massive historical and ongoing data generated from corruption investigation to assess the corruption scene, make informed decisions and allocate resources based on predictive analysis to maximize the enforcement effect while minimizing the resources needed.

Firstly, artificial intelligence should be promoted to increase both efficiency and effectiveness at work. For example, investigators quite often come across voluminous video and image analysis and need to examine them to elicit information regarding people, objects and actions to support criminal investigations. The examination exercise is labour intensive, and there are existing analytical tools to crop the relevant part of video and image by investigators to further the corruption investigation. Artificial intelligence should be proactively and widely used in other areas of the investigative work.

Secondly, undertaking crime forecasting by suitably tapping on the historical and ongoing case data can help the anti-corruption watchdog allocate resources more accurately. As

explained, the corruption landscape changes from time to time. Those managing the anti-corruption watchdog need to engage themselves in predictive analysis, which utilizes large volumes of data to forecast and formulate potential outcomes, and predict and reveal people or establishments at risk from such enterprises. When suitable, the anti-corruption watchdog can deploy resources and intervene early to frustrate corrupt criminal enterprises so that the spill-over damages to society can be kept to the minimum. In contrast with the traditional approach, which relies substantially on the expertise and experience of the human analyst, such predictive analysis operated by artificial intelligence hugely improves efficiency and accuracy, thereby assisting management in optimizing resources in a more precise manner.

Last but not least, the trend of cross-border corruption is on the rise, and as a result transnational anti-corruption enforcement is urgently needed more than ever before to prevent the corrupt from abusing the high accessibility to the global financial systems to advance their corrupt schemes and hide corrupt proceeds. But nowadays the tension and friction in international relations render the multilateral law enforcement cooperation and mutual legal assistance regime counterproductive. Cooperation and multilateralism must be restored to drive forward development and ensure that some of the world's most pressing issues, including corruption, can be more effectively tackled and their ill-effects reversed.

VII. CONCLUSION

Corruption is a complex challenge that continues to persist in many countries across the world. It has a direct impact on the three dimensions of sustainable development – social, economic and environmental – and affects each of the five pillars of the United Nations 2030 Agenda: people, planet, prosperity, peace and partnerships. The 2030 Agenda has established anti-corruption as a global imperative on which hinges the achievement of all sustainable development goals. Goal 16 is rooted in human rights and highlights the importance of strengthening institutions and governance in our pledge to leave no one behind. It is hoped that by a discussion from multiple perspectives the readers of this paper will be informed of the new and emerging forms of corruption and the effective countermeasures, in order that practitioners in the anti-corruption community are equipped with the necessary know-how to devise strategies, appropriate and consistent with their domestic legal systems, to call a halt to the evil phenomenon of corruption.