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INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 76.

This volume contains the work produced in the 137th International Training Course which was conducted from 5 September to 11 October 2007 and the Tenth International Training Course on the Criminal Justice Response to Corruption which was conducted from 24 October to 21 November 2007. The main theme of the 137th Course was “Corporate Crime and the Criminal Liability of Corporate Entities”.

Globalization has led not only to unprecedented opportunities for corporate activity, but also to an increase in the potential risk of economic crime or abuse committed by corporations in the course of their business. Highly publicized large-scale corporate scandals, such as Enron and WorldCom in the United States, Barings in Singapore, and Livedoor in Japan, have heightened awareness of the damage which can be inflicted by economic crime in developing as well as developed countries.

The principle that corporations cannot commit crime (*societas delinquere non potest*) used to be widely accepted, although the debate on whether legal entities can bear criminal responsibility now centres on how to define and regulate such responsibility. Other practical issues in the investigation, prosecution and adjudication of corporate crime also require attention, such as co-operation with other authorities; fear of reprisals against whistleblowers and witnesses; the need for investigative authorities to seize and analyse, in an effective and thorough manner, vast quantities of evidence, often electronic; etc; as well as many other difficult issues in regard to substantive and procedural law which have not yet been agreed upon by judicial precedent. UNAFEI therefore decided to hold this Course to enable participants to share their knowledge and experience, and come up with effective countermeasures to an increasingly globalized problem.

The detrimental effects of corruption on society are many and varied. In particular, corruption by public officials seriously undermines their integrity and neutrality in performing their official duties, leading to public distrust in the government and its institutions and potentially resulting in their eventual collapse. Corruption is a problem that needs constant challenge and attention; for this reason UNAFEI holds an annual international course specifically focused on corruption control.

In recognition of the harm corruption can cause, especially in developing countries, and the fact that it can transcend national borders, the General Assembly of the United Nations adopted the UN Convention against Corruption in 2003. The Convention came into force in December 2005 and requires States Parties to implement a number of measures to tackle corruption in a comprehensive way, including measures directed at prevention, criminalization, international co-operation, and asset recovery. It is hoped that all countries, including our participants’ countries, will become party to this Convention and fully implement it, thereby taking a step closer to freeing the world from the grip of corruption.

In this issue, in regard to the 137th Course, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the Reports of the Course are published. I regret that not all the papers submitted by the Course participants could be published. In regard to the Tenth International Course on the Criminal Justice Response to Corruption, selected individual presentation papers from among the participants and the Reports of the Course are published.

I would like to pay tribute to the contributions of the Government of Japan, particularly the

Ministry of Justice, the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes.

Finally I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular, the editor of Resource Material Series No. 76, Ms. Grace Lord.

December 2008



Keiichi Aizawa
Director of UNAFEI

PART ONE
RESOURCE MATERIAL SERIES
NO. 76

Work Product of the 137th International Training Course
“Corporate Crime and the Criminal Liability of Corporate Entities”

UNAFEI

VISITING EXPERTS' PAPERS

FIGHTING FRAUD AND CORRUPTION: HOW THE EUROPEAN UNION PROTECTS ITS PUBLIC FUNDS

*Johan Vlogaert**



I. INTRODUCTION

The Millennium Development Goals which have been agreed among the world's leading development institutions set very ambitious targets and challenges for the international donor community, to be achieved by the year 2015. The European Union, as one of the key players in the field of external aid, is actively participating in this unprecedented effort to meet the needs of the world's poorest peoples by stimulating, supporting and financing numerous development projects. This constantly growing development effort, which aims to distribute the development funds coherently, transparently and in the most effective way, aggravates at the same time the risk of fraud and irregularities, since in parallel the number of payments of development aid is also steadily rising.

The European Anti-Fraud Office, OLAF, was created with the aim of helping the European institutions fight fraud and financial irregularities, which also occur with funds paid out as development assistance. At the same time, one of its major tasks is to ensure that the contributions made by the Member States in the framework of the European Union's development assistance are properly spent. OLAF plays an active role in the field of administrative investigations, and in performing its investigations it co-operates with the Member States concerned. Moreover, in the field of external aid, it requests the assistance of and seeks to enhance its co-operation with multiple actors, including the international donors, auditors, international investigative bodies and authorities of the states benefiting from the EU's external aid.

Aware of the complexity of development assistance policies and based on its operational experience, OLAF acknowledges the problems resulting from different legal systems in the beneficiary countries and the difficulties generated by insufficient collaboration between the investigative services of the countries concerned. Last but not least, OLAF emphasizes the urgent need for enhanced co-operation between the donor institutions, in order to exchange data, share know-how (i.e. regarding observed and discovered *modi operandi*) and put strong emphasis on training and mutual, joint co-operation.

This article will present OLAF's overall structure, legal basis, competencies and operational network, and will also give an insight into day-to-day investigative activities. Given that our team performs investigations in the external aid field we will try to present an outline of its activities and challenges in the field of development and humanitarian aid as well as to indicate the problems that OLAF is currently facing in investigations in this area.

We hope that this article will make a modest contribution to the task in hand and serve as an invitation to co-operate with the European Union departments in the fight against fraud in the field of development and humanitarian aid.

II. OLAF'S MISSION

From the moment of its creation on 1 June 1999, OLAF was given a hybrid status. It is formally part of the European Commission, enabling it to exercise Commission powers, but it enjoys budgetary and administrative autonomy, designed to make it operationally independent. Its mission is to protect the financial and other interests of the Community against fraud and irregular conduct liable to result in administrative or criminal

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proceedings. To that end, the Office exercises in complete independence the powers of investigation conferred on the Commission by Community legislation. It conducts administrative investigations.

EU Regulation 1073/99 provides that OLAF is to exercise the powers conferred on the Commission in order to step up the fight against fraud, corruption and any other illegal activities detrimental to the Communities' financial interests. This remit covers all Community revenues and expenditures. It includes the general budget, budgets administered by the Communities or on their behalf and certain funds not covered by the budget, administered by the Community agencies for their own account. It also extends to all measures affecting or liable to affect the Communities' assets. Finally, it covers other, non-financial interests.¹

A. OLAF's Powers and Tasks

OLAF's core activity is performing administrative investigations; it conducts internal and external administrative investigations, as defined in Article 2 of Regulation 1073/99. It may also perform its co-ordination and assistance tasks by conducting criminal assistance cases, co-ordination cases, and monitoring cases. Moreover, OLAF assigns priority to developing effective co-operation with the Member States, making them more aware of their responsibilities and encouraging them to develop their own controls for combating fraud. It offers them assistance in conducting investigations by providing them with information gathered at Community level and co-ordinates the operational activities of the national authorities in transnational cases. It maintains direct contact with national judicial, law-enforcement and administrative authorities. OLAF has established the Anti-Fraud Information System (AFIS), a secure network for corresponding with the Member States and providing mutual assistance. Co-ordination is also facilitated by the Advisory Committee for the Co-ordination of Fraud Prevention (COCOLAF). Regarding intelligence, OLAF provides support at both Member State and Community level. It provides assistance with respect to specific operations and strategic analysis and risk assessment in order to target resources at the area of greatest risk.²

In addition, OLAF has started entering into what are referred to as "co-operation agreements" with other international investigation services, such as the Integrity Department of the World Bank, but also with authorities in non-EU countries that have responsibility for controlling/monitoring/auditing/investigating financial crime and incoming donor funds.

B. Staffing of OLAF

The Director-General of OLAF exercises the functions of appointing authority (AIPN) under the Staff Regulations of officials of the European Communities, and of the authority authorized to conclude contracts of employment under the conditions of employment of other servants. OLAF staff comprise Commission employees who are subject to the Staff Regulations and other general rules applicable to Commission staff. In mid-2007, there were approximately 420 persons employed at OLAF, of whom nearly 120 were employed as investigators working in diverse fields of EU expenditure.

OLAF is divided into four Directorates: Directorates A and B perform operational and investigative activities, Directorate C is charged with intelligence and follow-up of OLAF investigations (disciplinary, financial, judicial and administrative), and Directorate D incorporates conceptualization of the policy work, preparation of anti-fraud legislation and provision of logistical support to other units of OLAF. Many of the investigators and other OLAF employees are former prosecutors, judges, police investigative officers, tax inspectors, auditors or representatives of other anti-fraud investigative or supervisory organizations from the Member States. Contrary to other Commission DGs, where usually permanent officials are in the majority, many OLAF colleagues work on a temporary basis: as temporary agents, contract staff or seconded national experts. This situation is due to the very specific tasks performed by the investigators and the qualifications required, which cannot be easily found among regular EC staff. Nevertheless, a trend can currently be observed whereby the investigative experience of OLAF colleagues is being retained in-house, and simultaneously the number of the permanent OLAF staff is steadily growing.

¹ OLAF Manual, p. 13.

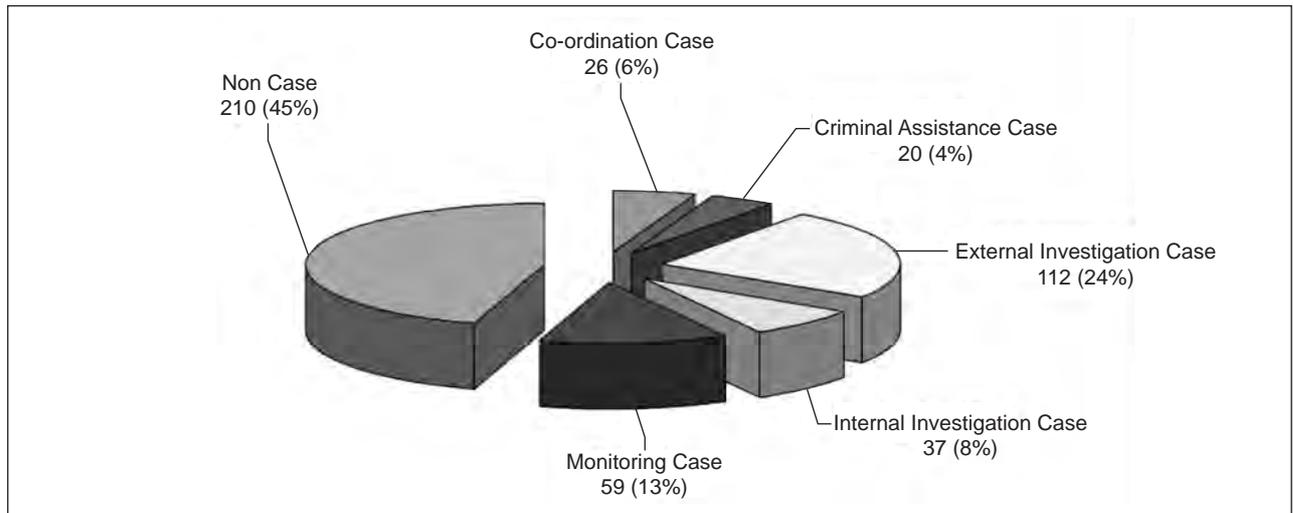
² OLAF Manual, p. 16.

III. TYPES OF OLAF CASES, FIELDS OF INVESTIGATION AND OPERATIONS IN WHICH OLAF IS ACTIVE

As already explained above, OLAF undertakes investigations when it discovers that the financial interests of the EU are endangered. OLAF classifies its cases under four administrative categories: internal investigations, external investigations, co-ordination cases and criminal assistance cases. If the recommendation is not to open a case, the matter should be classified in one of three categories: monitoring cases, non-cases, and prima facie non-cases.³

As shown below (Fig. 1), much of the information received by OLAF is classed within the category of non-cases (45%), whereas decisions to open, for instance, an external investigation account for 24% of the decisions undertaken.

Figure 1: Decisions taken in 2006⁴



A. Internal Investigations

Internal investigations are administrative investigations within the Community bodies for the purpose of detecting fraud, corruption or any other illegal activity affecting the financial interests of the European Communities. Additionally, internal investigations cover serious matters relating to the discharge of professional duties that constitute a dereliction of the obligations of officials and other servants, members of the institutions and bodies, heads of offices and agencies, or members of staff, liable to result in disciplinary or criminal proceedings. (Individuals who work inside Community bodies but are not subject to the Staff Regulations, such as temporary agency staff, cannot be the subject of an internal investigation.) Units A1 and A2 are in charge of internal investigations. In addition, Unit A2 has a special assignment to deal with most cases related to financing by the European Investment Bank (EIB).

B. External Investigations

External investigations are administrative investigations outside the Community bodies for the purpose of detecting fraud or other irregular conduct by natural or legal persons. They may be carried out under either horizontal or sectoral legislation. Such cases are classified as external investigations where OLAF provides most of the investigative input.

There are various ways in which OLAF can undertake its anti-fraud activities. As it cannot carry out preventive checks on EU-funded projects on its own initiative, OLAF has to start looking into a matter in response to information or allegations indicating the possible existence of a serious irregularity or fraud.

This kind of information can be received by OLAF in various ways: it can for example reach OLAF in the

³ OLAF Manual, p. 75.

⁴ OLAF Seventh Activity Report, http://ec.europa.eu/anti_fraud/reports/olaf/2006/summary_en.pdf.

form of a letter or an e-mail from a concerned citizen or anonymous informant. Sometimes it can come from a whistleblower working in one of the EU institutions or agencies. It can furthermore be information discovered by the media, or simply any information picked up by OLAF in the course of its duties. It should be stressed that information indicating serious irregularities in the field of external aid is often discovered primarily by other Commission bodies, i.e. EuropeAid (AIDCO) or an EU Delegation in the country concerned, which manages the project and maintains contact with the beneficiary. In such cases EuropeAid or the EU Delegation forwards information once it becomes aware of the irregularities during the implementation of the project (for example serious irregularities or mismanagement that comes to light thanks to the audits performed). Apart from audit results, there are other symptoms indicating that there is a serious problem with the funding disbursed. The EU as a contracting authority can also encounter problems with communication and interim or final reports which should prove that the activity financed by the EU has taken place. Cases of NGOs that fail to submit any data or report after having received funding, by simply “vanishing into thin air”, are also referred to OLAF. It is worth mentioning that there is also a special telephone number in every EU Member State, called the “OLAF Freephone”, which allows EU citizens to report fraud to the Commission departments.

Once an allegation is received by OLAF, the information is registered and then forwarded to the competent investigation unit. The Head of Unit appoints one or two evaluators who are from then on responsible for evaluating and presenting an assessment of the initial information. During the assessment phase, which initially lasts two months (but can be extended if necessary), the evaluators undertake various activities, one of the most important of which is checking whether EU finances are concerned. Subsequently, they communicate with the source of the information in order to verify the facts and obtain any clarifications that are needed and at the same time request the files concerning the projects in question from the EU bodies managing and supervising them (AIDCO, ECHO, EU Delegations). In some specific cases, the evaluator also contacts the OLAF Intelligence Unit in order to request background, supplementary information and data analysis from the operational intelligence analysts.

Once the evaluator has gathered all the necessary information related to the allegation and project in question, he or she proceeds to draft the initial assessment. In this internal OLAF document the evaluator describes the allegation, assesses its importance and financial impact, gauges the reliability of the source, and puts forward a proposal as to whether or not an investigation should be opened. Where opening of an investigation is proposed, the evaluator also presents a workplan setting out the steps to be taken in the future investigation, the legal basis applicable, and suggestions for the staffing of the investigation team.

The assessment of the initial information is discussed and appraised by the OLAF Board, which makes recommendations to the Director, who decides whether or not to open an external investigation.

1. Types of External Investigation

The Directorates for Investigations and Operations (Directorates A and B) are responsible for carrying out investigations and other operational tasks at OLAF. They are headed by Directors, who, in addition to their standard managerial roles, also chair the weekly meetings of the Executive Board. The Directorates are organized according to a flexible arrangement in which the teams (within the EU institutions referred to as “units”) are in charge of specific areas of investigative and operational activity. Within the team structure, Heads of Unit (HoUs) are responsible for ensuring the quality and effectiveness of work carried out under their authority by teams or individuals. A Head of Unit may also carry out other activities, or manage such activities, if empowered to do so by senior management. Heads of Unit may appoint Heads of Operations to assist them in their operational work and represent them as required. While they may at times be required to carry out some managerial tasks, Heads of Operations are essentially investigators and continue to handle their own casework.

The main role of investigators is to conduct investigations and other operational activities on behalf of OLAF and under the responsibility of the Heads of Unit. Investigators carry out the work provided for in the case workplan in accordance with the applicable rules and regulations, including the receipt and assessment of information, investigation activities, make contact at appropriate level with relevant authorities and the preparation of notes and reports. They also make recommendations as to follow-up, lessons learned and fraud-proofing.

An overview of the investigative and operational units, broken down by the field of activities related to the part of the EU budget concerned with their investigations, is presented below.

(i) Direct Expenditure

Unit A.3 is responsible for investigations and operational activities in relation to direct expenditure and external *Phare* and *Tacis* aid (enlargement cases and financial aid to the former Soviet republics). The activity of the Unit is divided approximately equally between these two areas.

Cases in the external *Phare* and *Tacis* aid sector are allocated on the basis of specified geographic areas. This is designed to ensure that expertise is developed in the specific geographic area, a consistent approach is taken, contacts and information flow are facilitated and working priorities and investigation strategies are established.

(ii) External Aid

Unit A.4 is responsible for investigations and operational activities in relation to external aid except *Phare* and *Tacis*. Its activities include investigations relating to EU humanitarian and development aid to non-EU countries (Asia, including the Middle East, Africa, Latin America, and the Pacific). Such aid may fall prey to complex and well organized financial fraud, facilitated by the large number of public and other institutional donors, the lack of co-ordination in their planning, monitoring and auditing activities, and complexity in their accounting and reporting. The investigators working in this unit possess extensive knowledge in the field of external aid funds and development financial mechanisms, as well as a good command of several languages; moreover, they spend approximately 60 days per year performing missions and on-the-spot checks in the countries concerned. Since the aim of this article is to present the activities of OLAF in the field of external aid, these matters will be discussed in detail in part IV, below.

(iii) Structural Funds

OLAF's Unit B.4 is responsible for investigations and operational activities in relation to "structural actions", for which management is shared with the national authorities in Member States. The Funds concerned are:

- the European Regional Development Fund (ERDF);
- the European Social Fund (ESF);
- the Financial Instrument for Fisheries Guidance (FIFG);
- the Guidance Section of the European Agricultural Guidance and Guarantee Fund (EAGGF — Guidance);
- the Cohesion Fund.

The main responsibilities for managing and monitoring structural funds expenditures remain with the Member States. When allegations of serious irregularities or fraud are brought to OLAF's knowledge, the Office may, after careful assessment, decide to intervene. Unit B.4 works closely with the Commission departments performing checks on the systems established by the Member States to comply with the principles of sound financial management (DG REGIO, DG EMPL, DG AGRI, DG FISH), as well as with the management and supervisory authorities in the Member States.

(iv) Agriculture

Unit B.1 is responsible for investigations and operational activities in relation to:

- application of the agricultural legislation and all activity in the framework of the common organization of agricultural markets with implications for the EU budget (agricultural trade as well as agricultural aid and subsidies). Agricultural trade cases concern import activities (related to the payment of customs duties) and/or export operations (involving customs activities and financial responsibility in the area of export refunds);
- the application of customs legislation concerning specified products;
- food aid for non-EU countries;
- application of the Washington Convention (CITES);
- public and animal health matters.

(v) Customs

Units B.2 and B.3 are responsible for investigations and operational activities, undertaken in co-ordination with partners in the Member States and non-EU countries, to combat fraud in the areas of customs, cigarettes, VAT, alcoholic beverages, mineral oils and the diversion of precursor chemicals. The customs investigations shared by the two units tackle fraud relating to:

- customs and precursors: all types of customs fraud related to industrial products, textile products and fish, including smuggling, false declaration of goods or value, false declaration of origin, and evasion of anti-dumping duties. These units are also responsible for combating attempts to obtain illegal supplies of precursor chemicals;
- cigarettes and alcohol: smuggling, diversion and counterfeiting of these products;
- VAT and mineral oils: international VAT carousel fraud and other intra-Community VAT fraud. Units B.2 and B.3 also provide assistance in combating the smuggling, mis-description and diversion of mineral oils.

Where the OLAF Board decides not to open either an external or an internal investigation, it can decide to deal with the matter in one of the following ways:

(a) Co-ordination Cases

Co-ordination cases are cases that could be the subject of an external investigation, but cases in which OLAF's role is to contribute to investigations being carried out by another national or Community body by, among other things, facilitating the gathering and exchange of information and ensuring operational synergy among the relevant national and Community departments; the main investigative input is provided by other authorities. OLAF's role includes facilitating contacts and encouraging the responsible authorities to work together.

(b) Criminal Assistance Cases

Criminal assistance cases are cases within the legal competence of OLAF in which the competent authorities of a Member State, candidate country or non-EU country carry out a criminal investigation and request OLAF's assistance or OLAF offers its assistance.

C. Monitoring Cases, Non-Cases and Prima Facie Non-Cases

1. Monitoring Cases

These are cases where OLAF would be competent to conduct an external investigation, but in which a Member State or other authority is in a better position to do so (and is usually already doing so). Monitoring cases are passed directly to the authority deemed competent to handle them. No OLAF investigation resources are required, but, as the interests of the EU are at stake, OLAF will follow up the case, via the appropriate follow-up unit.

2. Non-Cases

A matter is classified as a non-case where there is no need for OLAF to take any investigation, co-ordination, assistance or monitoring action. Non-cases result from assessments that conclude that EU interests appear not to be at risk from irregular activity, or other relevant factors indicate that no case should be opened. This would occur, for example, if only one Member State is concerned, and is already dealing with a matter in a satisfactory manner or where an irregularity observed does not have any impact on the finances of the EU. This process may result in the transmission to Member States of information about possible offences not related to the protection of EU interests.

3. Prima Facie Non-Cases

This is where information is received which clearly and unequivocally does not fall within the competence of OLAF, and the responsible Head of Unit proposes not to refer the information for assessment.⁵

D. Sanctioning and Recommendations Resulting from OLAF Actions

OLAF has no powers to impose sanctions. At the closure of an investigation, and even in the course of an

⁵ OLAF Manual, p. 75.

investigation, OLAF can make recommendations, based on its findings, to those authorities that have the necessary powers to impose sanctions. These recommendations may be of a financial nature (e.g. a recommendation to recover funds), administrative (i.e. a recommendation to improve contractual provisions or legislation, a recommendation to change and improve distribution of the funds or a suggestion as to how to improve overall control and effectiveness), disciplinary (i.e. a recommendation to the competent EU body that a disciplinary procedure be launched against a staff member), or judicial (e.g. a recommendation to transmit the relevant facts to a judicial/law-enforcement service in a Member State or non-EU country with a view to launching criminal proceedings against individuals or companies).

IV. OLAF AND EXTERNAL AID INVESTIGATIONS

A. Introduction: Importance of EU Development and Humanitarian Aid

By providing almost 10 billion euros worth of aid each year, the EC is one of the most important players in the field of development and humanitarian aid. Moreover, Europe has expressed a strong commitment to increase and strengthen its involvement in the years ahead.

Whereas in the past aid was often project-based, the future will see a move towards targeted and non-targeted budget assistance for the countries concerned.

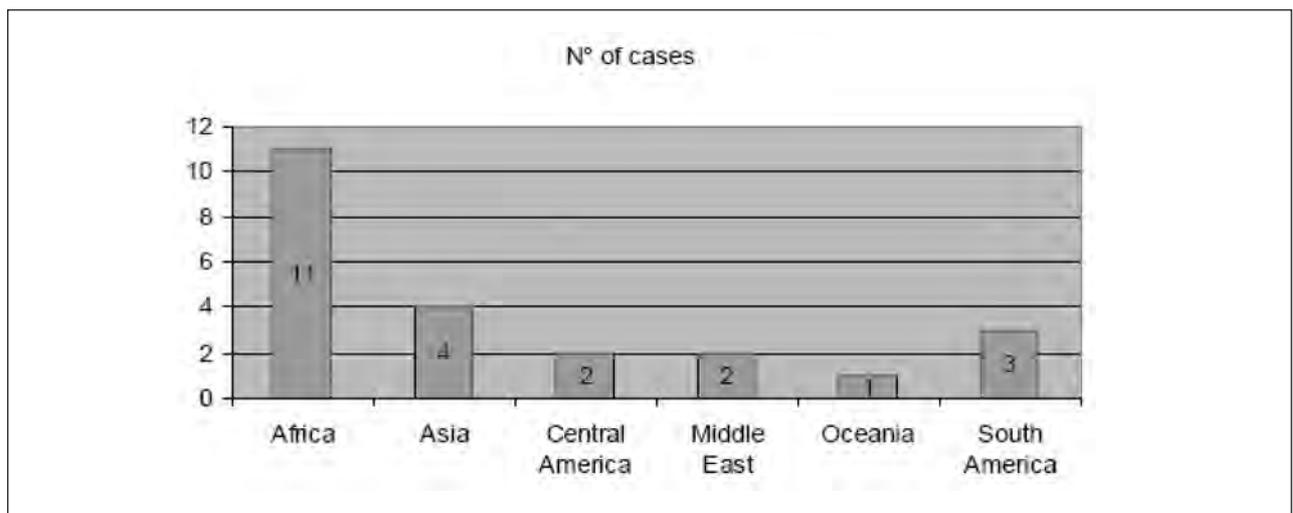
The aid is channelled via a variety of financial instruments, including the financing of charities, associations and NGOs, financing via other international donors like the UN or the World Bank, or as budget aid: directly to the country concerned.

While at the beginning of 2000 only a very few cases were reported to OLAF, we currently have a case-load of some 58 ongoing investigations and 46 initial assessments of information, covering all developing regions and countries receiving aid funds from the EU.

In view of this situation, OLAF is reinforcing its contacts with the EU bodies concerned, especially EuropeAid, but also with the monitoring bodies of other major donors. These may be agencies in Member States, non-EU countries, or other international institutions.

It is indeed our belief, based on experience, that only by working together will we be able to tackle major fraud in this area. To be an investigator in the field of development and humanitarian aid requires substantial financial investigative training and experience. Such an investigator also needs to have intuitive, communication and diplomatic skills allowing him or her to discuss very sensitive issues and to facilitate discussions at technical level but very often at the highest political level too. Colleagues boasting these qualities are welcome to join us.

Figure 2: External aid cases opened in 2006 by geographic region⁶



⁶ Source: OLAF Seventh Activity Report, http://ec.europa.eu/anti_fraud/reports/olaf/2006/report_en.pdf.

B. Types of Financing Mechanisms

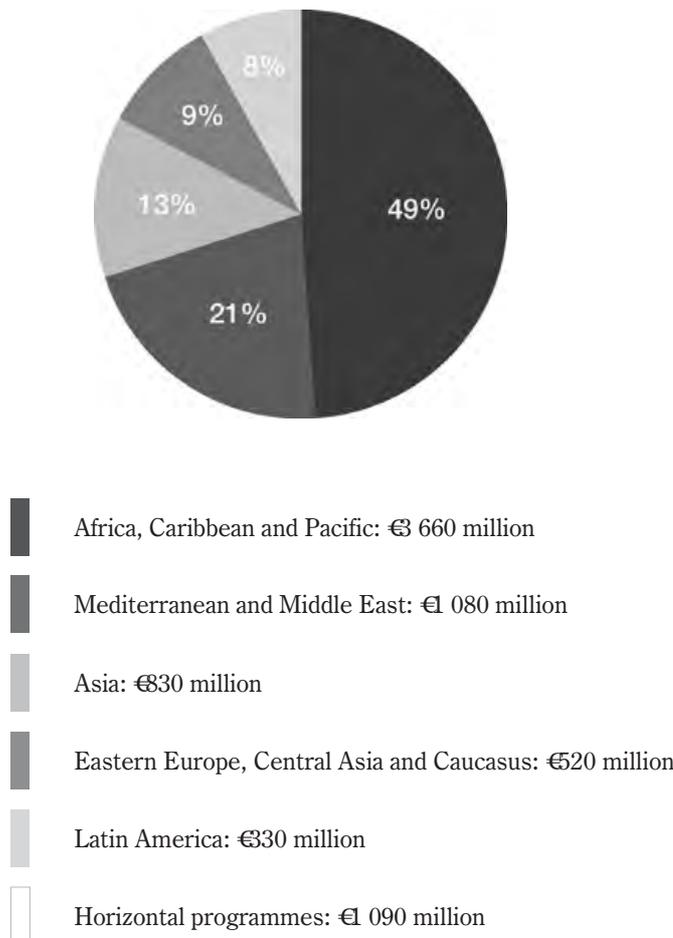
1. European Development Fund (EDF)

The European Development Fund (EDF), created by the Treaty of Rome in 1957, is the main instrument providing Community aid for development co-operation in the ACP (African, Caribbean and Pacific) States and Overseas Countries and Territories (OCT). The EDF is currently not under the Community’s general budget. Funded by the Member States, it is subject to its own financial rules and is managed by a specific committee. It consists of several instruments, including grants, risk capital and loans to the private sector. The ninth EDF has been allocated 13.5 billion euros for the period 2000-2007, and for the period 2008-2013 the aid granted to ACP States and OCTs will continue to be funded by the EDF.

Most of the current caseload of OLAF’s Unit A.4 relates to projects and bodies financed by the EDF, with a strong emphasis on ACP countries.

Figure 3: How much does each region get from the EU?

The EU, including Member States’ individual disbursements, contributes approximately €30 billion per year in external assistance. This accounts for over half of global development aid. In 2005, external assistance amounted to €10.4 billion. Of this, EuropeAid managed €7.5 billion. The geographic breakdown of the aid managed by EuropeAid is as follows:⁷



⁷ http://ec.europa.eu/europeaid/promotion/know/article_3958_en.htm.

2. Neighbourhood Policy and MEDA, ALA and other Financing Instruments

The MEDA programme is the principal financial instrument of the European Union for the implementation of the Euro-Mediterranean Partnership. The programme is conducted by DG EuropeAid and offers technical and financial support measures to accompany the reform of economic and social structures in the Mediterranean partner countries.

Examples of projects financed by MEDA are: structural adjustment programmes in Morocco, Tunisia and Jordan; the Syrian-Europe Business Centre; the social fund for employment creation in Egypt; rehabilitation of the public administration in Lebanon; rural development in Morocco.

Currently OLAF cases cover most of this region, including Syria, Lebanon, the Palestinian Territories, Israel, Tunisia, Algeria and Morocco.

3. European Investment Bank (EIB)

The European Investment Bank, the financing institution of the European Union, was created by the Treaty of Rome. The members of EIB are the Member States of the European Union, which have all subscribed to the Bank's capital. The EIB enjoys its own legal personality and financial autonomy within the Community system. The EIB's mission is to further the objectives of the European Union by providing long-term finance for specific capital projects in keeping with strict banking practice. As an institution of the EU, the EIB continuously adapts its activities to developments in Community policies. As a Bank, it works in close collaboration with the banking community both when borrowing on the capital markets and when financing capital projects. The EIB grants loans mainly from the proceeds of its borrowings, which, together with "own funds" (paid-in capital and reserves), constitute its "own resources". Outside the European Union, EIB financing operations are conducted principally from the Bank's own resources but also, under mandate, from the Union or Member States' budgetary resources.⁸

C. Legal Basis for OLAF's Operations and Investigations in the Field of External Aid

OLAF must always have a legal basis for opening an investigation. Community law empowers OLAF to conduct investigations and establishes its investigative powers. OLAF undertakes administrative investigations, rather than audits. Audits are checks on the regularity and sound application of the relevant legislative provisions with the objective of detecting any administrative malfunctioning or irregularities; in contrast, administrative investigations consist of more detailed inquiries with the objective of discovering facts or irregular behaviour liable to give rise to administrative or criminal proceedings against individuals or companies, and the recovery of money evaded or unduly obtained. Anomalies detected during a routine check or audit can give rise to the need for an investigation to be conducted by OLAF.

European Parliament and Council Regulation (EC) No 1073/1999 and Council Regulation (Euratom) No 1074/1999 confer on OLAF powers to perform internal investigations, as well as all of the Commission's powers to carry out external investigations. They require OLAF to conduct investigations with full respect for human rights and fundamental freedoms, including the principle of fairness, the rights of persons involved to express their views on the facts concerning them, and the principle that conclusions of an investigation may be based solely on elements that have evidential value. The Regulations stipulate that OLAF must exercise the powers of the Commission in order to step up the fight against fraud, corruption and any other illegal activities detrimental to the Communities' financial interests.

Other legislation applies, such as Council Regulation (Euratom, EC) No 2185/96, which empowers the Commission to conduct on-the-spot external investigations on the premises of economic operators (commercial companies, charities, associations, NGOs, etc.) that may have been involved in, or concerned by, an irregularity, when "there are reasons to think that irregularities have been committed" and when (1) the presumed irregularities involve economic operators acting in several Member States, (2) the situation in the Member State requires such a check to be strengthened in a case, or (3) a Member State so requests.

As far as expenditure in the field of external aid is concerned, the EC's rights to carry out checks are regulated by the financial agreements signed with the government of the country concerned. In the

⁸ <http://www.eib.org/about/the-eib,-the-eus-financing-institution.htm>.

framework of these agreements the National Authorising Officer (NAO) manages further distribution of the EU funds, which are part of the broader legal framework (ACP multilateral agreements, e.g. Lomé Convention). These provisions allowing OLAF checks are additionally described as part of the contract between the EC and the beneficiary. The abovementioned agreements and contracts provide for OLAF investigations and for the right of access to all files connected with the EU funding. Moreover, the beneficiary consents to keep documents available for EU verifications, for a certain period depending on the provisions of the contract (i.e. up to five years from the end-date of the activity).

D. OLAF's Investigative Action: On-the-Spot Checks, Interviews, Analysis, Satellite Imaging, etc.

Once an external investigation is opened, a team of investigators is assigned to the case. The following investigative steps can be undertaken:

1. Broad Intelligence Analysis

With help of OLAF intelligence analysts, checks can be performed in various databases, both internal to the EU institutions and external ones. OLAF has access to all Commission data with regard to financing and contracts. Currently OLAF is successfully using and further developing a search tool based on Commission sources and databases, which is constantly being improved and updated by the EC's Joint Research Centre (JRC) in Ispra. This useful tool allows us also to obtain information on other possible donors (from the open sources) that could have financially supported the same project. This method has already enabled us several times to uncover situations of double financing of projects by different donors.

2. Verifications with the Donor Agencies

Apart from the abovementioned method, if double financing is suspected OLAF contacts other donor agencies, foundations or governments and proposes that they cross-check information on financing disbursed for the activities of the beneficiary in question in order to determine whether a particular donor has financed an activity similar to or the same as the EU.

3. Satellite Imaging

Again thanks to co-operation with the JRC, investigators are able, when circumstances so require, to use satellite images, something which is especially useful when for example a number of direct beneficiaries need to be assessed (i.e. within the area of humanitarian aid) and the investigators want to scrutinize and examine the data provided to the EC.

4. Co-operation with Investigative Bodies in Member States and Non-EU Countries

Whenever possible OLAF seeks the co-operation of investigative bodies in the country concerned. This is especially vital and crucial in countries where civilization, cultural and linguistic barriers might seriously hamper the investigative process. Familiarity with and understanding of the local realities as well as knowledge of local criminal law prove to be indispensable assets on which OLAF can rely while co-operating with the authorities of the country concerned. In cases of parallel ongoing investigations in several countries, co-ordination of the investigative activities is often proposed, providing information for the law-enforcement agency/prosecutor body which is investigating the entity in question.

5. Co-operation with Auditors and Additional Audits

When an audit precedes the investigation, additional analysis and collaboration with the auditor who performed the audit is usually sought. Joint analysis of the findings by the investigators and auditors increases the effectiveness of the investigation as such. Additional or forensic audits can be also requested and they can be financed from OLAF's budget. When the OLAF investigation concludes that certain tenders were forged by using false bids, the auditors will be tasked to look into all contracts (often numbering several hundred) in order to check for the existence of fraud. In the framework of their investigation OLAF investigators can accompany the auditors while they perform their duties; such joint actions prove extremely effective thanks to the combined experience of the auditors and investigators.

6. On-the-Spot Checks

According to Regulation 2185/96 on OLAF's powers in the field of on-the-spot checks, OLAF investigators in co-operation with the authorities of the Member State can perform checks in the premises of the beneficiary or economic operator receiving EU funds. Such checks prove to be a very effective investigative

tool since they can allow the investigators to seize documents and hard disks and analyse paper and electronic data and other information related to the case involving the EU funds.

7. Other Direct Investigative Activities

These include interviews with different persons involved: informants, persons concerned, witnesses and any other person in possession of information or knowledge relevant to the case under investigation. Moreover, on the basis of the verification of the invoices and other financial documentation, visits to the companies which issued them can be carried out by the investigator in order to verify their reliability and validity.

It has to be stressed that OLAF's coercive powers, especially in non-EU countries, are fairly limited and cannot be compared to those enjoyed by the mainstream investigative bodies in the Member States. However, the fact that any lack of co-operation with OLAF investigations may eventually lead to freezing of EC financing and possibly recovery of funds prompts a rather high level of access and co-operation. Furthermore, as an administrative investigating body, OLAF is not bound by unwieldy mutual legal assistance arrangements, but can speak directly to government representatives and private partners. This facilitates and speeds up considerably OLAF's operations on the spot.

E. OLAF's Operational Networks

Not being bound by sometimes cumbersome arrangements for co-operation with law-enforcement bodies and judicial authorities, OLAF manages to build its own networks in the law-enforcement community in general.

The basic text creating OLAF provides for the possibility of direct contact with law-enforcement and justice officials, and OLAF therefore works closely on a daily basis with prosecution offices, investigating judges, police and customs bodies both in Member States and in non-EU countries.

Development agencies and foreign ministries in some Member States have identified, together with OLAF, the need for a joint rethink of what we do, what we can do better if we work together and how to find long-term solutions to problems. An informal group of interested partners will meet for the first time in autumn 2007 to launch a brainstorming exercise. OLAF has entered into co-operation agreements with Interpol, Europol and Eurojust and is a full member of the European Judicial Network (EJN).

What is less widely known is that, for several years now, there has been closer co-operation between what are called "international investigators". Investigative services of the UN, the World Bank, the EIB, the regional development banks and OLAF meet on a regular basis to improve co-operation both in the sharing of information and with regard to the creation of Joint Investigation Teams. OLAF recently took part in such a joint team with investigators from the UNDP in an African country and the experience was successful. An annual conference of international investigators looks into common subjects and potential solutions. Staff are exchanged between OLAF and the UN and World Bank. OLAF provides the permanent secretariat for this co-operation.

Looking at the challenges ahead, OLAF has started, in close co-operation with EuropeAid and the EIB, to build its own network of partners in Africa. With the co-operation of the Inspectorate General of Finance of Morocco, a meeting of attorney generals, presidents of Courts of Auditors, state inspectors and finance inspectors, as well as specialized anti-fraud bodies of 27 southern Mediterranean and sub-Sahara countries, took place for the first time in May 2007 in Morocco. These authorities have competence at national level for verifying, monitoring, auditing and investigating incoming donor money. This will be the start of a strong partnership between national administrative, law-enforcement and judicial bodies and OLAF. Networks of inspectors, such as the Association of State Inspections (FIGE), which currently represents ten African nations, as well as individual countries, will very soon enter into co-operation agreements with EuropeAid and OLAF, providing each other with the required mutual assistance in order to achieve successful optimization of public spending in those countries. OLAF and EuropeAid are committed to continuing this effort, already in spring 2008, with the other African nations. Subsequently, similar partnerships will be proposed to the countries of Latin America and Asia benefiting from EU development aid.

It is worth mentioning that several prosecution offices in Latin America have already signed or asked to

sign similar agreements with OLAF. Together with the anti-corruption prosecutors of Argentina, in November 2007 OLAF will host a regional conference for prosecutors.

F. Problems and Solutions

1. Multiple *Modi Operandi*: Double Funding and Need for Enhanced Donor Co-operation

There are some typical modus operandi encountered by OLAF investigators in certain cases in the field of external, development and humanitarian aid that display the features and characteristics of organized fraud. One of the biggest problems that make this fraud possible is the shortcomings in and sometimes total absence of co-ordination of grant award procedures, auditing, monitoring, evaluation and early warning systems between the different, global and international donor organizations. The abundance of different projects, programmes and beneficiaries combined with the large number of different legal environments and financial systems makes it a very challenging task to co-ordinate and supervise the donation and spending of the funds. Moreover, the fact that the same projects obtain financing from multiple sources creates a risk of abuse. Unfortunately, there are no standardized, universal and commonly approved ways of reporting or any stable verification systems that would prevent the donor organizations from over-funding the same activity.

OLAF will therefore engage actively in looking for long-term solutions with the aim of improving the exchange of information, enhancing co-ordination and adopting joint approaches to tackle all the problems.

2. On-the-Spot Checks in Non-EU Countries: Need for Administrative Co-operation with Countries Receiving EU Aid

One of the key problems that emerge when investigating fraud in non-EU countries (especially countries in more distant regions such as Africa) is the fact that the European Commission, and OLAF in particular, are not very well known. This might cause difficulties for performing on-the-spot checks. The EU inspectors perform the checks at the premises of the beneficiaries according to the contractual provisions and the clauses included in the financial agreements. However, as experience has shown in the past, these checks are not fully effective unless performed in close co-operation with the authorities of the beneficiary country. In order to overcome this problem it is necessary to establish a network of operational relations (the current co-operation in investigations and controls with the Moroccan authorities serves as a perfect example). This process is currently ongoing and considerable results have already been achieved so far, mainly thanks to the three international conferences devoted to fraud involving aid funds held in recent years.

3. Administrative Issues

OLAF A.4, as a unit dealing with investigations into external aid funds, is situated at the centre of a very complex institutional environment. Interacting on a daily basis with several EU bodies (AIDCO, ECHO, Delegations, RELEX, Cabinets), the authorities of Member States and non-member countries, beneficiaries of development aid, donor agencies, diplomatic representations and other investigative bodies, OLAF is well placed to co-ordinate its administrative investigations. Alas, the fact that there are so many actors involved often risks causing considerable delays that would slow down the pace of the investigation. To that end, it should be stressed that the OLAF team dealing with external aid handles an impressive amount of investigative work (58 active investigations and 46 evaluations). These figures are even more remarkable when it is borne in mind that this team's investigative activities (including missions and on-the-spot checks) cover Africa, South America, Oceania, Asia and the Middle East. In order to improve this situation certain measures concerning staffing have already been implemented.

Another important issue is the need for OLAF to explain and provide information on its activities and competences to other colleagues within the European institutions in order to ensure proper and effective co-operation in the framework of investigations already at internal level. This is why OLAF also actively participates in training for other EU officials dealing with external aid and colleagues posted to EU Delegations in the countries receiving EU development aid.

V. CONCLUSIONS

Development and humanitarian aid investigations currently receive a great deal of attention. A lot still needs to be achieved, starting with better communication and joint co-operation among all actors (not only investigators). This collaboration, as well as mutual trust, openness and understanding, are important pre-conditions for success.

Based on its operational experience, OLAF will endeavour to help colleagues in this process to build a true partnership. The fact that within the relatively short period of its existence OLAF has managed to lay the foundations for broad international co-operation in the fight against fraud involving aid funds is a promising development.

Future developments will include co-operation agreements, as well as technical support for our partners. This technical support may take the form of better training or provision of the necessary tools and conditions to help our partners pursue their investigations and act in accordance with their mandate. Last but not least, we will work closely with our colleagues in the planning and contracting units in order to transform our operational experience into better fraud-proofing of aid.

OLAF is at all times open to any kind of mutual collaboration. OLAF colleagues at all levels are committed to enlarging and strengthening their network of operational partners and contacts. We hope that this article will serve as an incentive for prospective partners to set up the basis for our future co-operation.

USEFUL LITERATURE

A considerable amount of material used in the above article was based on the OLAF Manual: the set of internal rules of the European Anti-Fraud Office (OLAF) which govern its investigations and operations. An electronic version of the OLAF Manual is available free of charge on the EU Bookshop website (<http://bookshop.europa.eu>).

Additional information regarding OLAF, its foundation, structure and competences can be found on OLAF's website: http://ec.europa.eu/anti_fraud/index_en.html.

Readers who are particularly interested in OLAF's current activities and its achievements are referred to OLAF's Seventh Activity Report covering the year 2006:
http://ec.europa.eu/anti_fraud/reports/olaf/2006/report_en.pdf.

EFFECTIVE MEASURES AGAINST CORPORATE CRIME AND CORPORATE LIABILITY IN SINGAPORE

*Lawrence Ang**



I. INTRODUCTION

Singapore is renowned for having one of the most dynamic and vibrant financial and business sectors in the world. We are home to one of the largest asset management communities in Asia, managing in excess of S\$720 billion in assets. Our capital markets have developed depth and sophistication, and we remain one of the leading foreign exchange centres in the world. We continue to attract global talent to our shores,¹ and a majority of the multi-national corporations (MNCs) in Singapore have set up their global and regional headquarters here. In the latest IMD World Competitiveness Yearbook 2007, Singapore has been ranked second in the World Competitiveness Scoreboard 2007. This is an improvement from our ranking for 2006 where we were ranked third behind the USA and Hong Kong.

Our achievement is largely attributable to strong fundamentals like a stable political environment, robust legal and judicial frameworks, efficient infrastructure and a safe, conducive business environment. In an era which has seen catastrophic corporate scandals and meltdowns like the saga surrounding companies like Enron and Worldcom, trustworthiness has taken on an important significance in global business. Singapore's reputation as a trusted hub and jurisdiction has given us a competitive advantage in attracting global investments, which in turn leads to our strong economic growth.

We are, nevertheless, acutely aware that this reputation of trustworthiness which we have painstakingly built up over the years can evaporate overnight once fraud and corporate shenanigans are allowed to creep in and take root. Singapore has had its share of corporate scandals like the incidents involving Barings Bank, and more recently China Aviation Oil. While these incidents have prompted some to question the strength of our regulatory framework, the fact that these cases have unfolded is proof of the effectiveness of our system as well. It is impossible to prevent corporate frauds absolutely. The crux lies in having a robust legal framework and enforcement and regulatory systems in place to minimize the opportunities for such occurrences, and where incidents and failures do surface, to swiftly and effectively address them.

It is with this philosophy in mind that Singapore has placed a high premium on combating corporate and economic crime. In this respect, we have adopted a system consisting of several mutually reinforcing components like a wide and comprehensive legal framework, a robust enforcement and supervision regime, close collaboration with market players and stakeholders, engagement in the global co-operation network in combating crime, and the commitment of our corporate leaders in maintaining integrity.

II. LEGAL FRAMEWORK FOR DEALING WITH CORPORATE CRIME

As a former British colony, Singapore inherited the English common law system.² Our present legal system is shaped largely by Singapore's rapid political, social and economic development³ over the years.

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¹ The Economist's "World in 2005" publication rated Singapore as the best Asian city to live in. The IMD World Competitiveness Yearbook 2005 has also declared Singapore as the most attractive Asian economy to foreign-skilled professionals.

² Singapore was founded by Sir Thomas Stamford Raffles of the British East India Company in 1819. In 1826, the British Parliament passed the Second Charter of Justice which provided for the setting up of the Court of Judicature of Prince of Wales' Island (Penang), Singapore and Malacca with civil and criminal jurisdictions similar to the courts in England, and the reception of English law in Singapore.

³ In 1993, all appeals to the Privy Council were abolished. A permanent Court of Appeal, presided by the Chief Justice and two Justices of Appeal was designated Singapore's highest court. In the same year, the Application of English Law Act (Chapter 71A), which provided for a cut-off date (12 November 1993) for the continuing reception of the English common law was passed.

While retaining our common law roots, Singapore has also drawn on the civil law traditions. The common law doctrine of *stare decisis* (judicial precedent) continues to be a key characteristic of our legal system. *Ratio decidendi* found in the decisions the Singapore Court of Appeal are binding on the High Court, District Court and Magistrate's Court. The English common law also continues to have a strong influence in traditional common law areas like Contract, Tort and Restitution Law. In other areas like Criminal Law, Company Law and Securities Law, however, Singapore has adopted the code-based civil law approach, with the law in these areas set out in statutes passed by legislature.

We have a judiciary that has, over the years, achieved worldwide recognition for its efficiency and competence. The Singapore courts have built up significant judicial expertise and resources to handle a wide range of cases, including complex commercial and economic crime cases. Many such cases have been tried before the Singapore courts with the corresponding result that a corpus of judicial decisions and sentencing principles has emerged which are increasingly shaping and influencing commercial and business practices in Singapore and the region.

Singapore possesses a broad and comprehensive legal framework of substantive, procedural and evidentiary laws which seeks to address the widest possible range of corporate and economic crime, and to adequately empower law enforcement and prosecution agencies to combat such crimes, with the ultimate objective of protecting investors. We have enacted both laws which are focused on specific areas, as well as statutes containing provisions which are worded with sufficient depth and width to cover a myriad of such crimes. We have consistently benchmarked our laws against the laws of leading developed jurisdictions. Our parliament has also been able to react swiftly by enacting new laws as well as amending existing ones to keep up with developments in our social and economic realm,⁴ and to effectively deal with the emerging sophistication of corporate and economic crimes brought about by such developments.

A. Criminal Laws and Sanctions

Corporate and economic crime in Singapore is predominantly dealt with by way of criminal sanctions or administrative actions.⁵ The alternative of civil sanctions is at present available only for securities offences such as insider trading and market misconduct. Criminal sanctions consist largely of imprisonment and fines or penalties. Individuals convicted of crimes involving fraud or dishonesty may also be disqualified from holding directorships in companies for a specified period. Where an offence is committed by a company or corporation's directors, officers or employees, criminal liability may be imposed on the company or corporation as well.⁶

1. General Corporate Fraud

The key offences involving fraud are found in the Penal Code (Cap 224) ('Penal Code'). They include the offences of criminal breach of trust, cheating, forgery, falsification of accounts, and offences involving counterfeit currency.

A person⁷ commits Criminal Breach of Trust (CBT) if he or she, being entrusted with property or with dominion over property, dishonestly misappropriates or converts to his or her own use that property.⁸ There are varying degrees of severity of CBT prescribed under the Penal Code, ranging from "simple" CBT which is punishable with a maximum imprisonment of three years to the aggravated form of CBT as a public servant, banker, attorney or agent which carries a maximum punishment of imprisonment for life. Cases of embezzlement of funds by company directors or employees are prosecuted for the offence of CBT.

⁴ The World Economic Forum's "Global Competitiveness Report 2005-2006" ranked Singapore's parliament first out of 117 countries for effectiveness as a law-making and oversight institution. In the World Bank's "Doing Business in 2006" report, which ranks 155 economies on key business regulations and reforms, Singapore ranked second after New Zealand as a country where investors are most protected.

⁵ Administrative actions would include composition of offences or the issuance of administrative warnings or reprimands.

⁶ This is premised on the fact that companies function through their directors and officers who represent the companies' directing mind and will. Their acts are therefore regarded as the companies' acts. For example, where a director, officer or employee acting on behalf of the company commits insider trading, both the company and director/officer/employee will be guilty and liable.

⁷ The word "person" includes any company or association or body of persons, whether incorporated or not.

⁸ Sections 405 to 409, Penal Code. See <http://agclwb.agc.gov.sg>

The offence of cheating is committed when a person deceives another, and through that deception, fraudulently induces the person so deceived to deliver any property or do something which causes damage or harm to that person in body, mind, reputation or property.⁹ Like the offence of CBT, there are different categories of the offence based on severity. Simple cheating is punishable with a maximum three years' imprisonment while the most severe category of cheating, where the victim is induced to deliver property, or to make, alter or destroy any valuable security¹⁰ is punishable with a maximum of seven years' imprisonment. Cases involving fraudulent investment scams like boiler room scams,¹¹ high yield investment programmes,¹² advance fee fraud,¹³ fraudulent transactions involving credit cards (genuine or counterfeit), fraudulent applications for credit cards or loan facilities, trade financing fraud,¹⁴ etc., are prosecuted under these provisions of the Penal Code.

Forgery as a criminal offence is the making of a false document¹⁵ or part of a document with the intention to commit fraud.¹⁶ Simple forgery carries a maximum punishment of two years' imprisonment. The most severe form of forgery, which is forgery of a valuable security, carries a maximum punishment of imprisonment for life. It is also an offence to knowingly use a forged document, or possess a forged document with the intention of using it.¹⁷ Cases involving counterfeit or forged documents like the making, possession or use of counterfeit credit cards, forged bank documents like cheques or bills of exchange, forged loan application forms, forged trade documents like bills of lading and sales invoices, forged insurance certificates, etc., will be prosecuted under these provisions.

An employee who fraudulently destroys or falsifies any book, paper, writing, valuable security or account which belongs to his or her employer commits the offence of falsification of accounts.¹⁸ The offence carries a maximum punishment of seven years' imprisonment. Cases involving manipulation of a company's ledgers and other accounting records are dealt with under this provision. The objective of falsification is often to enable false and misleading financial reports and statements to be prepared and presented.¹⁹

Under the Penal Code, it is an offence to forge or counterfeit any currency or bank note, or to traffic in or

⁹ Sections 415 to 420 Penal Code.

¹⁰ Section 30 Penal Code. A "valuable security" denotes a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he or she lies under legal liability, or has not a certain legal right.

¹¹ These involve high-pressure phone sales operations by salesmen who may make repeated calls offering the sale of share investments in third party businesses and promising extraordinary profit at little or no risk. Boiler-room operators may also maintain websites and provide local contact details to give victims the impression that their operation is proper. Local bank accounts are sometimes used to receive payments from victims but the monies will be quickly dissipated to overseas bank accounts. In many cases, these salesmen would become uncontactable as well.

¹² In such scams, victims are persuaded to invest in sophisticated or exotic-sounding schemes commonly known as high yield investment programmes (HYIP). Such investment schemes are usually offered via the Internet with promises of high returns. Usually, the investment and withdrawals are made via e-currency, such as e-gold, e-bullion and INTGold. Many HYIP have turned out to be ponzi scams, where the invested funds from new entrants are used to pay existing investors. HYIP usually discloses little or no details on their management and the underlying investment to generate the promised returns.

¹³ This is usually defined as any scam that tricks victims into paying money upfront on the false hope of receiving a large windfall later. The advance payment is required by the fraudsters as a processing fee. Common examples are false offers to lease standby letters of credit which could be used for credit enhancement purposes.

¹⁴ Trade financing fraud involves the issuance of false shipping documents which represent the existence of certain goods, their quality or value. The use of false shipping documents is usually either for the buyer to fraudulently obtain bank financing or for the seller to fraudulently collect monies against a letter of credit.

¹⁵ Section 464 Penal Code: a person makes a false statement if he dishonestly or fraudulently:

a) makes, signs, seals or executes (collectively, "creates") a document or part of it with the intention of causing it to be believed that the document was created by, or by the authority of, a person by whom the maker knew it was not created;
b) alters a document in a material part thereof, after it had been made or executed, without lawful authority; or
c) causes a person to sign, seal, execute or alter a document, knowing that such person could not or did not know the contents of the document or the nature of the alteration, by reason of unsoundness of mind, intoxication or deception.

¹⁶ Sections 465 to 474 Penal Code.

¹⁷ Sections 471 and 474 Penal Code.

¹⁸ Section 477A Penal Code.

¹⁹ This would constitute separate offences under the Companies Act (Cap 50) and the Securities & Futures Act (Cap 276).

knowingly possess forged or counterfeit currency or bank notes. These offences apply to local as well as foreign currency. Forgery or counterfeiting of currency notes, and trafficking in forged or counterfeit currency notes carries a maximum punishment of imprisonment for life. The maximum punishment for possession of counterfeit currency notes is imprisonment for ten years.²⁰ In Singapore, we have experienced a variety of offences involving counterfeit currency, from the relatively amateurish form of scanning and printing of currency notes via colour printers, to the use of premium quality US dollar bills which fooled even experienced money-changers. We have, thankfully, not encountered any syndicated counterfeiting of our local currency.²¹

2. Securities Fraud

The Securities & Futures Act (Cap 276) (SFA) contains the main body of rules governing securities fraud and market misconduct as well as prohibited conduct in futures trading and leveraged foreign exchange trading.²² These offences include insider trading, false trading and market rigging, market manipulation, affecting the price of securities by the dissemination of misleading information and fraudulently inducing persons to deal in securities.

The SFA was enacted in 2001 to replace and consolidate the old Securities Industry Act (Cap 289) (SIA) and other legislation²³ dealing with market regulation. The new Act sets out the regulatory framework for the capital markets in a single statute. One of the objectives for passing the new Act was to provide an enhanced market enforcement regime crucial for a disclosure based regime. Any transgressions must be dealt with expeditiously and firmly in order to preserve investor confidence.

(i) Insider Trading

The SFA redefined the offence of insider trading in Singapore. Under the old SIA,²⁴ the offence was based on the defendant's connection with the company and made only the insider and the tippee (a person acting on information furnished by an insider) liable for insider trading. There was difficulty in extending liability to others who are further down the information chain and who had knowingly traded on inside information.

Under the SFA, the focus is now on the essence of the offence, that is, trading while in possession of undisclosed price-sensitive information by the defendant, whether he or she is connected to the company or not. A person,²⁵ whether connected to a corporation²⁶ or not, and who possesses price sensitive information which he or she knows is not generally available is prohibited from dealing in, or procuring another person to deal in, the shares of the said corporation. He or she is also prohibited from communicating the information, whether directly or indirectly, to anyone whom he or she knows or ought reasonably to know, will likely deal in the shares of the corporation.²⁷ There is a rebuttable presumption against the defendant that he or she knew that the information he or she possessed was undisclosed and price sensitive upon proof by the prosecution that he or she was in possession of the information, and that the information was not generally available.²⁸ It is also not necessary for the prosecution to prove that the accused person intended to use the information for the purpose of insider trading.²⁹ The offence of insider trading is punishable with a maximum fine of S\$250,000 or imprisonment for up to seven years.³⁰

²⁰ Sections 489A, 489B and 489C Penal Code.

²¹ We attribute this to the resources and effort directed by our government towards making it immensely difficult and hence not cost effective to counterfeit the Singapore dollar bill.

²² Part XII of the Securities & Futures Act (Cap 289).

²³ The Futures Trading Act (Cap 160), the capital-raising provisions in the Companies Act (Cap 50) and certain provisions in the Exchanges (Demutualization & Merger) Act (Cap 99B).

²⁴ Section 103 SIA.

²⁵ A "person" includes any company or association or body of persons, corporate or unincorporated. See Section 2 of the Interpretation Act (Cap 1).

²⁶ Section 214 SFA, read with section 4(1) Companies Act (Cap 50), includes both a locally incorporated company or a foreign company.

²⁷ Sections 218 and 219 SFA. Section 218 SFA also sets out who "a person connected to a corporation" is; what constitutes "information"; when information is considered to be generally available; and when the information is considered price sensitive.

²⁸ Section 218(4) SFA.

²⁹ Section 220 SFA.

³⁰ Section 221 SFA.

The provisions in the SFA pertaining to insider trading apply to acts occurring outside Singapore in relation to securities of a local corporation or securities listed or traded in Singapore, as well as conduct within Singapore in relation to securities of an overseas corporation or securities listed or traded overseas.

(ii) *Market Misconduct*

(a) False Trading and Market Rigging

1. The offence of false trading and market rigging involving securities under the SFA include the following activities:

- (i) the creation of a false or misleading appearance of active trading in any securities on a securities exchange in Singapore, also known as 'churning';³¹
- (ii) the creation of a false or misleading appearance with respect to the market for, or price of, any securities on a securities exchange in Singapore;³²
- (iii) affecting the price of securities by way of purchases or sales which do not involve a change in the beneficial ownership of those securities, also known as 'wash sales';³³
- (iv) affecting the price of securities by means of any fictitious transactions or devices, also known as 'sham transactions'.³⁴

Section 197(3) of the SFA sets out the circumstances under which a person is deemed to have created a false or misleading appearance of active trading in securities. It is a defence if the defendant is able to establish that the acts or transactions were not carried out with the purpose of creating a false or misleading appearance of active trading or false or misleading appearance with respect to the market for or price of securities.³⁵

False trading involving futures contracts or leveraged foreign exchange trading is set out in section 206 of the SFA. Section 207 of the SFA also prohibits the act of bucketing: executing, or holding out as having executed, an order for the purchase or sale of a futures contract on a futures market or foreign exchange in connection with leveraged foreign exchange trading without having effected a bona fide purchase or sale.

(b) Market Manipulation

Under the SFA, a person is prohibited from carrying out two or more transactions in the securities of a corporation which will have the effect of affecting or maintaining the price of securities, with the object of inducing other persons to deal in the securities of the corporation or of a related corporation.³⁶ Transactions under the provision include the making of offers to buy or sell securities, and invitations to treat.³⁷ Acts covered under this section include increasing a share price to induce others to buy, decreasing a share price to induce others to sell, and maintaining a stock price to induce other to buy or sell.

(c) Dissemination of Misleading Information

A person is also prohibited from disseminating false or misleading information and statements which

³¹ Section 197(1) (a) SFA. 'Churning' involves a series of fictitious transactions designed to create a false impression of activity in a particular counter. The aim of all such activities would be to lure gullible investors into buying the security. Once enough buying pressure has been created to push the price up, the manipulator will sell and take his or her profit.

³² Section 197(1) (b) SFA. The prices quoted on the stock exchange are theoretically a reflection of supply and demand for securities. Activities intended to give a false or misleading appearance in respect of the market for, or price of, the securities are prohibited to ensure that the market reflects genuine forces of demand and supply.

³³ Section 197(2) SFA. A 'wash sale' occurs when there is a series of transactions at the end of which there is no change in beneficial ownership of securities. Section 197(5) SFA also provides that a transaction does not involve a change in beneficial ownership if a person who had an interest in the securities prior to the transaction has an interest in the securities after the transaction, e.g. buying and selling the same block of shares through nominees. The aim similarly is to create the impression of activity to lure the gullible investor.

³⁴ Section 197(2) SFA. A 'sham transaction' is done with the intention of giving the appearance of creating rights and obligations different from the actual rights or obligations actually intended to be created. For example, a company transferring securities to brokers who then re-sell the securities to a subsidiary of the company may amount to a sham transaction.

³⁵ Section 197(4) and Section 197(6) SFA.

³⁶ Section 198 SFA.

³⁷ Section 198(2) SFA.

are likely to induce the dealing of securities, or which are likely to affect the market price of securities.³⁸ The prices of securities are largely dependent on investor confidence, which can be influenced by positive or negative information. The provision targets people who attempt to ‘talk up’ or ‘talk down’ the market by spreading false rumours.

(d) **Fraudulently Inducing Persons to Deal in Securities**

Under the SFA, it is an offence to induce another person to deal in securities by (a) the intentional or reckless making of a misleading or false statement, promise or forecast; (b) the dishonest concealment of material facts; or (c) by way of recorded information which is false or misleading in a material particular.³⁹

(e) **Employing Manipulative and Deceptive Devices**

The SFA also contains a catch-all provision designed to cover any other form of securities fraud not specifically dealt with in the other sections.⁴⁰ The provision prohibits (a) employing any device, scheme or artifice to defraud; (b) engaging in any fraudulent or deceptive act, practice or course of business; or (c) making an untrue statement of a material fact or omitting to state a material fact necessary to make statements made not misleading, in connection with the purchase or sale of any securities. The provision would be useful in dealing with instances of ‘cornering’⁴¹ of securities. The section has also been invoked against dealers’ representatives (*remisiers*, meaning ‘intermediaries’) who engage in unauthorized securities trading using their clients’ accounts.

Market misconduct offences are punishable with a maximum fine of S\$250,000 or imprisonment for up to seven years. The provision applies to both conduct outside Singapore in relation to securities listed or traded in Singapore, as well as conduct within Singapore in relation to securities listed or traded overseas. An act done partly in and partly outside Singapore which, if done wholly in Singapore, would constitute an offence under the SFA would be dealt with as if the offence was committed in Singapore.⁴² This is to deter perpetrators of market misconduct from using Singapore as a haven for their illegal activities. An act done outside Singapore which has a substantial and reasonable effect in Singapore, and which would constitute an offence under the SFA would be dealt with as if the offence was committed in Singapore as well.⁴³ This confers on our courts extra-territorial jurisdiction over foreign acts that affect the integrity of Singapore’s markets.

3. Fraud Offences under the Companies Act (Cap 50)

The Companies Act (Cap 50) (hereinafter ‘Companies Act’) sets out various types of offences in relation to the conduct of the company and its directors and officers. In this segment, only those offences with the element of fraud will be covered. The offences in relation to a breach of directors’ duties and other regulatory breaches will be discussed in a later segment.⁴⁴

(i) *False and Misleading Statements*

Section 401(2) of the Companies Act provides that every person who willfully makes a false or misleading statement in any return, report, certificate, balance sheet or other documents required to be submitted under the Companies Act commits an offence punishable with a fine not exceeding S\$50,000 or imprisonment for a term not exceeding two years or both.

It is also an offence, punishable with the same penalty, to knowingly lodge, file or submit any document to the Registrar of Companies which is false or misleading.⁴⁵

³⁸ Sections 199 and 211 SFA.

³⁹ Sections 200 and 209 SFA.

⁴⁰ Sections 201 and 210 SFA.

⁴¹ ‘Cornering’ arises when a group of buyers attempts to monopolize a security with a view to controlling the price. The scam works best for counters with a limited number of shares in the free float. When investors, especially speculators, sell short (i.e. sell shares they do not already have in expectation of a drop in the share price) and they are unable to deliver subsequently, the persons who cornered the market would then be in a position to dictate the price.

⁴² Section 339(1) SFA.

⁴³ Section 339(2) SFA.

⁴⁴ See Part VI “Preventing Corporate Crime” below.

⁴⁵ Section 401(2A) Companies Act.

An officer of a corporation who, with intent to deceive, makes or furnishes (or knowingly and willfully authorizes or permits the making or furnishing) of any false or misleading statement or report to a director, auditor, member, debenture holder or his or her trustee of the corporation, and in the case of a subsidiary corporation, to an auditor of the holding company, commits an offence punishable with a maximum fine of \$10,000 and/or two years' imprisonment.⁴⁶

(ii) *Frauds by Officers*

An officer of a corporation who fraudulently procures any money, chattel or marketable security whether for him or herself or the corporation commits an offence punishable with a maximum fine of S\$15,000 and/or imprisonment for a maximum of three years.⁴⁷

An officer of a company who induces any person by fraudulent means to give credit to the company,⁴⁸ or conceals or dissipates property of the company in order to defraud creditors⁴⁹ commits an offence punishable with the same penalty.

4. Corruption

The Prevention of Corruption Act (Cap 241) (PCA) is the principal legislation dealing with corruption. It criminalizes the acts of giving and taking of bribes, and covers situations of agreeing or attempting to give or receive gratification. Corruption involving public servants is covered under Chapter IX of the Penal Code (Chapter 224) as well.⁵⁰

A person is guilty of an offence under the PCA if he or she corruptly solicits, receives or gives any gratification as an inducement to do or forbear from doing anything in respect of any matter or transaction.⁵¹ Where the gratification is corruptly given to or accepted by an agent as an inducement to do or forbear from doing any act in relation to his or her principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business, both the agent and the giver shall be guilty of an offence.⁵² A person who corruptly gives or receives any gratification would be guilty even if the recipient did not have the intention, power, right or opportunity to do or forbear to do the act for which the gratification was received.⁵³

The transaction involved must have a 'corrupt element' and the giver must know that he or she is doing a corrupt act.⁵⁴ 'Gratification' is given a wide definition under the PCA and is not limited to pecuniary benefits.⁵⁵ Proof of a receipt by or payment to a Government employee or employee of a public body of a gratification from a person who has or seeks dealings with the Government or public body raises a rebuttable presumption that the gratification was corruptly given.⁵⁶ For citizens of Singapore, they are caught by the Act if they commit any offence under the PCA. In this regard, the PCA has extra-territorial jurisdiction.⁵⁷

An offence under the PCA is punishable with a maximum fine of S\$100,000 and/or imprisonment up to five years. Where the transaction relates to a contract with the Government of Singapore or any public body, the maximum term of imprisonment is increased to seven years.⁵⁸ This enhanced punishment is applicable to the corrupt procuring of withdrawals of tenders for Government contracts, bribery of Members of Parliament or members of a public body.⁵⁹ A person convicted of an offence under the PCA can also be ordered by the court

⁴⁶ Section 402 Companies Act.

⁴⁷ Section 404(3) Companies Act.

⁴⁸ Section 406(a) Companies Act.

⁴⁹ Sections 406(b) and 406(c) Companies Act.

⁵⁰ Sections 161 to 165 Penal Code.

⁵¹ Section 5 PCA.

⁵² Section 6 PCA.

⁵³ Section 9 PCA.

⁵⁴ See *Chan Wing Seng v Public Prosecutor* [1997] 2 SLR 426.

⁵⁵ Section 2 PCA. See *Explanations* to Section 161 Penal Code as well.

⁵⁶ Section 8 PCA.

⁵⁷ Section 37 PCA.

⁵⁸ Section 7 PCA.

⁵⁹ Sections 10 to 12 PCA.

to pay as a penalty a sum which is equal to the amount of the gratification.⁶⁰ A principal may recover as a civil debt any illegal gratification received by the agent in money value from the agent or any person who has given such gratification.⁶¹ The court can also make a confiscation order under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A) (CDSA) in respect of the benefits derived by the defendant.⁶²

5. Money Laundering and Terrorism Financing

There are two separate legal regimes⁶³ governing money laundering and terrorism financing offences in Singapore. They are found in the CDSA and the Terrorism (Suppression of Financing) Act (Cap 325) (TSOFA).

(i) Money Laundering

The CDSA is the key anti-money laundering legislation in Singapore. It was passed on 6 July 1999 to expand the scope of money laundering offences to include non-drug related offences. Under the CDSA, the laundering of proceeds from all drug trafficking and serious offences⁶⁴ constitutes a money laundering offence. These offences are set out in Part VI of the CDSA. They can be divided into two broad categories. The first category relates to the concealment or transfer of benefits of crime while the second category relates to assisting another person to retain benefits of crime.

(a) Concealing or Transferring Benefits of Crime

There are three types of offences under this category. The first is committed when a person:

- (i) conceals or disguises any property which (in whole or in part, directly or indirectly) represents his or her benefits from drug trafficking or from criminal conduct; or
- (ii) converts or transfers that property or removes it from Singapore.⁶⁵

An example of this offence would be when a criminal launders his or her own proceeds of crime by, for e.g., transferring them to an offshore bank account or converting them into movable (jewellery) or immovable property (a house).

The second type of offence is committed when a person knowingly (in both subjective and objective senses) assists a person to commit the first offence so as to avoid the prosecution of a money laundering offence or to avoid the enforcement of a confiscation order under the CDSA.⁶⁶ An example of such an offence would be when lawyers or bankers knowingly assist their clients to receive or transfer proceeds of crime.

The third type of offence is committed when a person who, knowing or having reasonable grounds to believe that any property (in whole or in part, directly or indirectly) represents another person's benefits from drug trafficking or criminal conduct, acquires that property for no or inadequate consideration.⁶⁷ An example would be when a person knowingly purchases a jewellery item from a criminal at a fraction of the market value for the item.

(b) Assisting Another to Retain Benefits of Crime

The offence under this category is committed when a person enters into an arrangement, knowing or having reasonable grounds to believe that by the arrangement:

⁶⁰ Section 13 PCA.

⁶¹ Section 14 PCA.

⁶² Section 5 CDSA. Confiscation of benefits derived from criminal conduct is discussed at Part V of this paper.

⁶³ This is a rather unique feature of Singapore's anti-money laundering regime as in most other jurisdictions terrorist financing is criminalized as a money laundering offence under their anti-money laundering regimes.

⁶⁴ Section 2 CDSA. The First Schedule to the CDSA contains a list of five drug trafficking offences and the Second Schedule contains a list of 182 serious offences. Offences under the PCA as well as offences involving corruption and fraud under the Penal Code are included in the list. The list does not include offences under the SFA, Companies Act or Income Tax Act (tax evasion).

⁶⁵ Section 46(1) & 47(1) CDSA.

⁶⁶ Section 46(2) & 47(2) CDSA.

⁶⁷ Section 46(3) & 47(3) CDSA.

- (i) the retention or control by or on behalf of a criminal's benefits of drug trafficking or criminal conduct is facilitated (whether by concealment, removal from Singapore, transfer to nominees or otherwise); or
- (ii) the criminal's benefits from drug trafficking or criminal conduct are
 - (1.) used to secure funds that are placed at the criminal's disposal, directly or indirectly; or
 - (2.) are used for the criminal's benefit to acquire property by way of investment or otherwise AND knowing or having reasonable grounds to believe that the criminal is carrying/has carried on drug trafficking or is engaging/has engaged in criminal conduct and has benefited from these criminal activities.⁶⁸

A person charged with this offence has a good defence⁶⁹ if he or she can prove that:

- (a) he or she did not know and had no reasonable ground to believe that the arrangement was related to any person's proceeds of drug trafficking or criminal conduct; or
- (b) he or she did not know and had no reasonable ground to believe that, by the arrangement, the retention or control by the criminal of the proceeds from drug trafficking or criminal conduct would be facilitated or used; or
- (c) he or she intended to disclose to an authorized officer his or her suspicion or belief that the benefits were derived from drug trafficking or criminal conduct and he or she has a reasonable excuse for failing to do so; or
- (d) he or she, being an employee, had disclosed his or her suspicion or belief that the benefits were derived from drug trafficking or criminal conduct to the appropriate person in accordance with procedures established by his or her employer for the making of such disclosures.

The penalty for the commission of any of the offences in the two categories above is a maximum fine of S\$200,000 and/or a term of imprisonment not exceeding seven years.⁷⁰

(c) Tipping-off Offence

The CDSA also provides for the offence of 'tipping off'.⁷¹ The offence is committed when a person who

- (i) knows or has reasonable grounds to suspect that an authorized officer⁷² is acting or proposing to act, in connection with an investigation conducted for the purposes of the CDSA; or
- (ii) knows or has reasonable grounds to suspect that a disclosure has been made to an authorized officer under the CDSA; and
- (iii) discloses to any other person information which is likely to prejudice the investigation.

An example would be a banker calling up a client to inform him or her of the CAD's investigation into his or her bank account or to inform the customer that the bank's compliance officer has lodged a STR (suspicious transaction report) against him or her.

An exception is provided for information disclosed by lawyers to their clients 'in connection with the giving of advice to the client in the course of and for the purpose of the professional employment, of the advocate and solicitor.'⁷³ The exception does not apply, however, if the disclosure was made for an illegal purpose.⁷⁴

It is a defence for a tipping-off offence if the 'tipper' can prove that he did not know and had no reasonable ground to suspect that the disclosure was likely to be prejudicial to the investigation.⁷⁵

The punishment for a tipping-off offence is a maximum fine of S\$30,000 and/or imprisonment not

⁶⁸ Section 43(1) & 44(1) CDSA.

⁶⁹ Section 43(4) & 44(4) CDSA.

⁷⁰ Sections 43(5), 44(5), 46(6) & 47(6) CDSA.

⁷¹ Sections 48(1) & 48(2) CDSA.

⁷² Section 2 CDSA includes the CNB, CPIB, CAD and police officers and any other person authorized by the Minister.

⁷³ Section 48(3) CDSA.

⁷⁴ Section 48(4) CDSA.

⁷⁵ Section 48(5) CDSA.

exceeding three years.⁷⁶

(ii) Terrorism/Terrorist Financing

Singapore has, in the wake of the September 11 incident and our near escape with an aborted terrorist attack,⁷⁷ passed a series of anti-terrorism laws. A key focus of these laws was in the area of anti-terrorism financing. The relevant provisions are found in the following statutes and regulations:

- a) The Terrorism (Suppression of Financing) Act (Cap 325) (TSOFA);
- b) Regulations 5 to 7 and 9 and 10 of the United Nations (Anti-Terrorism Measures) Regulations 2001 (UN Regulations);
- c) Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002 (MAS Regulations).

The Terrorism (Suppression of Financing) Act (Chapter 325) (TSOFA) was passed on 8 July 2002 by Parliament to give effect to the International Convention for the Suppression of the Financing of Terrorism which Singapore signed on 18 December 2001 and the United Nations Security Council Resolution 1373.

The UN Regulations were passed to give effect to Resolution 1373, (2001) (Imposing Measures Against Terrorism) and Resolution 1390 (2002) of the UN Security Council. The MAS Regulations were enacted, pursuant to section 27A of the Monetary of Singapore Authority Act (Cap 186), to apply the relevant provisions in the UN Regulations to financial institutions in Singapore.⁷⁸

The terrorism/terrorist financing offences contained in the TSOFA, UN Regulations and MAS Regulations can be summarized as follows:

- i) intentionally or knowingly providing or collecting funds or property to use them to commit a terrorist act;⁷⁹
- ii) knowingly dealing with any property owned or controlled by or on behalf of any terrorist or terrorist entity;⁸⁰
- iii) knowingly entering into or facilitating a financial transaction related to a dealing in property owned or controlled by or on behalf of any terrorist or terrorist entity;⁸¹
- iv) knowingly providing any financial services or other related services relating to any terrorist property or for the benefit of any terrorist or terrorist entity;⁸²
- v) knowingly providing funds, economic resources or financial or other related services for the benefit of any Prohibited Person (defined as a terrorist, a terrorist entity and a person acting on behalf or at the direction of the terrorist or terrorist entity);⁸³
- vi) intentionally or knowingly using or possessing a property for the purpose of facilitating or carrying out a terrorist act.⁸⁴

The punishment prescribed for any of the above offences is a maximum fine of S\$100,000⁸⁵ and/or

⁷⁶ Section 48(1) & 48(2) CDSA.

⁷⁷ In 2002, the Singapore authorities uncovered a plot by a terrorist group to carry out terrorist acts in Singapore. They had formulated plans to hijack an aircraft from a neighbouring country and then crash it into the control tower of Changi International Airport. There was also a plan to drive two trucks laden with explosives into the United States Embassy and detonate them there. Our authorities also discovered they had conducted surveillance on our naval base, a Mass Rapid Transit station, and government ministry buildings. Fortunately our security services were able to uncover these plots in time and place the criminals under arrest.

⁷⁸ The provisions in both Regulations are identical. The MAS Regulations were necessary as Regulation 3 of the UN Regulations specifically states that the regulations do not apply to financial institutions.

⁷⁹ Section 3 TSOFA, Regulation 5 UN Regulations, Regulation 5 MAS Regulations.

⁸⁰ Section 6(1)(a) TSOFA, Regulation 6(a) UN Regulations, Regulation 6(a) MAS Regulations.

⁸¹ Section 6(1)(b) TSOFA, Regulation 6(b) UN Regulations, Regulation 6(b) MAS Regulations.

⁸² Section 6(1)(c) TSOFA, Regulation 6(c) UN Regulations, Regulation 6(c) MAS Regulations.

⁸³ Section 4 TSOFA, Regulation 7(1) UN Regulations, Regulation 7(1) MAS Regulations.

⁸⁴ Section 5 TSOFA.

⁸⁵ The penalties under the TSOFA are set out in each of the offence-creating provisions. For the UN Regulations, the punishment is found in Section 5 of the UN Act (Chapter 339). Punishment for the offence under the MAS Regulations is found in Section 27A(5) MAS Act.

imprisonment not exceeding five or ten years.

6. Other Offences

Besides the offences discussed so far, there are other offences set out in other statutes that would fit within the genre of corporate and economic crime. These offences will be discussed briefly in this segment.

(i) *Tax Evasion*

The offence of tax evasion is set out in the Income Tax Act (Cap 134). Any person who, willfully with intent to evade tax or assist another person to evade tax, omits any income or makes any false statement in an income tax return, or gives any false answer to any question or request for information made under the Act is guilty of an offence punishable with a maximum fine of S\$10,000 and/or imprisonment not exceeding three years. The offender will also have to pay a penalty of treble the amount of tax evaded in addition to the fine or imprisonment meted out against him or her.⁸⁶

If the person intending to evade tax prepares or maintains any false books of account or other records or falsifies any book of account or records, or makes use of any fraud, art or contrivance, he or she will be liable to a stiffer punishment of a maximum fine of S\$50,000 and/or imprisonment for a term not exceeding five years. The offender will have to pay, in addition, a penalty four times the amount of tax evaded.⁸⁷

Repeat offenders are liable to a minimum imprisonment term of six months.⁸⁸ The Comptroller of Income Tax may, however, compound these offences.

In any prosecutions under these two sections, the offender is presumed to have willfully intended to evade tax until he or she is able to rebut the presumption.⁸⁹

(ii) *Computer Related Crime*

The advent of computers and the Internet has brought about a proliferation of fraud committed through the use of computers or the Internet. The problem of electronically perpetrated fraud, particularly through theft of virtual identity and security information, is on the rise. Scams like the Nigerian advance fee fraud have also been perpetrated through the use of various forms of information technology. Identity thieves have managed to steal personal banking information through bogus websites simulating those of banks and financial institutions, and thereafter utilizing the information to illegally transfer funds from the victim's bank accounts. In this respect, cyber-criminals have also targeted databases of banks and financial institutions.

The Computer Misuse Act (Cap 50A) (CMA) contains a set of offences to deal with computer related offences. Under the CMA, any person who knowingly causes a computer to perform any function for the purpose of securing unauthorized access to any computer programme or data is guilty of an offence punishable with a maximum fine of S\$5,000 and/or to imprisonment for a term not exceeding two years.⁹⁰

A person who secures access to a computer programme or data held in a computer to commit an offence involving property, fraud, dishonesty or which causes bodily harm is liable to be punished with a maximum fine of S\$50,000 and/or to imprisonment for a term not exceeding ten years.⁹¹ Perpetrators of online scams and identity theft will be caught under this provision, although in such cases, they will be charged for the principal offences under the Penal Code, SFA or other statutory provisions dealing with the offences.

Any acts of unauthorized modification of the contents of any computer constitutes an offence punishable with a maximum fine of S\$10,000 and/or to imprisonment for a term not exceeding three years.⁹²

⁸⁶ Section 96(1) Income Tax Act.

⁸⁷ Section 96A(1) Income Tax Act.

⁸⁸ Sections 96(2) and 96A(2) Income Tax Act.

⁸⁹ Sections 96(3) and 96A(3) Income Tax Act.

⁹⁰ Section 3(1) CMA.

⁹¹ Section 4 CMA.

⁹² Section 5 CMA.

Other acts criminalized under the CMA include the unauthorized use or interception of computer service, unauthorized obstruction of use of a computer and unauthorized disclosure of any password or access code for any wrongful gain or purpose, or with the knowledge that it would cause wrongful loss to any person.⁹³

The CMA has extra-territorial effect as well and applies to any person, whatever his or her nationality or citizenship, and whether he or she is outside or within Singapore, as well as whether the act was committed outside or within Singapore, so long as the offender was in Singapore at the material time or the computer, programme or data was in Singapore at the material time.⁹⁴

B. Civil Sanctions

Besides being liable to criminal sanctions and penalties, offenders are subject to civil liabilities under the common law as well. Victims of fraud may file civil suits against the perpetrators. Directors who embezzle or mismanage company funds may be sued by the company and/or its shareholders for failing to discharge their fiduciary duties as directors of the company.

Under the SFA, civil sanctions are specifically prescribed for insider trading and market misconduct. These sanctions are either by way of a civil penalty ordered by the court on the application of the MAS, or compensation to victims of the offence.

1. Civil Penalty

Under Section 232 of the SFA, MAS may, with the consent of the public prosecutor, bring an action in court against a person who has committed any securities offence under Part XII of the SFA for an order of civil penalty of a sum:

- (i) not exceeding three times the amount of profit gained or loss avoided by the offender; or
- (ii) equal to S\$50,000 for a natural person or S\$100,000 for a corporation,

whichever amount is greater.⁹⁵

Where the offence did not result in profit gained or loss avoided, the court may order the offender to pay a civil penalty of a sum between S\$50,000 and S\$2 million.⁹⁶

Civil penalty actions cannot be commenced against offenders who have been charged and convicted or acquitted for the offence.⁹⁷ A civil penalty action shall be stayed after criminal proceedings are commenced against the offender, and may be continued only if the charge was subsequently withdrawn or the offender is granted a discharge not amounting to an acquittal.⁹⁸ A civil penalty is subject to a six year limitation period.⁹⁹

The MAS may allow an offender to consent to an order of civil penalty being made against him or her by the court on such terms as may be agreed between MAS and the offender.¹⁰⁰ Alternatively, MAS may also enter into an out-of-court settlement with or without admission of liability with an offender to pay the civil penalty.¹⁰¹

2. Civil Liability

Under Section 234 of the SFA, persons who have suffered loss when trading contemporaneously¹⁰² with

⁹³ Sections 6, 7 and 8 CMA.

⁹⁴ Section 11 CMA.

⁹⁵ Section 232(2) SFA.

⁹⁶ Section 232(3) SFA.

⁹⁷ Section 233(2) SFA.

⁹⁸ Section 233(3) SFA.

⁹⁹ Section 233(1) SFA.

¹⁰⁰ Section 232(4) SFA.

¹⁰¹ Section 232(5) SFA.

¹⁰² The factors to be considered in determining whether a transaction took place contemporaneously are set out in Section 234(5) SFA.

the offender may seek an order against the offender for payment of compensation for the loss suffered,¹⁰³ regardless of whether the offender has been convicted, or has had a civil penalty imposed on him or her, subject to a maximum recoverable amount, which is the amount of profit made or loss avoided by the offender.¹⁰⁴

III. INVESTIGATING CORPORATE CRIME

There are several characteristics of corporate and economic crimes which differentiate them from other general crimes. They are likely to be committed by people with high intellect, such as lawyers, accountants and bank officials. There is often a high degree of planning and preparation involved, both in the commission of the offences as well as in covering up the tracks. Many of these offences involve syndicates. Rapid technological advancements have also significantly increased the capabilities of these criminal elements. With the proliferation of the Internet, fraudsters now have a global reach and very often, it is impossible to even identify the perpetrator.

Given these tremendous challenges in dealing with modern corporate and commercial crime, it is imperative that enforcement agencies are well equipped, both in terms of hardware and 'heart-ware'. Besides harnessing the latest technology and recruiting bright and talented investigators, enforcement agencies also need to constantly upgrade their institutional knowledge and capabilities in order to keep up with the challenges of investigating and solving modern corporate and commercial crimes.

In this respect, Singapore has devoted significant resources to developing premier investigating agencies like the Commercial Affairs Department and Corrupt Practices Investigation Bureau which rank amongst the best in the world in terms of their professionalism, knowledge and integrity. These agencies are supported by a strong and robust legal framework which provides them with wide ranging investigative powers to enable them to carry out swift and effective investigations. As a result, Singapore has earned the distinction of having one of the most efficient enforcement regimes in the world.¹⁰⁵

Besides the CAD and CPIB, the MAS, which administers the civil penalty regime under the SFA, has an enforcement section which investigates the relevant offences under the SFA. Our Accounting and Corporate Regulatory Authority ('ACRA'), which regulates companies, businesses and public accountants, also carries out investigation in the areas under its purview. Investigators from MAS and ACRA are highly qualified and are given wide investigative powers under the respective statutes as well.

A. Our Enforcement and Investigation Agencies

1. Commercial Affairs Department (CAD)

The CAD is the principal investigation agency for economic crime in Singapore. Established in 1984 under the Ministry of Finance, the CAD has evolved into a premier white-collar criminal investigation agency handling a wide spectrum of commercial and financial crimes. It was reconstituted as a department of the Singapore Police Force in 2000. Since its inception in 1984, the CAD has achieved remarkable acclaim by solving numerous high-profile commercial crime cases, some of which have attracted international media coverage.

The CAD has its own dedicated investigative and intelligence resources. Specialist divisions are set up within the department, each focusing on specialized areas of commercial and financial fraud and other related crimes. There is also a dedicated unit for the investigation of money-laundering related crimes and recovery of proceeds of criminal activities.

(i) Commercial Crime Division

The Commercial Crime Division handles general fraud cases. It is made up of two branches:

¹⁰³ Section 234(1)(b) SFA: the loss is calculated by measuring the difference between the price of the securities at which the securities were dealt with in that transaction and their likely price if the offence had not been committed.

¹⁰⁴ Section 234(6) SFA.

¹⁰⁵ The World Economic Forum's "Global Competitiveness Report (GCR) 2005-2006" ranked Singapore's police service first out of 117 countries for her reliability in protecting businesses from crime.

- (a) **Financial Fraud Branch**
The Financial Fraud Branch investigates all types of credit card fraud, including fraudulent online transactions, merchant collusion and counterfeiting. It also investigates other major cases involving counterfeit currency syndicates and factoring fraud;
- (b) **General Fraud Branch**
The General Fraud Branch investigates organized fraud with a focus on syndicated scams. These include syndicated false insurance claims, syndicated forgery of travel documents, fly-by-night business operations and syndicated get-rich-quick scams.

(ii) Corporate Fraud Division

Corporate and commercial frauds committed by directors or officers of companies and business entities are investigated by the Corporate Fraud Division. These include offences like criminal breach of trust, falsification of accounts and cheating offences under the Penal Code (Chapter 224), as well as contraventions of the Companies Act (Chapter 50), Business Registration Act and Bankruptcy Act. The division also investigates offences committed by lawyers and accountants. These would include breaches of the Legal Profession Act (Chapter 161) and Accountants Act (Chapter 2).

Officers from the Corporate Fraud Division are equipped with advanced forensic accounting skills and legal knowledge to deal with the highly complex nature of the cases they investigate. Many of the officers in the Division possess professional qualifications in accounting and law as well.

(iii) Securities & Maritime Fraud Division

The Securities & Maritime Fraud Division comprises two branches:

- (a) **Securities Fraud Branch**
The Securities Fraud Branch investigates all criminal offences under the Securities & Futures Act (Chapter 289), which includes market misconduct offences such as insider trading and market rigging as well as other regulatory offences under the Act. The branch also investigates contraventions of the Financial Advisers Act (Chapter 110) and the Commodity Trading Act (Chapter 48A);
- (b) **Maritime and Investment Fraud Branch**
The Maritime & Investment Fraud Branch investigates maritime, investment and financing-related frauds. This broad portfolio covers fraud involving trade financing instruments like letters of credit, prohibited pyramid-selling schemes, fraudulent obtaining of financing and investment scams.

(iv) Financial Investigation Division

The Financial Investigation Division handles money-laundering cases and offences related to money-laundering. The Division consists of three branches:

- (a) **Suspicious Transaction Reporting Office (STRO)**
The STRO receives and analyses Suspicious Transaction Reports (STRs). It provides financial intelligence information for the detection of money-laundering, terrorism financing and other criminal offences. It is also Singapore's Financial Intelligence Unit (FIU). As the central agency in Singapore for receiving, analysing and disseminating reports of suspicious transactions, STRO turns raw data contained in STRs into financial intelligence that could be used to detect money-laundering, terrorism financing and other criminal offences. It also disseminates financial intelligence to relevant enforcement and regulatory agencies.
- (b) **Financial Investigation Branch**
The Financial Investigation Branch investigates money-laundering and other offences under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A), as well as offences under the Terrorism (Suppression of Financing) Act (Chapter 325). The branch has been successful in investigating several major money-laundering cases, some of which I will be discussing in a later part of this paper.
- (c) **Proceeds of Crime Unit**
The Proceeds of Crime Unit is responsible for the identification and seizure of proceeds of crime,

and thereafter managing such assets until they are returned to the rightful beneficiaries or confiscated under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A). Enforcement agencies who encounter incidences of money laundering while investigating into any offence may refer the matter to the unit for a joint investigation and subsequent prosecution. This process has the effect of improving the time taken to recover criminal assets. The unit also investigates offences committed by or through non-bank value transfer systems like remittance agents and money changers under the Money-Changing and Remittance Businesses Act (Chapter 187).

Besides recruiting talented and professionally qualified candidates, the CAD also regularly embarks on highly specialized training programmes for its investigators. These include joint training programmes with world-renowned economic crime enforcement agencies and industry leaders as well as training via video-conferencing with specialist agencies around the world.

2. Corrupt Practices Investigation Bureau (CPIB)

The CPIB is an independent body which investigates and aims to prevent corruption in the public and private sectors in Singapore. Established in 1952, it derives its powers of investigation¹⁰⁶ from the Prevention of Corruption Act (Cap 241) (PCA). The Bureau is headed by a director who is appointed by the President of Singapore. He is assisted by a Deputy Director, assistant directors and special investigators.¹⁰⁷

The Bureau is responsible for safeguarding the integrity of the public service and encouraging corruption-free transactions in the private sector. It is charged with the responsibility of checking on malpractices by public officers and reporting such cases to the appropriate government departments and public bodies for disciplinary action. For the private sector, the focus is on promoting good governance and ethical practices to ensure a level playing field.

Investigation is conducted by the Operations Division which has within it an elite Special Investigation Team which handles complex and major cases. During the investigation process, the CPIB officers frequently work with various Government agencies and private organizations in gathering evidence and obtaining necessary information. Completed investigation papers are submitted to the public prosecutor for legal assessment and prosecution.¹⁰⁸

The successful prosecution against many corrupt offenders has reduced corruption in Singapore to a near non-existent level. This has contributed to Singapore's reputation for having zero tolerance for corruption. Singapore has also consistently received high ratings in Transparency International's Corruption Perceptions Index.¹⁰⁹ Amongst an average of 130 countries featured in the last five years, Singapore has been ranked as the fifth least corrupt country in the world, with an average score of 9.3 on a scale of 1.0 (highly corrupt) to 10.0 (highly clean).

The Bureau also carries out corruption prevention by reviewing the work methods and procedures of departments and public bodies which are more susceptible to corruption, and recommending remedial and preventive measures to these departments and public bodies. Officers from the Bureau regularly conduct lectures and seminars to educate public officers on issues concerning corruption. Such lectures and seminars are conducted for private organizations as well.

3. Monetary Authority of Singapore (MAS)

The MAS is the *de facto* central bank of Singapore. Established under the Monetary Authority of Singapore Act (Chapter 186) (MAS Act), the MAS acts as chief supervisor and regulator of Singapore's financial services sector. It has prudential oversight over the securities and futures market and the banking and insurance industries. The MAS also enforces the civil penalty regime for insider trading and market misconduct.

¹⁰⁶ Sections 17 to 22 PCA.

¹⁰⁷ Section 3 PCA.

¹⁰⁸ Under the PCA, no prosecution can be instituted except by or with the written consent of the Public Prosecutor.

¹⁰⁹ Transparency International is a leading international non-governmental organization formed with the mission to promote anti-corruption on a worldwide scale. Its Corruption Perceptions Index is one of the most commonly-used measures for corruption in research due to its reputation for accuracy.

The MAS conducts investigations and audits in exercise of its powers or performance of its functions, to ensure compliance, as well as over any alleged or suspected contraventions of any provisions or regulations under the SFA, Banking Act (Chapter 19), Business Trusts Act (Chapter 31A), Financial Companies Act (Chapter 108), Financial Advisers Act (Chapter 110), Insurance Act (Chapter 142), Money Changing and Remittance Businesses Act (Chapter 187) and Trust Companies Act (Chapter 336).

Investigative powers in relation to contraventions of provisions in the SFA are conferred on MAS investigators under Part IX Division 3 of the SFA. These include requiring a person to give “all reasonable assistance” in an investigation,¹¹⁰ examining a witness under oath and recording of statements from the witness,¹¹¹ and requiring a person to provide information or produce documents or books relating to any matter under investigation.¹¹²

Powers of inspection and investigation are also conferred on the MAS under the other Acts mentioned above. In cases involving financial and insurance companies or advisers/intermediaries, such inspections and investigations would be carried out by MAS under conditions of secrecy.

4. Accounting and Corporate Regulatory Authority (ACRA)

The ACRA was formed on 1 April 2004 from the merger between the then Registry of Companies and Businesses (RCB) and the Public Accountants Board (PAB). The main role of ACRA is the regulation of companies, businesses and public accountants¹¹³ in Singapore.

The formation of ACRA was part of a move by the government of Singapore to move away from the industry self regulation in the wake of big accounting scandals such as Enron in the United States. ACRA performs a pivotal role in the monitoring of corporate compliance with disclosure requirements and accounting standards, and the regulation of public accountants performing statutory audits.

ACRA has its own in-house legal advisers and investigators who carry out its enforcement functions. These include investigations into regulatory breaches of provisions under the Companies Act (Cap 50), Business Registration Act (Cap 32), Limited Liability Partnerships Act (Cap 163A) and audit inspections on public accountants pursuant to the Accountants Act (Cap 2).

B. Co-operation amongst These Agencies

Though separate in terms of their constitution and specific areas of enforcement, the CAD, CPIB, MAS and ACRA work together as part of a multi-agency enforcement framework. For example, the CAD and CPIB often engage in joint investigations in cases where both fraud and corruption offences are committed by the same accused person(s). In such cases, investigators from both agencies will co-ordinate their investigations and share information with one another.

Another instance is where upon preliminary evaluation, it is determined that a civil penalty action would be more appropriate than criminal sanctions, the CAD may hand over a case to the MAS for their investigation and follow-up action. Similarly, where MAS encounters a case which warrants criminal sanctions, it will refer the matter to the CAD.

This co-operation and co-ordination between our enforcement agencies has allowed us to take swift, efficient and appropriate action against individuals and entities involved in the commission of corporate and commercial crimes.

C. The Investigation Process

1. Commencement of Investigations

Investigations by our enforcement agencies are usually triggered by one or more of the following:

- (i) a complaint lodged by a person(s) who may or may not be the victim of the alleged crime. In some

¹¹⁰ Section 154(1)(a) SFA.

¹¹¹ Section 154(1)(b) SFA. The manner of examination and recording is set out in Sections 156 to 158 SFA.

¹¹² Section 163 SFA.

¹¹³ Its functions are specifically set out in Section 6 of the ACRA Act (Cap 2A).

- instances, the person lodging the report can be the offender or contravening person him or herself;
- (ii) information gathered from the media. For example, published articles or reports on questionable activities or conduct taking place in a particular corporation may be sufficient to cause the enforcement agency to suspect that an offence(s) has been committed by or within the corporation and decide to commence investigation into its affairs.

The enforcement agency will evaluate every complaint or case arising from information from the media before deciding on whether to start the investigation process. Crucial factors like whether any offence has been disclosed, the availability of the potential defendants, witnesses and documentary records, as well as the prospect of making out a case sufficient to support a court prosecution, will be considered. This evaluation process does not usually involve the prosecuting agency, although for complex or sensitive cases, the enforcement officer may seek legal advice from a DPP or State Counsel from the Attorney-General's Chambers.

2. Powers of Investigations

Once a decision is made to initiate investigations, an investigator or team of investigators will be assigned to the case. CAD investigators are conferred similar powers of investigation as police officers. These powers are set out in Part V of the Criminal Procedure Code (Cap 68) ('CPC'). An investigator may, by order in writing, require the attendance of any person in Singapore to assist in investigations. If such a person fails to attend, the investigator may apply to the court for a warrant to secure his or her attendance.¹¹⁴ The investigator is empowered to examine and record statements from witnesses, and require these witnesses to execute bonds to secure their attendance to testify in subsequent court proceedings.¹¹⁵ The investigator is also empowered to issue orders to persons (individuals or companies) to produce any document or exhibit relevant to the investigation¹¹⁶ and to seize them if necessary.¹¹⁷ If such orders are not complied with, the investigator may conduct a search at any place or premises (or apply to the court for a search warrant where the offence investigated is non-seizable¹¹⁸) to retrieve the documents or exhibits.¹¹⁹ In the context of bank documents and information such as deposit statements and account information, an investigator (not below the rank of inspector) may conduct an inspection at the bank's premises.

Investigators from the CPIB are conferred, subject to authorization by the public prosecutor, even wider powers of investigations under the PCA. These include the investigation of any bank account, share account, purchase account, expense account or any other account or any safe deposit box in any bank, the inspection of banker's books in relation to any public servant suspected to have committed a corruption offence, or his or her spouse, child or trustee/agent. The public prosecutor is also empowered to require the accused person to make a sworn statement in writing listing out all properties owned by him or her, his or her spouse and children, as well as to obtain from the Comptroller of Income Tax, all information available to relating to the accused person's affairs.

3. Leveraging on Professional Expertise and Technology

Our enforcement agencies are also equipped with professional expertise and state-of-the art modern equipment to handle the often highly complex nature of white-collar crime investigations. Both the CAD and CPIB have computer forensics teams who are able to retrieve incriminating computer data and information like emails and soft copies of documents which have been previously deleted. The CAD has its in-house team of auditors who are adept at conducting forensic auditing. It also has a panel of experts consisting of leading industry experts whom the investigators can seek advice from concerning issues like accepted industry practices or whether a particular piece of information is price sensitive. The Police and CPIB also have a well established polygraph testing framework to aid in their investigations.¹²⁰ Our Health Sciences

¹¹⁴ Section 120 CPC.

¹¹⁵ Sections 121 and 126 CPC.

¹¹⁶ Section 58 CPC.

¹¹⁷ Section 68 CPC.

¹¹⁸ A police officer may arrest any person suspected of having committed a seizable offence without having been issued a warrant of arrest by the court. The CPC specifically sets out which offences are seizable and which are not under its Schedule A. Generally, non-seizable offences are less serious than seizable ones.

¹¹⁹ Sections 61 and 125 CPC.

¹²⁰ Although polygraph test results are inadmissible as evidence in our courts, polygraph tests have continued to play a role as highly important and valuable investigation tools.

Authority (HSA) also provides support to criminal investigations by conducting forensic examinations like handwriting analysis and analysis to ascertain the authenticity of documents.

Once an investigation is complete, the investigator will put up a report on his or her findings and make a recommendation on the course of action to adopt against the offender(s). The investigation papers will then be forwarded to the Attorney-General's Chambers for legal assessment.

IV. PROSECUTING CORPORATE CRIME

Article 35(1) of the Constitution of Singapore creates the office of the Attorney-General. The Attorney-General of Singapore is a non-political appointee and performs two primary roles:

- a) principal legal adviser to the Government; and
- b) public prosecutor.

The Attorney-General as public prosecutor has powers to institute, conduct or discontinue any proceedings for any offence.¹²¹ The CPC further provides that the Attorney-General shall be the public prosecutor, with control and direction of all criminal prosecutions and proceedings.¹²² This confers on the public prosecutor sole discretion over the prosecution of offences in Singapore.

A. Attorney-General's Chambers - Criminal Justice Division

The Criminal Justice Division (CJD) is the organizational extension of the Attorney-General's role as the public prosecutor and is the chief prosecuting agency in Singapore.

Officers of the CJD act as Deputy Public Prosecutors (DPPs) and Assistant Public Prosecutors (APPs) under the authority of the Attorney-General. DPPs conduct criminal prosecutions in the Subordinate Courts and High Court. They also conduct Magistrate's Appeals and Criminal Appeals, and appear in Coroner's, Disposal and Preliminary Inquiries. APPs conduct only criminal prosecutions in the Subordinate Courts.

Besides criminal litigation, DPPs also exercise the Attorney-General's control and direction of criminal prosecutions by advising law enforcement agencies in their investigations. Investigation papers from various enforcement agencies are submitted to CJD for DPPs to evaluate whether any offences have been disclosed and, if so, what charges should be preferred against the accused persons.

In view of the transnational nature of crime in our increasingly globalized world, CJD's work also has an international dimension. Officers process all requests from foreign states for assistance in criminal matters, including extradition requests. In addition, CJD officers are also actively involved in negotiations for treaties and agreements involving criminal matters, as well as participating in international conferences on issues concerning criminal justice.

The CJD is divided into eight Directorates, each handling different areas of work. There are six Trial Litigation Directorates, one Appellate Litigation Directorate and one Advisory Directorate. Of the six Trial Litigation Directorates, there are specialized Directorates each for Financial & Securities Offences and Corruption and Specialist Offences.

The Financial & Securities Offences Directorate consists of DPPs who specialize in the prosecution of complex commercial and economic crimes like corporate fraud and insider trading. Offences committed by professionals like lawyers and accountants are prosecuted by DPPs from the directorate as well. DPPs from the directorate undergo regular training programmes and also attend conferences and seminars to keep themselves abreast of developments in the area of corporate and finance laws as well as the latest trends in economic and commercial crimes.

The DPPs in the directorate work closely with the officers from the CAD, providing advice on legal issues arising during the investigation stage, as well as legal evaluation and assessment upon completion of

¹²¹ Article 35(8) of the Constitution of Singapore. See <http://agclwb.agc.gov.sg>

¹²² Section 336 of the Criminal Procedure Code (Chapter 68).

investigations. Some of the DPPs from this Directorate are also physically based at the CAD's premises to provide legal support at close proximity to the investigation teams at the CAD.

The Corruption & Specialist Crimes Directorate deals with cases investigated by the CPIB. This includes providing legal advice to the CPIB investigators, legal assessment and prosecution of these cases. The Directorate also handles cases investigated by specialized branches of the Singapore Police Force such as organized crime, vice offences, gambling offences, intellectual property offences and computer crimes.

The CJD conducts training courses for departmental prosecutors and law enforcement officers to update them on legal developments which may be relevant for their operations. These courses improve the quality of investigation, which in turn assist in prosecution. The CJD also has a task force to enforce timeliness in submission of investigation papers by law enforcement agencies to ensure efficient administration of criminal justice.

This close working relationship between the DPPs and investigators is one of the key attributes in Singapore's remarkable capabilities at solving and successfully prosecuting complex commercial and economic crimes. We do our best to work as a team.

B. The Criminal Prosecution Process

1. Deciding Whether to Prosecute

Upon completion of investigations, the investigating agency will submit the investigation papers to the Attorney-General's Chambers for legal assessment on the sufficiency of evidence to support the offences investigated. The process of legal assessment would involve the DPP going through the statements recorded from the witnesses and documents and exhibits seized. Where necessary, DPPs may carry out interviews with witnesses as well to clarify certain aspects of their statements as well as to assess their veracity.

In the context of corporate and commercial offences, this process will often involve going through voluminous statements and documents. DPPs often have to seek the views and opinions of experts (for example, in insider trading cases, whether a particular piece of information is price sensitive) in determining whether a particular offence is made out.

Depending on the nature of the offences committed, the factual matrix of the case and the sufficiency of evidence, a decision would then be made on the course of action to adopt against an accused person. The public prosecutor in exercising his or her prosecutorial discretion may decide to prosecute the accused person in court, or to direct the enforcement agency to take alternative action like composition¹²³ or the issuance of a warning to an accused person in lieu of prosecution. In the case of corporate or commercial cases, factors like the prevailing market realities and industry practices and the need to balance the often conflicting objectives of law enforcement and business efficiency will often have to be taken into consideration in this decision-making process.

2. Charging an Accused Person

Once the decision is made to proceed with prosecution, an accused person will be produced in court and charged formally. The accused person may elect to plead guilty to the charge or to claim trial. In most cases, however, an accused person's plea is seldom taken on the first occasion he or she is charged. Adjournments are usually sought by the accused person to seek legal advice or representation, or if they are already represented by a lawyer, to make representations¹²⁴ to the Attorney-General's Chambers. The matter would then be fixed for a pre-trial conference (PTC).

3. Pre-trial

The PTC is conducted by a District Judge and attended by the prosecutor and the accused or his or her defence counsel. The purpose of a PTC is to expedite criminal proceedings through proper case management.

¹²³ An offence is compounded if the criminal charge is withdrawn following a settlement between an accused person and the person who has the power to compound the offence under the law (usually a victim or a government body).

¹²⁴ These are letters written by an accused person's counsel to the Attorney-General's Chambers requesting either a withdrawal or reduction of the charges, or other forms of plea bargaining.

Where an accused person claims trial, a PTC will encourage disclosure and the narrowing down of issues to expedite the trial. In the Subordinate Courts, a District Judge will preside over the PTC which is held in the chambers of the District Judge. The prosecutor and the accused or his or her defence counsel would disclose their respective positions at the PTC and narrow down the issues that may be of contention at trial. The court also takes the opportunity to tie down administrative matters with both parties i.e. the number of witnesses to be examined by the prosecutor and the accused or his or her defence counsel, the manner of adducing evidence from the witnesses, the number of days required for trial, etc.

In the High Court, the Registrar of the Supreme Court or any of his or her deputies and assistants will preside over the pre-trial conferences. These pre-trial conferences are held in chambers. Pre-trial conferences for criminal cases pending before the High Court are conducted very much like those in the Subordinate Courts.

4. Trial

Where an accused pleads not guilty to a charge, the trial is the forum where evidence is adduced by the prosecution and the defence in order for the court to determine whether the accused is guilty of the charge against him or her. The evidentiary and procedural laws governing trials are found in the Evidence Act (Cap 97) and the CPC.

A trial begins with the prosecution's case. The prosecutor will lead evidence from the prosecution witnesses in court. Each witness will first be examined-in-chief by the prosecutor, followed by cross-examination by the defence and, if necessary, re-examination by the prosecutor.¹²⁵ The prosecution closes its case when all the prosecution witnesses have testified.

After the prosecution closes its case, the court will decide whether there is some evidence (not inherently incredible) which if the court were to accept as accurate, would establish each essential element in the charge. If a *prima facie* case is not made out, the accused would be acquitted at this stage. On the other hand, if a *prima facie* case is proved, the court will call upon the accused to enter upon his or her defence.

If the accused elects to give evidence on the stand, he or she will be the first witness for the defence. His or her evidence-in-chief will first be given, followed by cross-examination by the prosecutor and, if necessary, he or she will be re-examined. Even if the accused elects to remain silent, he or she can still call witnesses to testify for the defence. Each of these witnesses will first be examined-in-chief by the accused or his or her counsel, followed by cross-examination by the prosecutor and, if necessary, re-examination by the accused or his or her counsel. The defence closes its case when all the defence witnesses have testified. Thereafter, if the prosecution intends to call rebuttal evidence, an application will be made at this stage.

Both parties will then make their closing submissions with the defence presenting first followed by the prosecution. The prosecution has the right of reply on the whole case after the accused or his or her counsel has summed up the whole case. The court will then give its verdict.

Trials in a Magistrate's Court, District Court and the High Court are conducted in similar fashion. There is, however, an important distinction between trials in the High Court and trials in the Magistrate's and District Courts. Preliminary inquiries have to be conducted for all criminal cases sought to be tried before the High Court but not for cases sought to be tried in a Magistrate's or District Court. A preliminary inquiry is essentially a committal proceeding, and is a procedural safeguard to ensure that no one is made to stand trial in the High Court unless a *prima facie* case for the offence is established.

In certain situations, a Magistrate's Court or District Court hearing a criminal case may come to the opinion that the matter is one that ought properly to be tried before the High Court, or, the public prosecutor may make an application¹²⁶ to transfer the case to the High Court. The High Court may also order that a case shall be transferred from a Magistrate's Court or District Court and tried before the High Court.¹²⁷

¹²⁵ Section 140(1) Evidence Act.

¹²⁶ Section 186(1) CPC.

¹²⁷ Section 185(1) CPC.

5. Post Trial

On conclusion of the trial, the court will deliver its verdict. If an accused person is found guilty, he or she will be convicted and sentenced accordingly. If he is found not guilty, he or she will be given an acquittal and released immediately.

The relevant orders will also be issued by the court for documents and exhibits tendered during the trial to be disposed of or returned to the rightful owners.¹²⁸ Where there are disputes or competing claims over these exhibits or documents, a disposal inquiry will be convened.

6. Appeal

If either party is dissatisfied with the trial court's decision, they may file an appeal. There are generally four types of appeals: prosecution's appeal against acquittal, prosecution's appeal against sentence, an accused person's appeal against conviction and an accused person's appeal against sentence.

An appeal against a decision in a case originating in a Magistrate's Court or a District Court will be heard by the High Court. There is no further right of appeal to the Court of Appeal against the decision of the High Court.

The Court of Appeal hears criminal appeals against any decision made by the High Court in the exercise of its original criminal jurisdiction.¹²⁹

Where an accused person has pleaded guilty and been convicted, there shall be no appeal except as to the extent or legality of the sentence.¹³⁰

7. Criminal Revision

Where a trial court's decision is subsequently found to be palpably wrong such that an injustice was occasioned, e.g. when the trial court imposed a sentence which was wrong in law, a criminal revision may be filed at the High Court.¹³¹

C. The Civil Penalty Process

For securities fraud cases like insider trading and market misconduct under the SFA which can either be dealt with by way of criminal prosecution or the imposing of a civil penalty, the CAD and MAS have guidelines and protocols in place to determine at a very early stage of investigation whether a particular case should proceed on the 'criminal track' or 'civil track'. Factors like the severity of the offence(s), the extent of market impact, the need for effective deterrence and the evidential strength of the case¹³² would all be relevant considerations.

Once a case is placed on the 'civil track', the investigation will be conducted by investigators from the MAS. Upon completion of investigations, the MAS will decide on the course of action to adopt against the offender. This could include offering compensation or issuing a letter of warning to the offender, where the offence is relatively minor or technical in nature, resulting in minimal loss or damage. MAS may also enter into a settlement with the offender to pay a civil penalty with or without any admission of liability.

If the MAS decide to bring an action in court on the civil track, the case will be forwarded to the Attorney-General's Chambers with their recommendations with a view to obtaining the requisite consent from the public prosecutor. Upon the public prosecutor's consent, MAS will then proceed with the court action via the normal civil process. A full civil trial may ensue following which the court will make an order for a civil penalty against the offender if the court is satisfied on a balance of probabilities that he or she has contravened the relevant provisions. Alternatively, the offender may consent to the order being made against

¹²⁸ Section 386 CPC.

¹²⁹ Section 29A2 Supreme Court of Judicature Act (Cap) (SCJA).

¹³⁰ Section 244 CPC and Section 44(2) SCJA.

¹³¹ Section 268 CPC.

¹³² For criminal prosecutions, the burden of proof for the prosecution is the higher standard of beyond reasonable doubt whereas in a civil penalty action, the burden of proof is the civil standard of balance of probabilities.

him or her (without going through a trial) on such terms as may be agreed between the MAS and the offender.

V. RECOVERING PROCEEDS OF CORPORATE CRIME

The traditional process of prosecuting a criminal and having him or her convicted and sentenced accordingly is often insufficient to deter most commercial and financial crimes, which often reap highly lucrative returns. A person minded to commit such crimes has little hesitation in taking the risk of being caught, convicted and incarcerated as it would be worthwhile if he or she is able to enjoy the benefits after his or her release from prison.

As such, robust action is needed to remove a criminal's financial incentive to commit financial or economic crime. This can be achieved through determined efforts to identify, seize, and confiscate proceeds of crime and/or return stolen property to the victims.

The process of asset recovery may even uncover more predicate offences than initially reported, from the funds tracing and concealed income analysis of the suspect(s).

The legislative framework for the confiscation of benefits of crime in Singapore is found in the CDSA.

A. Confiscation Orders

A confiscation order is an order by the court, upon the conviction of an accused person of a drug trafficking or serious offence, to confiscate the benefits derived by him or her from these offences.¹³³ The order is made on the application of the public prosecutor.

The amount to be recovered under the order will be determined by the court based on guidelines provided under the CDSA.¹³⁴ Any property or interest disproportionate to the accused person's known sources of income shall be deemed benefits derived from criminal conduct.¹³⁵

The order has the same effect as a fine imposed on the accused person. An accused person is liable to imprisonment in default of payment for a term not exceeding two to ten years (depending on the amounts involved) if he or she fails to pay the amount ordered. The term of imprisonment will commence only after the accused has served the imprisonment for the predicate offence.¹³⁶

If an accused person absconds before he or she is convicted for the predicate offence, the court can still issue a confiscation order if there is evidence which if unrebutted would warrant a conviction against the accused for the predicate offence.¹³⁷ If an accused person is deceased, proceedings will continue against his or her personal representatives or beneficiaries of his or her estate and the order will be made against the estate of the accused person.¹³⁸

B. Restraint and Charging Orders

Where there is reasonable cause to believe that benefits of criminal conduct have been derived before an accused person is convicted, the High Court may, on the application of the public prosecutor, make a restraint order to prohibit any person from dealing with any realizable property,¹³⁹ or an order imposing a charge ('charging order') on realizable property for securing payment to the Government pursuant to a confiscation order.¹⁴⁰ A charging order can, however, only be made with respect to interests in immovable property in Singapore, local securities (including units in any unit trust), foreign securities registered in Singapore, or interests under any trust.¹⁴¹

¹³³ Sections 5(1) CDSA.

¹³⁴ Sections 10, 11 and 12 CDSA.

¹³⁵ Section 8 CDSA.

¹³⁶ Section 14 CDSA.

¹³⁷ Sections 26 and 27 CDSA .

¹³⁸ Section 28 CDSA.

¹³⁹ Sections 15 and 16 CDSA.

¹⁴⁰ Sections 15 and 17 CDSA.

¹⁴¹ Section 17(4) and 17(5) CDSA.

C. Financial Investigation

Investigations to identify and seize benefits of criminal conduct are handled by CAD's Proceeds of Crime Unit. Investigators from the unit are empowered under the CDSA to:

- i) apply to the court to issue an order to produce materials (production orders); and¹⁴²
- ii) apply to the court for a search warrant in relation to specified premises.¹⁴³

Where the production order sought is against a financial institution,¹⁴⁴ the application will have to be made in the High Court, by the Attorney-General.¹⁴⁵ All financial institutions are required to retain all financial transaction documents for a minimum retention period of six years.¹⁴⁶ Failure to do so will render the financial institution liable to be fined an amount not exceeding S\$10,000.

A person who fails to comply with a production order may be fined an amount not exceeding \$10,000 or imprisoned for a term not exceeding two years, or both. Failure to comply with a production order includes giving false or misleading materials or failing to give the correct information to the investigator.

Any person who hinders or obstructs an investigator in the execution of a search warrant is also liable to the same punishment.

VI. INTERNATIONAL CO-OPERATION

Singapore recognizes that in order to effectively combat and deter corporate and economic crime in the present age of globalization, it is both necessary and vital to engage in and contribute pro-actively to regional and global efforts to control such crimes. In this respect, Singapore is committed towards strengthening and enhancing cross border enforcement and regulatory co-operation as well as facilitating information exchange and technical co-operation.

A. Extradition and Mutual Legal Assistance

Singapore has an Extradition Act (Cap 103) that allows for the extradition of fugitives who are in Singapore to a state that requests for their extradition to face trial for offences committed in that state or *vice versa*. We have also enacted a Mutual Assistance in Criminal Matters Act (Cap 190A) (MACMA) which came into effect in April 2000. The MACMA enables Singapore to provide and obtain international assistance in criminal matters between Singapore and places outside Singapore. Such assistance includes the taking of evidence and production of things, effecting service of judicial documents, arranging for travel of persons to a requesting place to assist in a criminal matter, identifying or tracing proceeds of crime, the recovery, forfeiture or confiscation of property derived by crime and the identification and location of witnesses and suspects.¹⁴⁷

In accordance with international norms, these laws that provide for extradition and mutual legal assistance in criminal matters are premised on reciprocity, which is achieved where states enter into a treaty to extradite offenders or to provide mutual legal assistance in criminal matters to each other. Singapore has signed extradition treaties with Hong Kong SAR and Indonesia. As a member of the British Commonwealth of nations, however, Singapore is a party to the many Commonwealth "Schemes" on rendition of fugitives and mutual legal assistance in criminal matters. These "Schemes" are not treaties but rather arrangements agreed upon between the Law Ministers of Commonwealth countries to enact similar laws in their respective jurisdictions to provide for these matters. We also have similar arrangements with countries who have entered into extradition treaties with the United Kingdom when Singapore was still a British Colony (e.g. Germany).

Recently, Singapore has also signed the Treaty on Mutual Legal Assistance in Criminal Matters among

¹⁴² Section 30 CDSA.

¹⁴³ Section 34 CDSA.

¹⁴⁴ Section 2 CDSA includes a bank, merchant bank, finance company, capital market services licence holder under SFA, financial adviser under FAA, and insurance company.

¹⁴⁵ Section 31 CDSA.

¹⁴⁶ Section 37 CDSA. "Financial transaction document" and "minimum retention period" are defined in Section 36 CDSA.

¹⁴⁷ Sections 21, 22, 26, 29, 33, 37, and 38 MACMA.

Like-minded States.¹⁴⁸ This Treaty was signed in Kuala Lumpur on 29 November 2004, initially by eight member states of ASEAN. The remaining two member states became signatories on 17 January 2006. The Treaty has so far been ratified by Singapore, Malaysia, Vietnam, Brunei and Laos, and has come into force as between these five countries. With the Treaty, the countries of ASEAN have put in place a legal system to enhance their respective investigation and prevention processes against transnational crimes.

In addition to the Treaty, there are other initiatives to further strengthen ASEAN's legal infrastructure to fight transnational crime. In the 6th ASEAN Law Ministers Meeting held in Hanoi in September 2005, in-principle approval was given to commence work on an ASEAN Model Extradition Treaty to guide member states intending to enter into extradition arrangements with one another.

B. Membership in International Anti-Money Laundering and Counter-Terrorism Financing Organizations

Singapore is also a member of several international anti-money laundering and counter financing of terrorism (AML/CFT) organizations. Membership in these organizations underscores Singapore's commitment to the fight against money laundering and terrorism financing.

1. Financial Action Task Force (FATF)

The FATF (based in Paris) was set up in 1989 to examine the problem and trends of money laundering activities. Singapore has been a member of the FATF since September 1991. FATF has issued a set of 40 Recommendations, currently used internationally to measure the effectiveness of a country's anti-money laundering regime. Shortly after the terrorist attacks of 11 September 2001, the FATF expanded its mission to include the development and promotion of policies to combat terrorist financing. To this end, in October 2001, the FATF further issued its Eight Special Recommendations (SR) i.e. SR I to SR VIII on terrorism financing aimed at denying terrorists and their supporters, access to the international financial system. In October 2004, the FATF issued a new SR i.e. SR IX which focuses on the use of cash couriers in terrorism financing activities. As a member of FATF, Singapore must comply with both sets of recommendations.

2. Asia Pacific Group on Money Laundering (APG)

Singapore is also a founding member of the Asia/Pacific Group on Money Laundering (APG) and strongly supports its objectives and activities. The APG was formed in 1997 to prevent and detect money laundering in the region. Singapore hosted the inaugural region-focused plenary meeting of the FATF in June 2005 and it was the first time the meeting featured a joint session between FATF and the APG. The hosting of the plenary meeting by Singapore offers an opportunity for the APG to showcase the contributions of APG member countries in the global fight against money-laundering and terrorist financing.

3. Egmont Group Of FIUs

The Egmont Group of FIUs was established in June 1995 to provide an avenue for the timely sharing of information and provision of assistance between different jurisdictions. An FIU is defined as a central, national agency responsible for receiving (and as permitted, requesting), analysing and disseminating to the competent authorities disclosures of financial information concerning suspected proceeds of crime, or required by national legislation or regulation, in order to counter money laundering.

CAD's STRO was admitted into the Egmont Group in June 2002. As Singapore's FIU, STRO represents Singapore at international forums and regional bodies in global anti-money laundering and counter terrorism financing efforts and maintains close working relationships with FIUs in other countries through the Egmont Group of FIUs.

Under the CDSA, STRO is also authorized to share information with its foreign counterparts on the condition that there is an arrangement with the foreign agency for the sharing of information on the basis of reciprocity and confidentiality.¹⁴⁹

¹⁴⁸ See www.aseansec.org

¹⁴⁹ Section 41 CDSA. Any information shared is for intelligence or investigation purposes only and cannot be used as evidence in court. The arrangement can be in the form of a Memorandum of Understanding (MOU), and for this purpose, STRO has signed MOUs with ten foreign countries/jurisdictions and is actively involved in negotiations with a number of other countries.

VII. PREVENTION OF CORPORATE CRIMES

Corporate and economic crime carries with it drastic consequences and impact which frequently cannot be adequately remedied. In many instances, victims are unable to recover their losses even if the culprits have been apprehended and dealt with under the law. Companies and corporations have also been brought irrecoverably to their knees as a result of fraud committed by their directors and employees. Prevention is thus a key pillar for any strategy to combat corporate and economic crime effectively.

Singapore's focus in this aspect has been on:

- i) the regulation and supervision of our financial and business sector; and
- ii) promoting good governance and corporate accountability.

A. Regulation and Supervision

The MAS carries out its function as chief supervisor and regulator of the financial sector in Singapore through measures like licensing or registration of business entities. Persons who wish to engage in regulated activities have to comply with rules and regulations prescribed by MAS, which frequently conducts audits and inspections to ensure compliance by the licensees. MAS is also empowered to administer enforcement measures like the issuance of administrative warnings and reprimands or imposing composition fines for breaches of the respective regulations.

Under the SFA, any person who wishes to carry on a business in the regulated activities of dealing in securities, trading in futures contracts, leveraged foreign exchange trading, fund management, advising on corporate finance, securities financing and/or providing custodian services for securities must apply for a capital markets services licence from MAS before commencing business. Licences are required as well for individual representatives of holders of a capital markets services licence. Similar licensing/registration requirements exist for banks, business trusts, finance companies, insurance companies/agents/brokers/intermediaries, financial advisers and money-changing or remittance businesses.

Licences will only be granted upon applicants meeting stringent financial and other requirements like having officers, employees and substantial shareholders who are fit and proper persons (for example, persons who are sufficiently qualified or experienced, and who have not been previously convicted of an offence(s) involving fraud and dishonesty).

Any company or person who engages in these regulated activities without the requisite licence commits an offence and is liable to be punished with fines ranging from S\$20,000 to S\$250,000 or imprisonment not exceeding three years.

The greatest challenge for MAS remains the need to maintain an often delicate balance between effective regulation and supervision to promote a safe, sound, fair, efficient and transparent financial and business sector on the one hand, and creating a business friendly environment for businesses to progress, innovate and develop. In this respect, MAS adopts a risk-focused supervisory framework which affords stronger and stable institutions more latitude for innovation and creativity, while maintaining stricter control on weaker entities. A key objective of the MAS is the promotion of a disclosure based regulatory regime by establishing a framework that facilitates timely, accurate and adequate disclosure by institutions. An example would be MAS's pro-active approach in providing advice and guidance to institutions on measures to adopt or modifications to existing operations to ensure compliance with regulations.

B. Corporate Governance

Singapore has long recognized that in our development into a regional and global financial hub, the integrity of our government and institutions has been a major factor in our ability to draw investments and talent. We have managed to maintain a competitive edge in the midst of intense competition brought about by globalization and an increasingly borderless capital market by our uncompromising fidelity to integrity and accountability.

Singapore has built up an international reputation for good corporate governance over the years. We have been ranked as having the best corporate governance in Asia in several surveys, including Corporate

Governance Watch 2005 published by the Asian Corporate Governance Association. In 2006, the Political and Economic Risk Consultancy (PERC) reported that out of the 14 countries surveyed, Singapore ranked second behind the USA for our quality of corporate governance. The World Economic Forum's Global Competitiveness Report for 2005-2006 ranked corporate ethics in Singapore firms to be among the top five of the 117 economies assessed in the study. In the face of these accolades and affirmation, however, Singapore acknowledges that there is still considerable improvement to be made. It is therefore crucial for Singapore to continue to promote and enhance our corporate governance standard.

The corporate governance framework in Singapore can be found in our Companies Act and Code of Corporate Governance.

1. Companies Act

The Companies Act prescribes specific eligibility criteria for persons intending to be directors of companies. Hence in Singapore, directors who breach their fiduciary duties are exposed to both civil and criminal liability.

A director is required under the Companies Act to "act honestly and use reasonable diligence" in the discharge of his or her duties.¹⁵⁰ This means that a director must act in what he or she honestly considers to be the interest of the company.¹⁵¹ He or she must not place him or herself in a position of conflict between the company's and his or her personal interests¹⁵² and he or she must not employ the powers and assets he or she is entrusted with for any improper purposes. He or she must also exercise a reasonable degree of care and diligence which will not bring any foreseeable risk of harm to the company.¹⁵³ A director must declare the nature of his or her interest if he or she is in any way interested in a transaction with the company.¹⁵⁴ Directors in breach of these requirements are liable to fine of a maximum of S\$5,000 or imprisonment for a period not exceeding one year.

Directors are also required to disclose their shareholdings, debentures or participatory interests, or any rights, options or contracts in relation to the shares of the company or related corporation, or any changes in these interests to both ACRA and the Stock Exchange. The penalty for a breach of this requirement carries a maximum fine of S\$15,000 or imprisonment up to three years.¹⁵⁵

Directors are also required to furnish, at the company's annual general meeting, true and fair financial statements which comply with accounting standards. A failure to do so renders each director liable to a maximum fine of S\$50,000. If the failure was committed fraudulently, the punishment will be an enhanced maximum fine of S\$100,000 and imprisonment for up to three years.¹⁵⁶

A director who knowingly disseminates any statement of the company's capital which is misleading is liable to be fined up to S\$50,000 or imprisonment for up to two years.¹⁵⁷

Companies in Singapore are prohibited from giving loans to their directors or directors of related companies (including their spouses or children), or to companies for which these directors are interested in 20% or more of their equity share, or to provide guarantee or security for such loans save in certain excepted circumstances. Any director who authorizes the making of such a loan is liable to a maximum fine of S\$20,000 or imprisonment for up to two years.¹⁵⁸

2. Code on Corporate Governance

The Code of Corporate Governance was introduced in 2001 by our Ministry of Finance. It was subsequently reviewed and enhanced and the new Code of Corporate Governance 2005 was issued based on recommendations

¹⁵⁰ Section 157 Companies Act.

¹⁵¹ *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1994] 2 SLR 282.

¹⁵² *Boardman & Phipps* [1967] 2 AC 46.

¹⁵³ *National Companies and Securities Commission v Hurley* (1995) 13 ACLC 1635 at 164.

¹⁵⁴ Section 156 Companies Act.

¹⁵⁵ Sections 165 & 166 Companies Act.

¹⁵⁶ Sections 201 & 204 Companies Act.

¹⁵⁷ Section 401 Companies Act.

¹⁵⁸ Sections 162 & 163 Companies Act.

by the Council on Corporate Disclosure and Governance (CCDG). Singapore launched the CCDG on 16 August 2002. The task of the CCDG includes prescribing accounting standards in Singapore, reviewing and enhancing the existing corporate disclosure framework based on international best practices, as well as to promote good corporate governance in Singapore. The Chairman and members of the CCDG are appointed by the Minister for Finance. The CCDG's composition includes representatives from businesses, professional bodies, academic institutions and government. The CCDG's functions were taken over by the MAS and Singapore Exchange Limited (SGX) with effect from September 2007.

While it is not mandatory for companies to comply with the Code of Corporate Governance 2005, listed companies are required to disclose their corporate governance practices and give explanations for deviations from the Code in their annual reports. The MAS and Singapore Exchange Limited (SGX) has recently embarked on a comprehensive review of the state of corporate governance practices of listed companies based on key areas in the Code, with a view to determining practical measures to enhance corporate governance amongst listed companies. Some of these measures include collaborating with the Singapore Institute of Directors (SID) to explore the enhancement of efforts in director training and professional development in Singapore, as well as providing practical guidelines for audit committees on how they can better perform the critical role they play in the performance and governance of listed companies.

C. Co-operation with the Private Sector

To fight corporate and economic crime, partnership with the corporate and financial community is essential. One of the best defences against such crimes is for market players and stakeholders to be aware of and be sensitized to the risk of corporate and economic crime. This is especially crucial given the complexities involved in such crimes. There is also much to be gained by leveraging on industry expertise and resources to complement the government's efforts.

1. The Stock Exchange of Singapore

The stock market in Singapore is run by the Singapore Exchange Limited (SGX). It maintains both the Main Board as well as SESDAQ. Currently, there are more than 700 companies listed with SGX. The SGX is the frontline regulator of the stock market and plays an important role in promoting a fair, orderly and transparent marketplace. It works closely with MAS in developing and enforcing rules and regulations for issuers and market participants.

(i) Enforcement

SGX is empowered to investigate¹⁵⁹ alleged misconduct by members (stockbroking companies), their directors, employees and trading representatives. Investigations may be initiated based on a referral from the surveillance department (or any other department), a complaint from external bodies, or on the SGX's own initiative.

Where the investigation reveals a possible breach of SGX rules or bye-laws, disciplinary action may be taken against the offender. This may result in a reprimand, fine, suspension or expulsion. If there is a direct contravention of the law, the matter would be referred to the relevant authorities like the CAD or MAS for further action.

(ii) Market Surveillance

SGX conducts surveillance of trading activities of the securities and derivatives markets to detect unusual trading activities and prohibited trading practices or conduct, including insider trading and market manipulation. Two types of surveillance are carried out by the SGX—securities surveillance and derivatives surveillance.

For securities surveillance, a real-time market surveillance system which automatically alerts any irregular market behaviour such as unusual price and volume movements is employed. Each alert is then analysed by a surveillance analyst who assesses whether the particular market activity can be explained by public information such as company specific news, industry trends or economic factors. Where no explanation is apparent, the listed company may be required to indicate whether it knew why there might be unusual trading in its shares. It may also be required by the SGX to disclose material information to the public where

¹⁵⁹ Chapter 14 of the SGX Rules.

such information might reasonably be expected to significantly affect the trading volume and price of the securities.¹⁶⁰

In derivatives surveillance, SGX officers are stationed on the trading floor during intense trading activities, i.e. during the opening and closing of key designated contracts. At other times, surveillance cameras are used to observe floor activities. Pit observers and other floor officials ensure that prices are accurately reported and disseminated. Each trading pit also has its own committee that deals with price infractions and trade disputes. All floor trading activities are under constant video-camera surveillance and are tape-recorded.

SGX also carries out important supervisory functions like supervision of listed companies and admission of members and risk management for the clearing of securities and derivatives trade.

SGX reviews the admission and registration of members, their directors, and trading representatives to ensure that they meet the admission or registration criteria before admitting or registering them. It conducts annual inspections of their members to ensure that the trading rules and regulations are complied with and adequate internal controls are in place. SGX also monitors the financial health of its members, who are required to file financial reports with SGX periodically. In addition, members are required to submit their annual audited accounts to SGX.

2. Professional Organizations

Professional organizations play an important role in maintaining high standards of professionalism, competence and integrity amongst their members.

(i) *The Law Society of Singapore*

The Law Society of Singapore was established in 1967 pursuant to the enactment of the Legal Profession Act (Chapter 161). All practicing lawyers in Singapore are members of the Society. The Law Society's key role is the maintenance and enhancement of the standards of legal practice and the conduct and learning of the legal profession in Singapore. It performs this role by promulgating and enforcing rules on professional etiquette, discipline, ethics and the keeping of proper accounts by lawyers. The Law Society is managed by a Council of the Society which has powers to investigate any misconduct by lawyers and take disciplinary actions accordingly.

The Supreme Court of Singapore plays a major role in the maintenance of discipline within the legal profession as well. It has powers to impose sanctions like striking a lawyer off the Rolls, suspension of practice or censure, depending on the severity of the misconduct.

(ii) *Institute of Certified Public Accountants of Singapore (ICPAS)*

The ICPAS is the national organization of the accountancy profession in Singapore. It was established in June 1963 as the Singapore Society of Accountants (SSA) under the Singapore Society of Accountants Ordinance, then reconstituted and renamed the ICPAS on 11 February 1989, under the Accountants Act 1987. As of 1 April 2004, ICPAS is reconstituted as a society under the Societies Act.

The role of the ICPAS is to maintain a high standard of technical competence and integrity amongst members of the accountancy profession in Singapore. Besides administering the Institute's membership, the ICPAS caters for the training and professional development of its members through regular courses conducted by its training arm, the Singapore Accountancy Academy (SAA).

(iii) *Singapore Institute of Directors (SID)*

The SID is a national association of company directors for the local business community whose objective is to promote "high standards of corporate governance through education and training and upholding of the highest standard of professional and ethical conduct of directors". The SID works closely with its network of members and professionals such as accountants and lawyers, and the authorities to identify ways to uphold and enhance standards of corporate governance and directorship in Singapore. The SID has a code of conduct

¹⁶⁰ A list of events that require disclosure is contained in the SGX's listing manual, and include amongst other events mergers and acquisitions.

for directors in Singapore as minimum standards of compliance in discharging their fiduciary duties and is responsible for the discipline of its members.

3. Suspicious Transaction Reporting

The process of laundering criminal proceeds requires extensive use of financial instruments and facilities. The implication is that members of the financial community, such as banks, insurance companies, fund managers, and even moneychangers and remittance companies, will be targeted by money launderers as possible conduits for laundering money. Other bona fide businesses and companies may be misled to assist in the receipt and payment of tainted monies or property related to terrorism. Professionals such as lawyers and accountants may also unwittingly assist in the criminals' money laundering schemes. Given Singapore's status as a financial hub, money launderers will want to abuse our financial infrastructure to launder their criminal proceeds.

It is therefore vital for Singapore to build and maintain a robust Suspicious Transaction Reporting framework. Under the CDSA, reporting of a suspicious transaction is mandatory. Section 39(1) of the CDSA states:

“Where a person knows or has reasonable grounds to suspect that any property, in whole or in part, directly or indirectly represents the proceeds of drug trafficking or criminal conduct, or was used or intended to be used in connection with drug trafficking or criminal conduct ... and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge, suspicion or the information or other matter ... to an authorised officer as soon as is reasonably practicable after it comes to his attention.”

A failure to report a suspicious transaction is an offence and is punishable with a fine not exceeding S\$10,000.

A similar disclosure obligation is imposed under the TSOFA. Section 8 of the TSOFA provides that every person in Singapore and every citizen of Singapore outside Singapore who has possession, custody or control of any property belonging to a terrorist, or information about any transaction in respect of such property, must immediately inform the Commissioner of Police. Regulation 9 of the MAS (Anti-Terrorism Measures) Regulations 2002 also imposes such an obligation on every financial institution in Singapore.

Persons making STRs are given protection under Section 39(6) of the CDSA which states that such disclosure to the authorized officer “shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct” and shall not be liable for any loss arising out of the disclosure. Under the TSOFA a person or institution which has made such a disclosure in good faith is protected from any criminal or civil proceedings.¹⁶¹ Hence, a banker is relieved of his or her banking secrecy obligations¹⁶² when making such disclosures.

A person who has made an STR is also deemed not to have been in possession of the information disclosed for the purposes of Sections 43, 44, 46 and 47 of the CDSA.¹⁶³ This means he or she would not be liable for any money laundering offence(s) connected to the information disclosed.

Information between lawyers and their clients which are subjected to legal privilege are, however, exempted from the reporting obligations under Section 39(1) of the CDSA.¹⁶⁴ It is also a defence if a person has a reasonable excuse for not disclosing the information.¹⁶⁵

Suspicious Transactions Reports (STRs) have been very useful in combating crime. CAD has successfully detected a wide variety of criminal activity, such as cheating, criminal breach of trust, forgery and securities

¹⁶¹ Section 8(5) TSOFA.

¹⁶² Section 47 Banking Act (Chapter 19). Bankers also have a duty of confidentiality to their clients under the common law (*Tournier v National Provincial & Union Bank of England* [1924] 1 KB 461).

¹⁶³ Section 40 CDSA.

¹⁶⁴ Section 39(6) CDSA.

¹⁶⁵ Section 39(4) CDSA.

trading malpractices, as well as money laundering and terrorism financing. STR information has directly or indirectly led to the seizure of S\$110 million of proceeds of crime since 2000.

CAD's STRO is also constantly seeking to forge strong partnerships with the private sector. STRO serves as the point of contact between the law enforcers and the financial and business community. It also conducts various outreach programmes like feedback and dialogue sessions to various industry sectors to raise anti-money laundering and counter financing of terrorism (AML/CFT) awareness, as well as to encourage the increase in both the quantity and quality of STRs. STRO also provide guidelines on the manner of reporting STRs (such as the design of reporting forms and procedures for reporting STRs), advice on ML/TF typologies, as well as the types of suspicious transactions that the respective industries should look out for.

VIII. CONCLUSION

The control of corporate and economic crime involves a delicate balancing act, straddling between the objectives of robust and adequate regulation and enforcement on one hand, and the fostering of business enterprise and innovation. In the effort to raise corporate governance standards and promoting good regulatory practices, we must be mindful that this will not result in unnecessarily onerous and costly burden on businesses.

While Singapore has achieved significant success in our efforts at controlling and combating corporate and economic crime thus far, we recognize that we cannot rest on our laurels. We will need to constantly fine tune our system by learning from the experiences of other jurisdictions and ensuring that we keep abreast of the latest developments. We must remain nimble and agile in our ability to deal with emerging trends in corporate and economic crime as we continue to safeguard and preserve our reputation and integrity as a trusted international financial and business hub with tenacity and resolve.

PARTICIPANTS' PAPERS

THE BRAZILIAN LEGAL FRAMEWORK FOR INVESTIGATION, PROSECUTION AND TRIAL OF CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES

*Mabel Alves De Faria Correa**

I. INTRODUCTION

This study intends to analyse Brazilian law enforcement concerning the criminal liability of corporate entities and also to briefly explain how the Brazilian legal system applies administrative and civil liability upon those entities and point out the serious consequences that flow from that liability.

In this context, it also intends to show that, although, generally, there is no legal foresight of the criminal liability of corporate entities, administrative and civil liability have been sufficient punishment for those illegal activities.

On the other hand, concerning the natural person, Brazilian law foresees a reasonable criminal punishment for those who commit crime through corporate entities.

Thus, this paper shall emphasize, with examples, a current Brazilian problem: money laundering. It is carried out by economic criminal organizations which penetrate state entities and corrupt public agents to work for them, to the advantage of the criminals and to the detriment of society.

In view of that, the paper shall demonstrate that Brazilian legislation on money laundering needs to be improved because in many situations it is not possible to punish the offender.

The paper will also mention the main legal tools for the investigation, prosecution, trial and punishment of those illegal activities committed by natural persons through corporate entities, mainly the money laundering legislation.

II. MATERIAL AND PROCEDURAL WARRANTIES ESTABLISHED IN THE 1988 CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL

The 1988 Constitution of the Federative Republic of Brazil, containing 250 articles with many paragraphs and items, more than 50 amendments and six revision amendments, regulating the country's entire legal system, establishes material and procedural warranties for all citizens living in the country and guarantees the free exercise of Executive Power, Legislative Power, Judicial Power, Public Prosecution and the Constitutional Powers of the units of the Federation, mentioned below:

- (i) There is no crime without a previous law to define it, nor a punishment without a previous legal sanction (Article 5, XXXIX);
- (ii) Penal law shall not be retroactive, except to benefit the defendant (Article 5, XL);
- (iii) The practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-available and not subject to grace or amnesty, and the principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable (Article 5, XLIII);
- (iv) No punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and be executed against them, up to the limit of the value of the assets transferred

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- (Article 5, XLV);
- (v) The law shall regulate the individualization of punishment and shall adopt, among others deprivation or restriction of freedom, loss of assets, fine, alternative rendering of social service, suspension or deprivation of rights (Article 5, XLVI). Furthermore, there shall be no punishment of death, save in the case of declared war, under the terms of Article 84, XIX, of life imprisonment, of hard labor, of banishment and which is cruel (Article 5, XLVII) Extradition of a foreigner on the basis of political or ideological crime shall not be granted (Article 5, LII);
 - (vi) No one shall be deprived of freedom or of his assets without the due process of law (Article 5, LIV);
 - (vii) No one shall be arrested unless in *flagrante delicto* or by written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law (Article 5, LXI);
 - (viii) No one should be considered guilty before the issuing of a final and unappealable penal sentence (Article 5, LVII);
 - (ix) The arrest of any person as well as the place where he is being held shall be immediately informed to the competent judge and to the family of the person arrested or to the person indicated by him (Article 5, LXII). The rights of a arrested be informed of his rights (among which the right to remain silent, and he shall be ensured of assistance by his family and a lawyer) and be entitled to identification of those responsible for his arrest or for his police questioning are also guaranteed (Article 5, LXIII and LXIV);
 - (x) The home is the inviolable refuge of the individual, and no one may enter therein without the consent of the dweller, except in the events of *flagrante delicto* or disaster, or to give help, or, during the day, by court order (Article 5, XI);
 - (xi) The secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts (Article 5, XII);
 - (xii) The privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured (Article 5, X).

Regarding evidence obtaining procedures, the Federal Constitution establishes that evidence obtained through illicit means is unacceptable in the process (Article 5, LVI), as well as that the secrecy of correspondence, financial data and telephone communications are inviolable, except if a written judicial order is obtained in order to break this secrecy, in the manner prescribed by an ordinary law, for purposes of criminal investigation or criminal procedure finding acts (Article 5, XII).

It is important to make clear that Article 5, paragraph 2 of the Constitution also states that the rights and guarantees expressed in the Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties to which the Federative Republic of Brazil is a party, of course, after the adoption of its statements by the Brazilian National Congress.

III. THE CONSTITUTIONAL BASIS OF THE CRIMINAL LIABILITY OF THE LEGAL PERSON

The Federal Constitution of 1988, when it talks about the financial and economic order, establishes many principles, such as, among others, national sovereignty, private property, free competition, and the rights of the consumer and of the environment.

In the Brazilian legal system, the criminal liability of the legal person, although controversial to some jurists on grounds of jurisprudence, has been determined in the 1988 Constitution of the Federative Republic, which adopted it only in the defence of the environment and consumers (Art. 225, § 3 and Art. 173, § 5, respectively), through statutory laws such as the Law No. 9,605 of 2 December 1998 (Environmental Crimes Law).

The criminal liability of the legal person was constitutionally foresighted, in a comprehensive way, in the chapter "Of the general principles of economic activity", as follows:

- (i) Except in the cases foresighted in this Constitution, the direct exploration of the economic activity by the State is allowed only when necessary to national security legal requirements or to a relevant collective interest, as defined in law;

- (ii) The law, without damaging the individual liability of the legal person director, will establish its liability, submitting it to the punishment compatible to its nature, in all acts practiced against financial and economic order and against popular economy;
- (iii) All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the government and the community shall have the duty to defend and preserve it for present and future generations.
- (iv) Conduct and activities considered hurtful to the environment will submit the offenders, legal or natural persons, to administrative and criminal sanctions, independent of the obligation of repairing the caused damage, applying in relation to the environmental crimes, as disposed in Article 202, paragraph 5.

A. Criminal Liability of Corporations for Crimes Against the Environment

Conduct that provokes the use of penal sanctions may come from public and legal entities, as well as natural persons. The national penal systems must foresee, when possible, on the level of the Constitution or basic laws, some penal sanctions and other punishments adaptable to public and legal entities.

Whenever a private legal entity or a public entity participates in an activity that implicates major risk of damage to the environment, it must be requested of the responsible authorities to manage and administrate these entities to exercise the responsibility of supervision as a way to prevent the occurrence of damage, and they must be criminally charged in case of serious damage in consequence of lack of appropriate fulfillment of this responsibility.

Despite the usual demand for criminal liability for criminal offences, the prosecution of private legal entities for crimes against the environment may be possible, even if responsibility for the crime can not be directly imputed to a human element of this entity.

Whenever a legal entity is responsible for serious damage to the environment, it might be possible to prosecute this entity for crimes against the environment, even if the damage resulted from an individual act or omission or of cumulative acts and/or omissions committed over time.

The imposition of criminal sanctions against private legal entities does not discharge the guilt of the human elements of these entities involved in the perpetration of crimes against the environment.

IV. FEDERAL LAW No. 9,605 OF 12 FEBRUARY 1998 AND THE CRIMINAL LIABILITY OF THE LEGAL PERSON

Concerning environmental issues, the ordinary legislator, in view of the constitutional device, disposed that the legal person will be charged administratively, civilly and criminally as disposed in this Law, in cases where the transgression is committed by decision of its legal or contractual representative or by its administrative body, in the interest or benefit of their entity. The liability of the legal person does not exclude the liability of the natural person, plaintiff, joint-plaintiff or accessory in the same fact.

From the analysis of the device, we might notice the necessity of two requirements:

- (i) The decision about the practice of the illegal act has to be made by the legal or the contractual representative or its administrative body, considering the institutional action, obeying the organization rule;
- (ii) The infraction is committed in the interest or benefit of the legal person.

According to this law, the liability of the legal person does not exclude the liability of the natural person.

This law also adopted the disregarding of the corporate veil theory. According to this theory, whenever the corporate entity of the company represents an obstacle to the indemnification of the damages caused to the environment, it may have its legal person unconsidered, in order to reach the personal assets of the company partners.

V. THE LIABILITY OF THE LEGAL PERSON IN CIVIL MATTERS

The Brazilian Civil Code – Federal Law No. 10,406 of 1 January 2002 – talks about the obligation of indemnification for damages caused to others, independent of guilt, in the cases foresighted in law, when the causality connection between the occurred fact and the suffered injury is observed, or, what has been termed objective liability. This liability bases itself in the theory of risk due to the illegal activity, but with potential to cause damage, and limits itself to the indemnification of the damages, and the indemnity is established according to its extension, in conformity with Article 944 of the Civil Code.

In the environmental issue, the civil liability of the legal person bases itself in the theory of activity risk. Therefore, independent of guilt, the activity exercise, with or without profit purposes, even if it is not dangerous, but which may damage the environment, is based on the repair of damages, as long as the causality connection is proved.

VI. THE LIABILITY OF THE LEGAL PERSON IN ADMINISTRATIVE MATTERS

This sphere deals with the liability of the legal person facing the Government, in particular, the necessity of charging the offender for the social cost to the State of the protection of the environment.

Law No. 9,605 of 12 February 1998 shows the environmental administrative liability for environmental law infractions committed by every action or omission that violates the legal rules of use, enjoyment, promotion, protection and recuperation of the environment.

The environmental authority which has knowledge of environmental infraction is obliged to promote its immediate investigation, through proper administrative procedure, under the penalty of joint-responsibility. The right to due process of law is assured, observing the resolutions in this Law.

This way, independent of the existence of damage, conduct contrary to the legal devices is characterized as environmental infraction.

Therefore, the possibility of verifying civil liability subsists, even when there is no administrative liability: for example, when the environmental damage is caused by a lawful conduct. The same happens with administrative liability when there is no civil liability: for example, when there is legal infraction, without the occurrence of effective damage.

VII. CRIMES AGAINST THE POPULAR ECONOMY OR CRIMES AGAINST CONSUMER RELATIONS

In these crimes, there is only the criminal liability of the natural person; however, the legal person can also be reached by some sanctions foreseen in law, which actually have an administrative nature.

They are accessory sanctions, such as the closing or interdiction, definitively or temporarily, of the commercial establishment where the infraction occurred. This sanction does not have a criminal nature, but it is commonly used by the public health inspection, which is authorized to interdict hotels or restaurants, in the administrative area. There is also the sanction applied to entertainment establishments that do not respect legal age restrictions or restrictions on what is sold and consumed by adolescents on their premises. In these cases, a criminal judge can close a commercial establishment for 15 days, which is not about a penalty applied to the legal person, but is imposed as an accessory penalty on the natural person of its legal representative, the defendant in the procedure and the only one to suffer the sanction of a criminal nature.

It is disposed in Article 6 of Law No. 1,521/51 – Crimes against the Popular Economy – that depending on the gravity of the facts, its repercussions and effects, the judge, in the sentence, will decree the appropriate scale of the deprivation of rights.

In fact, it is noticed that, in the Brazilian legal system, in economic crimes there is no criminal liability of the legal person, but occasional effects, through the imposing of accessory penalties or civil nature sanctions, such as the dissolution of the corporation (Article 1218, VII, Civil Procedure Code).

Although the 1988 Federal Constitution, as earlier expressed, has established that federal law, without damaging the individual liability of the legal person director, must also establish the liability of the legal person itself, in the acts practiced against the financial and economic order and against the popular economy in fact, this liability limits itself to the administrative and civil sphere.

A. Economical Criminal Organization

Economic criminal organizations are notable for the specific practice of economic crimes, such as fraud, especially against public administration, through *inter alia*, auctions, competitions, etc., money laundering, and cartel formation, where corruption is always observed.

One of the most important characteristics of the economic criminal organization is its money laundering through public agents who earn easy money working on behalf of those criminal organizations.

Doing so, those agents breach the security of society, compromising the image of the public service. Beyond that, they hurt the interest of society in a serious way, hindering the access of the citizenry to public services such as national health, public education and public safety.

Economic criminal organizations in Brazil act mainly through off-shore entities, extraterritorial bank centres which are not subject to the control of the administrative authorities of the country. Like tax havens, they share the idea of representing a legitimate purpose and some kind of commercial justification, although they are involved directly in the main cases of money laundering uncovered in the last years, all of them with the participation of criminal organizations in the execution of illegal strategies.

The securities market, which comprises a set of institutions and instruments enabling the transfer of resources between takers (companies) and investors (savers), and aiming for the compatibility of their objectives, in particular the stock exchanges, whose operations are conducted through Securities Unregistered Bonds Market Makers, also supports the realization of money laundering operations.

Another sector which is vulnerable to money laundering operations is insurance, either in relation to the shareholders of insurance companies, or in relation to the insured, subscribers, participants and middlemen.

The shareholders of an insurance company can determine the realization of some investments that can enable money laundering operations; the insured may present false or fraudulent damages, aiming at money laundering as well; the subscribers and participants may transfer the property of capitation bonds, or promote the registration of inexistent or deceased people as nominees in Private Social Security accounts, among other things.

The absence of control over the real estate market makes it very fragile. In this sector, criminals perform various operations of purchase and sale of real estate for prices far higher than the real market price and also create false real estate speculations.

The lottery agencies, bingo houses, casinos and relatives by affinity are entities that also propitiate conditions conducive to money laundering by criminal organizations, which utilize techniques of manipulated awarding and realization of huge bets in some type of games.

In 1999, the investigation of the actions of the Italian Mafia in Brazil has begun; those actions involve the exploration of bingo games, mainly with the distribution of "*caça-niqueis*" (slot machines).

In the case of the lottery, the real winner is convinced to sell his or her winning ticket for a higher price than the announced prize. The buyer of the ticket presents him or herself to receive the money and may declare the amount to the State. Between the years of 1996 and 2000, it was verified that 200 people have won the Federal Lottery games 9095 times.

In 2005, the Civil Police of the Federal District of Brazil began an investigation that was concluded in July 2007 with the help of the Prosecutor of the State where they were looking for the identification of a criminal organization that embezzled money of the Federal District Government. That organization was composed of many fiscal auditors, staff of the Regional Bank of Brasília as well as its president, and politicians. One of

them, with the conclusion of the investigation, had to renounce his mandate as a senator of the Republic otherwise he would have been dismissed.

Many private entities received benefits, like tax exemptions, and also received money for work they had claimed to have done for the government, when in fact, they did not. The money they used to receive was shared with those corrupt public agents. For example, that criminal organization often carried out its activities by hiring private entities to provide a service to the government and that private company gave this contact to an NGO which did not fulfill the contract and then all of them, without doing the work, received and shared the public money.

One of the acts of embezzlement committed in such a way was uncovered during the case known as the *Aquarela Investigation*.¹

1. Brazilian Antitrust Law

In the crime of cartel formation in Brazil, foreseen in Article 4 of Federal Law No. 8,137 of 12 December 1990 (Crimes against the Tax Order), companies or groups of companies control prices, sales and production. These corporations reduce production of a product altogether if the offer is low, in order to generate greater demand and enable price elevation. Enterprises, directly or through employees, generally executives, get together to direct and to establish sales to prearranged clients and consequently set whatever prices they want.

The ability to form cartels is linked directly not only to market control, but also to the power of market control, understood as the reunion of conditions to completely exclude bidders. The cartel enterprises establish some kind of “*carteira*” (list) of clients, dividing them among themselves. In this way, each enterprise participating in the cartel sells to its own clients, and if any one of their clients intends to buy from another enterprise and asks for a quotation, this other enterpriser, knowing that the client is part of the cartel, will present a fictitious price, higher than that charged by the cartel, obliging the client to buy always from the same company. This way, the enterprises participating in the cartel may charge the prices they want to, as the client will never find a cheaper price.

However, to act in this way, the participating companies of the cartel, together, must have market share, “*domínio de mercado*”, and aim to make deals, covenants, adjusts and alliances, looking for the artificial settlement of the prices and quantities sold or produced, for regional control of the market by companies or groups of companies and for the control of the distribution network, in preference to the competition.

It might be observed, this way, that those companies are, as a matter of fact, economic criminal organizations, as there is preparation, organization, meetings, reunions, negotiations, client divisions, all directed to obtain profit. It is confirmed that one of the companies usually controls the cartel, and normally it is one that has better and greater structure, more clients and, therefore, a greater parcel of the market.

In one of the cases taken to court by the Public Prosecution Service of the State of Sao Paulo, a state of the Brazilian federation, the corporations that participated in the cartel used to receive price quotations orders and send them to their own syndicate, which concentrated all the orders and promoted weekly meetings in order to distribute new clients, according to the prearranged percentage, among the companies. In order to do that, the companies of the cartel developed software that receives, online, the copies of the price quotations orders of the clients. The material was analysed and separated for the correct division. Companies that decided not to participate were punished and could be excluded from the cartel. There were also foreseen punishments for companies that took a client from another company.

Parallel to the criminal investigation, there is the administrative procedure, which is the responsibility of the Secretary of Economic Law of the Justice Ministry, who has specific duties under Law No. 8,884/94, modified by Law No. 10,149/2000.

There is also Federal Law No. 6,024 of 13 January 1974, which establishes that private and non-federal

¹ Briefly explained in the Appendix.

public financial institutions, as well as credit co-operatives, are subject, according to this law, to intervention or extra-judicial liquidation, in both cases carried out and decreed by the "Banco Central do Brasil". The intervention will be adopted when the following abnormalities are found, concerning the business of the institution:

- (i) - the entity submits to a loss, resulting from bad management, which exposes its creditors to a risk;
- (ii) - repeated infractions of the terms of banking legislation are found and are not adjusted after the determinations of the "Banco Central do Brasil", using its power of supervision.

The police play an essential role in the fulfillment of provisional remedies, such as search and seizure, telephonic and general communications interceptions and field investigation. The Federal and State Revenue are also important.

There is foresight in Federal Law No. 8,137 of 12 December 1990 of the legal tool known as the Leniency Programme, whereby there is a reduction of one or two-thirds of the sentence in cases of spontaneous and effective collaboration of the suspect with the authorities. The foreseen punishment is of two to five years of confinement, or a fine.

In Law No. 8,884/94 there is provision for the use of the Leniency Programme. The Programme disposes that in crimes against the economic order, established in Law No. 8,137/90, the leniency agreement causes the suspension of the statute of limitation course and forbids the indictment from the Public Prosecutor's Office, which would initiate judicial proceedings.

As the law establishes that the power to make a lenient agreement belongs to the Secretary of Economic Law (SEL), the agreement in the administrative sphere forbids the Public Prosecution Service to prosecute the defendant for the cartel crime, but does not have any effects in relation to other crimes occasionally practiced by cartel integrals, such as, for example, the criminal association established in the Article 288 of the Federal Law No. 2,848 of 7 December 1940 – Criminal Code, according to which, when three or more people form an association in order to commit crimes, they are submitted to a punishment by imprisonment, for one to three years.

B. Money Laundering

Law No. 9,613/98 introduced to the Brazilian legal system the characterization of crimes called "money laundering".

In simple terms, the crime of money laundering or laundering of assets is a parasitic crime, because there will only be the laundering of assets when it is demonstrated by evidence that the objects of the crime of laundering (assets) come from another crime. That predicate crime will be necessarily a crime that brings economic advantages. That economic advantage is represented by the assets that will be laundered.

On the actual state of the Brazilian legislation, only the crimes listed in Article 1 of Law No. 9,613/98 are considered antecedents for the means of money laundering. With it, only those crimes can generate a product or illicit gain which could be an object of capital recycling.

The existence of a roll of predicate offences limits the actions of prevention and repression of the crime of money laundering, because the law does not mention some crimes such as the exploration of games of chance, robbery and extortion with kidnapping, as well as other crimes that involve money.

The Law of Money Laundering, besides listing the antecedent crimes and characterizing the crime of money laundering, regulates the judicial proceedings and sentencing of the crimes referred to in this law (Art 2 to 6) and establishes a supplementary norm of international co-operation (Art 8).

This Law set up the Brazilian system of prevention and fight against the crime of money laundering, whereas the Financial Activities Control Council (COAF) (Arts 14 to 17) was created as a National Intelligence Unit of prevention; it established rules of compliance for certain kinds of compulsory subjects, members of relevant economic groups (Arts 9 to 11); it set up the administrative liability of the compulsory subjects (Art.12); and it created the list of the National Clients of the National Financial System (Art. 10-A).

Brazilian law follows the model suggested by the inter-governmental Financial Action Task Force (FATF), created in 1989 under the auspices of the Organization for Economic Co-operation and Development (OECD) and of the G8. In the following year, the FATF issued its 40 recommendations which serve as a standard for the prevention and fight against money laundering. The Financial Action Task Force unites the financial intelligence units of various countries, called co-operators, inclusive of the COAF, and has regional representatives, such as the example of FATF-Jud which represents the countries of South America.

The Financial Intelligence Units, identified internationally as FIUs, are responsible for the gathering, analysis and spread of financial information regarding suspect transactions. The FIUs are central organs in the prevention of money laundering, because they receive communications of financial transactions given by the subjects under obligation, in other words, by the legal and the natural persons who work in certain economic areas, such as financial institutions, share brokers, companies which provide goods of high value, and factoring companies, among others.

The work of COAF is extremely important for the prevention of money laundering. But the information given by the Council is also indispensable for criminal prosecution, helping the identification of all the authors and co-authors of the crime and the localization of laundered assets, allowing the condemnation of the guilt and the confiscation of profit, instruments and proceeds of crime.

There are other organs, besides the COAF, in the Brazilian anti-money laundering system, which receive communications of suspect transactions. This is the case of the Central Bank of Brazil (BACEN) which receives news from the financial institutions under its inspection and passes it to the COAF. The same pattern is followed by other national organs, such as the Private Insurance Superintendence (SUSEP) and the Brazilian Securities Commission (CVM), which receives communications of the legal persons who act in the insurance area and brokers.

The databases of the Brazilian FIU are also fed information from foreign branches. This is a two-way system. The information put together by COAF is given to the State Public Prosecution Service, to the Federal Government of the State and to the Federal Police, to make it possible to block current financial transactions and/or allow the beginning of a criminal investigation.

The function of the prevention system does not depend only on the financial intelligence unit and the others involved. The development of the private sector is essential, especially of the economic entities which are obliged by Law No. 9,613/98 to report the suspicious activities of their clients. The compulsory subjects must keep a register of property with a complete identification of their customers and must scrutinize transactions.

Those duties reflect the prevention policy known as KYC (know your customer). The compulsory subjects must know their customers. Only with knowledge of the structure, composition and means and profession of the legal person, and the activities and income of the natural persons, can the compulsory subjects check if transactions are of a suspicious nature or not. However, what is observed is that the compulsory subjects work as watchtowers (or gatekeepers), which are responsible for the stiffness of the financial system and of the economy.

Checking the relevance of the collaboration of the compulsory subject, the importance of demanding the observation by those legal persons of their duties regarding anti-money laundering can be understood. The obliged companies must count on areas or departments responsible for the complete identification of customers, and maintain for five years a register of customers' financial transactions and the frequency of those transactions. They must also present of information of suspicious legal business, while maintaining the confidentiality of the customer.

There are various circumstances that allow the identification of a suspect. They are known as red flags. The Circular Letter BACEN No. 2,826/01 lists many suspicious activities that financial institutions must follow, register and communicate to the Central Bank of Brazil. They are as follows: substantial alterations in bank account routine; large-scale activities by wire transfer; transactions of no economic sense; simultaneous use of money accounts; transactions incompatible with the kind of business or profession of

the client; relationships with tax havens; refusing to inform the bank of the origin of the income or their identity; inconsistency of documents.

Violation of the obligation to report suspicious transactions is not characterized as a crime. However, compulsory subjects that do not fulfill Law No. 9,613/98 will be charged administratively by the COAF or the correspondent regulatory organ and can be brought into a criminal action as co-author or participants of money laundering, based on Article 13 of the Penal Code, which treats of the causal relevance of the omission. It is good to say that the lack of compliance can favour the practice of crime, because, "It can be considered cause, the action or omission without which the result would not have happened" (Article 13 of the Penal Code, *in verbis*).

In the federal sphere, the criminal prosecution of money laundering is concentrated in the specialized jurisdiction, already installed in various States of the Federation, by the resolution of the Federal Justice Council, issued in 2003.

The investigation of those crimes, when under federal competence, rests on the Public Prosecution Service and the Federal Police, nearly always with the operational support or information of the Federal Tax Bureau and the Central Bank of Brazil and of other organs of the Union, for example, COAF.

The institution of prosecution will be conducted with respect for due process and the right to legal defence, until the final decision of the judicial power.

To effectively fight money laundering, the criminal punishment of the author perpetrator is not enough. It is essential to make efforts to freeze and confiscate the assets that come from criminal activities and to recover them and return them to the State.

However, differently from what we see in the criminal field, at the civil level, the theme of assets recovery has another character. The General Proctorship of the National Treasure (PGEN), the General Union of Advocacy (AGU), and the correspondent organs of the State-members structure have the legitimacy to act before a court on fiscal execution and in other civil actions, as well as in administrative violation actions.

The first attribution of the Department of Asset Recovery and International Legal Cooperation (DRCI) is acting as a central authority of the system of international co-operation in almost all the penal bilateral and multilateral treaties settled by Brazil, except the agreement between Brazil and Portugal, in which the central authority is the International Center of Juridical Cooperation (CCJI).

The second attribution of the DRCI is of collaborating with the criminal prosecution and with the other entities in charge of the recovery of assets, for the effectiveness of the measures of recovery of the State Assets and its beings, as well as to the confiscation of values obtained in criminal activities, especially in money laundering.

The DRCI is also responsible for the co-ordination of the National Strategy of Fighting against Corruption and Money Laundering (ENCCLA).

Step by step, Brazil has made efforts to develop its mechanisms of prevention and to fight against money laundering. In 2004, for the first time, Goiás, a State of Brazil, has fulfilled the task of joining all the organs involved with money laundering and of presenting annual goals for the responsible organs, such as the Central Bank of Brazil, the Federal Revenue, the Justice Ministry, CVM, COAF, etc.

Many instruments of investigation and prosecution existing today and used by the police, public prosecutors and judiciary were created or definitely improved thanks to ENCCLA. That happened with the national list of customers of the National Financial System (CCS), created by the amendment of the Law No. 9,613/98, which introduced Art 10-A. Those records, administrated by the Central Bank of Brazil, were only implemented in 2004, because of the negotiation of the first meeting of the National Strategy of the Fight against Money Laundering. It was ENCCLA which initiated the establishment of the Freezing of Values

System, in real time, in the Central Bank of Brazil (BACEN-Jud).

It is also good to mention here other isolated initiatives by public organ members of the system of prevention of money laundering. The Central Bank of Brazil (BACEN) established rules making obligatory the declaration of Brazilian capital abroad, if it amounts to more than a hundred thousand US dollars, according to the National Monetary Council.

Despite all of that, there are yet many difficulties in the effective prevention of money laundering. First of all, it is worth remembering that the police, public prosecution service and judiciary must respect the laws and the individual guarantees foreseen in the Constitution during the prosecution of all and any offences, obeying the Constitution as well as the Pact of San José da Costa Rica (Intra- American Convention on Human Rights).

The main worry when dealing with money laundering is not permitting the use in the criminal procedure of illegally obtained proofs and to respect the legal defence and the adversarial system, guarantees that, if disregarded, would make worthless all the efforts to punish the guilt. Whereas the criminal perpetrators do not have limits for their actions, the State must respect the constitutional guarantees.

Another issue concerns the legislative entanglement regarding the subject and some deficits of our specific legislation which is not yet apt to permit a quick and complete prosecution, in order to protect important legal properties of society. This affirmation is particularly true with regard to Law No. 9,613/98, with its roll of basic offences, and Law No. 9,095/95, which deals with criminal organizations, without properly defining them, without specifying the predicate offence and without establishing appropriate proceedings for the utilization of particular important techniques of investigation, such as controlled delivery and wiretaps.

As if the above is not enough, authorities and State employees do not yet have the proper capacity to deal with this kind of economic criminality, which is complex and demands constant formation and constitution of multidisciplinary teams in order to effectively combat it.

To all of this, factors that propitiate money laundering or make it difficult to repress, are added the problems of obtaining information of the suspects along with the public officers and concessionaires of public services, and the lack of concrete control of our frontiers, which concerns the movement of people and goods and the existence of a parallel and clandestine system of movement of assets, using currency exchange shops, black market dollar dealers known as “*doleiros*”, factoring companies and other alternative systems of financial remittance. There is also the possibility for criminals to take advantage of tax havens in various locations around the world.

It is extremely hard to recuperate assets in cases of domestic money laundering. When the crime is transnational, the difficulties are increased.

The first step of the authorities of criminal prosecution is to identify the author of the offence and also the objects of the money laundering. The next step is the tracing of the valuables, through following the documentary trace left by the launderer, during the diverse operations of dissimulation.

If the tracing is successful, judicial freezing of the assets and their derivatives, wherever they are, is sought. In Brazil, freezing has been used by the BACEN-Jud for this purpose, upon the authorization of the competent judge.

However, when it is necessary to freeze assets existing outside of the country, it is necessary to request international assistance, either by the judiciary or by the public prosecution service, through the central authority.

Upon receiving the assistance request, the Brazilian central authority (the DRCI or the CCJI) will be in charge of sending the request to its counterpart in the requested State. If all the demands of the co-operation request based in an international treaty have been observed, the freezing will be carried out by the foreign State. In case there is no specific criminal treaty, it will be possible that there may be co-operation based on

the promise of reciprocity or on a multilateral convention that has appropriate and subsidiary rules on the subject.

Freezing the assets in Brazil, it will be necessary to protect them and wait for the final decision of the criminal action, in order to definitely declare in favour of the Union, or order restitution to the defendant declared not guilty. To avoid the deterioration of the apprehended assets, which may be vehicles, aircraft, real estate or livestock, the judge, by official letter or upon request from the public prosecution service, may determine the anticipated alienation of these assets, to preserve their value, as there is no loss to the innocent defendant, or, on the contrary hypothesis, it is preserved for the State in case of conviction.

If the assets are frozen abroad, depending on the legislation of the foreign country, the assets may be immediately delivered to the requested State or may be maintained under care until the final decision of the Brazilian authorities.

In all cases, the repatriation of the frozen assets is not a simple procedure, because it demands a specific requirement of an international assistance treaty in the internal law of the requested State or a reciprocity promise. Asset sharing, when the requested State reserves for itself part of the frozen assets to indemnify itself for the rendered co-operation, may also occur.

Anyway, what remains of the assets, after the indemnification of the victims and after the international share, must be destined to the Union, in the criminal actions of federal and state jurisdiction. The draft of the new money laundering law foresees the return of the recovered assets to the state treasury, when the criminal action is judged by a State judge.

C. Crimes Against the Public Administration

Federal Law No. 2,848 of December 1940, Criminal Code, contains a title with various descriptions of crimes that hurt the functional activity of the State, which in their majority, characterize acts of administrative violation, especially the acts of illegal enrichment expressed in Articles 312 (embezzlement); 315 (irregular use of public incomes and budgets); 317 (passive corruption) and 318 (facilitation of contraband or smuggling). These are called functional crimes, as they are practiced by State agents, who can be punished criminally and administratively.

The crime of embezzlement of public money is the first in the chapter of the crimes practiced by public employees against public administration in general and can be defined as the appropriation, deviation or subtraction of public or private movables by a public official taking advantage of his or her position.

In the crime of irregular use of public incomes and budgets there is non-conformity with the destination given to these budgets as disposed in budgetary law or other law, usually using bribery to privilege a specific economic group.

In the crime of passive corruption, the public employee attempts against the impersonal performance of the public activity, executing acts in exchange for retribution, to favour the obtaining of personal advantages to the detriment of the public interest.

In the crime of facilitation of contraband and smuggling, the officers in charge of customs collaborate in the import of prohibited merchandise or import without the proper payment of taxes.

Brazil signed, in December, 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD).

Federal Law No. 10,467 of June 2002 implemented this Convention in the national legal system and included as an antecedent crime of money laundering the crime perpetrated by individuals against foreign public administration.

**VIII. CRIMINAL PROCEDURES IN BRAZIL:
POLICE INQUIRY (INVESTIGATION) AND CRIMINAL PROCEDURE (PROSECUTION)**

Under Article 144 of the Federal Constitution, public safety is a duty of the State and the right and responsibility of all citizens, being exercised to preserve public order and the safety of persons and property, by means of the Federal Police, Federal Highway Police, Federal Railway Police, Civil Police and the Military Police & Fire Brigades.

The duties of the Federal Police include prevention of interstate and international drug trafficking and smuggling, protection of the national borders, and the execution of orders demanded by federal judges, such as execution of arrest warrants for those indicted on federal offences, for instance.

In Brazil, the state polices are divided into two nearly autonomous entities, the civil and military polices (Art. 144, IV and V), both of them under the control of the state governor, even though the military police forces are also auxiliary and reserve units of the National Army.

The civil polices are responsible for the investigation of the vast majority of criminal activities, excluding from their jurisdiction only military crimes (Art. 144, Paragraph 4). They also work as the states' judicial polices and are authorized by law to perform investigations which are run by precincts. Each precinct is run by a precinct chief called by the Constitution *Delegado de Polícia (Police Chief)*, who by law must hold a law degree.

A. The Police Inquiry

Once a crime has occurred, in order to gather evidence, a police inquest, conducted by the Civil Police Chief, may be initiated by written orders of the appropriate police authority *ex officio*; at the request of the victim or offended party; or by orders of the judge or the public prosecutor's office. Inquiries must be opened whenever the police are informed of a possible violation of the penal code (Criminal Procedure Code, Articles 4 and 5).

The time limit for the civil police to conclude an investigation is, ordinarily, of 30 days if no one is being held in detention (Criminal Procedure Code, Art. 10), and 10 days if a suspect has been arrested. If these time limits are exceeded, the judge (usually at the request of the police chief or the prosecutor) can extend the investigation for the same period. In practice, the time limit established by law for the end of the inquiry is almost never met, especially in complex investigations.

The police inquiry may only be closed by a judge's order, ordinarily at the request of the prosecutor or by suggestion of the police chief who writes the final report on the result of the investigation (Criminal Procedure Code, Art. 17 and 18).

However, Brazilian legislation includes Federal Law No. 9,099 of 26 September 1995, which has as one of its main objectives the simplification of the procedure in cases involving minor offensive potential crimes, in which the maximum penalties are not more than two years.

In these cases, the police inquiry is simplified, because there is no demanding of substantial proofs of the offence. The purpose is not the criminal sanction, but the repair of the damage with the immediate application of the punishment which, in this case, does not involve deprivation of freedom.

B. The Criminal Procedure

Once investigations are finished, the police chief must write a detailed written final report to the judge. This final report is passed on to the prosecutor to determine whether a suspect should be accused. An accusation may be issued whenever the prosecutor determines there is enough *prima facie* evidence to so justify (Criminal Procedure Code, Art. 41 and 43). If the prosecutor or the judge believes that further police investigation is necessary, they may order it to be undertaken by the police.

Concerning the procedural aspects of criminal responsibility of the corporate entity, the public prosecution service will interpose the criminal action, which must obey Law No. 9,605 of 12 February 1998, specifying natural and legal persons, but, if the ascertainment of these natural persons is not possible, this

circumstance must be clarified in the accusation document under the penalty of being considered inept.

Concerning the interrogation, the corporate entity will be interrogated through the natural person of its legal representative. However, it is perfectly suitable for an employee, when he has more knowledge of the facts, or when the legal representative is also a defendant at in same case, to take part in interrogations.

In the case of minor offensive potential crimes, these are regulated by the Environmental Crimes Law in its Articles 27 and 28 as well as by Law No. 9,099 of 26 September 1995, as mentioned before. Article 27 stands the possibility of penal settlement (consistent with the immediate application of the deprivation of rights when there is an earlier repair of the damage. According to Article 28, the punishment extinction may also occur, as long as there is an environmental damage repair testifying report.

The repair of the damage also enables the suspension of the procedure. The sentence for minor offensive potential crimes obeys the rule disposed in Article 76 of Law No. 9,099/95. The sanction imposed in a criminal action has no civil effects.

As for the penalties applicable to the corporate entity, the legislator disposed in Article 21 the possibility of alternative, cumulative and isolated imputing of the fine; the deprivation of rights; the partial suspension of activities; the temporary interdiction of the establishment, work or activity; or the prohibition of contracting with the Government; as well as obtaining from it either subsidies, donations or grants.

The fine must be fixed from 1 to 360 times the minimum wage, and can be increased three times if, due to the economic situation of the offender, it shows no efficacy (Art. 6, III, Law No. 9,065/98). The proceeds of the fine will be awarded to the National Penitentiary Fund after the costs of civil repair have been deducted.

The deprivation of rights can be applied through partial suspension of activities, when the company is not diligently abiding by the rules of temporary interdiction of the establishment, work or activity (when working without the proper licences) and, finally, the prohibition of contracting with the Government (for that the maximum term is ten years) .

In relation to other terms of deprivation of rights, the duration of the sanction will correspond to that which would be applied in case of punishment by confinement.

IX. LEGAL TOOLS USED FOR INQUIRY, PROCESS AND JUDGMENT OF ECONOMIC CRIMES

A. Leniency Programme

The situation of revelation of crime data involves the defendant and the state attorney, but the final decision is made by the judge, who will verify if the piece of information collaborates effectively with the justice administration.

The Leniency Programme is foreseen in the following Federal Laws, among others:

Federal Law No. 9,034 of 3 May 1995 (Organized Crime)
Federal Law No. 9,613 of 3 March 1998 (Money Laundering)
Federal Law No. 9,807 of 13 July 1999 (Witness and Victims Protection)
Federal Law No. 8,137 of 27 December 1990 (Crimes against the Tributary Order)
Federal Law No. 7,492 of 16 June 1986 (Crimes against the Financial System)
Federal Law No. 9,269 of 24 June 1996 (introduced the crime of extortion by means of kidnapping to the Criminal Code)

However, the focus will be on those laws that concern the theme of this essay.

1. Federal Law No. 9,034 of 3 May 1995

This law disposes the utilization of operational means for the prevention and repression of acts practiced by criminal organizations and must be applied in situations in which the defendant, through spontaneous collaboration, leads the authorities to the clarification of crimes of his or her own authorship, of criminal facts

for which he or she is not being investigated or prosecuted, and of other crimes that have been practiced by any criminal organization, including one in which he or she participates. The penalty will be reduced by one to two-thirds.

2. Federal Law No. 9,613 of 3 March 1998

This law addresses the crimes of money laundering or concealment of assets, rights, and valuables. The measures designed to prevent the misuse of the financial system for illicit actions, as described in this law, create the Council for Financial Activities Control (COAF). It also allows the application of the Leniency Programme in cases in which they investigate money laundering. The Law of Organized Crime has to be applied, where and when it fits, to the predicate crimes of money laundering: illicit traffic of drugs similar narcotics; terrorism and its financing; smuggling, trafficking of weapons, munitions or materials used for munitions production; kidnapping with extortion; acts against the Public Administration; and acts against the Brazilian financial system, perpetrated by criminal organizations, practiced by the private sector against a foreign public administration (active corruption in foreign commercial transactions, trading of influence in international commercial transactions – Articles 337-B and 337-C of the Federal Law No. 2,848 of 7 December 1940, Penal Code).

The Leniency Programme is applied in these cases where the accused collaborates spontaneously with the police authorities or the judge, giving an explanation that helps the investigation of the crime or the location of the assets, rights and valuables that were the object of the crime. The accused must point, for example, to names, conduct, and locales; in other words, concrete data or at least facts that indicate where to find the proof of the crime. The sentence will be reduced by one or two-thirds, served in an open system of imprisonment.

3. Federal Law No. 9,807 of 13 June 1999

This law establishes rules for the organization and maintenance of special programmes for the protection of victims and threatened witnesses. It set up the Federal Program of Assistance for Victims and Threatened Witnesses and makes use of the protection of the accused and condemned who have voluntarily granted effective collaboration to the police investigation for a criminal trial by the identification of the other criminals and in the total or partial recovery of the proceeds of the crime. The investigated suspect (accused by the police chief or accused by the attorney general), in case of conviction, will have his or her sentence reduced by one or two-thirds.

4. Federal Law No. 18,127 of 27 December 1990

This law establishes that in the case of crimes committed by gangs or by more than one person, against the tributary order (those that defraud the collection of taxes foreseen in law) and against the economic order and consumer relations (formation of cartels and other crimes committed against consumers in general) that the person who committed the offence, presenting him or herself spontaneously to the police chief or to the judge, will have his or her sentence reduced by one or two-thirds.

Concerning to the protection of the criminal collaborator, the application of especial measures of security and protection are possible, but have to be determined by a judge because there is no specification of those measures in concrete cases.

5. Federal Law No. 7,492 of 16 June 1986

This law establishes the crimes against the National Financial System.

Article 21 of this law specifies the crime of tax evasion which is characterized by imputing to itself or to a third party false identity for the realization of currencies. It is committed by offshore companies set up in tax havens, whose proprietors, apart using false names to open a bank account in Brazil, also run illegal currency business.

B. Controlled Delivery

Controlled delivery is foreseen in Federal Law No. 10,207 of 11 April 2001. It consists of delay and waiting for a better moment for police action against members of a criminal organization.

It grants police the right to wait for a more appropriate opportunity to act, where, in the right moment, according to the police chief, they can create a situation more conducive to obtaining proof of the crime. It can be done with or without the infiltration of police officers. In the latter case, judicial authorization is required. However, in Brazil, this kind of thing has not been used thus far.

C. Access for Data in the Media

Although the Federal Constitution of 1988 provides that the secrecy of postal and telegraphic communications is inviolable, it makes an exception, according to law, for criminal investigation or penal procedure instructions, where there is judicial authorization, determining the violability of the secrecy of telephonic communications.

In this way, according to Federal Law No. 9,296 of 7 July 1996, the police and/or the Government can trace the suspects. This is called wiretap. This law, foreseeing modern situations, enlarged its application in cases of information technology, and allows interception of messages via email.

According to the law, the police chief must conduct the procedures of cutting off telephone calls, reporting it to the Government.

On the other hand, illegal recording (recording not obtained by judicial order), is a crime, according to the law.

D. Acoustic Surveillance

Federal Law No. 9,034 of 3 May 1995, which talks about criminal organizations, was partially modified by Law No. 10,217 of 11 April 2001. It makes use, in any phase of the investigation, of the collection and interception of optical or acoustic electromagnetic signals, after the judicial authorization.

E. Inversion of the Burden of Proof

The inversion of proof is foreseen in the law relating to money laundering. It is a mechanism that aims to cope with the difficulty of the investigation, which elapses from the complexity of situations created by the money launderers.

It treats the provisional seizure and freezing of assets with the inversion of the burden of proof. The suspect has to prove the licit origin of the assets, which, once done, will allow the release of those assets.

F. Breach of Bank and Fiscal Secrecy

These are very important provisions, mainly when invoked against public administration and money laundering. They are very useful in the investigative phase, which is conducted by the police.

Complementary Law No. 105/2001, which talks about the secrecy of transactions of financial entities, establishes in which cases authorization of breach of banking secrecy is possible: in any phase of police inquiry or trial; under judicial authorization; in cases of terrorism; in cases of illicit traffic of narcotics or drugs; in cases of smuggling or traffic of weapons, munitions or materials used for munitions production; extortion on kidnapping; crimes against the national financial system and public administration; crimes against the tributary order and national health; and money laundering or hiding of assets, rights and valuables committed by criminal organizations. In fact, the conditions are referred to in the law establishing the offence of money laundering. Information about banking transactions of legal persons should be also undertaken by judicial order.

In the case of fiscal secrecy, if a natural person has property evidently superior to the limits of his or her origin or income, it signifies gain through illicit activities, civil or criminal.

Thus, income tax of either legal or natural persons is important material in any procedures necessary for the verification of goods and valuables.

G. Breach of Credit Card Transactions

There is no established legal foresight concerning the obligatory maintenance of secrecy in relation to transactions made through the Administration of the Credit Cards Entity, because they are not Financial Entities.

However, aiming for the preservation of the proof, the police chief must request the judge to determine, under judicial order, the data required of the Administration of the Credit Cards Entity.

H. Protection of Victims and Witnesses

Inter alia, DNA examinations, graphic techniques, comparison of materials, recognition of voices, and examination of documentary evidence, are more often used for the proving of criminal facts.

Nevertheless, testimonial proof cannot be dispensed with, being, in any situation, determinant for the investigation of the crime. What happens is, normally, the person feels uncomfortable about testifying, even at a police station or at a court of law. The situation is even worse for simple or humble people who, many times, through ignorance, may be afraid of justice, even though they are serving as witnesses.

The Penal Code determines that the crime of false testimony is punishable by one to three years of confinement. Nonetheless, if the condition of the witnesses in a common penal trial is already delicate, a situation in which they testify of the actions of people connected or supposedly connected with criminal organizations will be even more serious. It was necessary to introduce a mechanism for protection of witnesses, according to Federal Law No. 9,807 of 13 July 1999.

The lack of resources is the big obstacle to the efficient application of this Law and of the programmes foreseen in it, such as the change of residential address, and the support of the witness/victim and of their family during the months of the trial, in addition to the matter of police protection.

Article 11 of the Law mentioned above foresees a maximum duration of two years for State protection of the witness/victim, which can be extended in exceptional cases; in other words, when the reasons for the protection subsist.

This legislation also mentions the hiding of qualified data of the witness/victim from third parties, in other words, parties who are not part of the trial, including the press.

His or her identity must be preserved from the investigative phase.

Article 9 allows for the change of identity of the witness/victim, with alteration of the names of the people to be protected and also of people closely related to them.

I. Search and Seizure

Articles 240 to 250 of the Criminal Procedure Code, Federal Law No. 3,689 of 3 October 1941, establish the possibility of using search and seizure as provisional remedies to ensure the collection of crime proofs and instruments. It is usually accomplished by the police during a criminal investigation, after the judge's order, through the representation of the police chief, or without the judge's order, when it is permitted by the resident or by the person who is responsible for the locale where the measure will be executed.

X. CONCLUSION

Thus, as it was pointed out in this paper, the Brazilian framework for criminal liability of corporate entities is determined in the 1988 Constitution of the Federative Republic, but only as it relates to the environment and consumer defence.

Nevertheless, the punishment foresighted has, as a matter of fact, an administrative legal effect. However, in order to avoid economic organized crime through corporate entities, the Brazilian legal framework has developed important and modern tools which are being applied by the police and prosecutors, leading to greater success in solving crime, but not particularly in crimes of money laundering. This is because the law determines that only assets that come from a limited number of predicate crimes may make it possible to identify the money laundering crime.

Nowadays, the Brazilian institutional entities of law enforcement are promoting closer co-operation in order to apply the rule of law against natural persons who commit crime through corporate entities and some assets of such persons have been seized. In this regard, it is important to remember that, in many

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ways, these entities do not develop economic and social activity; their only interest is to launder money that results from other crimes, which greatly damages society, especially the needy.

Of course, there must be many improvements of the legal system and developments in investigation in Brazilian law enforcement. Police, public prosecutors and judges are trying their best to fight economic criminal organizations in any way they can. It is important to say that the Brazilian legislation is efficient, and it is only necessary to secure the commitment of those who are responsible for putting into practice Brazilian law enforcement.

At least, to achieve real results against the economic criminal organizations, the most important thing to do is to improve the investigation, prosecution and trial of crimes like embezzlement, corruption, and crimes against public administration, as mentioned in the *Aquarela Investigation* below.

APPENDIX

The *Aquarela Brasileira* investigation began in 2005, when financial transactions were observed by means of a corporate card of a State Bank, for the payment of large and small companies, non-governmental organizations, and other financial institutions. Thus, a police chief requested the approval of a judge for telephone interception of the suspicious companies and of their main staff members, including the president of the State Bank.

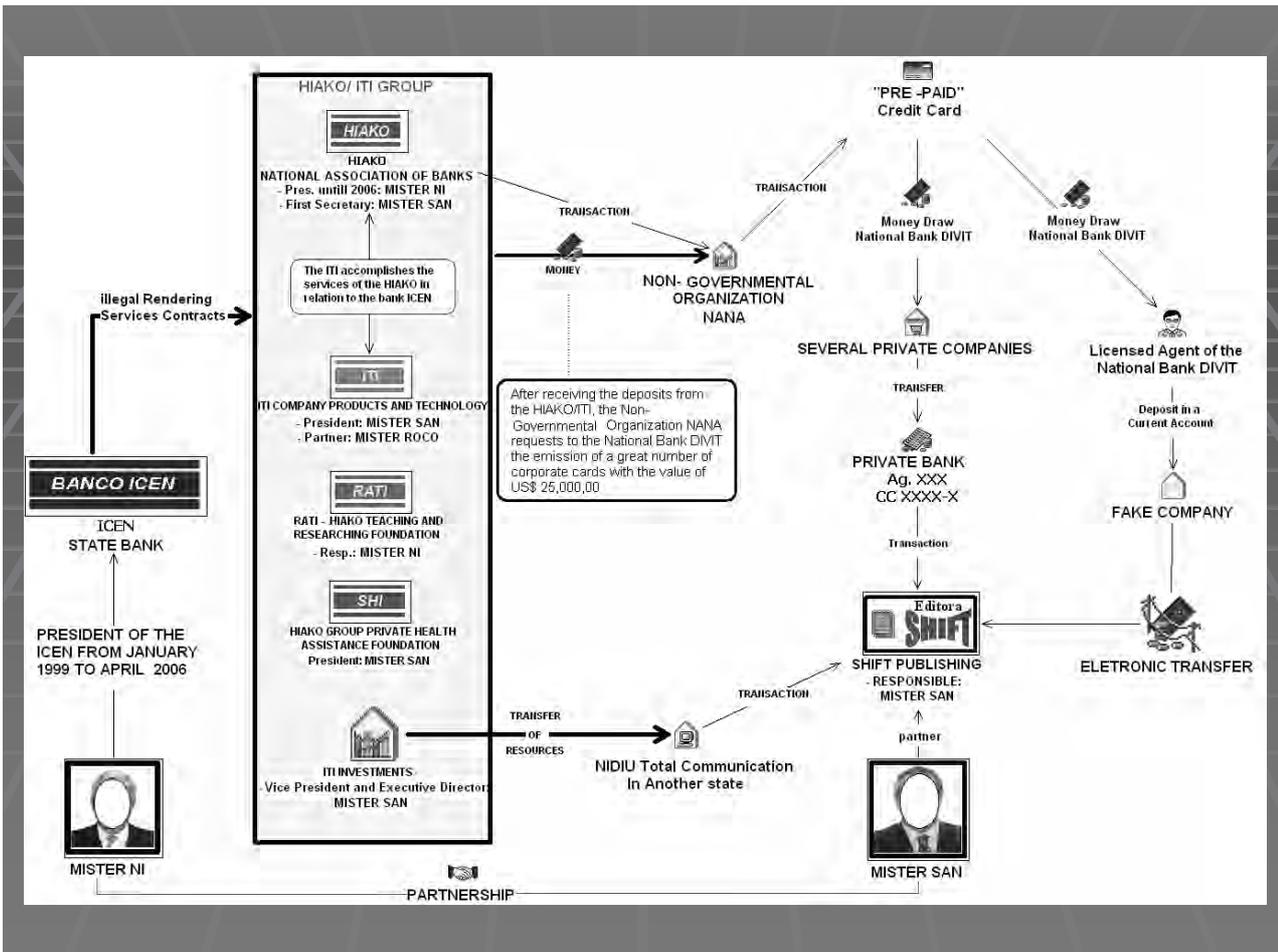
After two years of investigation, where those legal tools were applied, the police and the public prosecution service were able to identify how this criminal scheme worked. Police chiefs and prosecutors requested the judge's permission to apply legal tools such as search and seizure and cautionary lockdown. Seventeen prosecutors, 41 police chiefs and 283 police officers took part in the execution of these measures.

As a result, 20 people were arrested in Brasília and other states of Brazil. Also, 40 search and seizure warrants were executed resulting in the seizure of 130 computers.

In the State Bank, US\$ 240,000 (two hundred and forty thousand U.S dollars) was seized at the headquarters and all books named *Aquarela Brasileira* found with the suspects were arrested.

The suspects will be prosecuted for offences such as money laundering and crimes against public administration. It is assumed that the deviated money was around US\$ 30,000,000 (thirty million U.S dollars).

The foreseen punishment is around 25 years' imprisonment, a fine and freezing of the assets.



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All the real names involved in this case were changed because, in Brazil, no one shall be considered guilty before the issuing of a final penal sentence.

The criminal organization used to work in this way:

- (i) Mr. Ni was the president of that ICEN bank from January 1999 until April 2006;
- (ii) Mr. Ni used to make illegal Rendering Services Contracts through the ICEN Bank with these groups below;
- A – Hiako Group: Mr. Ni was the president of this group until 2006 and Mr. San was one of its board members;
- B – ITI Company Products and Technology. It used to work for the Hiako Group which was contracted to provide the services by the ICEN Bank. The president of the ITI Company was Mr. San.
- C – RATI: Teaching and Researching Foundation; used to render services to ICEN Bank. Mr. Ni was the chairman;
- D – SHI: Hiako Group Private Health Assistance Foundation: Mr. San was the chairman;
- E – ITI Investments: The chairman and business director was Mr. San.

Hiako Group used to trade with an NGO called NANA and used to pay for the service with a corporate debit card belonging to ICEN Bank. After receiving the money, NANA required the issuing of some corporate cards to the value of 25,000 U.S. dollars.

This amount of money was withdrawn and passed again to many private companies which deposited the money in private banks. The banks then used that money to pay Shift Publishing, which belonged to Mr. San, who was its chairman. The most interesting thing is that Shift Publishing, during its existence, published only one book, called *Aquarela Brasileira*. This publishing company also received money from ITI Investments, but not directly, because ITI transferred the money through NIDIU Total Communication in another state. The money received by SHIFT Publishing was incorporated as property of Mr. San who divided it among them.

Those companies used to withdraw the money with the corporate debit card of ICEN bank and used to make deposits at the DIVIT Bank. The bank had an employee who used to make the transaction, depositing the money into the account of fake companies who transferred the money electronically to SHIFT Publishing.

CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES IN MALAWI

*McSyd Hubert Chalunda**

I. INTRODUCTION

In criminology, corporate crime refers to crimes committed either by a corporation (i.e, a business entity having a separate legal personality from the natural persons that manage its activities), or by individuals that may be identified with a corporation or other business entity.¹ The individuals are so much in command of the corporation that their acts are treated as if they were acts of the corporation as in the case of *Lennard's Carrying Co. v Asiatic Petroleum Co Ltd*.² Corporate crime overlaps with white-collar crimes because the majority of individuals who may act as or represent the interests of the corporation are employees or professionals of a higher social class. It further overlaps with organized crime because criminals can set up corporations either for the purposes of crime or as a vehicle for laundering the proceeds of crime.³ Every country in the world has faced corporate crime of one type or the other. The countries have different ways and legislation of dealing with corporate crime and Malawi is not an exception. This paper, therefore, will examine and analyse the current situation, problems and challenges in the investigation, prosecution and trial of corporate crime in Malawi.

II. CRIMINAL LIABILITY AND CORPORATE CRIMINALIZATION IN MALAWI

A. Liability of Legal Persons

1. Criminal Liability of Corporate Entities in Malawi

In Malawi, upon incorporation, a company attains the status of a body corporate with a personality of its own distinct from that of its members and its management.⁴ As a result of this distinction, liability incurred by a company is its responsibility and not that of the shareholders. In *Naidoo v Mazi Import & Export Ltd and Tchongwe*,⁵ the plaintiff and the second defendant formed a limited company of which they became both shareholders and directors. Subsequently, the plaintiff incurred some expenses in the company's name and wanted them recovered from the two defendants. It was held that as the company was a distinct person, separate from the second defendant, the expenses could be recovered from the company and not from the second defendant as well.

In Malawi, the law recognizes that a company has dual identity as an association of persons⁶ which requires that for a company to be formed there should be an association of at least two persons and a person which is distinct from its members. In the latter case, it is recognized that it requires human agency to fulfill the mission and carry out the business of a corporate entity. Consequently, while in many cases the activities of the company will be identified with it as a person, there are instances where the law will hold its members or officers responsible for its actions as to hold otherwise would lead to absurdities.

2. Legal Framework of Criminal, Civil and Administrative Sanctions

Corporate entities in Malawi are criminally liable for some offences and are not for others. The companies will be held liable for offences committed under the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, 2006, Environmental Management Act, Capital Market Development Act and Workers

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¹ http://en.wikipedia.org/wiki/Corporate_crime

² (1915) AC 705.

³ http://en.wikipedia.org/wiki/Corporate_crime

⁴ Section 15(2) of the Companies Act, 1984.

⁵ Civil Case No. 706 of 1985.

⁶ Section 4 of the Companies Act, 1984.

Compensation Act.

The corporate entities are also liable in tort and contract separate from its directors and shareholders once they are incorporated under Section 15(2) of the Companies Act. As a result they can enjoy rights, own property, sue and be sued in their own right, and not as agents or trustees for their members. Lord Macnaughten made this point very eloquently in the classic case of *Salomon v Salomon*⁷ when he said, "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them."

Since the companies are separate legal persons under Section 15(2) of the act, they are amenable to any administrative action the state may want to take against them separate from their directors and shareholders.

III. CURRENT SITUATION OF SOME CORPORATE CRIMES IN MALAWI

A. Money Laundering

Money Laundering, Proceeds of Serious Crime and Terrorist Finance Act, 2006 provides *inter alia* for the offence of money laundering. Parliament enacted this law in 2006. It was gazetted recently and it is now operational under Malawian law.⁸ This piece of legislation criminalizes an act of money laundering under Section 35 of the act. According to the said section, an offence of money laundering is said to have been committed if a person knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of crime-

- (i) converts or transfers property knowing or having reason to believe that the property is the proceeds of crime, with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof;
- (ii) conceals or disguises the true nature, origin, location, disposition, movement or ownership of that property knowing or having reason to believe that the property is the proceeds of crime;
- (iii) acquires, possesses or uses that property, knowing or having reason to believe that it is derived, directly or indirectly, from proceeds of crime;
- (iv) participates in, associates with or conspires to commit, attempts to commit and aids, abets and facilitates the commission of any act or omission referred to in (a), (b) or (c).

In the event that a corporate entity is convicted of the same, the punishment is a mandatory fine of MK10,000,000 (Malawi Kwacha) and automatic loss of business authority. However, the law on money laundering has not been tested in courts because it is relatively new. Money laundering was on the increase in Malawi because there was no law to regulate the crime. Secondly, the offence is most of the time committed together with corruption which is a serious problem in Malawi. Despite the act being enacted last year, there are some big money laundering cases involving some companies currently being investigated in the country.

B. Terrorist Financing

The same Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, 2006 which is an omnibus piece of legislation, addressing issues of money laundering and proceeds of serious crime, also provides for the offence of terrorist financing. According to Section 36 of the Act, the offence of terrorist financing is committed when a person who, by any means whatsoever, engages in terrorist financing activities. In the event that a corporate entity is convicted of the offence, the law provides for a mandatory fine of MK15,000,000 and an automatic loss of business authority. There is no registered case so far in Malawi on terrorist financing.

C. Tax Evasion

The offences of tax evasion are provided for under the Customs and Excise Act, Cap 42:01 of the Laws of Malawi. Tax evasion is the most frequently committed offence of all economic crimes in Malawi because

⁷ (1897) AC 22.

⁸ Section 74 of the Constitution of the Republic of Malawi.

Malawi has a small economy. As a result, most of the companies would like to pay as little tax as possible in order to maximize their profits. Evading tax is seen as a way of achieving that goal.

In terms of corporate entities, the relevant provision is Section 141 of the said act. The section provides that a company will be held liable if any of its directors, managers or secretaries contravene any of the customs laws. In such a scenario, the company may be charged with tax evasion. Upon conviction, the penalty is a fine of not less than three times and not more than ten times the amount of tax which was supposed to be paid or imprisonment for three years.⁹ Tax evasion offences are most of the time settled out of court after the accused has been fined and paid the required money to the government. However, some cases end in trials. The fine is determined by the Commissioner General of the Malawi Revenue Authority which has an investigative department that investigates tax evasion.

D. Submission of Securities Reports Containing False Information, Market Manipulation and Insider Trading

The Capital Market Development Act, 1990 criminalizes the submission of securities reports containing false information,¹⁰ market manipulation,¹¹ and insider trading.¹² In the event of a conviction on any of the above offences, a person is liable to a fine of MK10,000 and to imprisonment for two years. Under this legislation, a corporate entity can be prosecuted and fined while its directors who are acting on its behalf may be imprisoned. Noting the shortfalls in the act and other ancillary acts like the Companies Act, 1984 in respect of regulating the securities market, the government has proposed an amendment bill with the aim of taking into account the shortfalls. The current act is not comprehensive and the penalties contained therein are very minimal in today's value.

E. Fraud

The law on corporate fraud is provided for in the Penal Code under Section 333. It does not target the company as a corporate body but its directors and other officers of the corporation. Upon conviction, a person is liable to imprisonment for seven years. Corporate fraud is not common in Malawi.

IV. INVESTIGATIONS

A. Specialized Investigative Authorities and Training Methods in Malawi

In Malawi there are two authorities that are mandated to investigate any corporate crime, namely the Anti-Corruption Bureau (ACB) and the Fiscal Department of the Malawi Police Force. The Anti-Corruption Bureau was created by an Act of Parliament in 1995 called the Corrupt Practices Act (CPA)¹³ to investigate all alleged or suspected corrupt practices in both the public and private sectors.¹⁴ The Act was amended in 2003 giving the ACB powers to investigate any crime that may be disclosed in the course of investigating corruption, hence the investigation of corporate crime. The Fiscal Police is a department within the Malawi Police Service which was created by the Republic of Malawi Constitution.¹⁵ The two institutions are independent of each other and have different ways of training their investigations officers. However, in some instances the two institutions conduct training of their officers together, like in the Financial Investigations and Computer Evidence Course.

In both institutions, the officers undergo a mandatory investigative skills course when they are recruited. Thereafter, they are trained on the job whereby they are attached to an experienced officer in order to have a hands on approach to the art of investigation. After six months, the officers undergo an Advanced Investigative Skills Course for four weeks. They are then paired with an experienced officer to start actual investigations. During the course of their work, some are attached to sister institutions within Southern Africa to learn how investigations are conducted in other countries, like Zambia, South Africa, Botswana and Tanzania. The training of officers is a continuous process. The officers are further trained in the United Kingdom, United States of

⁹ Section 142 of Customs and Excise Act.

¹⁰ Section 41 of Capital Market Development Act.

¹¹ Section 37 of the Capital Market Development Act.

¹² Section 37 of the Capital Market Development Act.

¹³ Section 4 of the Corrupt Practices Act.

¹⁴ Section 10(1)(b-h) of the Corrupt Practices Act.

¹⁵ Section 152 of the Constitution of the Republic of Malawi.

America, South Africa and Botswana, among other countries. The main emphasis is in specialization of the officers in specific crimes like computer forensic analysis, financial investigations, money laundering, banking fraud, undercover operations and surveillance.

B. Co-operation between Investigative Authorities in Malawi

As earlier explained, the two investigative authorities conduct their own investigations. However, there is always co-operation, co-ordination and sharing of information as far as big and complex investigations are concerned. In some instances, officers from the two institutions form a task force (team) to investigate a case. A case in point is the Investigative Team which has been formed recently among ACB, Fiscal Police Officers, Malawi Revenue Authority (MRA) and Reserve Bank of Malawi (RBM) officers. It is involved in the investigation of a money laundering case involving four shell companies. This happens frequently when need arises. There is a clear understanding between the investigative authorities because their end goal is to deal with the crime and their co-operation, co-ordination and information sharing is of vital importance, especially in huge corporate crimes.

C. Acquisition of Information on Corporate Crime

The mode of acquiring information on corporate crime at both the ACB and the Fiscal Police is the same. The information is obtained in any of the following ways:

- People going to the institutions in person to lodge or give information if they suspect that a crime has been committed by any corporate entity or directors or managers of the said entities;
- People can phone the institutions, write a letter, e-mail or fax the allegation of the crime;
- The print media often write about any corporate crime that may come to their attention. The two institutions may use the information in those articles as a basis for commencing an investigation;
- The police have confidential informants who sometimes give them information about an alleged crime. However, the ACB does not have confidential informants even though people are free to remain anonymous after giving information;
- Whistleblowers are also a source of information for the two institutions. The whistleblowers are protected by Section 51A of the Corrupt Practices Act. It is an offence to take any action of any kind to punish or victimize a person solely because he or she has been a whistleblower or informer.

D. Material and Electronic Evidence

In modern times, where there is advancement of technology, more often than not investigators encounter a scenario where they are required to identify, obtain and preserve electronic evidence. All investigators at the ACB and a good number at the Fiscal Police have been trained in basic skills of obtaining and preserving such evidence. However, computer data, recovery of deleted data and forensic analysis is left to the computer experts and not the investigators. In isolated cases, there might be outsourcing of expertise on the recovery of deleted computer data and forensic analysis. It is mainly done by United Kingdom computer experts. This, however, has huge financial implications as the services are always expensive.

E. Obtaining Statement Evidence

1. Interrogation Techniques

The investigators are well equipped during training with techniques of obtaining statements that contain relevant and sufficient information which will prove the case in court or lead to further line of inquiry during the investigation. Statements are taken during the interrogation time. Investigators are taught techniques of interrogations that will lead to the interviewee disclosing whatever the investigator wants from him or her. Interrogation is always conducted through open questioning in the presence of a lawyer.

2. Plea Bargaining

The law in Malawi does not provide for any plea bargaining between the State and the accused person. However, prosecutors treat each case depending on the available evidence. They may, for example, use one of the accused persons as a witness against the other. In such a case, the accused is charged, enters a plea of not guilty and the charges are then dropped against him or her.¹⁶ This only happens if the prosecution does not have other evidence to prove the case apart from the evidence of one of the accused persons.

¹⁶ Section 81B of the Criminal Procedure & Evidence Code.

3. Immunity of Investigators

The investigators at the ACB are immune from any action or proceedings for any act or thing done or omitted to be done in good faith in the exercise of their duties.¹⁷ The same applies to Fiscal Police officers.

V. PROSECUTION IN MALAWI

A. Mitigating Punishment of an Accused Person

In Malawi, there is no specific law or provision relating to lighter punishment in respect of an accused person who provides substantial co-operation in the investigation and/or prosecution of an offence. However, the prosecutor has the discretion to charge the accused person with a less serious offence if he or she has assisted in the investigation and/or prosecution. The discretion only arises if there are alternative offences to the serious offences committed by the accused. The facts of the case, therefore, must fit in the lesser offence for discretion to be exercised.

B. Granting of Immunity to Co-operating Persons

In the case of a co-operating accused person whereby the case can not be successfully prosecuted without him or her being the state witness, prosecution proceeds on the basis of Section 81B of the Criminal Procedure & Evidence Code. In such cases, soon after the accused person has entered plea of not guilty, the charges are withdrawn against him or her, leading to his or her acquittal. He or she then is turned into a state witness against the other accused persons. Immunity from prosecution is only granted when the state can not dispense with the person as a state witness.

C. Considerations in the Prosecution of a Corporate Entity

Under the Malawian laws which distinguish a company as a separate legal entity and under the prevailing principle of *Salomon v Salomon*,¹⁸ a corporate entity can be prosecuted for some offences, like money laundering and terrorist financing, while they can not be prosecuted for others, like fraud and tax evasion. In the latter scenario, the law allows the prosecution of its directors.

VI. TRIAL AND ADJUDICATION

A. Disclosure of Evidence

Criminal trials in Malawi can be initiated either in the subordinate courts or in the High Court.¹⁹ Corporate crimes are initiated in the subordinate courts where the rule of disclosure of evidence does not apply. However, the Director of Public Prosecution (DPP) can commit any case to the High Court from the subordinate Courts.²⁰ Corporate crimes are frequently committed to the High Courts due to their complexity. In the High Court the disclosure of evidence applies as a matter of practice and not as requirement by law. One can ably say that it is a silent rule.

B. Clarification of Disputes before the Trial

In Malawi, clarification of any disputes before trial is commonly known as Preliminary Objections and is done under Section 151(2) of the Criminal Procedure & Evidence Code. One normally objects to the charge and there are several circumstances under which it can be done:

- if the charge is defective either in substance or form;
- if the evidence discloses an offence other than the offence with which the accused is charged;
- if the accused desires to plead guilty to an offence other than the offence with which he/she is charged.

The accused is at liberty to object to any matter at the initial stage before trial commences. Should an accused person fail to raise these at the trial court, he or she is estopped from raising them on appeal according to the Malawi Supreme Court of Appeal ruling of *Republic v Lucius Chicco Banda*.²¹ Any clarification must be

¹⁷ Section 22 of the Corrupt Practices Act.

¹⁸ Supra Note 6.

¹⁹ For Treason under Section 38 of the Penal Code and Murder under Section 209 of the Penal Code which are only tried in the High Courts.

²⁰ Section 289 of the Criminal Procedure & Evidence Code.

²¹ Malawi Supreme Court of Appeal, Criminal Appeal No. 1 of 2007.

made before the first witness is called.

C. Effective Methods of Fact Finding

1. Witness Protection

There is no witness protection law in Malawi except under Section 51 of the Corrupt Practices Act which provides for the protection of whistleblowers. This provision only protects whistleblowers who have provided information to the Anti-Corruption Bureau. As such, our laws are lacking as far as witness protection is concerned.

2. Expert Witnesses

An expert witness may be allowed to state his or her opinion on a matter related to his or her expertise. Section 190 of the Criminal Procedure & Evidence Code provides that the opinion of experts may be sought, "Upon a point of foreign law, or of science or art, or as to the identity of handwriting or finger-prints."

Section 190 is couched in wide terms and would appear to cover any matter which is the subject of special knowledge.²² The section defines an "expert" as any person "specially skilled" in a particular field. It is for the court to determine a person's competency as an expert before his/her evidence is admitted. The expert may give his/her evidence both in the subordinate and High Court.

D. Sentencing Process

The courts pass sentences on the accused persons after they have heard the prosecution on the antecedents and also the accused persons in mitigation. The courts hear the antecedents and pleas in mitigation following a conviction in the subordinate court and High Court under Section 260 and 321(J) of the Criminal Procedure & Evidence Code. Under Section 12 of the Code, any court may pass any lawful sentence combining any of the sentences which it is authorized to pass, subject to the court's general jurisdiction under Section 14 of the same Code. Different considerations are taken into account depending on the circumstances of the case. The statute, therefore, only gives what are maximum or minimum sentences to which the offender is liable.

VII. INTERNATIONAL CO-OPERATION

A. Problems and Challenges in Investigations, Prosecution and Trial

In most cases, the investigations conducted by ACB require conducting investigations and obtaining of evidence in foreign countries. This is so because the perpetrators of the crime always transact with foreign companies and organizations. The two countries from which Malawi most of the time requires assistance in investigations are the Republic of South Africa and the United Kingdom. Malawi conducts its business mainly with these two countries.

The ACB does not have a direct link with foreign investigative authorities who can assist in investigating its cases. When the ACB would like to conduct foreign investigations, it uses the Police Service through its Interpol department to arrange that its (ACB) officers are allowed entry and power to investigate in foreign countries, hence the incorporation of a police officer in all foreign investigations. However, there is a good and strong partnership between the ACB and similar institutions in other countries like Zambia, Tanzania, Botswana and South Africa who greatly assist whenever we need to get information from the respective countries. The ACB has assisted many countries when they would like to investigate in Malawi. Some of the countries on whose behalf the ACB has conducted investigations are Zambia, the United Kingdom, South Africa, Botswana, the United States of America and Australia. At the moment, there is an ongoing investigation in which the Australian Police has requested the ACB to assist them in investigating an Australian company that is suspected of involvement in shady deals. The company is investing in Malawi. The ACB has assigned a team of investigators to conduct the investigations. In 2004, the ACB assisted investigating a case in which the North West Regional Asset Recovery Team (RART) of Lancashire Constabulary investigated a case of money laundering. With the evidence collected by the Malawi Team and passed to the UK, the accused persons were charged in the UK and pleaded guilty and were convicted accordingly. The RART confiscated approximately 2.9 pounds of property from the convicts.

²² Eg. Opinion of expert in computer forensics, like in the case of *Rep v Dr Bakili Muluzi*.

The foreign investigations have their setbacks. Topping the list is the financial constraint involved in the whole process. They are very costly and Malawi being a third world poor country can not afford to conduct all the investigations at the needed time and in the required manner. As a result of this, these investigations are sometimes stalled by the mere fact of lack of financial resources. Secondly, the process of obtaining information or being allowed to investigate in another country is very frustrating. Some countries are of the view that we are wasting their time as they have their own work to do. The matter becomes complicated if you do not know a person who can assist in the country you intend to obtain information from. It is much easier for a foreigner to obtain information or investigate in Malawi than the other way around. We are not rigid in accommodating international investigators.

The ACB has made its officers available if they are needed during prosecution and trial in any country where their services are required. A case in point is the UK case mentioned above. The ACB has also been assisted by other countries, especially the UK and South Africa, during prosecution of our cases. They have made available their personnel to testify in our courts. The only problem is the same issue of financial constraints when it comes to pay for their travel, accommodation and upkeep expenses.

B. Problems and Challenges in Obtaining and Providing Mutual Legal Assistance

Mutual Legal Assistance in Malawi is provided by the Attorney General through the Ministry of Foreign Affairs and International Co-operation. Any mutual legal assistance required from Malawi should also go to the Attorney General through the Ministry of Foreign Affairs and International Affairs. The process is not without problems and challenges. The major one is that the process is long and frustrating. It can take a year before a request is honoured. A quicker and simpler process could have been of much more help than the current one.

C. Problems and Challenges of Other Types of International Co-operation

Malawi has been involved in several joint investigations with other countries like the UK, South Africa, Zambia, Kenya and Tanzania. There is always great co-operation and understanding during these operations. The only problem and challenge is the same matter of financial constraints of some of the countries. On top of the joint investigations, Malawi is in constant touch with other countries and does exchange relevant information on corporate crimes in the respective countries.

VIII. CONCLUSION

Corporate crime is one of, if not the most, complex of economic crimes in modern times. The advancement of technology has aggravated the complexity of the crime in terms of uncovering it. Technology has also made it easy for some corporate entities to commit the crime. Every country in the world is faced with this crime in one way or the other. Bearing this in mind almost all countries have put in place different ways and legislation to regulate and curb the vice. However, legislation alone is not sufficient. There is great need for closer co-operation among the investigative and prosecution authorities in the world to join hands in the fight. The investigators and prosecutors who are at the forefront of uncovering the crime and prosecuting the offenders should be well equipped with the latest skills to enable them do the job with utmost competency and ability.

CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES

*Alex Manolito C. Labador**

I. INTRODUCTION

The emerging problem of corporate crime poses a serious threat to nations around the world. This problem is hard to control because of the large profit these crimes can yield plus the grim fact that most of the perpetrators wield a wide sphere of influence, being corporate entities with huge financial resources at their disposal. They can afford to offer “hard to resist” bribes to law enforcers and if bribes do not work, they can also afford to hire the best lawyers in the world to defend them during court litigation. More so, with the aid of modern technology, corporate crimes are mostly committed with a sophistication that gives prosecutors a harder time proving their guilt in court.

Nonetheless, the difficulties in prosecuting the perpetrators for the aforesaid reasons must not serve as a discouragement but rather a challenge among nations to persevere, co-operate, and support each other in curbing this global menace.

II. THE PHILIPPINE LEGAL SYSTEM IN CORPORATE CRIMES

Like most developing countries, the Philippines faces the urgent need to evolve a legal system that is responsive to the multifarious needs of its society. The Philippines has a legal system which is a mixture of Roman civil law and Anglo-American common law.

A. Philippine Corporate Law

1. The Nature of Philippine Corporate Law

Philippine corporate law is a direct transfer of American corporate law, and is therefore a product of the common law system. The Philippines adheres to the Corporation Code that provides for statutory principles. Philippine corporate law is essentially the product of commercial developments. These developments can be anticipated by way of jurisprudential rules that corporate principles adapted and applied to conform to the changing concepts and mechanisms within the world of commerce. The Corporation Code embodies statutory principles that are based on dated rules or legal expressions of approved corporate practices. The Corporation Code is a collection of rules governing only a particular medium of doing business in the Philippines, the corporation, and which expresses the accepted practice as a result of jurisprudential rules.

2. The Role of Corporations in Philippine Society

The underlying legal philosophy of Philippine corporate law is that of dynamism in the development of the doctrinal basis upon which the corporation is to function. This provides that the Corporation Code is not a defined limitation of the playing field of Philippine corporate law, but constitutes a guiding light; and in the ever changing playing field, it must look with dynamism on the changes upon which innovation and growth are founded.

B. Liability of Legal Persons

1. Current Situation of Criminal Liability of Corporate Entities in the Philippines

The Corporation Code of the Philippines, otherwise known as Batas Pambansa Blg. 68, became effective on 1 May 1980. It clarified the obligations of corporate directors and officers, and expressed in statutory language established principles and doctrines. There are three duties of the directors, trustees and officers of a corporation: the duty of obedience, the duty of diligence and the duty of loyalty. Duty of obedience

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means that they will direct the affairs of the corporation only in accordance with the purposes for which it was organized. Duty of diligence and duty of loyalty are reflected in the Corporation Code wherein directors or trustees who acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting there from suffered by the corporation, its stockholders or members and other persons.

The general rule on duties and liabilities of directors, trustees and officers is that the members of the Board and officers of a corporation who signify to act for and on behalf of the corporation, keep within the lawful scope of their authority in acting, and act in good faith, do not become liable, whether civilly or otherwise, for the consequences of their acts. Those acts are properly attributed to the corporation alone and no personal liability is incurred by such Board members and officers. The extent of liability of the directors, trustees or officers are joint and several (*in solidum*) if they assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty (Sec. 31, The Corporation Code of the Philippines Batas Pambansa Blg. 68). This means that either of several persons may be liable for the entire amount. The case of *Philippine National Bank v. Court of Appeals*, 83 Supreme Court Reports Annotated 237 (1978), laid out clearly the nature of liability of a corporation for the tortuous acts of its directors or officers. The Supreme Court held in this case that a corporation is civilly liable in the same manner as natural persons for torts, because “generally speaking, the rules governing the liability of a principal or master for a tort committed by an agent or servant are the same whether the principal or master be a natural person or a corporation, and whether the servant or agent be a natural person or artificial person. All of the authorities agree that a principal or master is liable for every tort which he expressly directs or authorizes, and this is just as true of a corporation as of a natural person. A corporation is liable, therefore, whenever a tortuous act is committed by an officer or agent under express direction or authority from the stockholders or members acting as a body, or, generally, from the directors as the governing body.”

In the case of *Tramat Mercantile, Inc. v. Court of Appeals*, 238 Supreme Court Reports Annotated 450 (1994), holds that “personal liability of a corporate director, trustee, or officer along (although not necessarily) with the corporation may so validly attach, as a rule only when:

- (a) He assents (i) to a patently unlawful act of the corporation, or (ii) for bad faith or gross negligence in directing its affairs, (iii) for conflict of interest, resulting in damages to the corporation, its stockholders or other persons (Section 31, Corporation Code);
- (b) He consents to the issuance of watered stocks or who, having knowledge thereof, does not forthwith file with the corporate secretary his written objection thereto (Section 65, Corporation Code);
- (c) He agrees to hold himself personally and solidarily liable with the corporation;
- (d) He is made, by a specific provision of law, to personally answer for his corporate action.”

2. Legal Framework of Criminal, Civil and Administrative Sanctions

In the Philippine setting there are various penal laws which corporations as such may violate. The Supreme Court in numerous cases held that when a criminal statute forbids the corporation itself from doing an act, the prohibition extends to the board of directors and to each director separately and individually. The principle was laid down in *People v. Tan Boon Kong*, 54 Phil. Reports 607 (1930), that “a corporation can act only through its officers and agents, and where the business itself involves a violation of the law, the correct rule is that all who participate in it are liable.” It can be discerned that the court refuses to apply the fiction of corporate entity to shield and protect the individual actors in the criminal act, although they do the criminal act for or on behalf of the corporation they represent. Another rationale explaining why corporations cannot be held liable for a crime is the impossibility or difficulty of imposing penal sanctions, i.e. imprisonment, on a being that has no corporal existence and which cannot be put in jail. A crime cannot be attributed to a corporation because it is just a mere artificial being without a mind: criminal intent is an important ingredient of a crime; therefore in cases involving artificial beings there is lack of malice.

In civil cases a corporation can be a real-party-in-interest for the purpose of filing a civil action for malicious prosecution for the damages incurred by the corporation in the criminal proceedings brought against its officer.

The Republic Act No. 8799, otherwise known as the Securities Regulation Code, provides for administrative sanctions against a corporation. Under Section 54 of the said code it is stated that “if, after due notice and hearing, the Securities and Exchange Commission finds that: (a) There is a violation of this Code, its rules or its orders; (b) Any registered broker or dealer, associated person thereof has failed reasonably to supervise, with a view to preventing violations, another person subject to supervision who commits any such violation; (c) Any registrant or other person has, in a registration statement or in other reports, applications, accounts, records or documents required by law or rules to be filed with the Commission, made any untrue statement of a material fact, or omitted to state any material fact required to be stated therein or necessary to make the statements therein not misleading; or, in case of an underwriter, has failed to conduct an inquiry with reasonable diligence to insure that a registration statement is accurate and complete in all material respects; or (d) Any person has refused to permit any lawful examinations into its affairs, it shall, in its discretion, and subject only to the limitations hereinafter prescribed, impose any or all of the following sanctions as may be appropriate in light of the facts and circumstances:

- (1) Suspension, or revocation of any registration for the offering of securities;
- (2) A fine of not less than PHP10,000 (Philippine pesos) nor more than PHP1,000,000 plus not more than PHP2,000 for each day of continuing violation;
- (3) In the case of a violation Section 19.2, 20, 24, 26 and 27, disqualification from being an officer, member of the Board of Directors, or person performing similar functions, of an issuer required to file reports under Section 17 of this Code or any other act, rule or regulation administered by the Commission;
- (4) In the case of a violation of Section 34, a fine of not more than three times the profit gained or loss avoided as a result of the purchase, sale or communication proscribed by such Section; and
- (5) Other penalties within the power of the Commission to impose.”

The imposition of these administrative sanctions shall be without prejudice to the filing of criminal cases against the individual responsible for such violation.

C. Criminalization in Relation to Corporate Crime

The Corporation Code of the Philippines specifically states in Section 144 the criminal penalties for violations of “any” of the provisions of the Corporation Code and the penalties include fine of not less than PHP1,000 but not more than PHP10,000 or imprisonment for not less than 30 days but not more than five years, or both, at the discretion of the court. If the corporation committed such violation the same may be dissolved in appropriate proceedings before the Securities and Exchange Commission.

The main doctrine of Separate Juridical Personality of the Corporation and that a corporation is distinct from the stockholders or members who compose it can be tempered by the Doctrine of Piercing the Veil of Corporate Fiction. In reviewing the decided cases of the Supreme Court, *Umali v. Court of Appeals*, 189 Supreme Court Reports Annotated 529 (1990), it can identify the three major areas wherein piercing the veil doctrine can be applied: (1) When the corporate entity is used to commit fraud (“fraud cases”); (2) When the corporate entity is used to defeat public convenience, or a mere farce (“alter ego cases”); and (3) When the piercing of corporate fiction is necessary to achieve justice or equity (“equity cases”).

One of the most common corporate crimes being committed in the Philippines is tax evasion wherein the fiction of corporate entity was being used as a shield for tax evasion by making it appear that the original sale was made by the parent corporation to the subsidiary corporation in order to gain tax advantage.

The legislature has also enacted special penal laws to criminalize corporate crimes and one of these is Presidential Decree No. 715 (1975) otherwise known as the “Anti-Dummy Law” which penalizes foreign investors who exceed in their representation in the governing board or body of corporations or associations in proportion to their allowable participation in the equity of the said entities.

Another special penal law is Republic Act No. 9160, as amended by Republic Act No. 9194, otherwise known as the “Anti-Money Laundering Act of 2001”, which criminalizes money laundering.

D. The Money Laundering Process and its Stages

1. Elements of the Crime of Money Laundering

Money laundering is the processing of criminal proceeds in order to disguise their illegal origin. It is a crime whereby the proceeds of unlawful activity are transacted thereby making them appear to have originated from legitimate sources. The elements of the crime of money laundering are: (1) there must be unlawful activity; (2) the activity must concern a monetary instrument or property; (3) there must have been a transaction or attempted transaction of the monetary instrument or property; (4) and there must be knowledge that the monetary instrument or property represents, involves, or relates to the proceeds of the unlawful activity.

2. Stages of Money Laundering

(i) Placement

This is the first stage and involves initial placement or introduction of the illegal funds into the financial system. Banks and other financial institutions are usually used at this point. (Example – circumvent the reporting requirements of SEC, commingled with legitimate funds.)

(ii) Layering

This is the second stage and involves a series of financial transactions during which the dirty money is passed through a series of procedures, putting layer upon layer of persons and financial activities into the laundering process. (Example: electronic transfer of funds, disguising the transfer as a payment for goods or services.)

(iii) Integration

This is the last stage wherein the money is once again made available to the criminal with the occupational and geographic origin concealed. The laundered funds are now integrated back into the legitimate economy through the purchase of properties, businesses and other investments.

E. Anti-Money Laundering Act of 2001

1. State Policies

Republic Act No. 9160, as amended by Republic Act No. 9194, otherwise known as the Anti-Money Laundering Act of 2001, embodied the state policies “to ensure that the Philippines shall not be used as a money laundering site for the proceeds of any unlawful activity; To extend co-operation in transnational investigations and prosecutions of persons involved in money laundering activities wherever committed; and to protect and preserve the integrity and confidentiality of bank accounts.”

2. Salient Features

The salient features of the law are: it criminalizes money laundering; it creates a financial intelligence unit or implementing agency; it imposes requirements of customer identification, record keeping and reporting of covered and suspicious transactions; it relaxes strict bank deposit secrecy laws; it provides for freezing/seizure/forfeiture/recover freezing/seizure/forfeiture/recovery of dirty money/property; and it provides for international co-operation.

F. Issues Concerning Investigation

1. Specialized Investigative Authorities and Training Methods for Investigators

The “Anti-Money Laundering Act of 2001” provides for the creation of the Anti-Money Laundering Council of the Philippines (AMLC). One of the functions of Anti-Money Laundering Council is “to investigate suspicious transactions and covered transactions deemed suspicious after an investigation of AMLC, money laundering activities, and other violations of this act.” The AMLC shall “act to institute civil forfeiture proceedings and all other remedial proceedings through the Office of the Solicitor General.” The AMLC provides modules on education and programmes to train investigators on the pernicious effects of money laundering, the methods and techniques used in money laundering, the means of preventing money laundering, and the effective ways of prosecuting and punishing the offenders.

2. Co-operation between Investigative Authorities Concerned at the State Level

The Anti-Money Laundering Council can “enlist the assistance of any branch, department, bureau, office, agency or instrumentality of the government, including government-owned and controlled corporations, in

undertaking any and all anti-money laundering operations, which may include the use of its personnel, facilities and resources, detection and investigation of money laundering offences and prosecution of offenders.” (Republic Act No. 9160)

3. Acquisition of Information on Money Laundering

The information on money laundering can be acquired through the reports of the covered institutions by requiring them to submit and receive covered or suspicious transactions. Covered Institutions refers to: (a) “Banks, non-banks, quasi-banks, trust entities, and all other institutions and their subsidiaries and affiliates supervised or regulated by the Bangko Sentral ng Pilipinas; (b) Insurance companies and all other institutions supervised or regulated by the Insurance Commission; and (c) All those supervised and regulated by the Securities and Exchange Commission, including securities dealers, brokers, pre-need companies, foreign exchange corporations, investment houses, trading advisers, and other entities administering or otherwise dealing in currency, commodities or financial derivatives based thereon.” (Republic Act No. 9160)

Covered institutions shall make an effort to guarantee that a corporate juridical entity has not been or is not being dissolved, wound up or voided. The business or operations of the said corporation has not been or is not being closed, shut down, phased out, or terminated and that shell companies should be dealt with extremely cautiously. Shell companies refer to business entities without active business or significant assets. There are three major requirements for compliance by the covered institutions to be forwarded to the Anti-Money Laundering Council. One is customer identification and due diligence; second is record keeping; third is reporting of suspicious and covered transactions. The Anti-Money Laundering Council have prepared forms together with the Securities and Exchange Commission to be filled up and submitted by the covered institutions; these are a compliance form, a covered transaction report and a suspicious transaction report. The AMLC and SEC have prepared examination rules and procedures on Anti-Money Laundering.

The Anti-Money Laundering Council has special powers to inquire into bank deposits/investments with or without court order; to cause a freeze/restraint on suspected dirty money/property, the court issuing a freeze order; to cause forfeiture of dirty money/property; and to implement necessary/justified measures to counteract money laundering.

G. Issues Concerning the Prosecution

1. Prosecution of Money Laundering Cases

Under the law of the Anti-Money Laundering Act, any person may be charged with and convicted of both the offence of money laundering (subject offence) and the unlawful activity (predicate offence). “Unlawful activity refers to any act or omission or series or combination thereof involving or having direct relation to the following: (1) Kidnapping for ransom; (2) Drug trafficking and other violations of the Comprehensive Dangerous Drugs Act of 2002; (3) Graft and corruption; (4) Plunder ; (5) Robbery and extortion; (6) Jueteng and Masiao; (7) Piracy; (8) Qualified Theft; (9) Swindling; (10) Smuggling; (11) Violations of Electronic Commerce Act of 2000; (12) Hijacking, destructive arson and murder, including those perpetrated by terrorists against non-combatant persons and similar targets; (13) Fraudulent practices and other violations under the Securities Regulation Code of 2000; (14) Felonies or offences of a similar nature that are punishable under the penal laws of other countries.” If the offender is a corporation, association, partnership or any juridical person the penalty shall be imposed upon the responsible officers, as the case may be, who participated in, or allowed by their gross negligence, the commission of the crime. The offender, if a juridical entity, may have its license suspended or revoked by the court. The other offences punishable under the law include knowingly transacting or attempting to transact any monetary instrument or property which involves the proceeds of any unlawful activity, and the penalty is 7 to 14 years’ imprisonment and a fine of not less than 3 million pesos but not more than twice the value of the monetary instrument or property. Another offence is knowingly performing or failing to perform an act in relation to any monetary instrument or property involving the proceeds of unlawful activity and for knowingly failing to disclose and file with the AMLC any monetary instrument or property required to be disclosed and filed. It is also penalizes those covered institutions who failed to keep records of all their transactions maintained and safely stored for five years from the dates of transactions. Malicious reporting of a money laundering transaction is an offence and is punishable under the act. The law also espouses breach of confidentiality in relation to reporting covered or suspicious transactions to the AMLC. The covered institutions and their officers and employees are prohibited from communicating or disclosing any information to the media, neither may such reporting be

published or aired in any manner or form by the mass media, electronic mail or other similar devices.

H. Issues in Trial and Adjudication

1. Jurisdiction over Money Laundering Cases

The Regional Trial Courts shall have jurisdiction to try all cases of money laundering. There are 56 Special Anti-Money Laundering Courts/Commercial Courts in the Philippines which have the jurisdiction to try and decide violations of the Anti-Money Laundering Act. If the accused is a public officer or private person who conspired with such a public officer, the case shall be tried by the *Sandiganbayan* court. (Supreme Court Resolution dated 1 June 2004.)

2. Disclosure of Evidence before the Trial

The evidence acquired by the Anti-Money Laundering Council shall be handled with confidentiality until such evidence be disclosed as necessary in the filing of charges against the offender. The law punishes the breach of confidentiality of the accumulated information by the covered institution if such was given to media by its officers or employees.

As provided by the Implementing Rules and Regulations of the Anti-Money Laundering Act, Rule 6.5 states that “Knowledge of the offender that any monetary instrument or property represents, involves, or relates to the proceeds of an unlawful activity or that any monetary instrument or property is required under the AMLA to be disclosed and filed with the AMLC, may be established by direct evidence or inferred from the attendant circumstances”. Rule 6.6 further states that “All the elements of every money laundering offence under Section 4 of the AMLA must be proved by evidence beyond reasonable doubt, including the element of knowledge that the monetary instrument or property represents, involves or relates to the proceeds of any unlawful activity.”

3. Effective Methods of Fact Finding

The Anti-Money Laundering Council consists of five units; the Executive Director (under which is the Technical Staff); the Compliance and Investigation Unit; the Legal Evaluation Unit; the Information Management and Analysis Unit; and the Administrative and Finance Unit. It has the power to issue orders to the appropriate Supervising Authority of the covered institution to determine the true identity of the owner of any monetary instrument or property. Based on the information gathered by the council as to the covered transactions and suspicious transactions, it will inquire and examine the facts in an investigation under the respective unit of the council through the assistance of different government agencies and covered institutions in monitoring and investigating such transactions.

The first money laundering conviction in the Philippines was on 2006 wherein a bank manager was convicted in violation of the Anti-Money Laundering Act. This was clear proof of the government’s determination to stifle and impede possible money trails of crime syndicates and terrorists.

I. International Co-operation

The Philippines is no longer subject to the Financial Action Task Force (FATF) on money laundering monitoring, because it complied with the necessary requirements of FATF. The FATF was established by the G7 Summit in 1989. Recognizing the threat posed to the banking system and to financial institutions, the G7 Heads of State and the President of the European Commission convened the Task Force.

The Philippines is still encountering difficulties and challenges in the investigation and prosecution of violations of the Anti-Money Laundering Act for reasons that not all covered institutions co-operate in reporting covered and suspicious transactions. The success in hampering money laundering is in the monitoring and reporting of the covered institutions; it is therefore imperative that covered institutions co-operate and actively participate in the campaign to prevent money trails of criminal syndicates and terrorists through corporations, banks and other institutions from circulating in the Philippines. The Financial Action Task Force supports the Philippines’ fight against money laundering by lending mutual assistance and giving information as international co-operation.

III. CORPORATE CRIME SITUATION IN THE PHILIPPINES

A. Tax Evasion

To address the problem of tax evasion in the Philippines, the Bureau of Internal Revenue (BIR) is implementing a programme dubbed "Run After Tax Evaders" (RATE). The RATE programme is an endeavour against tax evasion which aims to prosecute high profile tax evaders. Through this programme, the BIR envisions to enhance voluntary tax compliance. It is primarily intended to instill in the taxpaying public the principle that tax evasion is a crime and violators will be caught and punished. Also, this programme aims to provide maximum deterrent effect against tax evasion, thereby promoting public confidence in the Philippine tax system.

This programme covers the investigation and prosecution of individuals and/or entities engaged in tax evasion and other criminal violations of the National Internal Revenue Code (NIRC) of 1997.

From 1 January 2006 to date, 83 tax evasion cases have been filed with the Department of Justice (DOJ) through this programme. Of these cases, 47 are against corporate entities while the remaining 36 are against individuals. These cases are treated with utmost confidentiality, thus the BIR cannot disclose any further details.

B. Money Laundering

As of 31 July 2007, the AMLC has filed civil forfeiture cases against nine corporations. Among them is one "company A", which is facing a forfeiture case involving more than PHP20,000,000. Below is the synopsis of company A's money laundering case as obtained from the AMLC.

Company A sold, offered for sale, and distributed securities in the form of investment contracts to the public, with promises of interest at fifteen percent (15%) per month if the investments were PHP50,000 or more. In cases of investments worth less than PHP50,000, the interest rates were pegged at ten percent (10%).

At least 100 investors went to company A's offices daily to place their respective investments. Unusually large deposits were made in A's accounts per day – from PHP54.472 million to PHP91.742 million and massive withdrawals within a day amounting to PHP545 million. The aforesaid transactions were likewise reported by a bank because they exceeded the threshold limit and they were highly unusual given the purposes for which "A" was incorporated.

Investigations disclosed that several companies were being used by "A" as conduits for the money invested with it, B International Corporation and C International Corporation, the incorporators of which are members of the Ruiz and Cortel (not their real names) families. The common incorporator among the aforementioned companies was Mario J. Ruiz. A series of checks amounting to more than PHP80 million drawn from A's account were deposited to Ruiz's accounts.

The Securities and Exchange Commission (SEC) found "A" to be engaged in activities of selling, offering for sale, or distributing securities to the public without authority to do so, in violation of Section 8.1 of the Securities Regulation Code, and directed "A" to cease and desist from further engaging in these activities.

Considering that violations of the Securities Regulation Code are among the unlawful activities defined by the Anti-Money Laundering Act and based on the facts of the case, the bank accounts of A, B, C, and Mario Ruiz were ordered frozen by the AMLC.

Examination is still ongoing to obtain additional information on the transactions made by the account holders relating to money laundering through the bank accounts.

C. Fraud/Swindling

In the Philippines, lots of people are being victimized by pyramiding or "Ponzi" schemes. This scheme is a fraudulent investment operation that involves paying abnormally high, short-term returns to investors out of the money raised from new investors, rather than from profits generated by any real business undertaking. As reported in the news on 18 August 2007, the National Bureau of Investigation (NBI) of the

Philippines has filed charges against 27 officers and investors of Francswiss Investment, one of the pyramiding scams proliferating on the Internet.

The case stemmed from the complaints of at least 41 investors who claimed they lost a total of \$75,000 to the investment scheme, the NBI said, adding: "Francswiss, which started operating in March, was believed to have gypped unsuspecting investors in the Philippines of PHP1 billion". The news report further said: "The respondents allegedly lured unsuspecting victims over the Internet using the websites <http://www.francswiss.biz> and <http://deutchfrancs.com>. Investors were asked to invest \$1,000 in francswiss.biz and \$10,000 in deutchfrancs.com which promised to double their money in 22 days. They were told that their investment would earn daily interest of 4.5 percent or \$45 which they could cash through Internet-to-bank transactions. The investors were likewise promised additional 10 percent commission as "e-points" for every investor they recruited.

"Francswiss Investment promised interests bigger than those offered by banks," said director Ruel Lasala, head of the NBI-National Capital Region. "These types of investment schemes usually collapse as fast as they are created while investors are left unable to recover their investments," Lasala said. The investors were also told that their money would be re-invested in other lines of Francswiss Investment like overnight casinos and pawnshops, foreign exchange trading, sports betting, and mutual funds. "But we found out that none of these operations exist," Lasala said.

D. Foreign Bribery (Internet and Various Media Reports)

The Philippine government has been dragged into the arbitration case filed with the International Center for the Settlement of Investment Disputes (ICSID) in Washington D.C. by FRAPORT, a German company seeking compensation for expenses in building the Ninoy Aquino International Airport (NAIA) – 3. FRAPORT is the biggest investor in the Philippine International Air Terminals Co. (PIATCO), which won the bid to build NAIA – 3 in 1999. But the Philippine Government sought for the nullification of the contract because allegedly, the airport contract was obtained and implemented through various acts of corruption, fraud, and bribery.

After the Philippine Supreme Court declared the airport contract null and void because of proven anomalies, FRAPORT went to ICSID and alleged that its investments were being unfairly treated by the Philippine government, in the same manner as PIATCO went to the International Court of Arbitration of the International Chamber of Commerce (ICC) based in Singapore.

Allegedly, during the hearing, it was learned that the chunks of FRAPORT's \$425 million and PIATCO's \$565 million claims could not be accounted for, giving more credence to the Philippine legal team's position that the companies had been involved in illegal activities.

In the FRAPORT's \$425 million claim for instance, reports say the company can only show payment to Takenada Corporation, its sub-contractor, of some \$275 million and some \$30 million in "soft costs" which leaves a \$121 million gap. The "soft costs" have been attributed to FRAPORT's alleged illegal activities like the payment of \$850,000, believed to be a bribe, made to a certain political operator through PIATCO to obtain government approval within only two weeks. The money was traced after the Philippine legal team obtained a Hong Kong bank's records containing the related account transactions, the report said.

On 18 August 2007, a local news outlet reported the dismissal of the \$425 million arbitration case filed by FRAPORT against the Philippine Government. Accordingly, in the decision, the ICSID in Washington DC claimed no jurisdiction over the FRAPORT case because the German airport builder was found to have violated Philippine laws, the Anti-Dummy Law, and the Build-Operate-Transfer Law, among others. The report quoted Solicitor General Agnes Devanadera at a press conference, "So the government challenged the tribunal's jurisdiction, on the ground that before any foreign investor can ask for the protection and seek relief (from ICSID) under a treaty, there must be no violation of the laws of the Philippines that were committed by the investor," she said, referring to the Bilateral Investment Treaty on the Promotion and Reciprocal Protection of Investments between the Philippines and Germany.

In its request for arbitration, FRAPORT stated that it owns more than 61 percent of PIATCO, directly or indirectly, "through cascade companies that have equity ownership" of its local partner, Ms. Devanadera

said, thus, it was in violation of the Philippine constitution that allows foreigners to own only up to 40 percent of Philippine local companies.

Moreover, the report of Lala Rimando of Newsbreak on 11 February 2007 states that, "contrary to FRAPORT's assertion in ICSID that the completed airport terminal stands in Manila as pretty good evidence that an investment has been made, Terminal 3 stands incomplete, largely untested, and replete with structural defects". She added: "The quality assurance inspectors, the Japan Airport Consultants, raised these concerns during their inspection in 2002, and did not sign off on the terminal."

Also reported by the newspaper *Philippine Star*, a 100-square meter portion of the airport's ceiling collapsed a day before it was scheduled for soft opening in March 2006 thus confirming the report of Lala Rimando.

With regard to the arbitration case filed by PIATCO before the ICC in Singapore, the next hearing is reportedly set for November 2007.

E. Large Scale Pilferage

One pressing concern in the Philippines involving corporate entities today is the large scale pilferage of cable wires of electric companies, telecommunication carriers, and cable TV operators which is causing interruption of operations. These unlawful acts result in loss of revenue to the government, inconveniences both to the public and business sector, ruin the image of the service providers, and adversely affect the economic and social development of the country.

To illustrate how serious the problem is, from January to June 2007, there were a recorded 2,891 cable wire theft incidents with an estimated loss to concerned companies of PHP96.77 million. Although the financial setback can be tolerated, the pestering effect of the power outage on the public is unbearable.

Cable wire has aluminum and copper content. These two elements are expensive due to high demand in the foreign market and thus can yield huge profits. Investigations revealed that there are transnational crime groups behind this illegal act utilizing a wide range of contacts, such as: brokers and sales agents engaged in the trading of stolen cable wires, small and large junkshops, warehouses, international trading companies, shipping lines, etc.

Water companies are also suffering huge losses because of rampant theft of their steel pipes. Adding to the problem is the corollary disruption of water supply to the inconvenience of the community.

In previous months, a shipment of Philippine peso coins with a currency value of three million pesos bound abroad was intercepted by Philippine authorities. Logically, the consignee seems interested in the metal, and not the currency value of the coins. This confirms the preciousness of metal abroad and explains why corporate entities are scrambling to accumulate metals, by hook or by crook.

During the raid conducted on 10 August 2007 in the Philippines, the national police arrested the owner of a certain junkshop or warehouse, and 12 foreign nationals. Seized evidence is 4,597.3 kilograms of copper wires duly identified by officials of Manila Electric Company (MERALCO) as their exclusive properties and stock items. Another raid resulted in the arrest of the owner and manager of another junkshop, and the confiscation of six to eight tons of stolen copper wires of the National Waterworks and Sewerage System Administration (NAWASA) and Transmission Corporations (TRANSCO). The suspects are charged with violations of Republic Act 7832, the Anti-Pilferage Law and Presidential Decree no. 1612, the Anti-Fencing Law – the law that prohibits buying or just mere possession of stolen items.

IV. CONCLUSION

Curbing the commission of corporate crimes is really a daunting task that needs a synergized effort from all sectors of society in order to succeed. Since the scope of the problem is global, the corresponding effort to stop it must also be global. Therefore, there is a need for countries all over the world to co-operate towards this end.

Moreover, vigilance must be exercised by every concerned entity to prevent the commission of corporate crimes. The government for its part must exhibit political will and apply the full force of the law to whoever violates it. This political will becomes a good deterrent to the commission of crimes not only to ordinary citizens but also to influential people in the so called “corporate world”, as well.

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CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES

*Sadhana Singh**

I. INTRODUCTION

While the 1990s was a decade of booming markets and booming profits, it was also a decade of rampant corporate criminality. There is an emerging consensus among corporate criminologists, which is that corporate crime and violence inflicts far more damage on society than all street crime combined. Heightened concern around this issue has been demonstrated by a number of recent conferences on commercial crime, staged by the Republic of South Africa (RSA)¹ through its South African Police Service (SAPS) and organized business. A declaration of “serious economic offences” as a “priority crime” is significant, since the seriousness (or not) with which certain crimes are regarded is reflected in the resources which the state allocates to policing them.

II. BACKGROUND

Corporate crime is said to cause business failure and disintegrate economies. The National Prosecuting Authority (NPA) Act, 1998 (Act No. 32 of 1998) provides that all Serious Economic Offences must be investigated. This has led to the opening of Specialized Commercial Court Centres in the RSA, a clear expression of the South African Government’s commitment to an effective criminal justice system that delivers swift, reliable and fair justice and creates confidence among investors, local and international, the business sector and the general public. The most important motivations for the establishment of the specialized courts relate to the possibility that these institutions might make the administration of justice more efficient and thereby encourage the reporting of corporate crime. In this regard, the most important characteristics of such courts is their capacity to attract and utilize persons with appropriate expertise in the prosecution (in the case of criminal trials) and adjudication of matters in which such specialized knowledge is required for the most effective processing of cases. Thus both the prosecution and judiciary will become evermore familiar with complex factual issues, as well as with established law and procedure. This should lead to speedier and, therefore, less expensive proceedings for the state and litigants.

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¹ Abbreviations used in this paper:

AFU	Asset Forfeiture Unit
DSO	Directorate of Special Investigations
FICA	Financial Intelligence Centre Act
ICD	Independent Complaints Directorate
NIA	National Intelligence Agency
NPA	National Prosecuting Authority
PGI	Prosecution Guided Investigation
POCA	Prevention of Organized Crime Act
RSA	Republic of South Africa
SAPS	South African Police Service
SAQA	South African Qualifications Framework
SARS	South African Revenue Service

III. FOCUSED DISCUSSIONS ON CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES

A. Liability of Legal Persons and Criminalization in Relation to Corporate Crime

1. Liability of Legal Persons

(i) Current Situation of Criminal Liability of Corporate Entities in the RSA

Since the Companies Act was enacted in 1973, fundamental legal developments have taken place in the RSA. The most important change was the adoption of the Constitution in 1996. No area of South African law can be analysed or evaluated without recourse to the Constitution, which is the supreme law of the country. The Bill of Rights, as provided for in Chapter 2 of the Constitution, constitutes a cornerstone of democracy in the RSA. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. It also regulates the relationship between economic citizens and thus may have fundamental implications for company law.

Section 332 of the Criminal Procedure Act 51 of 1977 provides for the prosecution of corporations and members of associations. Section 332 (1) thereof provides: For the purpose of imposing upon a corporate body criminal liability for any offences, whether under any law or at common law – any act performed, with or without a particular intent, by or on instructions or with permissions, express or implied, given by a director or servant of that corporate body; and the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that body corporate in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interest of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

(ii) Legal Framework of Criminal, Civil and Administrative Sanction

Company law provides the legal basis for one of the most important institutions organizing and galvanizing the economy, namely, corporate business entities. The decision of the Department of Trade and Industry in the RSA to review and modernize company law in this country was based on the need to bring our law in line with international trends and to reflect and accommodate the changing environment for business, both in the RSA and globally. The current framework of South African company law is built on strong foundations, after much review, and new developments in the country. Criminal, civil and administrative sanctions are regulated and administered within the parameters of criminal law and the framework as set by the Criminal Procedure Act. The detailed legislative, regulatory and procedural frameworks dictate police action, and every specialized unit has a legal mandate and a legal framework within which to operate.

(iii) Various Kinds of Criminal Liability

Schedule A, Criminal Law (Snyman) indicates the construction of criminal liability. This will be illustrated by means of a diagram as shown below. The diagram below represents a standard crime. There are exceptions to this standard model. Strict liability crimes dispense with the requirement of culpability. The reason why compliance with the principle of legality is indicated with a dotted line is the following: if a person's liability for a well-known crime such as murder or theft has to be determined, it is so obvious that such a crime is recognized in our law that it is usually a waste of time to enquire whether there has been compliance with the requirement of legality. The reason why the box containing the words "Compliance with definitional elements" is further subdivided with a dotted line, is the following: crimes may according to their definitional elements be classified or subdivided in different ways.

order the person or company to perform that act within such period as the court may determine. Criminal liability has been attached to certain general acts relating to the falsification of records and the suppression of records, documents and other evidence.

B. Current Situation and Issues Concerning Corporate Crime in the RSA

Within the Department of Justice, a number of control measures have been introduced to limit the incidence of corporate crime. The SAPS and the National Intelligence Agency (NIA) are assisting the Department of Home Affairs to set up various corporate crime units, such as the anti-corruption unit. Measures aimed at strengthening the Independent Complaints Directorate (ICD) are under way. The NIA is assisting the ICD in its anti-corruption tasks. The SAPS see the immediate challenge as mobilizing resources to make corporate crime more dangerous and less profitable. Removing the profits of crime, *inter alia* through the forfeiture of assets, is attaining widespread priority. South Africa's eagerly awaited Money Laundering Act will come into effect later this year, thereby recognizing that the driving force behind commercial crime internationally is drug money and its laundering. With the assistance of the Reserve Bank and financial institutions, this legislation should prove an effective tool in combating illegal financial transactions.

The success of the SAPS in combating corporate crimes will be indicated by: a decline in the incidence of corporate crime; a rise in the percentage of recorded cases; and a marked rise in the number of successful prosecutions. These objectives can be achieved through: the development of codes of conduct, and prevention and standard response procedures to corporate crime; promotion of principles of good business practice and good governance; and rallying of public support for an anti-corruption ethic. Further, numerous conferences have also been held on commercial crime facilitated by organized business and the SAPS. Corporate crime, sometimes referred to as serious economic offences or commercial crime, has also been declared a number one priority crime in terms of the SAPS Strategic Plan 2005-2010 under the domain of organized crime.

Organized crime is a concept that appears to have established itself in criminology, although it has not yet received universal legislative acceptance or wide judicial recognition. However, it is not in serious dispute that organized crime is a global challenge. It is also accepted that linkages have long been established among criminals working in different countries in the region and beyond.

The RSA has embarked on an Organized Crime and Money Laundering programme dedicated to studying trends in the incidence of organized crime in Southern Africa since 1997. The programme strives to contribute to building the capacity of policy-makers and law enforcement agencies in the region to combat organized crime.

The conventional view is that money laundering follows a traceable pattern, comprising various stages. In reality, not every act of money laundering neatly follows a pattern (*Institute for Security Studies*).

Since 2002 the Institute for Security Studies in the RSA has been studying the nature and scale of money laundering in east and Southern Africa. The findings of the study are periodically published in newsletters, surveys and monographs. The programme is committed to continue to assist state and non-state institutions to detect and control money laundering in the region.

The RSA has developed a comprehensive legal structure to combat money laundering. Currently, the main statutes are the Prevention of Organized Crime Act 1998 (POCA) and the Financial Intelligence Centre Act 2001 (FICA). The financial intelligence unit and other supervisory and investigative bodies appear adequately staffed and genuinely committed to implementing the new system.

Additionally, the RSA has a number of agencies that investigate and prosecute cases involving money laundering. The NPA provides a national framework for prosecutions. Within the NPA, the Directorate of Special Operations (DSO) investigates and prosecutes a range of more serious cases. The NPA's Asset Forfeiture Unit (AFU) supports the police and other law enforcement structures in all aspects of forfeiture. The SAPS investigates criminal activity generally and has allocated the responsibility for investigating money laundering to specific units. The South African Revenue Service (SARS), which includes the Customs Service, is responsible for revenue collection and the investigation of tax evasion and evasion of

customs duties and works closely with law enforcement agencies on money laundering matters.

C. Issues Concerning Investigations

1. Specialized Investigative Authorities and Training Methods for Investigators

The RSA has developed a comprehensive legal structure to combat corporate crime. The statutes include the Prevention of Organized Crime Act 1998 (POCA), and the Financial Intelligence Centre Act 2001 (FICA). Some of the specialized investigative authorities (as mentioned at 2. *infra*) include: SAPS, NIA, NPA, AFU, SARS etc.

In the RSA, the *Detective Learning Program* which is registered at the South African Qualifications Authorities (SAQA) is mandatory, prior to the offering of more specialized training. Also, the RSA has embarked on an *Organized Crime and Money Laundering Program* dedicated to studying trends in the incidence of organized crime in Southern Africa since 1997. The programme strives to contribute to building the capacity of policy-makers and law enforcement agencies (not exclusive to the SAPS) in the region to combat organized crime.

Additionally, investigators already have adequate legal means to obtain information and evidence regarding alleged offences. Investigators also have sufficient legal tools for a wide range of investigative techniques.

2. Co-operation Between Investigative Authorities at the State Level

The investigative authorities include the SAPS, the Commercial/Organized Crime Unit, the DSO, the Sexual Offences Unit (SOCA), the Specialized Tax Unit, the Asset Forfeiture Unit and the Special Commercial Crimes Unit. These units form part of the Integrated Case Flow Management Steering Committee which meets bi-monthly to discuss the various issues around crimes. A further co-operation “safety-net” is the Prosecution Guided Investigations (PGI). PGI is still under development for formal implementation but has been informally practiced for many years now. This, in short, allows the prosecutors and all key parties to form an integrative approach and to become involved in investigations much earlier and not when the case is ready for court.

3. Acquisition of Information on Corporate Crime

A wide array of legislation regulates the acquisition of information, including the Criminal Procedure Act, criminal law statutes, the Constitution of the Republic, the SAPS Act, etc. There are specific procedures and techniques under this legislation which guide a crime scene from the inception of a complaint, to the mass media, dealing with informants and the various types of protection our law offers. It must be mentioned that in the RSA, every informer is treated with the utmost confidentiality and the identity of such informers is protected. Special broadcast and media laws are also available in the RSA which then governs mass media. In the SAPS, we have a special communication department which handles all media matters, knowing that some matters could be of a sensitive nature. Additionally, South African law makes abundant provision for the protection not only of whistleblowers but all types of witnesses, e.g. an employee employed in a large co-operation who is being threatened by its management can also seek protection under the RSA law.

4. Material and Electronic Evidence

The Interception and Monitoring Prohibition Act, Act 127 of 1992 covers all aspects, including but not limited to, “identifying, obtaining and preserving; obtaining relevant computer data and recovering of deleted data; forensic analysis and other” in terms of the investigation and should be read as such.

The Act was enacted to prohibit the interception of certain communications and the monitoring of certain conversations or communications; to provide for the interception of postal articles and communications and for the monitoring of conversations or communications in the case of a serious offence or if the security of the RSA is threatened; and to provide for matters connected therewith.

For purposes of the investigation of crime, an investigator who executes a direction or assists with the execution of a direction may at any time enter upon any premises in order to install, maintain or remove a monitoring device, or to intercept or take into possession a postal article, or to intercept any communication, or to install, maintain or remove a device by means of which any communication can be intercepted, for the

purposes of this Act. Having specified such, one must also take into consideration the sovereign law of the land, the Constitution, and act accordingly.

5. Measures to Obtain Statement Evidence

(i) *Techniques of Interrogation*

The RSA judicial system and the SAPS in particular make use of an interview system which is registered by the South African Qualifications Authority as "Conduct an Investigative Interview". Investigative interviews are conducted through a systematic search for the truth in respect of a crime or an alleged crime. The investigative interview system uses sound and structured methodology to extract the maximum possible sum of information from a victim, informer, witnesses or suspect, allowing for the successful planning, conducting and concluding of an interview with a victim, informer, witness or suspect utilizing the P.E.A.C.E. model. The acronym P.E.A.C.E. stands for: P = Planning and Preparation, E = Engage and Explain, A = Account Phase, C = Closure and E = Evaluation of all information. Additionally, under section 213 of the Criminal Procedure Act, Act 51 of 1977, proof of a written statement must exist and the statement must comply with the provisions of consent. "The statement shall purport to be signed by the person who made it, and shall contain a declaration by such person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or which he did not believe to be true. If the person who makes the statement cannot read it, it shall be read to him before he signs it, and an endorsement shall be made thereon by the person who so read the statement to the effect that it was so read."

(ii) *Plea Bargaining*

According to Section 106 of the Criminal Procedure Act, "when an accused pleads to a charge he may plead: that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or that he is not guilty; or that he has already been convicted of the offence with which he is charged; or that he has already been acquitted of the offence with which he is charged; or that he has received a free pardon under section 327 (6) from the State President for the offence charged; or that the court has no jurisdiction to try the offence; or that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or that the prosecutor has no title to prosecute; or that the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(c). Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge. An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea, provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(iii) *Immunity*

Various types of immunity exist. In RSA the State President may issue a free pardon under section 327 (6) of the Criminal Procedure Act. Also, the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(c) of the Criminal Procedure Act.

6. Special Investigative Techniques

(The Criminal Procedure Act, Act 51 of 1971, section 252A covers all aspects, including but not limited to, "electronic and other forms of surveillance; undercover operations; other special investigative techniques and use of special investigative techniques at the international level" in terms of the investigation, and should be read as such).

The section of the Act was enacted to authorize the use of traps and undercover operations and for the purposes of admissibility of evidence. However, the law and its limitations and the Constitution of the RSA should also be considered when applying this section.

"Any law enforcement officer, official of the State or any other person authorized thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to

prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3). If a court in any criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered.” When considering the admissibility of the evidence the court shall weigh up the public interest against the personal interest of the accused, having regard for the various factors, as applicable by this section; e.g. whether, in the absence of the use of a trap or an undercover operation, it would be difficult to detect, investigate, uncover or prevent its commission, etc.

“An attorney-general may issue general or specific guidelines regarding the supervision and control of traps and undercover operations, and may require any official or his or her agent to obtain his or her written approval in order to set a trap or to engage in an undercover operation at any place within his or her area of jurisdiction, and in connection therewith to comply with his or her instructions, written or otherwise.”

D. Issues Concerning the Prosecution

1. Mitigation, Immunity and Considerations

Mitigation, immunity and considerations can be read together in the investigation and/or prosecution. The role that mitigating factors surrounding the offender should play is streamlined. It makes little sense to claim that every offender is different and that this is the reason for having sentence discretion, when most of these differences do not affect the sentence at all. A re-evaluation of these subjective features is necessary, and much can be learned from systems where specific reductions of sentence are offered for specific mitigating factors, such as a plea of guilty, remorse, and other subjective factors that really reduce the blameworthiness of the offender. All the purposes of punishment need to be directly related to the interests of society. If there is no evidence that a particular sentence would deter others, or would individually deter the offender, then that factor should not be mentioned as a sentencing feature. The same goes for reform and incapacitation. In South Africa we are working on greatly expanding our resources for the execution of sentences. The courts are also being expanded.

Various types of immunity exist. In the RSA the State President may issue a free pardon under Section 327 (6) of the Criminal Procedure Act. Also, the prosecution may not be resumed or instituted owing to an order by a court under Section 342A(3)(c) of the Criminal Procedure Act.

E. Issues in Trial and Adjudication

1. Disclosure of Evidence before Trial

The Criminal Procedure Act, Section 217 states that, “Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided that a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in Section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question be admissible in the evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto”.

2. Clarification of Disputes before Trial

The Criminal Procedure Act, specifically Section 212B, states that, "if an accused has appointed a legal adviser and, at any stage during the proceedings, it appears to a public prosecutor that a particular fact or facts which must be proved in a charge against an accused is or are not in issue or will not be placed in issue in criminal proceedings against the accused, he or she may, notwithstanding section 220, forward or hand a notice to the accused or his or her legal adviser setting out that fact or those facts and stating that such fact or facts shall be deemed to have been proved at the proceedings unless notice is given that any such fact will be placed in issue. The first-mentioned notice contemplated in subsection (1) shall be sent by certified mail or handed to the accused or his or her legal adviser personally at least 14 days before the commencement of the criminal proceedings or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon by the accused or his or her legal adviser and the prosecutor. If any fact mentioned in such notice is intended to be placed in issue at the proceedings, the accused or his or her legal representative shall at least five days before the commencement or the date set for the continuation of the proceedings or within such shorter period as may be condoned by the court or agreed upon with the prosecutor deliver a notice in writing to that effect to the registrar or the clerk of the court, as the case may be, or orally notify the registrar or the clerk of the court to that effect in which case the registrar or the clerk of the court shall record such notice. The court may on its own initiative or at the request of the accused order oral evidence to be adduced regarding any fact contemplated in subsection (4)."

3. Effective Methods of Fact Finding

(i) *Witness Protection*

According to the Witness Protection Act, a witness is any person who is or may be required to give evidence or has given evidence in any proceedings. Subsections 7(1) and (2) of the Witness Protection Act provides as follows: "Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may report such belief to the investigating officer in the proceedings concerned; any person in charge of a police station; if in prison, a person in charge of the prison or registered social worker; to the public prosecutor; to any member of the Office for Witness Protection; and apply in the prescribed manner that he or she or any related person be placed under protection."

(ii) *Expert Witnesses*

An expert witness is someone who: has education of specialized knowledge; has superior knowledge regarding a subject; can deduce correct conclusions and can formulate an accurate opinion.

(iii) *Others*

The Criminal Procedure Act, Section 186, states that "the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case".

4. Sentencing Process

The Bill of Rights provides for due process, including the right to a fair, public trial within a reasonable time after being charged, and the right to appeal to a higher court. It also gives detainees the right to state funded legal counsel when "substantial injustice would otherwise result". There is a presumption of innocence for criminal defendants. Judges and magistrates hear criminal cases and determine guilt or innocence. Magistrates can use assessors in an advisory capacity in bail applications and sentencing. According to Section 274, a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court. In principle, South African courts employ a discretionary sentencing system. Within the boundaries set by the legislature, the courts have to exercise a judicial discretion in order to determine an appropriate sentence, based on a balancing of all the different factors present in the particular case. This discretion is coupled with a well-established system of appeal against sentences imposed in all the trial courts, as well as judicial review of sentences imposed in the lowest courts. No trial court is likely to impose a sentence in the full knowledge that that sentence is likely to be quashed on appeal, with the result that the appellate system influences the outcomes of criminal cases

substantially. The State is also permitted, in terms of the Criminal Procedure Act, to appeal against a patently lenient sentence.

F. International Co-operation

1. Current Situation of, and Problems and Challenges in, the Investigation, Prosecution and Trial of Above Mentioned Offences, in Relation to International Co-operation

The Republic of South Africa occupies a very important position in the world when it comes to the issue of international law enforcement co-operation. It is clear that South Africa by virtue of its position in Southern Africa, Africa and the whole world, is a very important player in the combating of transnational crime. With its assumption of the Presidency of Interpol, its membership of SARPCCO and its hosting of FIFA World Cup 2010, it is pertinent that its contribution to international law enforcement co-operation should move from strength to strength.

The SAPS has played a very important role in conducting joint operations throughout the region by providing the necessary manpower and logistics throughout.

The SAPS have also made a distinguished contribution in the execution of regional training courses by providing facilities and other requirements. South Africa has also demonstrated its appreciation of the importance of strong international law enforcement co-operation by seconding officials to the Interpol General Secretariat, the Interpol Sub Regional Bureau for Southern Africa and by appointing police attachés to a number of countries within the region and beyond. Additionally, various structures and processes exist to co-ordinate security initiatives at both the international and regional (SADC) level.

At the national level the legislative framework for law enforcement co-operation has been boosted through the enactment of two pieces of legislation in particular: the International Co-operation in Criminal Matters Act, no.75 of 1996 and The Extradition Amendment Act, no.77 of 1996. National policy frameworks of relevance in considering the priorities for co-operation between state and civil society as well as at the inter-state level include: the National Crime Prevention Strategy 1996 and the National Police Plan and Policing Priorities and Objectives 1997/8 & 1998/9; and the various Strategic Plans of SAPS, including 2005 to 2010.

2. Problems and Challenges in Obtaining and Providing Mutual Legal Assistance and other Types of International Co-operation

Under the International Co-operation in Criminal Matters Act, 75 of 1996, South Africa has broad powers to provide a wide range of mutual legal assistance (MLA) related to crime matters, and can provide MLA even where there is no dual criminality. Thus, it can exchange information relating to most investigations, but cannot assist in seizing certain types of assets.

South Africa has acceded to the 1988 United Nations Convention and has ratified the 1999 UN Convention, and is working to ratify the 2000 UN Convention. It has also entered into many bilateral treaties and agreements, either for MLA or at a law enforcement level.

IV. SUMMARY

The President of the Republic of South Africa, Mr Thabo Mbeki, summed it all nicely when he said “when in a society the shameless triumph, when the abuser is admired, when principles end and only opportunism prevails, when the insolent rule and the people tolerate it; when everything becomes corrupt but the majority is quiet because their slice is waiting ... when so much unite, perhaps it is time to hide oneself, time to suspend the battle; time to stop being a Quixote (impractically idealistic or fanciful); it is time to review our activities, re-evaluate those around us, and return to ourselves.”

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CORPORATE CRIME AND THE CRIMINAL LIABILITY OF CORPORATE ENTITIES IN THAILAND

*Bhornthip Sudti-autasilp**

I. INTRODUCTION

As advancement in information and communication technologies has made the world borderless, corporate activities have become global through network systems, thus making commission of corporate crime more sophisticated and complicated. Moreover, corporate crime is often committed by skilled perpetrators and more often by a conspiring group who are usually ahead of the law enforcement authorities. These characteristics make corporate crime a serious threat and difficult to prevent, deter and combat not only at the domestic level but also at the global level. Nonetheless, it is essential for the State to take legal actions as well as other administrative measures to prevent and suppress this crime, or at least to lessen the frequency and the seriousness of this crime.

The most serious corporate crime in Thailand is financial and banking crime. In 1997, Thailand faced a critical financial crisis which caused serious damage to the country. Its impact was far greater than that of ordinary crimes. Thailand's economy and financial system was undermined. Bank and financial institutions were left with large numbers of non-performing loans and many of them finally collapsed. Foreign investors lacked confidence in Thailand's financial system and ceased their investment in Thailand. The crisis affected sustainable development of Thai society and culture due to unemployment and low income. Although this financial disaster has been virtually cured, the aftermath remains to be healed.

This paper examines the current situation of corporate crime in Thailand, and problems and challenges in the investigation, prosecution and trial of corporate crime in Thailand. Following this introduction, it is divided into five parts. Firstly, I will explain the criminal liability of legal persons and persons responsible for the operation of such legal persons and criminalization in relation to corporate crime in Thailand. The following part analyses the current situation and issues concerning corporate crime in Thailand, especially financial and banking crimes. Thirdly I will address the enforcement authorities in relation to corporate crime in Thailand. Fourthly, I will briefly and generally describe international co-operation in criminal matters between Thailand and other States. The final part is the conclusion.

II. THE LIABILITY OF LEGAL PERSONS AND CRIMINALIZATION IN RELATION TO CORPORATE CRIME IN THAILAND

A. Criminal Liability of Legal Persons in Thailand

The Thai civil and commercial law recognizes that a corporation enjoys rights and duties as a natural person does and such rights and duties are distinguished from those of its shareholders.¹ A corporation's will is declared through its representatives and its business is carried out through its representatives.² Regarding criminal liability of a legal person, although the Supreme Court has decided that a legal person can be a subject of and be punished for a criminal offence, there is still controversy as to the scope of punishment. The controversy is whether a legal person can be punished for any act which is by law a criminal offence when committed by a natural person, or should a legal person be punished only when there is a statutory provision specifying so? This is because provisions on criminal liability of a legal person are stipulated only in some Acts, whilst the Penal Code, which is the major criminal law in Thailand, is silent on this matter.

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¹ The Civil and Commercial Code, Section 66 and Section 67.

² The Civil and Commercial Code, Section 70 paragraph 2.

Presently there are two opinions regarding the scope of criminal liability for a legal person. The first is that of legal scholars which is that a legal person cannot be punished for a criminal offence unless there is a statutory provision specifying so. This means that what is deemed to be an offence when committed by a natural person is not always considered a criminal offence when carried out by a legal person. A legal person should be criminally punished only when it commits an act which is a statutory offence. The second is that of the Supreme Court which has continuously held that a legal person can be criminally punished. However, before further discussion on this matter, it should be noted that the Thai legal system is based on the civil law system, with influences of common law. Legislation is seen as the primary source of law. Courts thus base their judgments on the provisions of codes and statutes. In the case where there is no legislation applicable to a certain case, courts may draw analogies from statutory provisions to fill lacunae and to achieve coherence.

To understand the scope of criminal liability on legal persons, the author will divide criminal legislation into three types.

1. Statutory Provisions Imposing Criminal Liability on a Legal Person

Examples include:

- The Commercial Banking Act B.E. 2505 (1962);³
- The Anti-Money Laundering Act B.E. 2542 (1999).⁴

This type of legislation does not raise any argument about whether a legal person is accountable for a criminal offence since the statutory provision clearly states that a legal person is the subject of an offence.

2. Statutory Provisions Imposing Criminal Liability on Persons of Certain Status

Examples include:

- The Mining Act B.E. 2461(1918): imposes criminal liability on “a mining concessionaire”;⁵
- The Measurements Act B.E. 2466 (1923): imposes criminal liability on “the principal” or “employer”;⁶
- The Act on the Standard of Export Goods B.E. 2503 (1959): imposes criminal liability on “any person who inspects the standard of goods”;
- The Factory Act B.E. 2512 (1969) imposes criminal liability on “any person who has been granted a license to operate a factory”;
- The Act on the Transportation by Land B.E. 2522 (1979) imposes criminal liability on “any person who has been granted a license to operate transportation”;
- The Supreme Court also decided that this type of statutory provision can be applied to a legal person.⁷

3. Statutory Provisions Specifying the Subject of the Offence by Using the Terms “Anyone” or “Whoever”

The Penal Code and other criminal legislation stipulate “anyone” or “whoever” as the subject of an offence without providing definition of such terms. Thus a question arises as to whether such terms include legal persons. However, the Supreme Court in many cases has construed these terms to include a legal person. In Supreme Court Decisions Nos. 787-788/2506, the Court laid down a precedent where the representative of a legal person acted in the scope of his authority and in accordance with the objectives of such a legal person

³ Section 41: Any commercial bank which fails to examine its register of shareholders or to notify its shareholders in violation of the provisions of Section 5 septem or makes a false statement or conceals facts which must be revealed in the confidential statements or explanatory notes submitted in accordance with Section 23 shall be liable to a fine not exceeding one hundred thousand Baht. This Act will later refer to as the Commercial Banking Act.

⁴ Section 61: Any legal person who commits offences under Section 5, Section 7, Section 8 or Section 9 shall be liable to a fine of two hundred thousand Baht to one million Baht. This Act will later be referred to as the AMLA.

⁵ In Supreme Court Decisions Nos. 841-842/2469 and No. 185/2489, the Court decided that a legal person as a mining concessionaire was liable for an offence.

⁶ A legal person can also be held liable as an employer for an act committed by its employees in the course of doing business for such legal person.

⁷ In Supreme Court Decision No. 480/2524, the Court decided that a legal person committed a criminal offence and therefore was liable to the fine according to the Factory Act B.E. 2512 Section 50 and Section 50 bis.

in a manner that such legal person benefited from such an act, and such legal person was accountable and held criminally liable for such an act. This interpretation shows that the Supreme Court applied Section 70 paragraph 2 of the Civil and Commercial Code to the case and deemed that the will of representatives of a legal person was the will of such legal person. Therefore an act committed by its representatives in the name of such legal person was an act of such legal person. The Court finally held that such legal person was accountable for an offence relating to imitation of trademark. The precedent from this case has been applied to many subsequent cases adjudicated by the Supreme Court, namely Decision No. 1737/2506 and Decision No. 1669/2506, where the Supreme Court respectively held that a legal person was liable for an offence relating to counterfeiting of a trademark and an offence relating to forgery. These cases are examples of offences under the Penal Code committed by a legal person. The Supreme Court also decided that a legal person can be held liable for a criminal offence under other criminal statutes. Example of this case can be found in Supreme Court Decision No. 59/2507 in which the Court held that a legal person could commit a crime under the Act on the Misuse of Cheques B.E. 2497(1954).

In conclusion, although it has been long recognized that a legal person should be held accountable for a criminal offence, and in practice a legal person can be held criminally liable in the same manner as a natural person, there is still an argument as to whether the imposition of criminal liability upon a legal person where there is no statutory provision specifying so is against the principle of due process of law.

B. Criminal Liability of Executives or Persons Responsible for the Activities of a Legal Person in Thailand

It is widely recognized that the notion of a legal person is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.⁸ Therefore, in order to prevent a legal person from committing a criminal offence, the imposition of criminal liability upon executives or persons responsible for the activities⁹ of a legal person is necessary. The first Thai legislation which stipulated criminal liability for executives of a corporation was the Act on the Prevention on Profiteering B.E. 2480(1937).¹⁰ This Act has the objective of preventing any wrongdoing which causes disorder of the market mechanism. Later on, the State promulgated various Acts which contain provisions on the criminal liability of executives of a legal person. Examples of these Acts include the Commercial Banking Act and the Act on Securities Exchange and Stock Market B.E. 2535 (1992).

Criminal liability attached to a legal person usually has linkage to criminal liability of its executives. This means that when it is prescribed by law that wrongdoing committed by a legal person is a criminal offence and such legal person shall be punished according to such law, it is usually presumed by such law that its executives commit the same offence and shall be punished accordingly. The rationale behind this is that the evidence to prove that the offender is guilty is usually in the possession of the offender, especially in the case of economic crime; thus making it difficult for the public prosecutor to reach a “proof beyond reasonable doubt” standard resulting in dismissal of the case. It has been argued that this is immoral and inconsistent with the principle of presumption of innocence. However, that argument has been quieted by the Constitutional Tribunal. In its verdict, the Tribunal stated that the Tribunal has thoroughly considered this matter and agreed that in criminal cases, an accused or offender is presumed innocent unless the plaintiff has successfully proved otherwise. Therefore, any legislation which prescribes that an accused or offender is criminally liable without such proof of the plaintiff certainly violates the Constitution and can not be enforced. However, Section 6 of the Gambling Act B.E. 2478 (1935) does not state this. On the contrary, it states that an accused or offender is presumed innocent unless the plaintiff has successfully proved that the accused or offender was found in the gambling place. Therefore such presumption does not apply primarily. It applies only when the plaintiff

⁸ <http://www.icclr.law.ubc.ca/Publications/Reports?FergusonsG.PDF>

Viscount Haldane cited in Gerry Ferguson, Corruption and Corporate Criminal Liability.

⁹ In this paper, executives of a legal person means representatives, directors, managers or any persons who are responsible for the operation or the business of a legal person or entitled to declare the will or decision of such legal person.

¹⁰ Section 18 of this Act states that in cases where a legal person commits an offence under the Act, its representative shall be liable according to Section 15, Section 16 or Section 17, unless he can prove that he had no part in the commission of such offence.

has successfully proved so. The Tribunal finally concluded that such presumption is not inconsistent with the Constitution.

Criminal liability of executives of a legal person has been stipulated in many pieces of legislation. Most of them are laws on economics. The liability imposed can be categorized into two types; conclusive or irrebuttal presumption and rebuttal presumption.

1. Conclusive or Irrebuttal Presumption

Examples of Acts which stipulate conclusive presumption of liability are the Act in Relation to the Fault of Registered Partnership, Limited Partnership, Associations and Foundations B.E. 2499 (1956)¹¹ and the Act on Places of Service B.E. 2509 (1966).¹² The rationale behind this conclusive presumption is that the act of a legal person is the act of an executive. Therefore, it is justified to deem that such act is committed within the knowledge of its executives.

In this case, the punishment imposed upon an accused is usually a fine. Under the Criminal Procedure Code Section 37(1), where the punishment is a fine and an accused has paid the fine as fixed, the case is settled. Therefore this presumption does not seriously affect the rights and liberty of such executives.

2. Rebuttal Presumption

Rebuttal presumption of criminal liability is mostly found in laws on economics. Examples include the AMLA¹³ and the Act on Offer of Sale to the State Agencies B.E. 2542 (1999).¹⁴ Although the Constitutional Tribunal, as mentioned earlier, held that this presumption is not inconsistent with the constitution, it should be noted that this presumption may have tremendous impact on the rights and liberty of such an executive. As an offender, such an executive has the burden of proving that he or she is innocent. Although he or she is successful in proving so, he or she may lose his or her credibility and trustworthiness. Despite this fact, in order to supervise and control the operation of a legal person, this presumption outweighs such loss.

C. Legal Framework of Criminal, Civil and Administrative Sanctions in Thailand

Criminal, civil and administrative sanctions are as follows.

1. Criminal Sanctions

The allowable criminal punishments stipulated in Section 18 of the Penal Code are the following:

- death (capital sentence)
- imprisonment
- confinement
- fine
- forfeiture of property.

However, there is argument about whether these criminal punishments are appropriate for a legal person. This is because it is not possible to inflict the death penalty, imprisonment or confinement upon a legal person, while fine, although perhaps of a large amount for natural persons, can still be a minimal amount compared to the large sums of pecuniary benefit a legal person may have acquired through the commission of an offence, and thus a fine penalty may not be a proper sanction to prevent a company from committing criminal acts. Forfeiture of properties can be done only to properties used to commit a crime or properties obtained from the commission of such crime. Considering these two remaining penalties, it is doubtful whether they are sufficient and appropriate. If these two penalties are insufficient or inappropriate, what punishments are appropriate?

2. Civil Sanctions

Civil sanctions are in the form of compensation for damages. A legal person as an employer or a principal is

¹¹ Section 25.

¹² Section 26.

¹³ Section 61.

¹⁴ Section 9.

liable for compensation for any damage done to other persons by its representatives or a person empowered to act on behalf of such legal person in the exercise of its functions, saving its rights of recourse against those who caused the damage. However, if the act is not within the scope of that legal person's objective or beyond the power or duties of such representatives or person empowered to act on behalf of such legal person, these said persons alone are liable for compensation.¹⁵

3. Administrative Sanctions

At present, legal drafting style in Thailand is to incorporate administrative sanctions into the legislation to make law enforcement more effective and to respond more rapidly to the crime. The legislation generally stipulates what a legal person or its executives or management persons must do and must refrain from doing. However, the conditions are normally provided in a subordinate law such as a notification or rule. Non-compliance with such conditions will constitute a criminal offence. Examples of administrative measures include the removal of executives from a corporation to prevent damage to public spheres as stipulated in the Commercial Banking Act and the Act on the Undertaking of Finance Business, revocation of the license of a corporation, daily fine until such legal person stops violating the laws as stipulated in the Enhancement and Conservation of National Quality Act B.E. 2535(1992) and the Act on the Control of Building B.E. 2522 (1979). Moreover, the legislation usually provides the sequence or order of punishment. Violation of such legislation will firstly be punished by the regulator of such legislation. If the violator is punished, the case is settled and there is no further indictment. For example, if the violator is to be fined, and such violator pays the fine fully, the case will be settled. On the contrary, if the violator fails to pay the fine, the regulator will further the case for prosecution.

D. Criminalization in Relation to Corporate Crime in Thailand

There is no definition of corporate crime nor is there any direct statutory provision regarding this type of crime. However, the term corporate crime can be defined as crime committed either by a corporation (for example, a business entity having a separate legal personality from the natural persons that manage its activities) or by individuals that may be identified with a corporation or other business entity¹⁶ or by their agents against members of the public, the environment, creditors, investors or corporate competitors).¹⁷

Corporate crime in Thailand usually relates to economic crime; in another words when a corporation commits a crime, it usually violates economic laws. It should also be noted that a corporation can either be a subject of the crime, which is the case when a corporation itself commits a crime, or a victim of the crime, which is the case when its executives or employers act against their fiduciary duty or dishonestly embezzle the assets of such corporation.

Economic crime in Thailand is categorized into seven types as follows:¹⁸

- offences relating to finance and banking¹⁹
- offences relating to commerce and trade²⁰
- offences relating to computer-related crimes²¹
- offences relating to product and consumer protection²²
- offences relating to price fixing and monopoly²³

¹⁵ The Civil and Commercial Code, Section 76.

¹⁶ http://en.wikipedia.org/wiki/Corporate_crime .

¹⁷ <http://www.aic.gov.au/publications/tandi/ti05.pdf> . Corporate Crime in Australia. Australian Institute of Criminology. Trends and issues in crime and criminal justice. Compiled and written by Peter Grabosky and John Braithwaite.

¹⁸ Government of Thailand, Thailand Country Report, The Eleventh United Nations Congress on Crime Prevention and Criminal Justice 18-25 April 2005 Bangkok, Thailand. Correction Press, Bangkok, 2005. p. 213

¹⁹ Examples are (a) offences relating to finance and banking in which either the Bank of Thailand, a commercial bank or credit finance company are the victim or offender under the Commercial Banking Act, the Act on the Undertaking of Finance Business and (b) offences relating to currency exchange under the Exchange Control Act B.E. 2485 (1942).

²⁰ Examples are intellectual property related crime, insurance fraud.

²¹ Examples are offences under the Computer Crime Act B.E. 2550 (2007).

²² Examples are offences under the Consumer Protection Act B.E. 2522 (1979).

²³ Examples are offences under the Trade Competition Act B.E. 2542 (1999), and the Price of Goods and Service Act B.E. 2542 (1999).

- offences relating to taxation, customs, income tax and excise tax²⁴
- offences relating to forestry, minerals, fuels, petrochemicals and natural resources.²⁵

III. CURRENT SITUATION AND ISSUES CONCERNING CORPORATE CRIME IN THAILAND

As mentioned earlier, when a corporation commits a crime, it is usually related to economic crime.²⁶ Compared to street crime, economic crime seems to be less violent since it causes no physical harm; thus it can lure one into thinking that it is not dangerous. However, its impact is far greater than one can imagine. Moreover, it is difficult to prevent, deter or combat economic crime since it is often committed by elite well-educated people of good reputation, experts and executives, directors, managers or persons responsible for the operation of or empowered to decide on behalf of such corporations in the course of their duty. In this regard, corporate crime overlaps with white collar crime. Corporate crime may also overlap with organized crime. This is because criminals may create a corporation either for the purpose of crime or as a vehicle for laundering the proceeds of crime. With the advancement of technology which makes the global market borderless and available to corporations, corporate crime may become transnational crime. Moreover, corporate crime is mostly hidden, obscured within the layers of economic complexities; thus making commission of corporate crime more sophisticated and complicated than ordinary crime. These characteristics of corporate crime make it not only difficult to prevent, deter and eradicate but also require international co-operation to do so.

At present, there are various kinds of economic crime occurring in Thailand. Examples of economic crime are crimes in relation to intellectual property, commerce, banking and finance, environment and public health. However, according to the statistics of the Royal Thai Police,²⁷ economic crime in Thailand is mostly crime in relation to commerce and finance and banking. It is said that from 1993 to 2003 the loss in capital markets and financial markets were 50,000 million baht. Out of this number, 40,000 million baht was lost in the financial market. From 1992 to 2002, there were 46 cases filed in relation to banking and financial crimes; 27 cases were filed under the Commercial Banking Act and 19 cases were filed under the Act on the Undertaking of Finance Business. The total amount of loss was 42,678.1 million baht. This paper will explore only economic crime in relation to finance and banking.

Financial and banking crime has been among the most serious corporate crime in Thailand. It destroyed Thailand's financial systems and embroiled Thailand in financial crises. The first financial crisis was the Raja case in 1979. This case stimulated the State to promulgate a new legislation called the Act on Loan Amounting to Fraudulence B.E. 2527 (1984) which later was amended in B.E. 2535 (1992) and in B.E. 2545(2002). The second financial crisis happened from 1983 to 1992 when many financial institutions collapsed and the State had to take over their business to protect the public who were creditors of those financial institutions. The third financial crisis happened in 1997. It started with the case of the Bangkok Bank of Commerce Plc. (B.B.C). B.B.C's executives had fraudulently carried out the business of the bank by providing non-collateral loans, providing loans to paper companies and making false statements of the bank. B.B.C. was blamed as the cause of the 1997 financial disaster. The impact from this third financial crisis is critical; its damage was greater than those of the earlier crises. Thailand's economic and financial systems were destroyed, resulting in economic instability which scared away foreign investors. Bank and financial institutions were left with a large number of non-performing loans and many finally collapsed. As many as 1.84 million people were unemployed in 1998.²⁸ Debtors of non-performing loan were sued. Many companies

²⁴ Examples are offences under the Revenue Code, the Custom Act B.E. 2496 (1953), the Excise Tax Act B.E.2527 (1984) and the Excise Tariff Act B.E. 2527 (1984).

²⁵ Examples are offences under the Forest Act B.E. 2484 (1941), the Mineral Act B.E.2510 (1967), the Petroleum Act B.E. 2514 (1971) and the Petroleum Income Tax Act B.E. 2514 (1971).

²⁶ As mentioned above that corporate crime relates to economic crime, therefore, the term economic crime also refers to economic crime committed by a corporation.

²⁷ [http:// www.rakbankerd.com/hotnewes.html?nid=36](http://www.rakbankerd.com/hotnewes.html?nid=36)

²⁸ http://www.info.tdri.or.th/library/quarterly/text/m99_2.htm

Summary of Discussion and Recommendations. The 1998 TDRI Year-End Conference "From Crisis to Sustainable Development". Jointly organized by Thai Chai Pattana Foundation and the Thailand Development Research Institute. December 12-13, 1998. Ambassador City Jomthien, Chon Buri Published in TDRI Quarterly Review Vol. 14 No. 1 March 1999.

went bankrupt. The impact was also felt among the poor, especially those receiving state welfare and other less advantaged groups under the care of charitable foundations. Moreover, as the economy has continued to be weak for some time, the social and economic impacts spread throughout society in the form of income reduction and a rise in living expenses, which in turn cause increasing crime, drug abuse, unsustainable exploitation of natural resources, and over-use of public facilities.²⁹

Commercial banks and financial institutions play a significant role in a country's economy. How far a country can be developed depends enormously upon its banking and financial systems and status. However, the capital used in the operation of the commercial bank is gathered from the public through the deposit system. As aforementioned, the B.B.C. case was the result of corrupt or dishonest practice of its executives; therefore to prevent the recurring of financial crisis, legal measures must also be efficiently and effectively provided to regulate or supervise the practice of these persons. It is also essential to bear in mind that legal measures must be appropriately provided so that they do not interrupt the flow of the market and the law should not be altered or amended too frequently as this would confuse investors, hindering the growth of investment.

Section 1168 of the Civil and Commercial Code states that: "the directors must in their conduct of the business apply the diligence of a careful businessman". In addition, there are statutory provisions stipulating that the operation of commercial banks and financial institutions which results in the loss of public interest is a criminal offence and the directors or management persons of the bank or financial institutions shall be punished by such provisions. Other non-criminal measures, such as remedial measures, are also provided under Thai law.

A. Preventive and Remedial Measures for Financial and Banking Crimes

1. Preventive Measures

To prevent this type of crime, criminal sanctions and non-criminal sanctions are used. These sanctions detail as follows.

(i) Criminal Sanctions

The Commercial Banking Act and the Undertaking of Finance Business were promulgated to regulate business operation of commercial banks and financial institutions respectively. However, the Commercial Bank Act does not stipulate the punishments for executives who violate the law. Therefore, the criminal sanctions applied are those specified in the Penal Code, such as fraud and embezzlement, whilst the punishments for executives of financial institutions are stipulated in the Act on the Undertaking of Finance Business. The penalties under the Penal Code and the Act on the Undertaking of Finance Business are fine and imprisonment.

(ii) Non-Criminal Sanctions

Both the Commercial Banking Act and the Act on the Undertaking of Finance Business provide administrative measures to control banking and financial business. These measures can be summarized as follows:

(a) Removal of Directors or Management Persons

This measure is provided in Section 24 ter of the Commercial Banking Act³⁰ and Section 57 bis of the

²⁹ Ibid, p.12.

³⁰ Section 24 ter: Where there is evidence that the condition or operation of any commercial bank is such that damage may be caused to the public interest, or where the directors, managers or persons responsible for the operation of any commercial bank fail to comply with the order of the Bank of Thailand under Section 24 bis, the Bank of Thailand shall have power to order such commercial bank to remove directors or persons who were responsible for the operation of the commercial bank and for having caused such damage.

Where the Bank of Thailand orders the removal of any persons under the first paragraph, the commercial bank shall, with the approval of the Bank of Thailand, appoint persons to replace the persons so removed within 30 days from the removal date.

Where any commercial bank fails to remove the persons under the first paragraph or fails to appoint other persons in place of persons so removed as specified in the second paragraph, the Bank of Thailand, with the approval of the Minister, shall have the power to remove such persons or appoint one or more persons to replace the persons so removed.

Where there is an urgent need to rectify the financial condition or the operation of any commercial bank such that any delay may cause damage to the public interest, the Bank of Thailand, with the approval of the Minister, shall have the power to immediately remove directors, managers or persons responsible for the operation of the commercial bank and appoint one or more persons to replace the persons so removed as appropriate.

Act on the Undertaking of Finance Business.³¹ Under these provisions, there are two circumstances in which the Bank of Thailand (BOT) can remove directors or management persons of commercial banks and finance institutions. The first case is when damage has been caused or may have been caused to the public interest. The second case is when damage has not yet been caused but there is an urgent need to rectify the status or the operation of commercial banks or financial institutions. These sections were amended in 1997. Before the amendment, the BOT had the power to remove such persons only when there was evidence that such persons had caused damage to the public interest in the course of their operations. However, in practice, problems that arise from the operation of commercial banks or financial institutions can rapidly result in disaster for such institutions, as happened in the case of B.B.C. Therefore, if the BOT is required to investigate the cause of such damage before the removal can be done, it may be too late to rejuvenate the commercial bank and financial institution. Having been made aware of such problems, the State thus amended these two sections.

(b) Restraint of Certain Types of People from Holding Managerial Positions or Becoming Executives
Section 12 quarter of the Commercial Banking Act and Section 22 of the Act on the Undertaking of Finance Business prohibit persons who fall under the following categories from managerial positions. These categories are:

- (1) persons who have been imprisoned by a final court judgment for an offence related to property committed with dishonest intent;
- (2) persons who have been a director, manager, deputy manager, or assistant manager of a commercial bank or a financial institution which has had with its licence withdrawn, unless an exception has been granted by the BOT;
- (3) persons who have been removed from a position in a commercial bank or financial institution.

The reasons to prohibit such persons from managerial positions are that they lack sufficient knowledge to operate the business, are not trustworthy and have a tendency to commit financial crimes which may lead to the collapse of the corporation.

2. Remedial Measures

Remedial measures provided in the Commercial Banking Act and the Act on the Undertaking of Finance Business are: seizure and attachment of property, restraint from leaving the kingdom and restitution or compensation for damage.

(i) Seizure and Attachment of Property

Section 46 decem paragraphs 1-3 of the Commercial Bank Act, and Section 75 tredecim paragraphs 1-3 of the Act on the Undertaking of Finance Business state that the BOT has power to order seizure or attachment of properties of directors or management persons of commercial banks or financial institutions or properties which are legally deemed to be properties belonging to such persons if the BOT considers that damage to the public interest may be caused unless an immediate action is taken. Such order of the BOT shall continue to be in effect unless the Court orders otherwise. In some instances, such as in the process of gathering evidence,

³¹ Section 57 bis: Where there is evidence that the condition or operation of any company is such that damage may be caused to the public interest, or where the directors, managers or persons responsible for the operation of any company fail to comply with the order of the Bank of Thailand under the first paragraph of Section 57 or Section 57 ter, the Bank of Thailand shall have power to order such company to remove its directors, managers or persons responsible for its operation who having caused such condition or operation of the company. If the Bank of Thailand orders the removal of any person, such company shall, with the approval of the Bank of Thailand, appoint other persons to replace the persons so removed within thirty days from the removal date. There a company fails to remove such persons or removes but fails to appoint other persons in their places, the Bank of Thailand with the approval of the Minister shall have power to issue the following orders:

- (1) removal of its directors, managers or persons responsible for the operation of the company whom the company fails to remove;
- (2) appoint one more persons to replace the person removed for a period not longer than three years. The person so appointed shall be entitled to remuneration to be paid from the assets of the company as prescribed by the Minister. During the period that the persons so appointed hold office, shareholders of the company may not pass a resolution to revoke or change the orders of the Bank of Thailand. The person removed shall no longer be involved in or manage, directly or indirectly, affair sof the company, and shall facilitate and inform facts to the person under (2) or in the manner as a competent officer may prescribe.

For the purpose of this Section, the order of the Bank of Thailand issued by virtue of this Section shall be deemed to be resolution of a shareholders' meeting under the Civil and Commercial Code or the law on limited public companies, as the case may be.

which make it impossible to file a case in Court within 180 days, the Court having territorial jurisdiction may extend the period of seizure or attachment as requested by the BOT.

An official who has the duty to carry out such an order is an official by definition of the Penal Code;³² thus in case he or she fails to comply with such order, for example destroy, conceal, steal or transfer such properties, he or she commits a criminal offence and shall be punished accordingly. These offences are offences under the Penal Code Section 141,³³ Section 142³⁴ or Section 368.³⁵ Furthermore, if non-compliance with such order is to prevent creditors from receiving payment in whole or in part, Section 350 of the Penal Code shall be applied.³⁶

(ii) Restraint from Leaving the Kingdom

This measure is stipulated in Section 46 decem paragraph 4 of the Commercial Banking Act.³⁷ Under this section, in order for the Court or Director General of the Police Department (presently Commissioner General of the Royal Thai Police) to order such restraint, two elements must be proved:

- (a) that there is sufficient evidence that the said person has committed an offence prescribed by law; and
- (b) that there is reasonable grounds for suspecting that the said person is about to abscond from the Kingdom.

(iii) Restitution or Compensation for Damage

The last paragraph of Section 46 novem of the Commercial Banking Act³⁸ and Section 75 duodecim of the

³² Response of the Judiciary Council (general assembly) to the BOT query.

³³ Section 141: Whoever removes, damages, destroys or renders useless any official seal or mark stamped or affixed by an official to anything in the due exercise of his functions as evidence in the seizing, attaching or keeping of such thing, shall be punished with imprisonment not exceeding two years or fine not exceeding four thousand baht, or both.

³⁴ Section 142: Whoever, damages, destroys, conceals, makes away with, loses or renders useless any property or document himself, or orders such person or the other person to send or keep it, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht, or both.

³⁵ Section 368: Whoever, being informed of an order of an official given according to the power invested by law, refuses to comply with the same without any reasonable cause or excuse, shall be punished with imprisonment not exceeding ten days or fine not exceeding five thousand baht, or both.

If such order is an order authorized by law requiring a person to assist in carrying on the activities in the function of an official, the offender shall be punished with imprisonment not exceeding one month or fine not exceeding one thousand baht, or both.

³⁶ Section 350: Whoever, in order to prevent his creditor or the creditor of the other person from receiving payment in whole or in part which has been or will be claimed through the Court, removes, conceals or transfers any property to another person, or maliciously contracts a debt for any sum which is not true, shall be punished with imprisonment not exceeding two years or fine not exceeding four thousand baht, or both.

³⁷ Section 46 decem paragraph 4: In the case under the first paragraph, and where there is reasonable ground for suspecting that the said person is about to abscond from the Kingdom, the Criminal Court shall have power to restrain that person from leaving the Kingdom when requested by the Bank of Thailand. In case of emergency, when the Governor of the Bank of Thailand or a person designated by the Governor notify the Director General of the Police Department, the Director General of the Police Department shall have power to restrain that person from leaving the Kingdom for a temporary period of not more than fifteen days until the Criminal Court orders otherwise.

³⁸ Section 46 novem: In the case where it appears that any of the following offences have been committed:

- (1) in the operation of any commercial bank, the director or person responsible for the operation of that commercial bank commits an offence concerning things under the provisions of Chapter 1, Chapter 111, Chapter IV, Chapter V or Chapter V11 of title X11 of the Penal Code, or Section 40, Section 41, or Section 42, of the Act on Offences concerning Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations B.E. 2499, or Section 243 or Section 244 of the Limited Public Companies Act B.E. 2521;
- (2) in the examination of a commercial bank's accounts, the auditor commits an offence under Section 269 of the Penal Code or Section 31 of the Act on Offences concerning Registered Partnerships, Limited Companies, Associations and Foundations B.E. 2499; or
- (3) any person who employs or supports another to commit the offence under (1) or (2), the Bank of Thailand shall be deemed to be the injured person under the Criminal Procedure Code.

Where offences under this Section have been committed, the public prosecutor, when instituting the criminal prosecution, shall have power to apply for the restitution of the property or the value thereof or the compensation for any damage on behalf of the person injured. The provisions on filing of civil cases in connection with an offence under the Criminal Procedure Code shall apply *mutatis mutandis*.

Act on the Undertaking of Finance Business³⁹ state that the public prosecutor shall have the power to apply for restitution of the property or compensation for damage. These sections also state that the provisions on the filing of a civil case in relation to penal actions are to be applied *mutatis mutandis*. Thus the public prosecutor is entitled under Section 43 of the Criminal Procedure Code⁴⁰ to file a civil case on behalf of the injured person. It should be noted that remedial measures provided in the Commercial Banking Act and in the Act on the Undertaking of Finance Business is broader than that in the Criminal Procedure Code. In the Criminal Procedure Code, the public prosecutor has power to apply only for restitution of the property or the value which the injured person is entitled to and such right of restitution is in relation to offences against property, but he or she has no power to apply for damages on behalf of the injured person. The injured person has to file a civil case in relation to such criminal offence to acquire damages.

B. Problems in Relation to Preventive and Remedial Measures

There are some problems in relation to preventive and remedial measures.

1. Problems Regarding Preventive Measures

(i) Problem Regarding the Elements of Crime

The structure of criminal liability in Thailand or the elements which are required to be successfully proved to punish a person are:

- such person commits an act intentionally, negligently, or unintentionally in cases of strict liability;⁴¹
- the law provides that such act is a crime and there is no justified cause, such as a lawful defence, to so act;
- such person is able to appreciate the nature or illegality of his or her act and is able to control him or herself. Hence, where such person is unable to appreciate the nature and illegality of his or her act or unable to control his or her defective mind, he or she is not liable for such act.

The first element, the intention, has two meanings. The first is manifest intention or simple intention. The second is special intention or bad motive. The term "special intention" is defined in the Penal Code as "to do an act dishonestly".⁴²

³⁹ The public prosecutor, when instituting criminal prosecution under Section 75 bis, Section 75 ter, Section 75 quarter, Section 75 quinqué, Section 75 sex, Section 75 septem and Section 75 octo, Section 75 novem, Section 75 decem or Section 75 undecim, shall have power to claim the restitution of the property or the value thereof or damages on behalf of the injured person and shall be exempted from the Court's fee.

⁴⁰ Section 43: In cases of theft, snatching, robbery, gang-robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property, where the injured person has the right to claim the restitution of the property he has been deprived of through of the offence, or the value thereof, the Public Prosecutor, when instituting the criminal prosecution, shall, on behalf of the injured person, apply for restitution of the property or the value thereof.

⁴¹ Section 59 of the Thai Penal Code: A person shall be criminally liable only when such person commits an act intentionally, except in the case where the law provides that such person must be liable when such person commits an act by negligence, or except in the case where the law clearly provides that such person must be liable even though such person commits an act unintentionally. To do an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing.

⁴² Section 1: In this Code

(1) "To do an act dishonestly" means to do an act in order to procure, for himself or the other person, any advantage to which he is not entitled by law.

Offences relating to financial and banking crimes as stated in the Penal Code,⁴³ the Commercial Banking Act or the Act on the Undertakings of Finance Business⁴⁴ require special intention or bad motive of the perpetrator. This requirement causes a considerable problem since the public prosecutor has a duty under the Criminal Procedure Code⁴⁵ to prove beyond reasonable doubt. If the public prosecutor fails to prove to such extent, the Court dismisses the case. In practice it is difficult to reach such standard and the Court usually dismisses the case.

(ii) Problem Regarding Persons Disqualified from Holding Executive or Managerial Positions

As mentioned above, according to the Commercial Banking Act⁴⁶ and the Act on the Undertaking of Finance Business,⁴⁷ there are three groups of people who are barred from managerial positions. These people are:

- (a) executives who have been imprisoned by a final court judgment for an offence during the performance of executive duty;
- (b) persons who have been imprisoned by a final court judgment for a dishonest act in relation to properties;
- (c) persons who have been alleged by an injured person to have committed an offence in relation to

⁴³ Criminal liability for executives or persons who commit financial and banking crimes are stated in the Thai Penal Code Section 352-355.

Section 352. Whoever, being in the possession of the property belonging to the other person, or of which the other person is a co-owner, dishonestly converts such property to himself or a third person is said to commit misappropriation, and shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht or both.

Section 353: Whoever, being entrusted with the management of a property belonging to the other person, or of which the other person is a co-owner, dishonestly does an act contrary to his duty by any means whatever so as to cause damage to the benefit on account of being a property of such other person, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht or both.

Section 354: If the offence under Section 352 and Section 353 be committed by the offender in the status of being an executor or administrator of the property of the other person under the order of the Court or under a will, or in the status of being a person having an occupation or business of public trust, the offender shall be punished with imprisonment not exceeding five years or fine not exceeding ten thousand baht, or both.

Section 355: Whoever, having found a valuable movable property hidden or buried under the circumstances in which no person may claim to be the owner, converts such property to himself or the other person, shall be punished with imprisonment not exceeding one year or fine not exceeding two thousand baht, or both.

⁴⁴ Criminal liability for executives or persons who commit financial and banking crimes are stated in Section 75 bis to Section 75 quarter:

Section 75 bis: Any director, manager or person responsible for the operation of a company, who dishonestly deceives the public by the assertion of falsehood or the concealment of facts which should be revealed to the public and, by such deception, obtains a property from a number of the public so deceived or from a third person, or causes the public so deceived or a third person to execute, revoke or destroy a document of right, shall be liable to imprisonment for a term of five to ten years and a fine of five hundred thousand to one million baht.

Section 75 ter: Any director, manager or person responsible for the operation of a company, who being entrusted with the management of the property of the company or of which the company is a co-owner, dishonestly does an act contrary to his duties, by any means whatever, so as to cause damage to the usefulness in the nature of it being a property of the company, shall be liable to imprisonment for a term of five to ten years and a fine of five hundred thousand to one million baht.

Section 75 quarter: Any director, manager or person responsible for the operation of a company, who being in possession of a thing belonging to the company or of which the company is a co-owner, dishonestly converts the thing to himself or a third person, shall be liable to imprisonment for a term of five to ten years and a fine of five hundred thousand to one million baht.

⁴⁵ Section 227: The Court shall exercise its discretion in considering and weighing all the evidence taken. No judgment of conviction shall be delivered unless and until the Court is fully satisfied that an offence has actually been perpetrated and that the accused has committed that offence. Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him.

⁴⁶ Section 12 quarter (2): No commercial bank shall appoint or allow any person with any of the following qualifications or attributes to be or to perform the duties of a director, manager, deputy manager, assistant manager or adviser...(2)having been imprisoned by a final court judgment for an offence related to property committed with dishonest intention.

⁴⁷ Section 22(2): No finance company shall appoint or allow any person with any of the following qualifications or attributes to be or perform the duty of a director, a manager, an officer or a person with power of management, or an adviser...(2) having been imprisoned by a final court judgment for an offence related to property committed with dishonest intent.

financial crime.⁴⁸

However, these sections do not include two groups of people who have a tendency to commit crimes and cause detriment to commercial banks and financial institutions. These groups of people are outlined below.

- (a) Executives of commercial banks and financial institutions who have been alleged to have committed financial crime and the case is in Court proceedings

As explained earlier, only executives of commercial banks and financial institutions who have been imprisoned by a final court judgment are disqualified from the operations of such institutions. During the judicial proceeding, if the board of such institutions do not remove such executives, the State has no statutory authority to do so. However, there is a tendency for such executives to surreptitiously destroy evidence which is admissible to file against them in court, thus resulting in dismissal of the case. A good example of this was the Siam City Bank (SCIB) case, where the Board of the Bank affirmed that it would not remove its executives until final judgment was rendered;

- (b) Persons who have been imprisoned by a final court judgment for an offence related to property committed with dishonest intent but the imprisonment is suspended

The question arises that if the Court inflicts imprisonment on such persons but suspends the penalty, is it deemed that such persons are disqualified under Section 12 quarter (2) of the Commercial Bank and Section 22(2) of the Act on the Undertaking of Finance Business? There is no precedence for this matter. However, in Supreme Court Decision No 1983/2497, the Court held that an offender who had been imprisoned by a final court judgment but had had the punishment suspended, should be deemed not to have received the punishment of imprisonment. Thus, it is predictable that the Court will decide the same should the question arise.

The objective of Section 12 quarter (2) and Section 22(2) is to prevent persons as provided above from being appointed as executives so that they cannot dishonestly procure benefits to which they are not entitled and cause detriment to the public interest. Thus it is important that these two sections are interpreted to include persons who have been imprisoned by a final court judgment for an offence related to property committed with dishonest intent even though such imprisonment is suspended.

2. Problems Regarding Remedial Measures

(i) *Problems Regarding Seizure or Attachment*

- (a) Problems Regarding Properties under Seizure or Attachment

Under Section 46 decem of the Commercial Banking Act and Section 75 tredecem of the Act on the Undertaking of Finance Business, there are two kinds of properties for which the BOT has the power to order seizure or attachment. These properties are properties belonging to the wrongdoer and properties which may legally be deemed to be properties belonging to the wrongdoer. These sections do not include properties which the wrongdoer has transferred to others, such as family members. Therefore, in cases where the wrongdoer has transferred properties to others, the BOT has no authority to order seizure or attachment. This is a pitfall and needs to be taken into serious consideration.

- (b) Problems Regarding Execution of Properties

In practice, the BOT will notify related agencies of such orders and demand that such properties shall not be transferred. The BOT will also notify the Execution Department that such properties shall not be sold under public auction.

A question arises as to whether a creditor of this garnishee (person whose property has been under the seizure or attachment order of the BOT) can request that such orders be revoked. The question can be distinguished into two aspects, the first is where there is no final judgment of the court asserting the right of such creditor and the second is where final judgment is rendered. In Supreme Court Decision No.6632/2542, the Court decided that where there is no final judgment asserting the rights of creditors, such creditor had no rights to request revocation of such orders. From this Decision, it can be concluded that only the judgment creditor is entitled to request

⁴⁸ Notification of the BOT.

revocation of seizure or attachment. However, according to Section 271 of the Civil Procedural Code, a judgment creditor is entitled to the execution of judgment within ten years of the date of such judgment. The execution official shall collect and sell properties of the judgment debtor and repay money debt to the judgment creditor. Thus, a question arises regarding the priority of the orders of the BOT and the Court judgment. In this regard, the Legal Execution Department have laid down a guideline that the Court judgment has priority over the order of the BOT. This makes remedial measures under the Commercial Banking Act and the Act on the Undertaking of Finance Business ineffective, and is hence a pitfall of law.

(c) Problem Regarding the AMLA

Section 49 paragraph 1 of the AMLA states that where there is convincing evidence that any property is the property connected with the commission of an offence, the Secretary General of the Anti-Money Laundering Office shall refer the case to the public prosecutor for consideration and file an application with the Court for an order that such property be vested in the State without delay. Section 51 paragraph 1 states that if the Court is satisfied, following an inquiry into an application filed by the public prosecutor under Section 49, that the property to which the application relates is the property connected with the commission of the offence and that the application of the person claiming to be the owner or transferee thereof under Section 50 paragraph 1 is not tenable, the Court shall give an order that the property be vested in the State. Section 3 provides the definition of “predicate offence” to include any offence relating to misappropriation or fraud or exertion of an act of violence against property or dishonest conduct under the law on commercial banking, the law on the operation of finance, securities and credit foncier (land loan) businesses or the law on securities and stock exchange committed by a manager, director or any person responsible for or interested in the operation of such financial institutions.

Therefore, offences relating to finance and banking crime are governed by this Act which enables the public prosecutor to file an application and the Court to order such property to be vested in the State. However, it is doubtful whether the remedial measures as provided in Section 46 of the Commercial Bank and Section 75 of the Act on the Undertaking of Finance Business which authorize the public prosecutor to apply for restitution of property or compensation for damage on behalf of the injured person will be effectively used since the AMLA empowers the Court to order such property to be vested in the State.

In addition, although Section 49, Section 50, Section 52 and Section 53 of the AMLA allow a person to claim ownership of such property, this person must be the real owner or transferee. The victim of the crime is not allowed to claim ownership under these sections. Moreover, he or she must successfully prove that such property is not connected with the offences.

Another matter which is also necessary to take into consideration is that although the Secretary General of the Anti-Money Laundering Office is empowered under Section 49 to refer the case to the competent official under the law which prescribes such offence⁴⁹ for preliminary protection of the injured person’s rights, it is within the discretion of the Secretary General to refer the case for such protection. The victim has no right to request preliminary protection.

(ii) Problem Regarding the Delay of Remedial Process

The Criminal Procedure Code also applies to the investigation and adjudication of finance and banking cases. However, the main objective of this Code is to punish the offender rather than to cure the injured. Moreover, although Section 46 novem of the Commercial Banking Act and Section 75 duodecim the Act on the Undertaking of Finance Business authorize the public prosecutor to apply for restitution of property or damage on the behalf of the injured, Section 47 of the Criminal Procedure Code states that the Court shall follow the law concerning civil liabilities when adjudicating a civil case in connection with a criminal offence and that the Court is bound by the facts as found by the judgment in the criminal case.⁵⁰ Therefore, before the Court can order restitution for the injured, criminal judgment must be pronounced. It can be concluded

⁴⁹ In case of crimes in relation to the Commercial Act and the Act on the Undertakings of Finance Business, the competent official is the Bank of Thailand.

⁵⁰ The Criminal Procedure Code, Section 47: Judgment in the civil case shall be given in accordance with the provisions of law concerning civil liabilities, without regard to conviction or non-conviction of the accused.

that whilst the Commercial Banking Act and the Act on the Undertaking of Finance Business are substantive laws aiming at curing the loss of the injured, the Criminal Procedure Code, which is a procedural law, does not enhance such an objective.

IV. THE ENFORCEMENT OF LAWS IN RELATION TO CORPORATE CRIME IN THAILAND

In order to maintain public order, the State clarifies its criminal policy by promulgating statutory provisions on what behaviour constitutes a criminal offence and is to be punished. However, in order for such laws to be enforced effectively, the enforcement authorities need to work hand in hand.

Criminal procedure for corporate crime is the same as for other types of crime. It begins with the police investigation of the crime and the submission of police opinion to the public prosecutors.⁵¹ The public prosecutor then reviews evidence gathered from the investigation and decides whether to charge or discharge the alleged offence.⁵² If the public prosecutor is of the opinion to charge the offender, he or she will institute a case in court. The Court adjudicates the case and renders its judgment. However, since the nature of financial and banking crime is different from other types of crime, the process is sometimes not easy. In some instances, the Court may have to dismiss the case because the public prosecutor does not have sufficient evidence to prove beyond a reasonable doubt that the offender committed the crime.⁵³ This part will briefly explain the investigation, prosecution and judicial process mentioned above and problems arising from the process.

A. Investigation and Prosecution of Corporate Crime

Before 2005, the Economic Crime Investigation Division (ECDI) under the Police Department⁵⁴ was the only authorized body to investigate and inquire into economic crimes. The public prosecutor was not involved in the investigation process. However, pursuant to the Act on the restructuring of governmental agencies, bureaus and departments, B.E. 2545 (2002), the Act on the Special Cases Investigation was enacted in B.E. 2547 (2004). The Department of Special Cases Investigation (DSI) was established by this Act. It is a joint professional governmental department under the Ministry of Justice, commissioned specifically for the surveillance, deterrence and effective prevention of organized criminal activities that continue to jeopardize the country's economy, social order, and national stability, as well as for the eradication of any illicit groups or activities that endanger international security.⁵⁵ Therefore, the DSI became another investigative and inquiry authority. Section 3 of this Act defines Special Cases as criminal cases as specified in Section 21. Section 21 states that Special Cases which require special investigation and inquiry are any of the criminal offences which fall under the list as prescribed in the annex of this Act and in the ministerial regulation issued as suggested by the Special Investigation Board, provided that such a criminal case is (a) complex and requires special investigation and collection of evidence; (b) seriously affects public order and morality, security of the kingdom, international relations, or the economics or finance of the kingdom; (c) is a significant transnational crime or is being or has been committed by organized crime groups; or (d) is a crime in which influential people are involved as principals, instigators or supporters.

There are 27 types of offences which are Special Cases. Twenty two are prescribed in the annex of this Act and five in the ministerial regulation issued pursuant to this Act. Lists of the offences which are in the annex are as follows:

- offences relating to the law on loan amounting to public cheating and fraud
- offences relating to the law on competition
- offences relating to the law on commercial banking

⁵¹ The Criminal Procedure Code, Section 142.

⁵² The Criminal Procedure Code, Section 143.

⁵³ The Criminal Procedure Code, Section 185: If the Court is of opinion that the accused has not committed the offence, or that the acts done by him do not constitute an offence, or that the case is barred by prescription, or that there are legal grounds upon which the accused ought not be punished, the Court shall dismiss the case and release the accused; but pending final judgment, the Court may detain or grant the accused provisional release.

⁵⁴ The Police Department has been restructured and its name is now the Royal Thai Police. The Divisions concerned are Economic Crime Investigation Division and Crime Suppression Division.

⁵⁵ www.dsi.go.th/dsi/about_box.jsp?detail=17

- offences relating to the law on the undertaking of finance business, securities business and credit foncier (land loan) business
- offences relating to the law on chain loan control
- offences relating to the law on foreign exchange control
- offences relating to the law on government procurement fraud
- offences relating to the law on the protection of layout design of integrated circuits
- offences relating to the law on consumer protection
- offences relating to the law on trademarks
- offences relating to the law on currency
- offences relating to the law on tax and duty, and compensation of exported goods procured in the kingdom
- offences relating to the law on interest on loans by financial institutions
- offences relating to the law on the Bank of Thailand
- offences relating to the law on public companies
- offences relating to the law on anti-money laundering
- offences relating to the law on the industrial product standards
- offences relating to the law on copyright
- offences relating to the law on promotion of investment
- offences relating to the law on enhancement and conservation of national environmental quality
- offences relating to the law on patents
- offences relating to the law on the security and exchange commission.

Offences which are in the Ministerial Regulations are as follows:

- offences relating to the Revenue Code
- offences relating to the Custom Act
- offences relating to the Excise Act
- offences relating to the Liquor Act.

Financial and banking crime is a Special Case under this Act. Therefore, the DSI is the investigative and inquiry agency for these cases. Offences which do not fall under these categories are under the authority of the Royal Thai Police to investigate.

Section 32 states that for the efficiency of suppression of Special Case offences, the Board of Special Cases may approve a public prosecutor or military prosecutor to inquire or participate in a special case in order to give advice and examine the evidence from the beginning of the investigation process. However, in a Special Case which is a serious transnational crime or is committed by an organized crime group or a criminal case in which an influential person is the principal, instigator or supporter, a public prosecutor or a military prosecutor is required to conduct a joint investigation with the Special Case Inquiry Official in every case. By allowing the public prosecutor to jointly investigate the case with the DSI, this section has changed the former function of the public prosecutor in which he or she was excluded from the investigation and inquiry into the offence; in this regard the public prosecutor has an opportunity to advise the DSI and learn about the necessary evidence for the case. Hence, this Act reinforces efficiency in the investigation of complex crimes and solves the loophole of evidence gathering in the traditional structure of investigation and inquiry.

The Act usually specifies what authority is the regulator of the Act. The specified authority will act primarily an investigation authority and file a complaint to either the ECID or the DSI, according to the offences. As for financial and banking crime, the BOT is a regulator and plays a significant role in gathering facts and conducts primarily investigation, however, the Commercial Banking Act and the Act on the Undertaking of Finance Business also confers a wide range of authorities upon the BOT. For example, in cases where the punishment is fine, if it is fully paid within the specified period, the case is considered settled. However, if the law does not specify that the criminal be fined, the BOT has no right to settle the case. In this context, the BOT has to further the case to the DSI.

B. Trial of Corporate Crime

At present, except for economic cases relating to intellectual property, which are under the jurisdiction of

the Central Court of Intellectual Property and International Trade, there are no other specialized courts dealing with cases relating to economic or corporate crime. Economic and corporate crime is adjudicated by the Criminal Court or other provincial courts which have jurisdiction over criminal cases.

The procedural law used in the trial is the Criminal Procedure Code. Under Section 185,⁵⁶ the public prosecutor has to prove beyond reasonable doubt that the offender committed such crimes, otherwise the Court will dismiss the case.

Another Act relating to the trial is the Act on the Protection of Witnesses in Criminal Cases B.E. 2546(2004). Under Section 3 of this Act, the term "witness" means oral evidence from a person who provides or shall provide facts for officials with the power and duty to conduct an investigation, officials with the power and duty to conduct an inquiry, and officials who have the duty to prefer a criminal charge in court against an alleged offender and the Court in the trial of criminal cases. This term also includes expert witnesses but excludes an accused who cites him or herself as a witness. Section 6 provides general safety measures for witnesses and Section 8 provides special measures for witnesses. Section 3 defines the term "safety" as safety in life, body, health, liberty, reputation and property or other rights of the witness before and after testifying in court. Both protection measures have the same objectives which are to keep witnesses in a safe place and conceal the identity of witnesses. However, in certain cases such as cases relating to the security of the kingdom or organized crime or cases where the maximum rate of imprisonment exceeds ten years, special protection, such as changing the name and identity of the witness and providing education or training for the witness so that he or she can live his or her life, may be used to protect the witness.

C. Problems Regarding the Law Enforcement Process and Authorities

1. The Complexity of Corporate Crime and the Lack of Specialized Personnel

The complexity of corporate crime makes it difficult to investigate and prosecute a company. Although the DSI was established in the hope of investigating corporate crime in particular and the specific departments were created to prosecute perpetrators of different types of economic crime, (namely the Department of Economic Crimes Litigation, the Department of Tax Litigation and the Department of Intellectual Property Litigation, which were established by the Office of the Attorney General (OAG)), the problem continues since the number of skilled personnel is minimal compared to the number of cases of economic crime arising. Moreover, these personnel may be transferred to other public agencies, either by their own will or by compulsory rotation. The lack of specialized personnel may result in delay in investigation and prosecution, and the loss of the best evidence which can be used against the defendant in court. As for the court, there is no specialized court or division in the court to try economic crime except for the Central International Trade and Intellectual Property Court.

2. The Lack of Real Co-operation between Enforcement Authorities

Although Section 32 of the Special Investigation Act authorizes joint investigation between a public prosecutor and the Special Case Inquiry Officials, it applies only in a serious transnational crime case committed by an organized crime group or a criminal case in which an influential person is the principal, instigator or supporter. Moreover, the regulator of certain Acts, for example in financial and banking crime, the BOT, which is the regulator of the Commercial Bank Act and the Act on the Undertaking of Finance Business and plays a significant role in gathering facts and conducting preliminary investigation, will meet with public prosecutors and the Special Case Inquiry Officials only when a crime has already been committed. In such cases, evidence which may have been available at the time when such malicious acts or corrupt practices began may have already been destroyed.

3. Public Awareness of Corporate Crime and its Danger

The public may not be aware of corporate crime. Therefore they do not make allegations of offences and the police cannot make an inquiry unless such an offence is a public offence. In these circumstances, the criminal is not punished. In addition, the public may be aware of corporate crime, however, in some cases they view the seriousness of the crime as equivalent to 'ordinary' crime, not fully understanding the impact which corporate crime will have. Therefore they do not actively co-operate with the State in fighting it.

⁵⁶ Section 185, supra 5.

4. Collection of Evidence

(i) Public Awareness

Lack of public awareness makes it difficult to collect supportive evidence.

(ii) Social Status of the Criminal

Because of the social status of the criminals the public may be afraid to provide evidence or to co-operate with the police. Witness may be intimidated and may not be willing to testify.

(iii) Electronic Evidence

In some instances, investigative and inquiry authorities need to have some skill and knowledge to obtain such evidence. They must know when and where to collect this type of evidence since it is easily destroyed. In cases where the evidence is destroyed, problems may arise in cases where there is no other evidence.

5. Burden of Proof

The public prosecutor needs to prove beyond reasonable doubt that the offender committed such a crime. However, corporate crime is usually committed by the executives or the employees of the corporation; therefore there is a tendency that the executives or employees destroy the evidence to conceal the crime. Hence, to satisfy the court with such an extensive degree of proof without the necessary evidence is almost impossible.

6. International Co-operation

Corporate crime is a not only a domestic issue but also a global issue. To prevent and combat this crime, international co-operation is essential. This is especially true when the local perpetrator successfully flees the country and escapes until the statute of limitations has expired; provided there is extradition, it is not possible to prosecute him or her. In this case extradition is necessary. For example, in the B.B.C case which, as mentioned earlier, was a serious corruption case and was a cause of the collapse of Thailand's economy in 1997, the criminals had escaped to Canada. Thanks to extradition the criminals were extradited and were prosecuted. Later they were found guilty and were punished. However, in some cases where extradition was not possible, the criminal was able to escape from justice and use another country as a safe haven.

V. INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS

Apart from the Extradition Act B.E. 2472(1929), Thailand has also promulgated the Act on Mutual Legal Assistance in Criminal Matters B.E. 2535(1992). This Act does not constitute new provisions on criminal procedures. It is merely a legal tool for Thai officials to exercise their power when foreign states request co-operation. This Act allows a faster move to respond to crimes since there is no judicial procedure involved which will prolong the process. In this case, co-operation between administrative authorities of the requesting and requested states is required. In addition, according to this Act, if the requesting state is a party to a bilateral treaty or agreement with Thailand, the requesting state can directly request legal assistance through the OAG. As of 2005, Thailand has mutual legal assistance treaties with ten countries: Canada, China, France, India, Norway, Poland, Republic of Korea, Sri Lanka, the UK and the USA.

The contents of this Act are summarized as follows.

A. Types of Legal Assistance

There are eight types of legal assistance categorized in this Act which are:

- (a) investigation and inquiry as provided in Chapter 2 Section 15-17;
- (b) provision and procurement of documents or information which is in the possession of the Thai agencies as provided in Chapter 3 Section 18-20;
- (c) delivery of documents as provided in Chapter 4 Section 21-22;
- (d) search and seizure as provided in Chapter 5 Section 23-25;
- (e) extradition of persons under custody for the taking of evidence as provided in Chapter 6 Section 26-29;
- (f) location of persons as provided in Chapter 7 Section 30;
- (g) commencement of criminal proceedings of the court as provided in Chapter 8 Section 31;
- (h) confiscation and seizure of property as provided in Chapter 9 Section 32-3.

B. Persons in Charge of Co-operation

Section 6 states that the Central Authority in matters of international co-operation shall be the Attorney General or the person designated by him or her. Section 12 states that the Central Authority shall transmit the following requests for assistance to the Competent Authority:

- (a) the request for inquiry, procurement of documents or other evidence outside court, delivery of documents, search and seizure of documents or articles and locating persons shall be sent to the Commissioner General of the Royal Thai Police;
- (b) the request for proceedings in court such as requests for taking oral evidence, documentary evidence and material evidence and requests for confiscation and seizure of property shall be sent to the Executive Director of the Office of Criminal Litigation;
- (c) the request for transferring persons in custody for the purpose of testimony shall be sent to Director General of the Department of Corrections;
- (d) the request for the institution of criminal proceedings shall be sent to the Commissioner General of the Royal Thai Police and the Executive Director of the Office of Criminal Litigation.

Section 18 states that the Central Authority shall send the request on the procurement of documents and information to the agencies that have such documents and information in their possession.

C. Methods of Requesting Assistance and Providing Assistance

Section 10 provides methods of requesting for assistance which are summarized as follows:

- (a) a State which has a mutual assistance treaty with Thailand shall submit its request directly to the Central Authority;
- (b) a State which has no mutual assistance treaty with Thailand shall submit its request through the diplomatic channel.

D. Grounds for Refusal

Section 9 provides four grounds for refusal as follows:

- (a) There is no mutual assistance treaty between Thailand and the requesting State and the requesting State does not commit to assisting Thailand in a similar manner when requested;
- (b) The act which prompts the request for assistance is not an offence punishable under Thai laws unless the mutual assistance treaty between Thailand and such State specifies otherwise;
- (c) Such request has an effect on the sovereignty, stability and other crucial public interest of Thailand;
- (d) Such request is related to a political offence or military offences.

In 2002, there were 41 requests, most of which were requests for collection of evidence, taking oral evidence, delivery of documents or copy of documents. In general, Thailand has provided legal assistance to requesting States without delay.

E. International Co-operation in Criminal Matters and Extradition

Apart from the Act on Mutual Legal Assistance in Criminal Matters, Thailand has another act called the Extradition Act B.E. 2472 (1929). These two acts may seem to be the same but they are not. Extradition is a long-established legal method while international co-operation in criminal matters is a new idea. The Extradition Act is exercised by order of the court while the Act on Mutual Legal Assistance on Criminal Cases is exercised by administrative power.

VI. CONCLUSION

In conclusion, corporate crime is serious crime which has tremendous effects and impacts on economic stability and social security at both domestic level and international level. Therefore, it is incumbent upon the State to impose efficient and appropriate criminal liability upon a legal person as well as its representatives who are the soul and the mind of such corporations and are actually the persons operating the business of the corporations. Since corporate crime is usually economic crime, the laws in relation to economic crime need to be flexible, up to date and in advance of the criminals. In addition, the laws should not be so over-regulated and frequently changing that they obstruct the flow of the market which would destroy the country's economic stability. The personnel involved in law enforcement need special training and need to work in co-operation. Moreover, international co-operation is essential to prevent and combat economic crime or corporate crime. Although Thailand has not become party to all of the international conventions in relation to the prevention of crime nor has she concluded a treaty on extradition or mutual assistance in criminal matters with every country, Thailand may co-operate with other countries in extradition and mutual assistance in criminal matters on a reciprocal basis. This is to ensure that criminals must not be able to escape from justice and use any country as a safe haven.

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REPORTS OF THE COURSE

GROUP 1

ISSUES CONCERNING THE LEGAL FRAMEWORK ON CORPORATE CRIME, CORPORATE LIABILITY AND MISUSE OF CORPORATE VEHICLES

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<i>Co-Chairperson</i>	Mr. Alex M.C. Labador	(Philippines)
<i>Rapporteur</i>	Mr. Tsaone C. Mokone	(Botswana)
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I. INTRODUCTION

Group 1 started its discussion on 13 September 2007. The group elected, by consensus, Mr. Matsuoka (Japan) as its chairperson, Mr. Labador (Philippines) as its co-chairperson, Mr. Mokone (Botswana) as its rapporteur, and Ms Bhornthip (Thailand) as its co-rapporteur. The group, which is assigned to discuss “Issues concerning the Legal Framework on Corporate Crime, Corporate Liability and Misuse of Corporate Vehicles”, agreed to conduct its discussion in accordance with the following agenda:

- 1) Current situation of corporate crime in participating countries;
- 2) Nature and causes of corporate crime;
- 3) Liability of legal persons under international agreements/documents;
- 4) Legal framework of corporate criminal liability in participating countries;
- 5) Other types of liability legal persons are subject to in regard to corporate crime:
 - 5.1) Civil liability;
 - 5.2) Administrative liability;
- 6) Individual liability of natural persons;
- 7) Misuse of corporate vehicles:
 - 7.1) Current situation of corporate vehicles;
 - 7.2) Regulations on the misuse of corporate vehicles in international agreements, such as the FATF Forty Recommendations, and domestic laws.

II. CURRENT SITUATION OF CORPORATE CRIME IN PARTICIPATING COUNTRIES

The group first reviewed the situation with regard to corporate crime in each participating country.

The following are the types of corporate crime committed in the participating countries: domestic and foreign corruption related to public tenders, finance or banking, or commerce and trade; intellectual property crime; cybercrime; anti-monopoly violations; tax evasions; the stock exchange and bid rigging.

A. The Philippines

The participant from the Philippines said that in his country it is provided by law to charge both the natural and the legal person, but the emphasis so far has been to charge the directors and managers of companies rather than the company itself, except for money laundering and tax evasion cases where the law enforcement authorities frequently go after the companies and individuals running them.

B. Thailand

In Thailand, there is no definition of the term “corporate crime”. There is no legislation dealing specifically with corporate crime; however corporate crimes are mostly related to economic crimes. Both the natural and legal persons can be the subject of a criminal offence.

C. Japan

According to Japanese law, a company itself cannot commit a crime, but directors, managers and employees can. A double punishment does exist in Japan for certain offences, under which a legal person can be held criminally liable under conditions described later. Some of these offences are committed in the course of business by companies that in general terms are conducting legitimate activities, whereas some of them are committed by companies organized for the purpose of committing crimes.

D. Indonesia

Development policy which prioritizes economic growth produces giant corporations and conglomerations dominating and monopolizing the Indonesian economy which is still full of corruption, collusion and nepotism, said the participant from Indonesia. The development of corporations tends to have an expansive negative impact in which, on legal grounds, an action committed by a corporation shall be a criminal act. Commonly, it's related with economic or financial interest and also to take financial advantage in which the action shall be an economic crime such as corruption, monopoly practice, tax evasion, etc. Both the natural and legal persons are held liable for corporate crimes, but legal persons have never been prosecuted for economic crimes.

E. Botswana

The participant from Botswana said that the law provides for the punishment of both the natural and legal persons, but mostly the concentration has been on charging the directors and managers.

It was evident from the discussions that prosecution against legal persons is rare in many countries and this is attributable mainly to the following reasons: the law is insufficient in providing conditions to apply; there is a low level of awareness among the law enforcement authorities of the necessity of going after companies as such; there are difficulties in proving the conditions for attributing liability to legal persons; and there is fear of the possible economic impact on the public when the company as such is punished.

Although in many of the participating countries prosecution against corporations is rare, the group unanimously agreed that it is necessary to investigate and prosecute companies to tackle this problem.

III. NATURE AND CAUSES OF CORPORATE CRIMES

The nature and causes of corporate crime were more or less similar in most of the participating countries and were summarized as follows:

- Related mostly to economic crime;
- Often complicated and difficult to detect;
- Provides no physical harm to the victims, hence a lack of visual or obvious evidence;
- Committed by high rank individuals or educated people in charge of the corporation;
- In many countries it is for the profit or benefit of both the individuals and the companies whereas in Japan, it is committed mostly for the profit or benefit of the companies, especially large companies;
- Some financial institutions in some countries are not sufficiently co-operating with law enforcement agencies in giving information;
- Increased computerization of financial documents creates electronic data (and evidence) which is easily destroyed or altered. Perpetrators are also using modern technology to commit crimes, making them difficult to detect;
- Corporate crime is related to organized and transnational crimes or is committed by organized criminals and is thus so difficult to investigate;
- Corporate crime is not fully investigated, and law enforcement agents lack capacity and capability;
- In one country, corruption of law enforcement agents facilitates the commission of the offence;
- In some countries, corporations are used as a vehicle for money laundering or for obtaining unlawful benefits;
- In some countries, legal systems are not fully functioning and regulations are not strictly adhered to;
- Corporate crime is sometimes committed to take advantage of loopholes in national legislation.

IV. LIABILITY OF LEGAL PERSONS UNDER INTERNATIONAL AGREEMENTS/DOCUMENTS

There is no international agreement directly relating to corporate crime as such, however there are various international agreements related to corporate crime. Some of these are the United Nations Convention against Corruption, the Council of Europe Criminal Law Convention on Corruption, the 40 Recommendations of the Financial Action Task Force (FATF), and the Council of Europe Convention on Cybercrime, just to mention a few. Article 26 of the UNCAC has the typical elements of an international agreement pertaining to the liability of legal persons. It was evident from the discussions that most countries have signed these international agreements, but what was lacking was the implementation of the “liability of legal persons” clauses.

The group agreed that as stipulated in these provisions, a country may take different approaches to implement these requirements but it should be effective enough to tackle corporate crime and be implemented in law and in practice.

V. LEGAL FRAMEWORK OF CORPORATE CRIMINAL LIABILITY IN PARTICIPATING COUNTRIES

A. Thailand

In Thailand, a corporation can be defined in law as a legal person. Once it is created, it is separated from its shareholders and can enjoy the same rights and is subject to the same duties as a natural person. The will of a legal person is declared through its representatives.

As for criminal liability of a legal person, there is still controversy in Thailand as to whether a legal person can be the subject of a criminal offence and be held liable. There are two opinions on this matter. But before discussing this issue it is important to explain the different types of criminal legislation in Thailand. The first is where the provision in the legislation clearly states that a legal person is the subject of a crime and can be criminally charged, such as the Anti-Money Laundering Act 1999, Section 61. The second is when the legislation specifies that the subject of the offence is a person of certain status or position. For example, under the Mining Act B.E. 2461(A.D. 1918), the Act imposes criminal liability for a mining concessionaire who violates the provision of such Act. In this case, the subject of the offence is the mining concessionaire. The third is where the legislation does not state clearly who is the subject of the offence. This is the case of the Penal Code, which is the major criminal law in Thailand, and other laws which contain criminal provisions. The term used in the third type of laws is “anybody” without further definition of such term. This is the category which is obscured and controversial. It is argued whether or not such term includes legal persons.

There are two opinions on this matter. The first is that of legal academics who base their opinion on the grounds that a legal person is merely a fictitious person and does not have a mind of its own to commit an offence. It thus lacks malice. In addition, a legal person can be punished only when the law says so. If there is no specific law, the legal person cannot be punished. This is according to the legal principle “no law, no punishment”. Therefore, a legal person cannot be a subject of such criminal offences and cannot be punished.

The second opinion is that of the Supreme Court. The Supreme Court has been continuously deciding that a legal person can be held liable since a legal person’s will is declared through its representative. Therefore, the act of the representatives is the act of that legal person provided that the representatives act in the business of and in the name of the legal person. In conclusion, the Supreme Court has interpreted the term “anybody” to cover not only natural persons but also legal persons. Examples of the offences of which the Supreme Court has held that the legal person can be the subject are refusal to comply with a lawful order of an official, cheating and fraud, and taking false information to charge a person in court. The offences charged in these decisions were offences which require intention. However, the Supreme Court also decided that the legal person could also be held liable for a negligent act. In addition, the Supreme Court decided that a legal person could be a subject of other law which has criminal provisions, such as the Act on the Misuse of Cheques B.E. 2497(1954).

However, under Section 18 of the Thai Penal Code, the allowable criminal liability or punishments are the

following: (1) death (or life sentence); (2) imprisonment; (3) confinement; (4) fine; and (5) forfeiture of property. The Penal Code is the major criminal law in Thailand. The only allowable penalties in any other criminal legislation must be these five types of penalties. This is a legal pitfall since death, imprisonment and confinement cannot be imposed upon a legal person. Thus only fine and forfeiture are the possible sanctions for a legal person. When compared to the monetary benefit a legal person obtains from such crimes, the maximum fine under Section 61 of the AMLA, which is one million baht, is minimal. Regarding forfeiture of assets, such property has to be that used to commit the crime or obtained from such crime. Therefore, it is doubtful whether these criminal sanctions are appropriate or sufficient to prevent a corporation from committing crime.

B. Indonesia

In Indonesia, the legal framework of corporate criminal liability could be looked at in two different ways: the Penal Code and the Special Crime Law. The Penal Code states the principle that it is only human beings who can commit criminal acts (be the subject of a criminal act). In the event that there is a criminal act in relation to a corporation, the liability for its crime, by the virtue of Penal Code, shall be duly borne by the corporation management so made to present on behalf of and in the name of corporation. Meanwhile, those corporation managements who are not involved in such criminal acts shall not be prosecuted.

Criminal law other than the Penal Code has stipulated corporations as the subject of criminal acts, in addition to human beings. In 1951, for the first time, it was applied in the urgent law regarding commodities stockpiling. The principle of corporations' criminal liability was then adopted in various laws other than the Penal Code, such as laws regarding tax, capital markets, eradication of corruption, money laundering, etc. In order for a corporation to be held criminally liable, a 'directing mind' shall commit the offence. The term 'directing mind' refers to directors, managers, owners and also *de facto* owners. The principal penalty for a corporation is fine. As for additional criminal penalties, revoking of business licences and liquidation are available. Criminal sanctions are only enforced as a last resort after any other civil or administrative sanctions.

C. Japan

According to Japanese law, a company itself cannot commit a crime, but directors, managers and employees can. However a double punishment does exist in Japan in many specific laws, such as tax law; anti-monopoly law; anti-organized crime law; securities and exchange law; company law; unfair competition law, including foreign bribery; but not in the Penal Code. Under the double punishment provisions, when any representative, agent, employee or other person engaging in the business of a legal person commits an offence in connection with the business of such legal person, the fine shall be imposed on such legal person in addition to punishing the actor, unless the legal person can prove that the legal person has taken all necessary measures in its assignment, supervision and/or other duties in order to prevent such an individual(s) from committing the crime (this negligence of the legal person is presumed).

A natural person who is capable of being the subject of the crime can either be a director or an employee.

It is usually important to identify a specific person in the company who has committed an offence.

The penalty for a legal person (provided that there is a double punishment provision) is a fine.

D. Botswana

In Botswana, a corporation is defined in law as a legal person. Once it is created, it is separated from its shareholders and can enjoy the same rights and is subject to the same duties as a natural person, according to the Botswana Companies Act. Section 24 of the Penal Code states that where an offence is committed by any company or other body corporate, or any society, association or body of persons, every person charged with, or concerned or acting in the control or management of the affairs or activities of such company or body corporate shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his or her part, he or she was not aware that the offence was being or was intended or was about to be committed, or that he or she took all reasonable steps to prevent its commission. The sanctions against the corporation could be fine or forfeiture. According to Section 29 of the Penal Code, it is stated that where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive.

There is no criminal liability, but only administrative and civil liability, for legal persons in the Philippines, which are described below.

VI. OTHER TYPES OF LIABILITY LEGAL PERSONS ARE SUBJECT TO IN REGARD TO CORPORATE CRIME (CIVIL AND ADMINISTRATIVE)

A. Indonesia

Civil liability according to Indonesian Civil Code means that corporations as well as natural persons are subject to responsibility for the misconduct and breach of a contract that can cause loss to another party. A corporation can be held liable for the loss of another party in the form of indemnification, performing their duty and remedy. The corporate liability principal can be found in some laws besides the Civil Code such as in the Natural Resources Law, Tax Law, Consumer Rights Law, Intellectual Property Law, etc.

The use of administrative sanction for legal persons that violate the law can be used also. Administrative sanction is applied to the corporation that violates the law. The administrative liability can be in the form of fine, obligation to perform administrative requirements and combined with daily fine, and revoking of their business licence. Administrative law is regulated in the laws on tax, banking, export and import, concession in mining, stock market, etc.

B. Thailand

In Thailand, a legal person can be held liable for compensation for any damage done to other persons by its representatives or the person empowered to act on behalf of the legal person in the exercise of its functions, saving its rights of recourse against those who caused the damage.

Thailand has incorporated administrative sanctions in the law to make the laws more effective. The legal drafting style is that the law states that the act committed is a criminal offence and allows punishment and other details to be elaborated in subordinate laws such as notifications or rules. This makes it easier to amend such provisions and empower the enforcement agency of that law to exercise its power. For example, under the Commercial Bank Act B.E. 2505, the Bank of Thailand (BOT) is the regulator of the Act. Therefore it can exercise its administrative power, such as to remove the directors of a commercial bank if damage has been caused or may have been caused to the public. This administrative sanction is a quick response to that situation because without this administrative sanction, the BOT will have no power to remove the directors and cannot stop them from operating the company even when there is a sign that such directors are dishonest and operate the business badly or have shown some malicious intent to obtain benefits or use a company for their own interest.

Thus the regulator of the law can enforce the law by itself. There is no need to have the case initiated by the police or public prosecutor which may not act rapidly enough to prevent or stop the crime. Examples of the administrative sanctions are:

- (a) daily fine until such legal persons stop violating the laws, such as the Enhancement and Conservation of National Quality Act B.E. 2535(1992) Section 91, under which a legal person must pay a daily penalty four times the daily expenses for the normal operation of its on-site facility for wastewater treatment or waste disposal throughout the period of illegal discharge;
- (b) removal of directors or persons responsible for the operation of the corporation if they cause or may cause damage to the public or in urgency to correct the status of the company; such as the Commercial Bank Act and the Undertaking of Finance Business, Securities Business and Credit Foncier Business B.E. 2522 (A.D. 1979).

C. The Philippines

In the Philippines, the Corporation Code or the R.A. No. 68 states as a general rule that the corporation is distinct from its Board of Officers. This means that the Officers cannot be held liable for the consequences of their acts as long as they keep within the lawful scope of their authority in acting and act in good faith. Those acts are properly attributed to the Corporation alone. However, they become also liable if they assent to patently unlawful acts, gross negligence or bad faith in directing the affairs of the Corporation, or acquire any personal interest in conflict with their duty. A corporation can only be charged with civil and administrative

cases, unlike a natural person who can be charged with criminal, civil, and administrative cases. A corporation found violating the Corporation Code may be dissolved in appropriate proceedings before the Securities and Exchange Commission (SEC).

The main doctrine of separate juridical personality of the corporation from its stockholders or members who compose it can be tempered by the doctrine of piercing the veil. This means that through the piercing the veil doctrine, both the corporation and the stockholders or members can be charged with a certain offence.

The Republic Act No. 8799, otherwise known as the Securities and Regulation Code, provides administrative sanctions against an erring corporation, such as suspension or revocation of any registration for the offering of securities, fines, and disqualification of its officers through the SEC. The imposition of these administrative sanctions shall be without prejudice to the filing of criminal cases against the responsible individuals.

D. Japan

In Japan, legal persons and directors, etc. may be required to compensate damages as their civil liability. As for administrative liability, a legal person may be subject to revocation of licence, suspension of business operations and a surcharge. For serious cases, the regulatory agencies impose surcharges on legal persons and also file a criminal accusation against them.

VII. INDIVIDUAL LIABILITY OF NATURAL PERSONS

The discussion on this issue was more or less covered during the discussion of items (IV) and (V) above. Further, there was some additional information provided by some countries.

A. Thailand

In Thailand, there are provisions in many pieces of legislation stipulating presumption of individual liability, either conclusive or irrebuttal or rebuttal presumption. An example of conclusive presumption is the Act Determining Offences Relating to Registered Partnership, Limited Partnership, Associations and Foundations B.E. 2499(A.D. 1956) Section 25. The rationale behind this conclusive presumption is that the act of a legal person is the act of an executive. Therefore, it is believed that such an act is committed within the knowledge of the executive. In this case, the punishment imposed upon an accused is usually a fine and under the Thai Criminal Procedure Code Section 37(1) if the punishment is a fine and if an accused has paid the fine as fixed, the case is settled. Therefore this presumption does not seriously affect the rights and liberty of such executives. Examples of rebuttal presumption are found the Anti-Money Laundering Act B.E. 2542(1999) Section 61.

B. Botswana

In Botswana, Sections 322-325 of the Penal Code provide for the criminal liability of natural persons, like fraudulent appropriation or accounting by directors or officers, false statements by officials of companies, false accounting by clerks or servants and false accounting by public officers.

C. The Philippines

The Corporation Code of the Philippines specifically states in Section 144 the criminal penalties for violations of "any" of the provisions of the Corporation Code and the penalties include fine of not less than PHP1,000 (Philippine pesos) but not more than PHP10,000 or by imprisonment for not less than 30 days but not more than five years, or both, at the discretion of the court. Criminal penalties are for natural persons only.

VIII. MISUSE OF CORPORATE VEHICLES

A. Current Situation of Misuse of Corporate Vehicles

1. The Philippines

In the Philippines, a drug dealer built a concrete products factory to lead people into believing that his fortune was coming from a legitimate source. Obviously, the company was established primarily not for profit, the usual objective of any business enterprise, but for laundering the money coming from the drug activities. Eventually, this scheme was discovered after his arrest. During that time the Anti-Money Laundering Act was not yet enacted so he was only indicted on drug charges and his assets were subjected

to civil forfeiture in favour of the government.

2. Thailand

In Thailand, the current situation of misuse of corporate vehicles comprises money laundering cases through illicit activities and tax evasion cases and paper companies deceiving overseas job seekers by taking deposits from them with a false promise to place them in paid employment. Directors of a commercial bank grant loans to paper companies.

3. Japan

According to the Japanese participant, the concept of misuse of corporate vehicles incorporates two points of view: one is misuse of existence of corporate vehicles; the other is the use of a paper company. The following two examples were provided.

(i) *A Fraud Case on the Pretext of Investment (Misuse of Existence of Corporate Vehicles)*

Company A appeals to the public for an individual investment, explaining that Company A invests the funds in Company B, Company B invests the fund in some other enterprise, and makes a profit, which will be returned to the investor. Actually, Company A is deeply connected to Company B, but they pretend otherwise, for the purpose of avoiding liability or punishment. In fact, Company B doesn't invest the money, and the owner of Company A and B flees with the money. Company A then goes bankrupt, the perfunctory reason being that the enterprise is unsuccessful. This is a case of misuse of the existence of corporate vehicles. Sometimes, they pretend that they invest in an enterprise in a foreign country; for that reason it is more difficult to identify the owner when investigating. For such reasons, international co-operation is necessary to fight this crime.

(ii) *Money Laundering, Tax Evasion Case (Use of a Paper Company)*

Company A commits a crime and generates an illegal profit, and the owner of Company A intends to conceal this illegal profit. The owner of Company A uses several paper companies (B, C, and D) to move this illegal profit around finally and back into his possession. Company B, C, D do not have any activity. This was a case of use of a paper company. In this case, the offender also used a paper company established in a foreign country to avoid identifying himself. It is also necessary for countries to co-operate during investigations in such cases.

4. Botswana

In Botswana it is said that many companies come into the country to set up businesses as the government is vigorously encouraging foreign investment to diversify the economy. After receiving subsidies from the government, some of these companies operate only for a few months then close their businesses claiming bankruptcy and go back to their original countries, leaving behind half-completed projects and many stranded employees. There is a problem also with private schools which take tuition fees from students and then close their schools before students take their examinations. It is also said that in order to comply with the FATF 40+ recommendations, the Financial Intelligence Unit is being set up to address money laundering issues.

B. Regulations on the Misuse of Corporate Vehicles in International Agreements, such as the FATF Forty Plus Recommendations, and Domestic Laws

The discussion centered mainly on the regulation of anti-money laundering measures (customer identification, record keeping, suspicious transaction reporting), and regulations on companies (whether a company is registered and whether it is supervised by the Government, and law enforcement authorities' access to such information, as well as bank information and company information).

1. Japan

In Japan, if someone intends to establish a company, he or she should report to the Regional Legal Affairs Bureau, and name the director of the company and the address of the main office of the company, etc. The government office stores this registration. If there is a change of director, he or she should report to the government office. Investigation agencies and the general public can easily access these registration documents.

When someone establishes an account in a financial institution, the financial institution should identify and verify the identity of the customer. The investigation authorities can access this information and all other bank information upon request to the financial institutions. In practice, they mostly provide such information voluntarily, without a court order. Furthermore, financial institutions should file suspicious transaction reports to the FIU in relation to the customer. The investigation authorities can easily access the FIU information.

2. Indonesia

In Indonesia, every incorporated company under the Indonesian Limited Company Law should apply for registration. Every company is required to register at the Ministry of Justice; therefore it is easier for the company to be controlled. However the controlling is limited only to the administration of paperwork if there is a complaint against the company. Every listed company in the stock market is required to provide annual reports. The report is examined by an independent auditor, and sanctions will be applied if the reports are made up or are false. Companies that bid on government project tenders are required to submit general reports about their companies and the validity of the reports are examined and audited by independent auditors.

It was also said that Indonesia has taken some measures regarding corporate crime, for example, adopting the 40+ FATF Recommendations into Indonesian law. One concrete action is the enactment of the Money Laundering Law. The Money Laundering Law created the Financial Intelligence Unit, or PPAJK, whose main duties are collecting, analysing and evaluating every suspicious transaction. Every provider of financial services must report to the FIU in case of suspicious transactions or a transaction of more than 500 million rupiah. Moreover, people who carry money in the amount of 100 million rupiah inside or outside Indonesia shall declare the money.

3. Botswana

In Botswana it was said that all companies should register at the Registrar of Companies under the Ministry of Trade and Industry. A company must fulfill the requirements stipulated in the Companies Act, such as disclosing the names of all directors and providing information on shareholders and the physical location of the company. At least one of the directors should be a citizen of Botswana and so on. This information is a public record which can be accessed by authorized persons.

4. Thailand

In Thailand the AMLA established the Anti-Money Laundering Office (AMLO) as an independent agency under the Ministry of Justice. The AMLO receives, analyses, and processes suspicious and large transaction reports, as required by the AMLA. The AMLA requires customer identification, record keeping, the reporting of large and suspicious transactions, and provides for the civil forfeiture of property involved in a money laundering offence. Therefore, financial institutions must disclose their clients and ownership to AMLO if requested.

The private limited company is formed by registration of a Memorandum of Association and Articles of Association as its initiative documents. There must be at least seven shareholders in the private limited company. The name of the company, the address of the company, the registered capital, the objectives, shareholding structure, Articles of Association (By-Laws), and directors, must be included in the registration paper. This information can be checked by the public. The company also has a duty to prepare its financial statement at least once every 12 months and must be audited by at least one auditor. This balance sheet has to be approved by the general meeting of the shareholders. Then the financial statement must be lodged with the Business Information Service Office of the Department of Commercial Registration.

IX. CONCLUSION

In the era of globalization, corporate activities have become transnational. Corporations tend to expand; however, this sometimes produces negative as well as positive impacts on society, such as commission of economic crimes with highly sophisticated and complicated *modi operandi*.

Faced with this challenge, each segment of the criminal justice system is mandated to come up with

effective solutions to address the problem. Furthermore, the international community has to work hand in hand to curb corporate crimes.

Every country has taken some steps to prevent and detect corporate crimes and misuse of corporate vehicles, and impose sanctions on corporate entities that commit crimes. Although the legal systems of participant countries vary regarding the liability of legal persons, we concluded that it is important to punish legal persons effectively and appropriately.

X. RECOMMENDATIONS

1. Effective methods of raising awareness among the public and the law enforcement authorities of the phenomenon of charging legal persons is necessary;
2. In order for the competent authorities to impose adequate sanctions against legal persons, it is important to have a variety of sanctions available as options, which may be criminal, administrative and/or civil, in accordance with the legal system of each country;
3. In order to prevent, deter, and combat corporate crimes, effective and adequate legal sanctions should be imposed on legal persons, regardless of sanctions against natural persons;
4. Legal persons and offenders should be deprived of the proceeds of corporate crime. To serve this purpose, laws on confiscation and forfeiture should be strengthened and fully implemented;
5. Corporate crime is a global problem. Therefore, international co-operation, in terms of international agreements as well as of co-operation and co-ordination through formal and informal channels, is important and should be strengthened;
6. Sharing of technical investigative know-how pertaining to corporate crime, through training and other means, should be enhanced among the international community;
7. Legal measures that may contribute to the prevention and detection of misuse of corporate vehicles and corporation crime, such as registration systems for companies and obligations for financial institutions (customer identification, record keeping and suspicious transaction reporting) should be strengthened. Company and bank information kept by relevant authorities/institutions should be accessible to the competent authorities in a timely manner.

GROUP 2

ISSUES CONCERNING THE INVESTIGATION OF CORPORATE CRIME

Chairperson	Mr. Jayantha Jayasuriya	(Sri Lanka)
Co-Chairperson	Mr. Yukitoshi Yokoyama	(Japan)
Rapporteur	Ms. Mabel Correa	(Brazil)
Co-Rapporteur	Ms. Sadhana Singh	(South Africa)
Members	Mr. Francisco Penalzoza	(Mexico)
	Mr. Hiromitsu Iizuka	(Japan)
	Mr. Maximo Navarro	(Panama)
Advisers	Professor Shintaro Naito	(UNAFEI)
	Professor Tae Sugiyama	(UNAFEI)
	Professor Ikuo Kamano	(UNAFEI)

I. BACKGROUND

Corporate crime is affecting us globally. This transnational problem has a serious impact on a country's economy. It is important that this growing problem be tackled and that effective measures are put in place to assist in the prevention of corporate crime in our countries. International co-operation should be enhanced to ensure that we all are making a concerted effort to unify our support and commitment to eradicating this crime. In this context, this report is based on the information obtained from the lectures delivered by the experts in their respective fields, the individual presentations of the group members and group discussions. Guidance, comments, suggestions and strategic advice was provided by the group advisers.

II. INTRODUCTION

Group 2 started its discussion on 13 September 2007. The group elected, by consensus, Mr. Jayasuriya as its chairperson, Mr. Yokoyama as its co-chairperson, Ms. Correa as its rapporteur, and Ms. Singh as its co-rapporteur. The group was assigned to discuss "Issues Concerning the Investigation of Corporate Crime". The group agreed to conduct its discussion in accordance with the following agenda:

- 1) Characteristics of investigations into corporate crime: the current situation with regards to the issues concerning the investigation of corporate crime in each country;
- 2) Effective measures against corporate crime:
 - 2.1) Acquisition of information on corporate crime;
 - 2.2) Strengthening the resources of investigative authorities;
 - 2.3) Collection of material and electronic evidence;
 - 2.4) Measures to obtain statements and collate evidence;
- 3) Co-operation between investigative authorities at the state level;
- 4) Co-operation between foreign investigative authorities.

III. SUMMARY OF DISCUSSIONS AND DELIBERATIONS

A. Characteristics of Investigations into Corporate Crime: Issues in Each Country

The group had previously discussed the issues relating to corporate crime in plenary with other Course colleagues, and considering the fact that Group One was tasked with contemplating the definition of "corporate crime", Group Two therefore decided not to make any attempt to give a specific definition.

However, during the lectures and the discussions within the group, the boundaries of a broad framework of this type of crime were discussed. Accordingly, the group agreed that the discussions should focus on financial/commercial/economic crimes involving corporate entities which have a serious impact on the economic and social stability of the countries concerned.

Members expressed their views on different aspects, such as the nature of the offence, the nature of potential suspects, the nature of potential witnesses and the nature of the investigative authorities.

Having deliberated on these matters, the group identified the following as the main characteristics of corporate crime:

1. Involvement of Various State Agencies

Corporate crime can be committed in different ways, such as tax evasion, financial fraud, money laundering, illegal practices affecting stock exchanges, etc. Therefore, in order to conduct an efficient investigation, it is important to make use of strategic partners such as customs, inland revenue, stock exchange, and fair trade commissions and to utilize the expert knowledge they possess in their respective fields.

Existing domestic systems empower different entities to investigate into each of these separate activities. Therefore, as it stands, many different state entities conduct investigations in relation to matters pertaining to corporate crime.

2. Effective Use of State Resources

Arising out of the consideration reflected under item A.1 *supra*, the group unanimously agreed it is imperative that all the resources directed into different entities be utilized in a co-ordinated manner to ensure state resources are used effectively and efficiently.

3. Specialized Expertise

The group discussed extensively the different ways in which corporate crime could be committed and agreed that the developments in the technological field had provided advanced instruments and different techniques with which wrongdoers can commit corporate crime. In addition, corporate crime involves specialized fields such as accounting, taxation, securities and exchanges, banking and investments, and customs. Therefore, investigators who are generally trained to investigate ordinary crimes will face difficulties in investigating corporate crime unless they are given extensive training and knowledge of these new technological developments and training in specialized fields.

4. The Nature of the Witness

During the discussions all members expressed their views on the nature of potential witnesses in corporate crime. It was agreed in many instances that co-workers and employees of the potential suspects are the people who would be able to provide valuable information and evidence relating to wrongdoings of the suspects. Therefore investigations relating to corporate crime would always require addressing the security concerns of potential witnesses. In this regard the group extensively discussed the law relating to protection of whistleblowers in Japan and South Africa. Participants from these countries provided an overview of their respective legislation and the group agreed on the importance of introducing such a system in relation to corporate crime investigations.

It was further discussed that some countries, such as South Africa, make use of the plea bargaining system. However its application, and that it operates within the framework of the law, is important. However, a majority of the participants were of the view that the existing systems in their respective countries do not provide such mechanisms and any changes to the existing systems would require extensive discussion and agreement between various state agencies in the country. This creates legal difficulties in using these kinds of individuals as witnesses.

5. Nature of the Suspects

The group identified this feature considering the involvement of corporate entities and that the people holding positions in the senior management of such entities are involved in the commission of corporate crime. Their financial capabilities and economic influence and the consequent pressures that they could exert on state agencies require independent bodies to conduct investigations into corporate crime.

6. Complexity of the Investigation

All of the above mentioned features reflect the complexity of an investigation into corporate crime. Therefore, the group agreed to identify these features as characteristics of corporate crime. The group further agreed that different activities of individuals and corporate entities, financial and commercial transactions, transactions related to properties etc., and the involvement of different levels of jurisdictions further reflect the complexity of corporate crime.

7. Involvement of Different Financial and Commercial Institutions

An investigation into corporate crimes would always involve examination of material available in the banking, financial and commercial systems as the wrongdoers would mostly use such institutions as vehicles to commit corporate crime. Therefore, the group identified this feature as a characteristic of corporate crime.

B. Effective Measures against Corporate Crime

1. Acquisition of Information on Corporate Crime: Current Situation and Problems

The chairperson (from Sri Lanka) described briefly how the investigative authorities seek assistance from a magistrate to conduct investigations. The co-chairperson (from Japan) explained the current process regarding the Whistleblower Protection Act, which protects whistleblowers from dismissal, and that in Japan investigative authorities obtain banking information from financial institutions, which provide the information voluntarily and speedily.

The participant from Panama stated that there are many ways in which the authorities in Panama can become aware of a crime. However, it is important that investigations conducted by the judicial police or the prosecutor reach the same objective. With regard to corporate crime, the control and supervision measures of the regulatory authorities allow that some information about suspicious activities of a corporation can be evaluated to begin a formal investigation.

Then the participant from Mexico stated that legally, in some countries, special techniques of obtaining information such as undercover operations, protection of offender-witnesses, controlled delivery and electronic or other forms of surveillance, etc., can be applied only in the investigation of certain offences like organized crime related with money laundering and not in the investigation of corporate crime, unless the corporation is involved or is being used as a medium or instrument to commit crime by members of an organized criminal group. Therefore, he suggested that the group focus on the normal techniques of investigation permitted by the domestic legal systems, the sources of information that are needed for the investigation and the way which one could obtain such information.

The participant from the Japan Fair Trade Commission (JFTC) stated the importance of anonymous sources to initiate an investigation.

The South African participant discussed the following issues: a wide array of legislation regulates the acquisition of information, including the Criminal Procedure Act, the criminal law statutes, the Constitution of the Republic of South Africa, the South African Police Act, etc. There are specific procedures and techniques under the legislation which guide the management of a crime scene from the inception of a complaint, to the mass media, dealing with informants and the various types of protection our laws offer. It must be mentioned that in the Republic of South Africa every informer is treated with the utmost confidentiality and the identity of such an informer is protected. The South African law makes abundant provision for the protection not only of the whistleblowers but for all types of witnesses. There is also a toll free number in many countries where callers can provide information to the police.

The other recognized sources of information are by email and Internet. The group also discussed the practice of using the media as a source of information.

Professor Naito stated that the group should also focus on how to analyse quality information and the credibility thereof and further asked the group to consider whether undercover operations could be an effective way to gather evidence of corporate crime.

The participant from Panama stated that special investigative techniques can be used in the investigation of corporate crimes, such as money laundering, which are related to drug offences and some cases of fraud. The experience in the investigation of these cases shows us that many of them involve criminal organizations which use business entities to conceal the proceeds of illegal acts.

The participant from Mexico again stated that legally, in various countries, the special investigative techniques that are established to gather or collect evidence in relation to organized crime cannot be applied

in investigations of corporate crime if the offence doesn't have any relation to organized crime; besides, he stated that he knows there are various countries which, even though they have signed and adopted the United Nations Convention against Transnational Organized Crime, have not made any changes in their respective legal systems in order to establish these special investigative techniques for the purpose of effectively combating organized crime, much less to investigate or combat corporate crime.

The chairperson observed that there was a question as to whether the legal framework relating to organized crime and money laundering could be used as a guide to establishing a legal framework relating to corporate crime. Therefore, using special methods of investigation relating to corporate crime is an issue that has to be given more consideration by all countries.

Professor Naito mentioned that some countries do not adopt undercover operations as a method of gathering information in terms of corporate crime. He further stated that Financial Information Units in respective countries have the capabilities to track suspicious information, which is generally recognized as one of the most useful and efficient sources of information of money laundering and other related offences.

The Brazilian participant stated that in the existing law in her country there is no criminal liability for corporate crime. Therefore, the authorities have to investigate only natural persons (of the corporate entity) who commit crime. Therefore, the participant is of the view that it is possible to use traditional techniques such as undercover operations, surveillance, etc. in order to gather information in relation to corporate crime.

2. Strengthening the Resources of Investigative Authorities: Current Situation and Problems

The group embarked upon discussing the strengthening of resources of investigative authorities. In this regard the chairperson discussed the issue surrounding the need for employing persons with necessary qualifications and skills. He further explained that in Sri Lanka graduates are directly recruited to the rank of Assistant Superintendent of Police. To investigate corporate crime it is necessary for investigators to improve their specialized knowledge.

The Mexican participant said that the prosecutor or the faculty person who conducts the investigation is required to have special knowledge in different fields such as customs, taxes, stock exchange, accounting, etc., as well as knowledge of how the mechanism of the crime functions and how those fields work and change; and moreover, whether it is applied or not and how things work, for example, how to trace, catch or intercept communications.

The co-chairperson said that sharing of expertise through personnel exchanges among related agencies occurs frequently in Japan. For example, experts specialized in tax investigation from the Tokyo Regional Taxation Bureau are posted at the Special Investigation Department of the Tokyo District Public Prosecutors Office and at the Tokyo District Court. The co-chairperson asked how Mexico conducts its investigations, and if it is possible to share information with other countries. In that regard the participant of Mexico gave an explanation of how an investigation is conducted in relation to organized crime and in relation to other offences where corporate crime is involved; and how the collected information can be shared.

According to the participant from Panama, regarding resources of investigative authorities, there are three important categories which can be identified: human, technical and legal. In this regard, investigators in Panama are trained in the Detective Academy where they learn investigation techniques, the legal framework, etc. These investigators are in possession of university degrees in different areas of expertise and they are specialized in investigating crimes such as corporate crime. It is necessary that the investigators are provided with the technical tools to carry out their tasks efficiently. This includes typical examples of technical tools such as the surveillance of suspects, and the analysis of information from computing hardware and software. The participant identified the laws and the legal framework that supports an investigation.

Regarding legal resources the group has already recognized that some countries may have gaps in the application of special investigative techniques in the investigation of corporate crime.

The participant from Brazil mentioned the training investigators receive at the Police Training School and

also the training they receive in specialized skills such as accounting, information technology, and special investigative techniques.

The participant from South Africa discussed the following issues: From a human resource perspective a person must undergo a course before he or she can become a detective; likewise, before joining a specialized field detectives will undergo specialized training. Ms. Singh explained further that from a financial and logistical perspective, detectives have sufficient legal tools for a wide range of investigative techniques.

The participant from Mexico said that even if a country has special investigative units or special faculty agents in relation to corporate crime, training is always needed and is still not sufficient, and he therefore expressed the need for ongoing training, taking into consideration that special fields, such as taxes, customs, stock exchange, investments, etc., are continuously in flux, and that criminals always find new and different ways to commit crime.

The group recognized that training is a common problem affecting all countries.

The participant from Mexico stated that in his country it is established that the prosecutor needs to take some courses annually in order to continue to be a prosecutor, and besides, the prosecutor needs to identify what he or she needs and take courses by him or herself if he or she wants to be specialized and investigate in the best and most efficient way.

The co-chairperson observed that in terms of economic crime investigators have to co-operate with the authorities of other countries. Therefore knowledge of the issues relating to mutual international co-operation and exchange of information is indispensable.

The participant from Mexico stated that it is important to know how the legal systems of other countries function in order to know how to obtain proofs, conduct the investigation and establish co-ordination. It is time consuming to obtain information from other countries.

3. Collection of Material and Electronic Evidence: Current Situation and Problems Affecting Each Country

In this regard the chairperson stated that the group should focus on how to collect and apply this evidence.

It was explained that the current situation in Japan is that whilst they are in the process of obtaining a court order, investigators can impose an immediate but temporary freeze on the account.

The chairperson stated that from a Sri Lankan perspective the law recognizes that information stored as electronic facts can be used as evidence in a trial. There is no prohibition on investigators seizing electronic data as evidence. Experts are necessary to assist in the retrieval and analysis of evidence when required.

The co-chairperson stated that in Japan, according to the Criminal Procedure Act, electronic information and hard copies can serve as evidence. However, the difficulty in investigation is the vast quantity of data collected and the time within which it is required to analyze such data; in this situation experts are required.

The participants from Japan stated that it is important to collect information from the data that is stored as electronic evidence. A difficult situation arises when an email message is stored in an external server.

The participant from Panama stated that the advancement of technological information used by criminals creates a problem which hampers the successful investigation and prosecution of corporate crime. Evidence such as electronic material, computer files, digital images, etc., may help during depositions and trial. In many corporate crimes the companies secretly commit crimes and systematically hide the evidence; therefore it is necessary to train investigators to gather this kind of evidence, which is very important to obtain in the initial stages of the investigation.

It was explained that in South Africa, the South African Police Service makes use of forensic experts who are currently employed in the South African Police Service, to assist in obtaining electronic evidence.

Sometimes it is necessary to use external experts to obtain evidence. However, this can be a lengthy and expensive procedure.

The participant from Brazil stated that, as in Japan, it is possible to collect evidence from electronic data. The problem arises with the volume of information and the time it takes to analyse such data. However, in Brazil there are units of full-time forensic investigators but there are too few such staff in relation to the number of investigations.

The chairperson noted that it is necessary to provide prior notice and opportunity to the opposing party to examine the computers and servers involved. The difficulties would arise when the server is located in a foreign jurisdiction.

The participant from Mexico said that the subject in discussion is collection of material and electronic evidence so it relates not only to electronic evidence inside a computer or the computer itself; it covers also financial and bank statements, account books, e-mail and ordinary correspondence, orders of deposit or transfer of money, tax statements, etc., therefore the discussion must include these materials, the identification of sources of information and how to obtain them. Besides, if the investigator or the prosecutor knows how the mechanism of the economic or financial crime functions, he or she can identify what material is needed to prove the elements of the crime; in other words, which is the important or necessary material and how he or she can obtain it applying the domestic legal system of his or her own country.

The chairperson provided an overview of the subject concerned. He stated that all the laws are similar in relation to the admissibility of computer evidence. However, issues arise in an investigation considering the volume of such material that needs to be collected and analysed. Therefore, experts to assist in the retrieval and analysis of such information become necessary. To obtain assistance from foreign jurisdictions one has to use mutual legal assistance. The main issue that will arise in this regard is the timeframe within which such retrieval and analysis should be carried out, especially in terms of speedy investigations.

The participant from Mexico added that in the investigation of economic or financial crime and the collection of material such as account books and documents in relation to the operation of the corporation, sometimes it is better to establish the corresponding co-ordination or co-operation with the administrative authorities which have the power to visit the suspect, and review and collect this material instead of obtaining a search warrant, because such action is easier and faster. However, if the place where the material and electronic evidence is located is private property which the other administrative authorities do not have legal power to visit and review, it is necessary to obtain a court order or judicial warrant to collect and seize such evidence.

Professor Naito stated that, in most economic crimes, documentary evidence is critically important to prove the facts; therefore, investigative authorities have to make every effort to collect such evidence from every institution, especially from financial institutions. He also pointed out that, in some countries, there is difficulty for investigative authorities in collecting documentary evidence from certain professionals, especially private attorneys, due to their constitutional rights and legal privilege. The chairperson responded by stating that in Sri Lanka the record of communications between the client and the lawyer are privileged. The co-chairperson added that in relation to an attorney and client, one has difficulties in obtaining the information.

The Japanese participant from the JTFC stated that the JTFC may, in order to conduct necessary administrative investigations with regard to a case, collect reports from persons concerned.

The participant from Mexico said that in his country's legal system, there's no restriction on obtaining evidence or statements from legal or accounting advisers; the problem is that if they have a relationship with the offender or they have participated in the crime, they are not going to give any information and say anything. Therefore, if the results of the investigation establish this relationship or participation, it's better to obtain a warrant in order to collect and seize the evidence and after that to take their statements. And in regard to the relationship between the attorney and the suspect, if it's legally and formally established in the investigation, there's no possibility of obtaining any statement from the attorney, because he or she has the right to not disclose anything; besides, the group doesn't need to focus on these attorneys because the

prosecutor or investigator is not going to obtain anything and what is important is what the professional advisers know and what relationship they have with the commission of the crime. This is the information we are looking for.

The South African participant emphasized the importance of collecting material evidence from the relevant parties, such as the revenue office. Companies' laws make provisions to ensure that documentation is kept for a certain period of time.

The co-chairperson indicated that it is difficult to obtain information from an attorney in regard to the client, and it was recognized that due to the differences in the legal systems of each of the represented countries, there was difference of opinion regarding whether or not the communication between attorney and client should be privileged.

Professor Naito stated that Japanese law makes provision for attorneys and certain professions to refuse to comply with a warrant for search and seizure in some cases; however, this shall not apply if, for example, the refusal is deemed to be an abuse of rights wholly in the interest of the accused.

4. Measures to Obtain Statement Evidence

The co-chairperson stated the importance in corporate crimes of statement evidence regarding discussions between suspects and others held behind closed doors.

In Japan there is no system of plea bargaining or of providing immunity to suspects. Therefore, sometimes prosecutors face difficulties in obtaining statements from suspects. There are some discussions about the introduction of plea bargaining and immunity. However, at present, the idea is not fully accepted by Japanese society.

The participant from Panama stated that the witness is usually close to the main offenders; therefore it is usually difficult to obtain this kind of evidence in the initial stages of the investigation. In many cases of crimes involving corporations or business entities, the confidential information (about the illegal activity) is handled by a few people who are in positions of authority in the company.

With regards to statement taking in South Africa, the technique of interrogation is important. The South African Police Service makes use of an interview system. Investigative interviews are conducted through a systematic search for the truth in respect of a crime and alleged crime. Statements must comply with the provisions of consent. The statement shall be signed by the person who made it, and shall contain the declaration by such person to the effect that it is true to the best of his or her knowledge. It is also important that all elements of the crime must be reflected in the statement.

The rapporteur stated that in Brazil, by law, an offender who voluntarily makes statement must receive a reduced penalty. Witnesses must make a statement otherwise he or she will be committing a crime. It is also necessary to develop interrogative techniques. In Brazil, there is no legal framework governing plea bargaining or immunity.

The participant from Mexico stated that is important to distinguish or identify who really is a witness in order to obtain his or her statement, because anyone who has participated or collaborated as an accomplice in the commission of the crime is not a witness; therefore if the legal system allows it, it is possible to apply a plea bargain or immunity. Maybe the confusion arises because in fact, in these last cases, the accomplice is treated as a witness but legally he or she is not. However, what is important is to know who the relevant witness is, how to take or obtain his or her statement and when the best time is, and to do this efficiently. First the investigator or prosecutor needs to know how the mechanism of the financial or economic crime works; second, how to examine him or her, in other words, what to ask, how to approach him or her, etc., (for this purpose the development of special interrogative techniques is required); third, the witness statement must be directed in order to prove the specific subjective elements of the crime's description such as knowledge, intention or purpose and his or her culpability.

C. Co-operation between Investigative Authorities at the State Level

The Mexican participant stated that during the investigative stage the secretive and sophisticated nature of the crime must be taken into consideration, remembering that the commission of corporate crime involves different specialized areas, such as taxes, customs, stock exchange, accounting, etc., and in order to prove efficiently its commission, co-operation between the investigator or prosecutor and the administrative investigative authorities at state level is required. This is necessary because the administrative authorities have special knowledge and expertise in relation to the facts that can constitute the crime, and have legal powers to visit the corporation, review it and collect material. This is important because if the investigator or the prosecutor is conducting a secret investigation the offender won't know that he or she is under an investigation; on the other hand, if the prosecutor asks for and executes a search warrant, the offender becomes aware of the investigation, and may try to avoid justice, moving him or herself and the profits of the crime to another country and destroying the rest of the evidence.

In South Africa the current position is that there is an integrated, multi-disciplinary approach in the co-operation of the investigative authorities at state level. The South African Police Service investigates criminal activity and has allocated the responsibility of investigating money laundering to specific units. The South African Revenue Service and the Customs Service is responsible for revenue collection and the investigation of tax evasion and evasion of custom duties and works closely with law enforcement agencies on money laundering. Within the National Prosecution Agency (NPA), the Directorate of Special Operations (Scorpions) investigates and prosecutes a range of serious cases. The NPA's Asset Forfeiture Unit supports the police and other law enforcement structures in all aspects of forfeiture.

The Brazilian participant stated that administrative authorities and criminal authorities can share information, and that the criminal authorities can ask for any kind of information from the administrative authorities and can use such information in court after disclosing it.

The chairperson said that this issue is important. The group had already identified the involvement of different state agencies as a characteristic of corporate crime. It is necessary to discuss how the investigative authorities, two different state entities, share and co-operate with each other and how they can launch a successful prosecution.

The co-chairperson stated that criminal investigative authorities will not ask administrative bodies to collect evidence. However, if tax authorities, for example, find illegal practices, they will report them to the investigative authorities. And criminal authorities may ask administrative bodies to show the evidence they have collected.

The participant from Mexico stated that co-ordination with administrative investigative authorities is more relevant when the investigation of corporate crime involves different specialized areas, such as taxes, customs, stock exchange, accounting, etc., because in all of them, it is necessary to find the legal truth of the facts, to regard or collect proofs and to identify which is the crime committed; taking into consideration that legally, at the beginning or during an investigation the crime which appears to have been committed is often not the crime which is identified at the close of the investigation. Besides, sometimes different administrative investigative authorities and the prosecutor are investigating the same suspects or corporate entity. Therefore in order to succeed in the investigation, co-ordination is the better tool, especially when the crime is money laundering, because its commission involves these different specialized areas.

The participant from the JFTC stated that the JFTC is able to use information from other agencies, such as the prosecutor's office, as a basis for starting investigation.

The chairperson expressed his reservations about the legality of using an administrative body as a conduit to obtain evidence against an accused person. He further expressed the desirability of sharing information legally collected by the administrative body with the criminal investigators to achieve an efficient and effective prosecution.

In Panama, the power to carry out criminal investigation is centralized in the Public Prosecutors Office; therefore the information required to complete investigation is provided by any governmental or private

institution when it is requested by the prosecutor. In the cases of administrative investigations, if the authority discovers an illegal activity established by the Penal Code, and it is necessary to carry out one administrative investigation at the same time, the administrative agency sends copies about the alleged offence and all the evidence to the prosecutor.

D. Co-operation between Foreign Investigative Authorities

The chairperson discussed the issues surrounding corporate crime. He elaborated on the fact that in most instances corporate crime spreads outside national jurisdictions. Therefore the importance and relevance of co-operation between foreign jurisdictions becomes imperative. However, issues may arise in relation to the available timeframes and the proper understanding of the nature and location of material available overseas. The visiting expert from the European Anti-Fraud Office (OLAF) described how the administrative investigation body of the European Union works directly with different state organs. However, the possibility of adopting such methods between two countries raises several issues. The method described by the visiting expert was formulated with the agreement of all state parties concerned.

The co-chairperson stated that assets can be located in foreign countries so it is necessary to have the assistance of foreign authorities. Japan receives co-operation through Interpol and mutual legal assistance from foreign states and if it has signed a criminal matters treaty, investigative authorities can directly establish assistance with foreign countries.

The participant from the Japan Fair Trade Commission stated that international co-operation is very important. The JFTC endeavours to accelerate international co-operation in competition policies through exchanges of opinions with overseas competition authorities, execution of Bilateral Antimonopoly Cooperation Agreements and Economic Partnership agreements, and positive participation in various international conferences.

The participant from Brazil explained that international co-operation in Brazil is through Interpol and that it takes time to obtain information through formal channels.

In Panama, Interpol is used, like many countries, as a source to obtain further information. In the field of international co-operation and mutual legal assistance, Interpol was considered an informal source; however, currently Interpol is recognized as the world's largest international police organization to facilitate international co-operation in criminal investigations, even where diplomatic relations do not exist between particular countries.

In South Africa international co-operation is important. The current position is that South Africa makes use of mutual legal assistance to obtain information. Interpol is one of the most important organizations which provides information and facilitates international co-operation in the investigations of criminal offences. It was further mentioned that the visiting expert from Singapore made an important contribution when he stated the importance of investigative authorities understanding what treaties and bilateral agreements are in place in the cases of extradition.

The chairperson stated that it is necessary to give authorities involved in investigation knowledge of the legal frameworks of foreign countries for the purpose of obtaining legal assistance.

The Mexican participant stated that in most cases, the commission of corporate crime affects, has repercussions or takes place in two or more jurisdictions. International trade, characterized today by the velocity with which mercantile and financial traffic and exchange of services take place in general, in conjunction with economic globalization and the immense technological advances in communications, plus the dynamism with which corporations operate in the international environment, mobilizes huge sums of money daily from one financial centre to another, and has become fertile ground for the commission of corporate crime and the concealment or laundering of its profits. Therefore, co-ordination and enforcement of mutual legal assistance in investigation is more than relevant, not only to gather or collect proofs, but also in the conduct of joint investigations and in the identification and location of the profits of crime with the purpose of seizing or freezing them and later on confiscating them.

IV. RECOMMENDATIONS

At the end of the discussion the participants of the group reached a consensus regarding the following recommendations, as possible countermeasures to corporate crime.

1. The development of a basic guideline document in the investigation of financial/commercial/economic crimes involving corporate entities which have a serious impact on the economic and social stability of countries. The guideline document should include: a) the legal study of the elements of the crime; b) the identification of the sources of information; c) the techniques of investigation that could be applied; d) methods of interrogation; e) collection of material or evidence that can be used to prove the elements of the crime, etc.;
2. The development of interrogative techniques for victims, witnesses and suspects;
3. The establishment or strengthening of the co-operation between prosecutors or police officers and the administrative investigative authorities at state level who have the power to conduct administrative investigation in relation to corporate crime;
4. The strengthening of the co-ordination between police officers and prosecutors from the beginning of the investigation;
5. The establishment or strengthening of co-operation with foreign countries to develop joint investigations and a close working relationship in fighting corporate crime, the enforcement of mutual legal assistance treaties to share information and collect evidence, and the identification and location of the profits or proceeds of crime with the purpose of seizing or freezing them and later confiscating them;
6. The enhancement of the expertise of administrative investigative authorities, police officers and prosecutors in the areas of investigation of corporate crime and the strengthening of financial resources for investigative authorities to train them in order to acquire or improve their specialized knowledge.

In addition to the above-mentioned recommendations, it became clear that the majority of the participating countries do not provide special investigative techniques to investigate corporate crime and such mechanisms and any changes to the existing systems would require extensive discussion and agreement between various state agencies in accordance with the domestic laws in the respective countries. Therefore the group suggests the following:

1. An investigation or a study to assess whether special investigative techniques, in accordance with the domestic law, could be applicable in the field of corporate crime;
2. A comparative study of the legal frameworks in some countries as an aid to providing sufficient legal tools to support the investigators in their work.

GROUP 3

TRIAL AND SENTENCING IN CORPORATE CRIME CASES

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<i>Co-Chairperson</i>	Mr. Takeshi Hashimoto	(Japan)
<i>Rapporteur</i>	Mr. McSyd Hubert Chalunda	(Malawi)
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<i>Members</i>	Ms. Sitang Tangsiri	(Thailand)
	Mr. Noboru Shimizu	(Japan)
<i>Advisers</i>	Prof. Jun Oshino	(UNAFEI)
	Prof. Ryuji Tatsuya	(UNAFEI)

I. INTRODUCTION

Group 3 started its discussion on 23 September 2007. The Group elected by consensus Mr. Mohamed Ahmed Abani as its chairperson, Mr. Takeshi Hashimoto as its co-chairperson, Mr. Mc Syd Hubert Chalunda as its rapporteur, and Mr. Trimulyono Hendradi as its co-rapporteur. The Group, which was assigned to discuss “Trial and Sentencing in Corporate Crime Cases”, agreed to conduct its discussion according to the following agenda: 1) The nature of corporate trials in respective countries; 2) The rule of evidence in the different jurisdictions i.e. the hearsay and documentary evidence rule; 3) Fair and speedy trials, i.e. preparation for trials: disclosure of evidence, clarification of disputes, utilization of forensic analysis or expert witnesses for the fact finding; 4) Sentencing procedures in participating countries; 5) Effective sanctions against corporate crimes, i.e. sanctions against individuals, such as directors, senior supervisors and ordinary employees as well as sanctions against corporate entities.

II. THE CURRENT SITUATION OF THE NATURE OF CORPORATE CRIME TRIALS

The group first reviewed the current situation of the nature of corporate crime trials in participants’ countries.

A. Thailand

The participant from Thailand said that in her country they use the civil law system and there is no difference in the trial of corporate crimes and other criminal trials. However, in many corporate crime trials there are many forensic expert witnesses. The trial process is time consuming as the cases are complicated. More time is needed to present the evidence in court. She went on to say that the trials are presided over by no fewer than two judges. There is no jury. If there is an appeal of the case to the Court of Appeal or the Supreme Court, three judges preside over the case. In Thailand some corporate crimes regarding intellectual property are tried in the Central Intellectual Property and International Trade Court. Since intellectual property cases possess different characteristics from ordinary criminal cases, a new procedure has been devised to achieve convenient, speedy and fair proceedings in these cases. There is no special court for tax crimes. The tax court is only for civil cases.

B. Malawi

The participant from Malawi said that his country uses the common law system. Corporate criminal cases are tried in the same way as other criminal cases using the same courts. The cases are normally initiated in the Magistrate Courts. However, due to their complexity, the cases are transferred to the High Court for trial. In the Magistrate and High Courts, the cases are presided over by a single magistrate or judge respectively. Even though the law provides that cases at the High Court can be presided over by the jury, in reality a single judge presides over them. (The law also provides for the single judge in the absence of the jury). On appeal, the cases are presided over by no fewer than three judges in the Supreme Court. Malawi does not have a special court for tax crimes. There is only a special department for the enforcement of tax laws and investigating tax evasion.

C. Indonesia

The participant from Indonesia said that in his country they use the civil law system. Corporate criminal

cases are tried in the same courts as other criminal cases. At first instance, the cases are examined by three judges. If any of the parties is not satisfied with the judge's verdict, an appeal is made to the High Court where three judges also hear the case. If the verdict of the High Court is not satisfactory to any of the parties, an appeal is made to the Supreme Court. Three judges again will hear the appeal. Indonesia does not have a special court for tax crimes. There is only a special department for the enforcement of tax laws and investigating tax evasion.

D. Niger

The participant from Niger said his country uses the civil law system which is different from other group members' legal systems. Corporate criminal cases are tried in the same courts as other criminal cases. The cases that are serious in nature are tried by a panel of seven, comprising three professional judges and four jurors. The jurors are selected from the citizenry and are of different professional backgrounds. The verdict in the case is made by all seven in consultation. The participant expressed his concerns with this system as he feels that it can result in injustice as most of the jurors do not know the law and might reach a wrong conclusion in the case. He concluded by saying that there are neither special courts in Niger which try tax cases nor special departments to deal with them.

E. Japan

The participants from Japan said that in their country corporate criminal cases are tried in the same courts as other criminal cases. The trials for corporate crime cases frequently take a long time due to their complexity. Trials are conducted by professional judges. They said that at first instance, if the case is simple, it is decided by a single judge; if the case is complex, it may be decided by three judges. If there is an appeal of the case to the High Court, three judges will preside over the case. Moreover if there is an appeal of the case to the Supreme Court, in principle five justices will preside over the case. However, if the case has significant issues, such as constitutional considerations, all 15 justices may preside over the case. The participants said that two major District Courts (Tokyo District Court and Osaka District Court) have special departments for tax evasion cases.

At the conclusion of the discussion, the Group unanimously confirmed that there are no special courts in their respective countries which try corporate criminal cases. The cases are tried in the same way as all other criminal cases. However, in Thailand, corporate crimes regarding intellectual property are tried by the Central Intellectual Property and International Trade Court.

III. THE RULE OF EVIDENCE

A. Hearsay Rule

The Group afterwards discussed the rules of evidence in respective countries regarding hearsay and documentary evidence. The participants from Thailand, Malawi, Indonesia and Japan said that hearsay evidence is inadmissible in their courts. The person who perceived the crime with his or her senses is required to give testimony in court to allow the court to cross-examine him or her. The participant from Niger said that in his country's legal system hearsay evidence is admissible during trial. The participants from Indonesia and Malawi went on to say that despite the general inadmissibility of hearsay evidence in their courts, the testimony of an expert witness can be admitted in court in the absence of the expert. The Japanese participants said that one of the exceptions to the ban on hearsay evidence is when the defence agrees to its use in court. Other exceptions are provided in the Code of Criminal Procedure. For example, when the witness cannot testify in court because he or she has passed away, is outside the country etc., the written statement recorded by the prosecutor is admitted in court as hearsay evidence. If the witness has changed the statement since it was recorded by the prosecutor and the requirements provided in the Code of Criminal Procedure are satisfied, the statement is admitted in court as hearsay evidence. Financial statements and general ledgers are regarded as hearsay evidence in Japan; however, such evidence is admissible as an exception to the hearsay rule, which is stipulated in the Code of Criminal Procedure.

B. Documentary Evidence

The participants from Thailand, Malawi, Indonesia and Japan all explained that original documents are admissible as evidence in their courts. However, there is an exception to this rule whereby copies can be admitted in evidence. In Thailand, if the originals are not available, certified copies or oral evidence of their contents are acceptable. If official documents are cited as evidence, even where the originals are still

available, copies certified by the authorities may be sent to court as evidence, unless otherwise directed in the summons. In Malawi and Indonesia, the copies can be admitted if they have been certified by public notaries, government officials or commissioners of oaths as true copies of the original documents. As for Japan, there is no statutory law that prohibits the use of copies as evidence, however, according to the precedent, it is necessary to meet the following conditions:

- a) when it is known that the original document did exist
- b) when the original document can not be found
- c) when the copy is the true copy (exact copy) of the original document. In this case the person who originated the document must satisfy the court that the copy is exactly the one he or she originated.

The scenario, however, was different for the participant from Niger. He explained that both original and copied documents are admitted in evidence provided that the evidence was collected in the presence of the accused/offender and the court has agreed to its use.

All the participants concluded that in their respective jurisdictions, any evidence to be admitted in court must be collected by the investigators or any person conducting the investigation legally. Unlawful collection of evidence will render its inadmissibility in court.

C. Electronic Evidence

The participants from Thailand, Indonesia, Japan and Malawi said that in their countries electronic evidence is admitted in court. In Thailand, the Electronic Transaction Act allows electronic documents to be used as evidence in the courts and makes digital signatures legally binding. Many Thai governmental rules and regulations have been revised to allow electronic documents as evidence. The Malawian participant, however, said that the law has not clearly taken care of the use of electronic evidence but with the advancement of technology and the increase in cases committed through computers, the courts allow its use provided the court is satisfied that the evidence has not been tampered with. The participant from Niger informed the group that electronic evidence is also admissible in Niger courts provided it is legally obtained.

IV. FAIR AND SPEEDY TRIAL

A. Preparation for Trial: Disclosure of Evidence and Clarification of Disputes

1. Japan

The participants from Japan said that the trials of complex cases, including corporate crime cases, sometimes take a very long time which earns public criticism. In order to speed up the trial process, they introduced pre-trial arrangement proceedings in November 2005. At these proceedings both parties sort out all preliminary issues like the evidence or witnesses to be used during trial, etc. All the factual disputes and clarifications in issue are sorted out before the actual trial.

The participants went on to say that until the pre-trial arrangement proceeding was introduced in Japan it was enough for the prosecutor to disclose evidence which he or she planned to use for the trial prior to the first trial date. In addition, according to Supreme Court precedent, the defence counsel could request the judges to order the prosecutor to disclose the particular evidence during trial in limited circumstances. By using the new pre-trial arrangement proceedings, now both parties can request such disclosure in a wider and earlier manner than before, which leads to speedy trials. The pre-trial arrangement proceedings are always *in camera*.

2. Niger

The participant from Niger informed the Group that there is no pre-trial proceeding in his country's legal system. There is no law requiring the disclosure of evidence before trial. However, in most cases the defence counsel is given the evidence against the accused before trial. The accused is also informed of the charges against him or her before the actual trial, and is further requested to find a defence counsel to represent him or her in the case. In the case that he or she can not hire a defence counsel, it is the duty of the government to assign one to represent him or her during trial in order to ensure a fair trial. The participant went on to say that the trials are always held in open court. When the trial starts it is held continuously until the case is disposed of.

3. Indonesia

The participant from Indonesia said there is no pre-trial proceeding in his country's legal system to disclose evidence. The pre-trial proceedings are only done to examine whether the arrest and/or detention was legal or not and to decide whether the district court has the jurisdiction to try the case at hand. In Indonesia the evidence is disclosed during the trial. However, if the defence counsel needs more evidence from the prosecutor, he or she is free to ask the judge that he or she be given the evidence by the prosecutor in order to prepare for the case. To ensure a fair trial the offender is allowed to bring his or her own evidence into court during trials.

4. Malawi

The Malawian participant explained that even though the law is silent on the disclosure of evidence, the prosecutor is expected to disclose all the evidence he or she will use during the trial at least 14 days before the trial date. This enables the defence counsel to prepare the defence and also speeds up the trial as there will be no unnecessary adjournment. The prosecutor is also expected to furnish the defence counsel with the list of its witnesses and their statements.

The participant further said that before the actual trial, the defence counsel is free to seek any clarifications from the prosecutor or judge. They can object to the charges themselves if they are improper or defective. They can even seek an amendment of the charges. The law allows that any clarification should be made before the trial commences. The law does not allow the clarification of disputes at the appeal stage of a case. The participant informed the Group members that criminal trials in Malawi are very long and slow. This is happening mainly because of a shortage of legal personnel in the country who can handle the cases. As a result, there are a lot of adjournments during the trial.

5. Thailand

Finally, the Thai participant said the law in her country provides for the disclosure of evidence by both the prosecutor and defence counsel before the commencement of trial. In case of the accused not making a statement or making a negative statement, when any of the parties requests, or the court deems suitable, the court may designate the date and notify both parties of evidence inspection not less than 14 days before the trial. Any disputes in the case are clarified before the trial. The prosecutor and the defense counsel agree in advance the number of witnesses and who is to testify at the trial. Trials in Thailand are continuous. There is no break or adjournment once the trial has commenced. However, if the witness does not appear or if there are reasonable grounds for the adjournment of the trial, the court shall adjourn the case as it thinks fit.

6. Summary

In conclusion, it was observed that Japan, Thailand and Malawi recognize pre-trial proceedings to clarify any disputes in the case in order to speed up the trial. Niger and Indonesia do not have pre-trial proceedings. Secondly, it was observed that Japan, Malawi, Thailand, and to some extent Niger, have a disclosure of evidence principle before the trial commences. Indonesia on the other hand does not have the disclosure of evidence principle. Lastly, it was observed that all the countries except Malawi, and to some extent Japan, have a continuous trial process which speeds up the trial. The shortage of legal personnel (judges, prosecutors and defence lawyers) was cited as a reason for the adjournments of trials in Malawi.

B. Utilization of Forensic Analysis and/or Expert Witnesses in Fact Finding

1. Thailand

The Thai participant was the first to comment on this topic. She said that in her country, forensic analysis is used in some criminal cases such as drugs and murder as well as in corporate crimes. The person who does the forensic analysis becomes a witness and is required to testify in court under oath on the analysis done. The courts also utilize the expert witnesses. The experts give evidence in their area of expertise. The experts can give evidence in person or use their witness statements provided the defence counsel has agreed to it. She concluded that the only problem facing Thailand is the lack of experts in some fields.

2. Malawi and Indonesia

The participants from Malawi and Indonesia said that in their respective countries forensic analysis is used in the courts to prove the case. For example, computer experts are used to retrieve and analyse data deleted from a computer. However, the Indonesian participant said that for corporate crime in his country

they do not need forensic analysis but opinions of expert witnesses. Soon after the analysis, a report is prepared which is tendered in court as part of evidence. The two participants further explained that the laws in their respective countries allow expert witnesses to be used and give evidence in court in the area of their expertise. The experts give evidence under oath in person. However, in some instances the court can allow their reports or statements to be admitted in evidence in their absence. The Malawian participant said it is up to the court to assess the capability of the expert witness before allowing him or her to give evidence as an expert. It is mainly done through assessing his or her past experience and previous work.

3. Niger

In the case of Niger, as stated by its participant, forensic analysis and expert witnesses are also used. On the issue of forensic analysts and expert witnesses, there is a prepared list of experts who are chosen when need arises to analyse a matter or give expert opinion. The defence counsel has to agree to the choice of the analyst or expert. However, the participant said that if there is no one on the list, another expert can be chosen. After the analysis or examination, they produce a report which is tendered in court as part of evidence. They are also called in court to give their evidence in person.

4. Japan

Finally, the Japanese participants informed the group members that forensic analysis is used in Japanese courts in several ways, like fingerprinting and DNA and computer analysis. The police have specialists who testify in court on their analysis. On the issue of expert witnesses, the participants explained that they are frequently used and testify in court. Their opinions and analysis are used in court as part of evidence. For example, psychiatrists are sometimes called to give opinions on the mental condition of a defendant. The prosecutor chooses the expert witnesses. However, the court has the final decision whether or not to allow a particular expert witness to give evidence. The participants said that reports by expert witnesses are treated as hearsay evidence. Unless the defence counsel has agreed to use it, the expert witness is called in court to testify concerning the admissibility or credibility of the report. In some cases, if necessary, the court has the authority to choose an expert witness without request of the parties.

C. Fair Trial

1. Japan

The Japanese participants were the first to address this topic. They said that in Japan, a fair trial is a constitutional right of every accused person. In order that the accused is accorded a fair trial, the trial should be open to the public. In addition to that it must be presided over by unbiased judges. In this regard, the only information available to the presiding judges before the trial is the indictment. They continued in saying that the Japanese court system would like as much as possible to have a continuous trial after commencement but in reality it is virtually impossible because defence counsels are busy with other cases. As a result, there are adjournments which delay the cases. The pre-trial arrangement proceedings are aimed at speeding up the trial where unnecessary issues are eliminated and relevant matters are isolated and are discussed at the actual trial. The participants were of the view that in order to accord the accused a speedy trial, there is a need to increase the number of defence counsels.

Finally on the issue of trial, the two participants narrated that in principle in Japan if the accused is absent from court, the trial can not proceed. However, in minor cases where a fine of up to five hundred thousand yen will be imposed in case of conviction, the trial can proceed in the absence of the accused. However, even in such a case, he or she is usually present at the trial.

2. Malawi, Thailand and Indonesia

The three participants from Malawi, Thailand and Indonesia expressed similar sentiments regarding fair trial in their respective countries. They explained that fair trial is maintained by making sure that the accused is afforded the chance to answer to the charges leveled before him or her. He or she should not be condemned before he or she is heard. Secondly, the trial must be presided over by unbiased judges. Thirdly, the accused has the right to find a lawyer of his or her choice to represent him or her. Fourthly, the trial should be held in public and the accused should be given a chance to cross-examine the witnesses against him or her or contradict the evidence against him or her. In addition to the above, in Malawi and Indonesia, fair trial is afforded to the accused by separation of duties between the investigator and the prosecutor. In these countries, one can not be an investigator and prosecutor of the same case. In Thailand, in special cases

specified by law, the prosecutor may be required to inquire or participate in order to give advice and examine the evidence from the beginning of the investigation process. In cases of serious transnational crime committed by an organized crime group or a criminal case in which a politically or socially influential person is the principal, instigator or supporter, a prosecutor is required to conduct a joint investigation with the special case inquiry official. Moreover, in cases where the offence is alleged to have occurred outside Thailand, the Attorney General, or any other official(s) in charge of his or her functions, is the inquiry officer.

3. Summary

Lastly, all the participants said that in their respective countries, as far as criminal trials are concerned, the accused must be present in court during the proceedings otherwise the trial will be seen to be unfair. The absence of the accused before court is enough reason to cause an adjournment of the trial. On the same matter, the participant from Niger explained that in his country an accused is required to be present in court for his or her trial. However, in some cases the trial can proceed in the absence of the accused in court.

V. SENTENCING

A. Sentencing Procedures

1. Thailand

Each participant explained the sentencing procedures in their respective countries and the factors the court takes into account in passing sentences. The Thai participant explained that the two trial judges pass a verdict after hearing evidence from both the persecutor and defence counsel. A judgment is read in an open court either on the day the trial is over or within three days from such date. However, if there are reasonable grounds the court may postpone the reading of the judgment to a later date. Upon conviction and in coming up with the sentence several considerations are taken into account by the judges such as the gravity of the offence committed, past criminal record of the accused, etc.

2. Malawi

The participant from Malawi said that after both the prosecutor and defence counsel have closed their cases, they make final oral and written statements that will be submitted to the court. Based on these submissions and the evidence submitted during the trial, the trial judge passes a verdict of guilty or not guilty. In the event that the accused is convicted, sentencing is in most cases passed separately. It can be done the very day of the judgment, after a day or two, or even after a week. At this moment the accused (now a convict) is kept in prison. On the day of sentencing, the prosecutor submits to the court its antecedents and pleads with the court as to what they think should be the right sentence for the convict. On the other hand, the defence counsel submits its mitigations pleading with the court to be lenient with the convict based on the facts they put forward. The judge therefore passes an appropriate sentence based on the facts put forward by both parties, the gravity of the offence and the past criminal record of the convict.

3. Indonesia

In Indonesia, before the judges give a verdict, both the prosecutor and the defence counsel submit their arguments. Normally, the prosecutor submits that the offender should be convicted and proposes a possible sentence. The defence counsel on the other hand submits that the offender should be acquitted and set free. The participant went to say that the judges make a decision based on the prosecutor's recommendations, the facts that came up during trial and the defence counsel's arguments. Many considerations are taken into account by judges in sentencing such as the gravity of the offence committed, the offender's past criminal record, etc.

4. Niger

According to Mr. Abani, sentencing in Niger, especially in serious offences, is decided by three judges and four jurors at the end of the trial. In simple offences, a verdict and sentence is passed by a single judge. The verdict and sentence is reached by the consensus of the said seven people. In Niger, it is possible to pass a prison sentence on the offender and impose a civil penalty on him or her, which normally is compensated to the victim of his or her crime.

5. Japan

The matter of sentencing procedures was concluded by the explanation of the two Japanese participants

as to the procedure followed in their country. They said that there are no clear sentencing guidelines in their country. In closing argument, the prosecutor recommends a particular sentence. The judge gives a verdict on the case. In the event of a conviction a sentence is rendered taking into consideration the content of the crime such as motive, gravity of the offence, etc. The prosecutor's recommendation is also important for sentencing. In practice, judges usually consider the prosecutor's sentencing recommendation as an important guideline for similar cases. In contrast to Niger, the Japanese participants said that criminal and civil sanctions are not pronounced together. Recently, the Code of Criminal Procedure has been amended to allow victims to use the outcome of the criminal proceedings to claim damages. However, this procedure can be applied only to certain types of serious offences such as homicide, not corporate crime.

B. Sentencing Guidelines

1. Japan

It was agreed before addressing the last topic on our agenda, which was effective sanctions against corporate crime, that there was need to discuss the sentencing guidelines in the respective countries. The matter was brought to the floor by the co-chairperson, Mr. Hashimoto, who was also the first to contribute. He said that in Japan there is no standardization or formal guideline in giving sentence. Sentences vary depending on what the judge deems appropriate, therefore in corporate crime deciding the sentence is very difficult. He was of the view that it would be good if there were formal guidelines to guide judges, especially for corporate crime.

The other Japanese participant added that prosecutors on the other hand have very precise guidelines in deciding the sentence to give as a sentencing recommendation to the judge. For instance in corporate crime there is a special standard which they use and follow.

2. Niger

The participant from Niger said that there are no formal sentencing guidelines in his country. The law in Niger provides for the minimum and maximum sentence for every offence. Judges are at liberty to pass a sentence which they deem fit depending on the facts of the case. They can even pass a lower sentence than the one provided for in law. He went on to explain that in Niger sentences are categorized into three groups:

- If it is a petty crime, the penalty is a fine ranging from 500CFA to 100,000CFA or imprisonment of 1 day up to 29 days;
- If it is an offence, the penalty is imprisonment of 30 days to not more than 10 years, deportation and sometimes fine;
- If it is a serious crime, the penalty is 10 to 30 years' imprisonment, life imprisonment or the death penalty.

3. Malawi

In Malawi there are no clear sentencing guidelines. The penalties are provided for in laws. The law provides the maximum sentence on every offence. However, in practice, judges are very reluctant to impose the maximum sentence unless the offender has previous convictions for the same offence or the offence is very serious. Judges sometimes follow previous judgments on sentencing, especially if they are rendered by the Supreme and High Courts. The participant further explained that the Magistrate Courts in Malawi cannot pass a sentence of more than 14 years' imprisonment. If the magistrate thinks the offender should be sentenced to more than 14 years, he or she transfers the case to the High Court which has jurisdiction to pass sentences of more than 14 years. Lastly, the participant said that the offender has the right to appeal both the conviction and sentence.

4. Indonesia

On his part, the Indonesian participant said there are no formal sentencing guidelines in his country. However, in similar cases there is a custom among the judges to pass similar sentences. In Indonesia the prosecutor would be guided by his or her supervisor on the appropriate sentence to recommend to the judge. Before recommending to the judge the possible sentence, the prosecutor must report to his or her supervisor and propose a suitable sentence. The supervisor will either agree or disagree with the prosecutor's proposal. The proposed sentence will be submitted to the judge as the prosecutor's recommendation on the possible sentence to be imposed on the offender. In most cases, the judge will follow

the recommendation of the prosecutor.

5. Thailand

The participant from Thailand explained that there are no formal sentencing guidelines in her country. However, judges have informal guidelines that they use among themselves. The sentences are provided for in the legislation and other judicial precedents, especially those from the Supreme Court. The judges have the power to pass the sentence they deem fit depending on the facts of the case and what the law provides.

In concluding the matter, it was found that none of the five countries have clear and formal sentencing guidelines which judges can use. Judges rely on the penalties provided for in the laws or previous precedents. It was felt by the Group members that it is important that the countries have clear and formal guidelines on sentencing to aid judges in coming up with appropriate and consistent sentences since corporate crimes are so complicated, even though they should not be bound by them. The guidelines will remove the disparities in sentencing seen now in the countries where similar cases end up with different sentences.

VI. EFFECTIVE SANCTIONS AGAINST CORPORATE CRIMES

A. The Situation in Participating Countries

1. Thailand

The Thai participant said that in her country there are criminal sanctions that are imposed on both the individuals and corporate entities committing corporate crimes. Upon conviction, the individuals are subject to all types of penalties. However, as for corporate entities, there are only certain penalties that can be imposed; such penalties are fines and forfeiture of property. On administrative sanctions, Thailand also imposes administrative sanctions on individuals and corporate entities. For instance, if there is evidence that the condition or operation of any securities company has caused damage to the public interest, the Office of the Securities and Exchange Commission has the power to order such company to remove its directors, managers or persons who are responsible for its operation who have caused the damage (the Securities and Exchange Act B.E 2535). As for the corporate entities, administrative sanctions also include various measures such as forcing the closure of business or daily fine by the competent officials. Civil sanctions are also imposed on individuals and corporate entities as punishment for corporate crimes. They have to pay compensation for damages to the victims of crime.

2. Niger

The Niger participant explained that criminal, civil and administrative sanctions are imposed on perpetrators of corporate crimes in Niger. Criminally, individuals are sentenced to death, imprisonment (life or determinate), or they are expelled from Niger for a specified period of time, their proceeds are confiscated, and further, their civil rights, such as voting, are denied (revoked). The corporate entities are, on the other hand, fined and their assets are confiscated. Also the company is debarred from conducting business with the government, judicially suspended from carrying on their business for a specified period of time, or dissolved. However, the law provides that the corporate entities and individuals that report any criminal acts in their company or their association with others are exempted from criminal sanctions. Civil sanctions are imposed on corporate entities to compensate the victim of the crime for damage.

3. Indonesia

The Indonesian participant said that in his country both criminal and administrative sanctions are imposed on the accused. Criminally, the accused may be imprisoned or fined and the accused company's trading licence would be revoked and the business dissolved followed by the liquidation of the company. He went on to say that criminal and administrative sanctions are decided in separate courts. According to the participant, there is no civil sanction in Indonesia for the accused of corporate crimes.

4. Malawi

In Malawi, as expressed by its participant, criminal and administrative sanctions are imposed on the offenders of corporate crimes. The main sanctions are imprisonment or fine. Administratively, the government can revoke the work permit granted to the individual if he or she is a foreigner and request him or her to leave the country. Coming to the sanctions imposed on the corporate entity, the participant explained that the law,

especially on money laundering and terrorism financing, imposes criminal sanctions on the corporate entity itself. Upon conviction, the corporate entity is fined and automatically loses its business. Administratively, the corporate entity's business licence can be revoked. Furthermore, the corporate entity can be disbarred from conducting business with the government.

5. Japan

In Japan, according to its two participants, criminal sanctions imposed on individuals are mainly imprisonment and fine. In addition, a director sentenced for certain types of corporate crime is disqualified from his or her position which will result in difficulties in securing another job. If the individual is of a lower position, the corporations have their own internal mechanics in dealing with him or her. Normally, he or she will be fired from the company. There is no punitive damage sanction imposed on the offenders of corporate crimes. Regarding sanctions on the corporate entity, the participants explained that the criminal sanctions are imposed on corporations when they violate the law which provides for double punishment. Administrative sanctions (e.g. an order for business suspension, revocation of licence) can also be imposed on corporations.

VII. RECOMMENDATIONS

After a lengthy discussion on all the above topics the group members came up with the following recommendations:

1. There is no need to establish or create special courts in respective countries to deal with corporate crime cases. The procedure currently followed in dealing with such cases is appropriate. However, it would be useful to establish specialized departments to deal with corporate crime cases like tax evasion in order to ensure speedy and fair trials;
2. Every country should have legislation to provide for the use of electronic evidence to avoid the evidence being challenged in court. The legislation will make its use in court unequivocally binding;
3. As much as possible, the countries should use original documents as evidence in courts. Copied documents must be used with strict conditions to avoid the use of tampered evidence;
4. Preparation before the actual trial is vital in all the countries where clarifications of disputes and disclosure of evidence should be made. The preparation will speed up the trial process because it will cut unnecessary objections which may arise during the trial;
5. The court should maintain a list of qualified forensic analysts and experts who can be called to give testimony, rather than the parties calling their own analysts and experts; this would avoid possible conflicts of opinion between opposing experts. The list would be prepared by the court in consultation with relevant bodies. However, the parties should not be bound to use only the analysts and experts on the list;
6. Countries must have adequate jurists and legal personnel to handle corporate crime cases in order to ensure fair and speedy trials. Countries should strive to have as much as possible a continuous trial process without adjournments so that there is a speedy trial process;
7. Judgment and sentencing should be rendered within a reasonable time after the trial. Preferably, the judgment and sentence should be delivered together at the end of the trial;
8. In order to avoid disparities in sentencing and speed up trial, it is useful to establish sentencing guidelines. However, judges should not be bound by the guidelines in determining (passing) sentence;
9. In order to combat corporate crimes, there should be a balance amongst criminal (penal), civil, and administrative sanctions imposed on both corporate entities and the individuals concerned.

PART TWO

**Work Product of the Tenth International Training Course on
the Criminal Justice Response to Corruption**

UNAFEI

PARTICIPANTS' PAPERS

THE CRIMINAL JUSTICE SYSTEM IN CAMEROON: PROBLEMS FACED WITH REGARD TO CORRUPTION AND SUGGESTED SOLUTIONS

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I. INTRODUCTION

Cameroon is a bi-jural state, a legacy of colonialism. The country is however gradually departing from this heritage towards a unified system that will give it a legal identity of its own. A lot has already been done to advance in this direction. Several laws have been unified and promulgated, with still a lot more left to be done. The most recent of such unified laws is the Criminal Procedure Code which went into effect on 1 January 2007. Before now, the country operated a dual criminal procedural system reflecting its bi-jural nature; the inquisitorial system derived from French civil law, and the accusatorial which emanates from English common law. The new code is a hybrid system merging key features of both systems with the accusatorial procedure adopted as its basis, with the presumption of innocence.

II. LEGAL STRUCTURE

Our legal system is structured and placed under the supervisory authority of the Ministry of Justice with Courts of First Instances at the District and sub-divisional levels. High Courts are distributed at Divisional level; Courts of Appeal at Provincial level; and at its helm is the Supreme Court.

Promotions, appointments, transfer and the discipline of magistrates and judges passes through the hierarchy of the Minister of Justice who makes proposals and recommendations to the Presidency of the Republic before it gets to the Higher Judicial Council. This council is presided over by the head of the executive branch of the government who is the President of the country. He promotes, appoints, transfers and integrates magistrates and judges into the judiciary. Magistrates are trained and integrated into the Magistracy directly from the country's school of administration and magistracy.

It is also important to note that while judges perform the role of decision making in a judicial process, they are but one part of a long chain of people with influence over a law suit. In the private sector, we have legal professionals like lawyers, bailiffs and the notary public. Lawyers are constituted into a bar association with an elected president and a bar council. Bailiffs and the notary public likewise have similar orders. These private legal professions are placed under the directorate of legal professions and control in the Ministry of Justice, which acts as an overseer. The Minister remains the general supervisor. In the absence of a law school in the country, where these private legal professionals can be trained, aspirants are admitted into legal chambers. At the end of their training they write an end of course examination directed by the Ministry of Justice in collaboration with the Bar Council. Bailiffs and notaries go through the same process.

A. The Criminal Justice System

Our justice system consists of two major departments; the bench and the criminal department, commonly known as the legal department. The legal department is the prosecuting arm in charge of all criminal matters. Magistrates and judges are moved from one department to the other. A presiding magistrate on the bench can be transferred to the legal department as a prosecutor and vice versa. In other words, there aren't specific magistrates and judges assigned to the bench and to the legal department. They all work inter-changeably.

In the criminal department, we have the State Counsel's Chambers at the level of the Courts of First

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Instance and the High Courts, and the Office of the Attorney General at the levels of the Courts of Appeal and Supreme Courts, with the Minister of Justice as the hierarchical supervisory authority. This department supervises, controls and directs all investigations, and prosecutes same at different levels.

B. Investigative Methods

Investigation in Cameroon is regulated by the newly promulgated Criminal Procedure Code. Investigations are directly placed under the supervision of a magistrate acting as a state counsel, who in turn is answerable to the Attorney General at the level of the Court of Appeal.

Investigations are carried out by the judicial police and gendarmes who act as auxiliaries of the state counsel. The duties of the judicial police are performed by judicial police officers, judicial agents and all other civil servants or persons to whom judicial police duties are assigned by law. They are responsible for investigating offences, collecting evidence, identifying offenders and accomplices, and bringing them before the legal department. They also receive complaints and reports against persons and carry out investigations, but must inform the state counsel without delay of the offences of which they have knowledge. They equally execute rogatory commissions of judicial authorities.

Investigations can be commenced by way of written or oral information, a written or oral complaint or a written report by a competent authority sent to the state counsel. The state counsel may also be seized of his or her own motion. Any person who has knowledge of an offence classified as a felony or misdemeanor can inform the state counsel or any judicial police officer thereof. In the absence of any of the two, any administrative authority of the locality could be informed. In like manner, any public servant who in the exercise of his or her duties has knowledge of a felony or misdemeanor is required to inform the state counsel and forward to him or her any document relating thereto.

In the course of an investigation, a suspect can be arrested and placed under police custody for a period of forty eight hours renewable once. An investigator may question any person whose statement is likely to lead to the discovery of the truth. Witnesses are heard separately and as much as possible in the presence of the defendant. If any person summoned for questioning fails to appear, the state counsel may issue a writ of *capias* compelling him or her to come. The assistance of any expert or any person capable of assisting the investigator at any phase of the investigation can be requested. In cases of felonies and misdemeanors attracting imprisonment of at least two years, Section 92 (3) of the Code gives an investigator the right to intercept, record or transcribe all correspondences sent by means of telecommunications, and the right to take photographs at private premises, provided he or she has written authorization from the state counsel. Section 102 of our Code demands that investigation processes should be secret and any person who assists in the investigations shall be bound by professional secrecy. A suspect should be immediately informed of the allegations against him or her and treated humanely both morally and materially as per Section 122 (i) of the Code. He or she should also be informed of his or her right to silence.

Preliminary investigation is obligatory in all felonies. It is conducted by an examining magistrate at the request of the state counsel by way of a judicial act in writing, known as a holding charge. The state counsel may at any stage of the preliminary investigation, by an additional holding charge, request the examining magistrate to perform any acts which he or she deems necessary for the discovery of the truth.

The examining magistrate is at liberty to visit any area within his or her jurisdiction to carry out all measures of investigations necessary for the discovery of the truth. He or she can carry out searches and seizures. Searches and seizures may also be carried out by judicial police officers who possess a search warrant as per Section 93 (1) of the Code. He or she may however carry out searches without a search warrant in cases of misdemeanors committed in *flagrante delicto*. Where a search and seizure has been done by a judicial police officer, he or she is expected to make an inventory of the entire objects seized. They shall be placed under seal and deposited with the legal department.

An examining magistrate can issue a bench warrant against a witness who fails to appear. He or she may also give a rogatory commission to any other examining magistrate or to a judicial police officer as per Section 152 of the Code. Where in the cause of hearing a witness, it is discovered that he or she is likely to be charged as a co-offender or an accomplice, he or she may be remanded in custody.

As per Section 198 of the Code, an examining magistrate, by way of an international rogatory commission, can carry out all measures of investigations in a foreign country, in particular to question an individual charged in Cameroon, to hear a witness, and to carry out searches and seizures. The rogatory commission should be accompanied by a detailed report. If the presence of a Cameroonian examining Magistrate or of a Cameroonian Judicial Police Officer is necessary to follow-up the execution of a rogatory commission in a foreign country, the Cameroon Government shall accredit him or her to the foreign country. Sections 673 and 674 of the Code make provision for an extradition order against a suspect or a convict who resides outside the national territory.

Remand in custody is an exceptional measure as per Section 218 (1) of the Code, which shall not be ordered except in the case of a felony or a misdemeanor. A self bail or conditional bail is available for suspects accused of misdemeanor and simple offences as long as they provide sufficient security or guarantee. The decision of an examining magistrate is subject to appeal before the inquiry control chambers of the Appeal Court.

At the close of his or her investigations, the originals of the police case files are forwarded to the state counsel without delay as well as all other relevant documents. The state counsel on receipt of the case file can prepare charges or an indictment order against an accused, close the file or send back the file for further investigations.

III. INVESTIGATION AND PROSECUTION OF CORRUPTION CASES

The fight against corruption has become a global concern. Corruption in Cameroon, like in many other countries, has gradually found its way into the very fabric of everyday life. It poses as a serious developmental challenge and has become a pivotal obstacle to economic development. Whether in politics, administration, the private or public sectors or the economy, one thing is certain: corruption is spreading like a canker worm, which needs to be urgently halted before it attains the proportion of an epidemic. Corruption has several facets. It can be passive or active bribery, embezzlement, illicit enrichment, money laundering, bid rigging and many other forms. Corruption in almost all of the forms enumerated above constitutes an offence in our Penal Code and other related legal instruments. To further lend support in this fight against corruption, specialized investigative bodies have recently been instituted, such as the National Agency for the Investigation of Financial Crimes, an Anti-corruption Commission, and the Law on Asset and Property Declaration. Putting good laws in place is one thing, but for such laws to become productive there has to be effective enforcement, effective investigation and prosecution, and an efficient judiciary. Law enforcement has an important preventive effect in that it helps to create the necessary awareness of the crime. Its preventive measures can however only be effective if those called to implement the rules rid themselves of those corrupt tendencies that tend to undermine good laws, and make them stand out like white elephants. Successful law enforcement can generate momentum and mobilize society against corruption. Without investigation and prosecution of corruption in all its forms, including the prosecution of high-level corruption, the chances of success of specific prevention measures may be fairly slim.

Detecting, investigating and prosecuting corruption are particularly difficult endeavours. Bribery and corruption are indeed often characterized by a high degree of sophistication in committing and camouflaging the crimes. It is most often submerged in a lot of secrecy and at times involves high-ranking officials who wield financial and administrative powers, with strong political connections. In most instances, those who could have either reported such offences or been called as witnesses are reluctant to co-operate. Despite all of the investigative modalities instituted in the new Criminal Code as summarized above, investigating and prosecuting corruption cases still constitute enormous problems arising from its peculiarities. Let's examine some of these obstacles.

A. Problems and Limitations in Investigating and Prosecuting Corruption Cases

1. Corrupt Investigators

One of our major constraints begins with those assigned to carry out investigations in corruption cases. Some of them will readily release information to a suspect of his or her imminent arrest in return for some financial gain. Such an illegal release of information enables the suspect to either go into hiding or proceed to destroy all incriminating evidence. Most of the time, escapees go out of the country. These suspects stay in hiding until prescription of the offence as per Section 65 of the Code. Many are those who have been

intercepted at airports or borders trying to escape. Suspects most often use the huge amount of resources they have accumulated fraudulently to bribe and corrupt investigators and even witnesses. The reports of internal auditors often hardly reflect the true situation since they themselves are easily bought off. There are recurrent cases where statements of suspects have been modified to hide the truth. Criminal exhibits are destroyed or made away with in return for financial rewards. Suspects, aided by investigators, escape from police custody. We have cases of criminals who constantly fall into the dragnet of the police and walk out at will as long as they are ready to pay the corrupt price.

As a judge, sitting in the military court of the Southwest Province, I tried cases brought against military officers for extorting money from criminals in the course of carrying out investigations. I also tried some other cases involving high-ranking military officials for corruption and embezzlement of huge financial and material resources destined for soldiers at the Bakassi conflict zone between Cameroon and Nigeria which were converted into private gain.

2. Poor Working Conditions

The lack of adequate resources hinders effective investigation. Investigating corruption cases requires a lot of resources, especially in cases of transnational involvement. Unfortunately, most investigative services in Cameroon lack even the basics such as ink, paper, computers and vehicles for rapid interventions, etc. There also exist acute technological limitations such as quick access to computerized information, telephone lines and calls, Internet facilities, etc.

3. Lack of Expertise and Effective Training

Most often those assigned to detecting and investigating corruption cases lack effective training in specific relevant matters. Investigators assigned to investigate corruption cases should be professionally and properly trained and should be persons of undisputed integrity to be able to withstand the temptations of being corrupt. This lack of expertise constitutes an acute limitation.

4. Lack of Verifiable Information

The lack of verifiable information hampers investigation. This comes as a result of long delays in reporting within public administration and as such gives the suspects enough time to hide their misdeeds. Some citizens are reluctant to report cases of corruption for fear of being victimized.

5. Cross-border Co-operation

Another handicap is that of obtaining evidence from abroad where the corruption case in issue involves many different countries. The process of rogatory commission and extradition procedures can be very time-consuming, especially where there is no existing convention or a treaty for mutual legal assistance. Many corruption cases today go beyond our national boundaries and thus require a great deal of international assistance.

6. Lack of Confidentiality

This is one other important element needed for an effective investigation. Information should not be prematurely divulged, especially before the arrest of an accused person. Unfortunately, there are times when even before an investigation opens, it already makes headlines in our newspapers. This explains why several suspects run away to unknown destinations and others proceed to destroy valuable evidence and exhibits. Section 102 of the CPC calls for secrecy at all stages of in investigation.

7. Lack of an Effective Complaint System

For the fight against corruption to be more effective, the participation of all actors is required; hence the need for an effective complaints system through which informants and whistleblowers can transmit information which can help trigger investigation and eventual prosecution. It should however be a system that will guarantee confidentiality and protection for this category of persons.

8. Lack of Sufficient Incriminating Evidence and the Absence of Witnesses during Prosecution

Besides the absence of investigators who are supposed to be witnesses for the prosecution during trial, one other major handicap is the absence of incriminating exhibits to buttress the prosecution's case. In situations where valuable incriminating evidence was destroyed at the stage of investigation, it makes it

difficult for the prosecution to prove its case beyond reasonable doubt, as required by law. As per the accusatorial process, the burden of proof is on the prosecution. A similar handicap arises from the absence of prosecution witnesses who in several cases hesitate to come and testify, partly for fear of being victimized and in some cases because they have been bought off by those seeking to hide their criminal deeds. With neither incriminating exhibits nor witnesses, the case for the prosecution suffers frustration which might lead to an unmerited discharge of an accused person under Section 365(3) of the Code for want of incriminating evidence.

9. Insufficient Independence of the Law Enforcement Agencies

Investigation can only be effective if those charged with investigation are given some degree of independence from undue influence. With our criminal justice system placed directly under the supervisory authority of the Ministry of Justice, the independent latitude needed in investigating corruption cases is considerably narrowed down.

B. Problems at the Trial Stage

There are no specialized courts, nor specific judges assigned for corruption cases. The same judges hear civil, criminal, labour and other matters, including interlocutory applications. In very busy jurisdictions, which most often are the jurisdictions with the highest number of corruption cases, judges are overburdened with a backlog of cases. A single judge at times has more than a hundred criminal cases besides civil, labour and interlocutory applications. Given the complexity of most corruption cases, many witnesses are involved and a lot of documentary evidence is needed to buttress the case of the prosecution. The defence in like manner does same. This also contributes to delays during trial. Defence counsels also cause undue delay by constantly raising objections to the admissibility of documents even when it is uncalled for, and the judge at such instances has to make a ruling. Most defence counsels operate independent chambers, making it difficult for them to single-handedly keep up with the number of cases they have. As such, they constantly ask for adjournments under the guise of other reasons.

With the institution of the new Criminal Procedure Code, the recording of court proceedings is done by the judge and is handwritten which makes trials long and laborious. Counsels often tend to conduct very long cross-examinations which are also time-consuming. Even when judgments are delivered, it takes a long time for judgments to be typed and appeals processed, because of insufficient resources such as computers, photocopy machines, etc.

Judges, court assistants and private practitioners also need a lot of training and continuous education to enable them to understand and master the new Code and other international legal instruments which they are called to implement. The judges as per the new code are called to be neutral arbitrators, which demands a high degree of integrity, fairness, justice and the ability to live far above corruption itself. Unfortunately, some judges at times fall prey to the attractions of corruption, which tends to make it difficult for them to be neutral.

IV. SUGGESTED SOLUTIONS

Plagued with so many problems, our criminal justice system needs urgent and systematic transformation to make it clean and transparent. Solutions need to be put in place to enable effective investigation, prosecution and fair trial. Public confidence in the criminal justice system is an important pre-requisite for an effective system. Listed below are some suggested solutions.

A. Effective Training and Education

Training programmes should be organized for legal personnel, including members of the private legal professions. Continuing legal education for magistrates and judges are essential to ensure that they understand their laws, especially the new Criminal Procedure Code and applicable international treaties so that their rulings are legally unassailable. A law school should be created for the proper training of lawyers.

One of the best defences against improper influence is full knowledge of applicable laws. Systematic distribution of laws and amendments on a timely basis to all judges is essential to combating corruption. Young magistrates are often in no position to counter legal arguments presented by individuals seeking to influence the outcome because they do not have ready access to current laws and amendments.

B. Improve Work Conditions

Legal officials should be provided with proper and adequate work conditions. Offices should be well-equipped with all that is needed to render effective services, increase productivity and prevent corruption. Provision should be made to ensure a decent living for legal staff and their families, in the absence of which legal personnel would continuously find themselves under a strong compelling force to succumb to the temptation of committing dishonest acts in return for a favour related to the discharge or performance of their official duties. Consequently, there is a need for adequate salaries and facilities. This will go a long way to curb need-based corruption at the lower and middle levels of legal personnel, if not totally reduce it.

C. Protection of Witnesses, Informants and Whistleblowers

For corruption practices to be unveiled, adequate protection should be provided to informants who disclose cases of corruption and voluntarily provide information. Witnesses will also be reluctant to testify if they are not sure of being protected.

D. Disciplinary and Legal Actions

Disciplinary measures play an important role in curbing corruption and deterring others from doing the same.

E. Interagency Co-ordination and International Co-operation

Co-operation is not a phenomenon limited to a particular administration, institution or sector. Successful approaches to the prevention of corruption between agencies, services, institutions and administrations are of vital importance in order to exchange experiences on the effectiveness of corruption prevention measures. Cross-border co-operation should be enhanced.

V. GENERAL MEASURES TO PREVENT CORRUPTION

There is no magic set of structures that will reduce corruption in all situations. These suggestions are just minimum standards for developing and maintaining integrity, accountability and transparency within the legal system. A total change will surely emanate from an upright mind anchored in integrity.

A. Enhancing the Independence of the Judiciary

Without the judiciary, there can be no rule of law. For a democratic state to function properly, it needs a legitimate rule of law enforced and protected by an independent and credible judiciary. This should be so because the judiciary also serves the function of creating a balance of power between the legislative and the executive branches. One of the major problems that our legal system encounters is that the rule of law has been historically weak. The executive and the legislative are excessively strong, creating an unbalanced state of affairs where the executive imposes its will and has significant control over the judiciary. The judiciary is frequently viewed as an acquiescent branch of government. In Cameroon, it is the sole prerogative of the president to appoint, promote and transfer judges without the restraints of transparent and objective selection procedures. Given such a situation, the executive and legislative branches are averse to relinquishing their influence over the judiciary. With the judiciary under the Ministry of Justice, a judge feels compelled to respond positively to the dictates of he or she who has the power to determine the rise or fall of his or her career.

Until quite recently, when the executive gave the green light for some senior executive officials to be arrested, there were many people who thought that they were untouchable because of the amount of power they wield and their strong political connections. Without the fiat from the executive, the judiciary could not have commenced legal action against some highly placed officials. Proceedings against political giants like Mr. Ondong Ondong, the Director General of Feicom, and others for corruption and embezzlement of public funds is one example. The same is also true of the ongoing case against Mr. Siyam Siewe, former Minister and former Director General of Cameroon National Ports Authority, and others. Such cases explain why corruption and embezzlement have been ravaging our country for years and yet go unpunished: because of overbearing and influential executive and legislative branches that virtually control the judiciary.

A clean, transparent and independent judicial system is of paramount importance for anti-corruption laws to be properly converted into veritable legal weapons. Our judicial system has been so structured as to foster corruption. The external pressures on a judge to act unethically are great. The Judicial Council should

be detached from the Ministry of Justice to ensure independence of the judiciary. It should also assume responsibility for selection and promotion of judges. The appointment procedures should be transparent and based on criteria that are not compromised by political considerations.

B. Increase the Salary of Judicial Staff

Salaries should be commensurate with the responsibilities of judges and legal personnel. The cost of housing in a secure environment, especially in big cities like Yaoundé and Douala, is exceedingly high for judges on present salaries.

C. Introducing an Accountability Mechanism

One of the major remedies to corruption is to improve the governance structure of the judiciary so that it has significant authority and control over the administration and budget of the courts. Judges must be held legally accountable by providing reasoned decisions and judgments that are open to appeal. Financial accountability ensures that the judiciary account for both the intended and actual use of resources allocated. Structures and standards should be regularly evaluated and improved upon. There is a need for transparency. Judges should be impartial, independent and beyond reproach.

D. Institution of a Code of Conduct

This will go a long way in spelling out the standard of ethical conduct expected of public servants in general and judicial staff in particular. It will also serve as a guide for the public as to what they should expect from a public servant in conduct and attitude. A code of conduct will strengthen the integrity of judges and improve public perception of the courts by clarifying the behaviour expected of judges. Unless judges begin to prosecute their own for disregarding the laws they are expected to enforce, citizens will continue to view the courts with scepticism.

E. Public Access to Information on Legal Issues

To reduce opportunities for corruption in administrative processes, court procedures must be simplified and made comprehensible to the court user. They must be precise in order to minimize the discretion of legal staff. The public should be properly informed of the different legal fees required for the processing of legal documents to circumvent corrupt and inflated demands from legal staff. For public perception of the judiciary to improve, citizens must be encouraged to develop a better understanding of their legal rights and obligations as well as the responsibility of the court to provide fair, effective and speedy justice. Civil society organizations can play a role in enhancing public awareness of legal rights and court procedures by devising and distributing legal pamphlets. With such basic information, citizens can learn how to participate more directly in the judicial process, particularly in the areas that most affect them.

F. Enhancing Competency of External Control

Many groups outside the judiciary can work to curb judicial corruption by supporting the judiciary's demands for independence and by continuously monitoring judicial performance and uncovering incidents of corruption. Strengthening these groups and ensuring they have access to the information necessary to perform their monitoring role can contribute to the reduction of judicial corruption. It is also essential for judges to have a vital and effective voluntary association that will safeguard their independence and protect their interests.

The Bar Association should be strengthened to act as a catalyst for changes and enhance the ethics of their members. The Bar Association should recognize as one of its roles the defence of the independence of the judiciary and lobby government to ensure its effectiveness. They should impose sanctions on members who engage in corruption and bring the profession into disrepute. This should also hold true with the order of notary public and bailiffs.

Journalists also have a role to play. To assist in more accurate reporting of cases of public interest, courts should provide briefings to the media. Public perception of judicial corruption is often worse than the reality and part of the reason for this is inaccurate reporting.

By monitoring the judicial process, civil society organizations can also expose unethical judges and create pressure on government for judicial reform.

G. Job Rotation

Enhancing staff mobility can substantially augment integrity. Long-term positions can foster corruption. A job rotation policy should be instituted, especially concerning people in managerial positions who can easily become vulnerable to corruption. This will minimize the risk of corruption, both individual and systematic. In Cameroon, some high-ranking officials retain managerial positions for as long as 20 years, giving them enough time and power to embezzle and possibly seal up all traces of wrongdoing.

VI. LEGAL INSTRUMENTS IN THE FIGHT AGAINST CORRUPTION AND THEIR IMPLEMENTATION

Cameroon has joined the fight against corruption. It is in this light that the President of the Republic promulgated a series of specific corruption laws and ratified some international legal instruments.

A. National Anti-corruption Laws

Besides the Penal Code, which prescribes sanctions against acts of corruption and related offences, specific laws have been promulgated for the prevention and fight against corruption. On 11 March 2006 the National Anti-corruption Commission was created. This Commission is an independent public organ with the goal of efficiently contributing to the corruption fight. In the same vein, on 25 April 2006 the Law on the Declaration of Assets and Property followed suit. This law envisages members of governments, parliamentarians, directors general and a host of other high-ranking officials, who in the execution of their functions should avoid any conflict of interest, declaring their assets when they take public office. Assets to be declared include those in the country and abroad. Laws on banking secrets and creating the National Agency for the Investigation of Financial Matters have also been promulgated.

B. International Instruments

On 21 April 2004 the President of the Republic was authorized to ratify the United Nations Convention against Corruption (UNCAC) and its predicate offences which Cameroon adopted on 31 October 2003. This Convention was effectively ratified on 18 May 2004. The same law also authorized the president to ratify the United Nations convention against Transnational Organized Crime. This law was adopted on 19 November 2004. These laws constitute the basis of our recently promulgated national laws in the fight against corruption. Another law that still has to be ratified by Cameroon is the African Union Convention for the Fight against Corruption which was adopted at the African Union Heads of States summit held in Maputo, Mozambique on 12 July 2003.

VII. CONCLUSION

Corruption control in our criminal justice system calls for concerted efforts and a combination of other factors. Prevention, it is often said, is better than cure and it is cost effective. Measures should be taken to increase public awareness of the ills of corruption, through media intervention, training seminars, and workshops. Anti-corruption programmes should be encouraged in our educational institutions so that our children as early as possible can cultivate anti-corruption attitudes.

COMBATING CORRUPTION: CHALLENGES IN THE MALAWI LEGAL SYSTEM

*Ivy Kamanga**

I. INTRODUCTION

The term “corruption” has become a key word in determining a country’s world standing in terms of its peoples’ financial morals and capacity to deliver in terms of distribution of wealth. There are some countries, especially in the developing world, that are presumed to be potentially corrupt countries. In such countries, it is presumed that people cannot render their services unless the party that seeks services parts with a valuable commodity. In other instances, the party that seeks an offer to render the service has to part with a valuable commodity in order to get such a contract. Malawi is one of the countries that in the past ten years has had its image tarnished with the taint of corruption. In an attempt to correct its image, the country has developed a legal formula in the form of laws that are intended to prevent and correct the corruption disease. This paper is an attempt to discuss some of the challenges the Malawi legal system has so far faced in an attempt to deal with the corruption issue in the past ten years and up to the present. The challenges include: political interference; constitutional interpretation of fundamental human rights and its implication on corruption; the question of whether or not activities that suspects indulge in fall within the criminal justice arena or the civil justice arena; the sentencing pattern in corruption cases, especially whether or not the law should provide for minimum or maximum mandatory sentences; and lack of expertise in the legal authorities to determine and define corruption.

II. THE LAWS

A. The Penal Code

Prior to 1995 Malawi did not have a definite legal document that dealt with corruption issues. Like most commonwealth countries, issues of corruption were another chapter in the country’s penal laws. Hence we had the Penal Code which had a chapter that provided for corruption and abuse of office.

Section 90 of the Penal Code defined official corruption in the following manner. “Any person who:

- a) being employed in the public service and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done by him in the discharge of the duties of his office; or
- b) Corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for any other person, any property or benefit of any kind on account of such act or omission on the part of the person so employed,

shall be guilty of a misdemeanor and shall be liable to imprisonment for three years”.

Under this particular provision, the law defined corruption as a misdemeanor and therefore not a serious crime. The law also provided the maximum sentence for a corruption case. The maximum sentence was three years. This made a mockery of the criminal justice system because as long as a matter fell under Section 90 of the Penal Code, the maximum sentence was three years. The monetary value of the service or benefit did not matter. At the same time, we had a provision in the same Penal Code that provided for the minimum mandatory sentences where a public officer who had been convicted of the offence of theft and the

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value of the property in issue did not exceed MK2000 (Malawi Kwacha) would be penalized with a mandatory custodial sentence of 12 months. If the value exceeded MK2000 the sentences would range from 2 years to 14 years on a graduating scale. Here one has to bear in mind that if the value of the stolen property was MK80,000 or above the culprit would serve a mandatory 14 year term in custody. Hence the country had a lot of its citizens complaining about the criminal justice system, the citizens' observation being that the criminal justice system tolerated corruption.

There was also the issue of prosecution in matters that fell under corruption and abuse of office. All matters of corruption and abuse of office could only be prosecuted by the Director of Public Prosecution or with his or her sanction. This had its repercussions. The office of the Director of Public Prosecutions was generally a political office in the sense that such a Director was appointed by the President and would report to the Minister of Justice. In the old Malawi regime, the Minister of Justice for most part was the president himself. It was the citizens' observation that this type of reporting system did not encourage transparency and would easily accommodate corruption.

B. The 1994 Constitution of the Republic of Malawi

As Malawians opted for a new Constitution in 1994 the Constitution attempted to protect the office of the Director of Public Prosecution by ensuring that there should be no interference in the performance of his or her job. This was done by providing procedures for appointment and removal from office of the Director of Public Prosecution in the Constitution itself. The Constitution thereby provides that appointment of the Director of Public Prosecutions shall be made by the President and confirmed by the Public Appointments Committee of Parliament. Where the President is inclined to remove a Director from office, the same should only be based on incompetence; or where the Director is compromised in the exercise of his or her duties to the extent that his or her ability to exercise his or her functions impartially is in serious question. These Constitutional provisions attempt to provide and ensure that the Director has general protection in the exercise of his or her duties in all matters, including corruption matters.

It was however once more observed by the citizenry that much as the Director of Public Prosecutions had Constitutional protection there were a lot of presumed corruption cases that were not being prosecuted. These observations resulted in the assembling as well as coming into force of the Corrupt Practices Act 1995.

C. The Corrupt Practices Act 1995

This was an attempt to provide for the establishment of an Anti-Corruption Bureau and to make comprehensive provision for the prevention of corruption. The functions of the Bureau include investigation as well as prosecution of corruption matters. With regard to prosecution, the Act provides that no prosecution for an offence can be instituted except with the written consent of the Director of Public Prosecutions. Consequently, much as the Independent Bureau had been created, and much as it could investigate and make a finding that there was need to prosecute, the Director of the Bureau could not proceed to prosecute without the sanction of the Director of Public Prosecutions. In the period in issue a lot of cases were reported as investigated and recommended for prosecution but not many such cases ended up in the courts. In some cases, matters would just be registered in the courts and there would be no prosecution. No reasonable explanation for non-prosecution would be provided. The suspects would consequently apply to court for discharge under the Criminal Procedure and Evidence Code. In the absence of reasonable explanation for non-prosecution, the court would discharge the suspects. In as much as such discharge does not operate as a bar to subsequent proceeding on account of the same facts, it is very rare for the prosecutors to seek reinstatement of such matters.

Then there was an attempt to address the issue of the mandatory maximum sentence as was provided in the Penal Code. To solve the problem of the mandatory maximum sentence, a mandatory minimum sentence of seven years was introduced in the new Corrupt Practices Act. This also had its own repercussions. It was observed that providing for a minimum mandatory sentence of seven years limited the sentencing court's discretion to provide a meaningful sentence where the nature of the offence did not invite such stiff sentence. It was thereby observed that courts would rarely convict suspects where, all things being equal, the nature of the offence did not justify a seven year custodial sentence.

In an attempt to resolve these problems, the Corrupt Practices Act was reviewed in 2004 and provided for the Independence of the Bureau by providing that the Bureau shall exercise its functions and powers

independent of the direction and interference of any other person or authority. In an attempt to ensure that the withholding of consent should not be abused by the Director of Public Prosecutions for purposes of scoring political points, an amendment was made to Section 42 of the Corrupt Practices Act in 2004 whose wording requires that if the Director of Public Prosecutions withholds consent he or she should firstly provide reasons for so withholding the consent to the Director of the Anti Corruption Bureau. Such reasons should be in writing and the basis for withholding of consent should only be based on fact and law. Secondly, the Director of Public Prosecutions should inform the Legal Affairs Committee of Parliament of those reasons within thirty days of the decision. Failure to do so entitles the Director of the Bureau to proceed as if the Director of Public Prosecutions had given consent. Despite these amendments the need for the Director of the Bureau to get the consent of the Director of Public Prosecution when it comes to prosecution of the matter still remains. Technically, the Director of Public Prosecutions still has the power to visit the court at any time if he or she so wishes and can withdraw a matter that is being prosecuted by the Bureau.

With regard to the provision of mandatory sentences, the minimum mandatory sentence was removed in the 2004 review and now judicial officers have discretion to impose sentences that are in tandem with offences charged. This has resulted in more prosecutions of minor corruption cases.

D. Political Interference

As discussed, above, the Constitution of the Republic of Malawi as well as the Corrupt Practices Act attempted to provide for offices of the public prosecutor and the office of the Anti-Corruption Bureau to be free from interferences. With regard to the Director of Public Prosecutions, the appointment by the President and confirmation by the legislature was envisioned as the best practice that would provide for checks and balances to ensure that the head of Public Prosecutions would perform his or her services impartially, without fear or ill-will. The lessons drawn from the provision however show that such provisions for checks and balances do not always work for the common good of the citizenry, as was envisaged in the Constitution. In the case of *Mary Nangwale and the Attorney General of the Republic of Malawi* the applicant was appointed by the President as the Inspector General of the Malawi Police Service. To all intents and purposes, she was capable of delivering as Inspector General, however, Parliament, of which the opposition political parties formed a majority, did not confirm the appointment. No reasonable explanation was given for non-confirmation. Political analysts' observations are that the application for confirmation was tabled at the wrong time. The office of Director of Public Prosecutions is equally designed to provide for checks and balances. The President can appoint a candidate to fill the post. However the appointment is subject to Parliamentary confirmation. If the majority in Parliament so wish, they can frustrate such appointments at the expense of the nation. And in the *Mary Nangwale* case the court ruled that the conduct of the members of Parliament in coming up with the position that they did was not subject to judicial review. The wording for the appointment of the Director of the Anti-Corruption Bureau, much as it is in the Corrupt Practices Act, also provides for such checks and balances.

The provisions for the Director of Public Prosecutions to provide a legal and factual basis for withholding consent within a 30 day period were also intended to ensure that there should be no political interference in the affairs of the Bureau. Probably, the shortsightedness of the proposers of this provision was that they could only see political interference from the political power that had the government of the day. The proposers probably never envisaged a situation that would result in having political interference either from the opposition parties or from both parties.

In a situation where the opposition parties have as much to lose from investigations and prosecution of their political leaders who are engaged in or have a record of corrupt practices both camps are likely to speak one language or bargain for the Director of Public Prosecutions and the Bureau to desist from investigating or prosecuting individuals who share their interests. To that extent, the reporting mechanism to the Legal Affairs Committee of Parliament may lack the drive for ensuring that matters of corruption be investigated and prosecuted. This is because the Legal Affairs Committee of Parliament is a body whose composition is of the different political parties that are represented in Parliament.

E. Corruption Matters in Court

1. Prosecutorial Challenges

(i) Lack of Expertise

Lack of expertise has infected all sections of the criminal justice system.

(a) Investigators

It is difficult to come up with a good prosecution record in a corrupt society when the people that are mandated to investigate such matters lack the requisite investigative skills. As stated elsewhere, corruption does not fall under the 'just another criminal case' category. It therefore becomes imperative that the investigators should have the expertise and skill to know how to conduct investigation of corruption matters. The investigators of the Bureau lack the same.

(b) Prosecutors

Most of the prosecutors of these matters are very young and inexperienced junior lawyers. Lack of experience and expertise in presenting to a court evidence which demonstrates the elements of a crime results in failure of prosecution. In a country where there is no sufficient incentive to entice lawyers to work in the public service, some of the corruption matters are actually prosecuted by non-lawyers. Where the prosecution is by non-lawyers who do not have the requisite experience, the situation becomes worse.

(c) Judicial Officers

Corruption matters in Malawi can be prosecuted in the magistracy, which are courts of first instance. Unless the value of the subject matter is exceptionally high or the prosecution is of the view that the likely sentence is beyond the jurisdiction of a magistrate, most criminal trials are conducted in the magistrate courts. The mandatory maximum sentence for corruption matters falls within the jurisdiction of the magistrate courts. The lack of officers with a legal background equally affects the judiciary. Newly appointed judicial officers can therefore be assigned a corruption matter where the suspect is represented by two or three seasoned lawyers who take turns at bulldozing and intimidating the freshman judicial officer. The situation becomes dire where the judicial officer is not only newly appointed but also has no legal background and the prosecutor has no experience.

(ii) Lack of Legal Mandate to Prosecute Related Offences

The other challenge that prosecutors from the Bureau face is one of lack of legal mandate to prosecute in criminal matters that are related to corruption but fall elsewhere than the Corrupt Practices Act. Where the Director of Public Prosecutions gives consent to prosecute a particular charge it becomes difficult for the corruption prosecutor to vary the charge or provide an alternate charge to which consent had not been given.

(iii) Evidential Burden

Since in corruption matters exchange of gains is not done in public, it becomes difficult for prosecutors to identify witnesses who can adequately provide the requisite evidence in court. In some cases, the witnesses are the co-offenders, and in such instances, the prosecution labours to establish its case as its witnesses tend to be hostile in court. In other instances the credibility of such witnesses' testimony is suspect and prosecutors grovel in court.

(iv) Corruption Prosecution versus Human Rights Provisions

The Malawi experience is that corruption matters take a long period of time in the justice delivery system and often do not reach any conclusion. The Constitution of the Republic of Malawi provides for the right to a fair trial of an accused person, which includes the right to public trial before a court of law within a reasonable time after having been charged. There are however a lot of corruption suspects who were charged with offences under the Corrupt Practices Act, yet such cases are not coming to any finality. The prosecution service is persistently failing to prosecute or conclude prosecution of such matters. This interferes with the suspects' rights. As the Constitution provides for speedy trial there is need for such suspects, once charged, to go through the criminal justice system within a reasonable time.

Where a convict has been sentenced to a custodial sentence, he or she will suffer the conditions of prison. The Malawi prisons are very old, most are in a dilapidated state and are usually overcrowded. Section 19 of the Malawi Constitution provides that during the enforcement of a penalty, respect for human dignity shall be guaranteed; and no person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment. In *Yusufu Mwawa v Republic* a Minister was convicted and ordered to serve a custodial sentence. He suffered a stroke whilst in custody. The system had no place to keep him other than the prison, which did not have an appropriate environment for convicts with his disadvantage. The sentencing options are also silent in terms of catering for such instances.

(v) Corruption – A Case for Civil Remedy or Criminal Remedy

In most of the high profile corruption matters that Malawi has suffered, the same have been in the form of high profile politicians seeking a contract with the government to render a service; collecting the consideration and failing to perform or deliver. Millions of *kwachas* have been lost in the process. As the parties that have failed to deliver have been undergoing prosecution for corruption the questions that the courts have been asked to determine have been whether or not the suspects have committed a criminal act or are in breach of a contractual agreement.

(vi) Standard of Proof

As collection of evidence in corruption matters has proved a challenge to corruption investigators, attempts have been made by the corruption prosecutors to persuade the court to lower the standard of proof. The standard of proof in corruption matters still remains one of proof beyond reasonable doubt. Yet to prove the elements of corruption is no mean feat as the standard of proof is on the higher side and the Anti-Corruption Bureau's success record on enforcement (prosecution) is lacking. At the same time, the courts have noted that since corruption is a criminal offence the standard of proof in such cases can never be reduced.

Proving a corruption case beyond reasonable doubt thereby remains a challenge that the Anti-Corruption Bureau has yet to deconstruct.

(vii) Burden of Proof

As with all criminal offences the burden of proof in corruption matters remains with the State except for exceptional circumstances that are actually stipulated by statute. This is another challenge that the prosecution faces where to all intents and purposes there is a public officer who on the face of it appears to be engaged in corrupt activities but the burden lies on prosecutor to establish that the officer is engaged in corrupt practices.

Section 32 of the Corrupt Practices Act attempts to take care of this challenge by creating the offence of "possession of unexplained property" which shifts the burden of proof to the suspect. At the same time Section 42(2) (f) (iii) of the Constitution provides a suspect with the right "to fair trial which includes the right to remain silent during plea proceedings or trial and not to testify during trial".

There are differences in the application and interpretation and conciliation of these two provisions in different courts. Whereas some courts have applied the statutory provisions whilst taking cognizance of the Constitutional provisions and concluded that the statutory provision is unconstitutional, there are other courts which have realized that the statutory provision is actually constitutionally sound as not all human rights provisions are non-derogable. Hence Section 32 of the Corrupt Practices Act is a deliberate intention of parliament to curtail some rights of a public officer who abuses the public office for personal gain.

A standard direction from the court that is mandated to provide guidance is yet to be provided. This creates a loophole in the criminal justice system.

2. Corruption and Judicial Officers

(i) Review and Confirmations

The Criminal Procedure and Evidence Code provides for the review of matters concluded by the magistrate courts where conviction and sentences in varying degrees are imposed. This provides opportunity for the higher court to monitor the patterns and trends of judgments of the lower courts. The limitation however is that no such mechanism is provided where a hearing concludes in an acquittal. This potentially gives judicial officers windows to engage in clandestine activities.

(ii) Uniformity in Sentencing

Once a corruption matter is concluded and a guilty verdict is rendered, the biggest challenge for judicial officers becomes provision of sentences. Whilst appreciating that no two cases are alike, the sentences have a predictability in terms of type of sentence and number of years the convict should serve a custodial sentence. In the Malawi attempts have been made by the Supreme Court to come up with sentencing practice directions for offences that fall under some other criminal provisions of some other statutes. No

such direction has as of yet been introduced for corruption cases. Discretion for judges to provide meaningful sentences on a case per case basis cannot be over-emphasized. At the same time, there is need to take cognizance of the fact that in a system where no leverage is introduced for the use of the discretion, discretion can be abused. Lack of practice direction from the Supreme Court on sentencing for corruption cases therefore potentially gives room for abuse of the discretion.

III. CONCLUSION

To curtail most of the challenges that Malawi is facing, there is need for legal reform; the consent of the Director of Public Prosecutions in matters that fall within the ambit of the Corrupt Practices Act needs to be revisited and abolished. A revision of the provisions that deal with checks and balances of the appointing and confirming bodies also needs to be revisited. The appointing body for the Director of the Bureau should be an independent body that has no political affiliations. The Bureau should also be accountable to a body that has no political affiliations.

Adequate resources for the criminal justice players to ensure that they have the necessary expertise and resources to investigate, prosecute and deter should also be considered.

There is a need for society as well as for the courts to appreciate that, much as corruption matters are criminal matters, they are not ordinary criminal matters. The prosecution of corruption matters needs to be expedited to ensure that the same complies with Constitutional provisions. The judicial officers and prosecutors need ongoing, product-tailored training to ensure that they appreciate the nature and intricacies of corruption. Sensitization of the public at large to ensure that witnesses do not end up being hostile in the courts should also be implemented.

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Republic versus Kathumba and others

COUNTRY REPORT

*Oxana Bologan**

I. CURRENT SITUATION OF CORRUPTION

Corruption continues to alter the national values and to threaten the political, economic and social stability of the Republic of Moldova. Our society, regretfully, hasn't avoided corruption and its dangerous effects. At the moment, this social vice is one of the main problems that transition countries have to confront, inclusive of the Republic of Moldova. Its spreading is facilitated by public tolerance, poverty, an insufficient mechanism of assuring of the supremacy of the law, etc. People discuss corruption at great length, but, still, not enough, because the high level of it within the country underlines the necessity of the implementation of more efficient countermeasures.

When we speak about corruption, we speak about the definition, the causes, its impact, consequences, methods of studying the problem, prognosis, prevention and combating it. No country can say that it isn't affected by corruption. As a result, this vice becomes a transnational phenomenon, having specific characteristics for each country. It is obvious that if corruption has a multi-dimensional, complex and multi-structural character, it needs to be combated, as well, by complex means.

The Moldovan legislation defines corruption as an anti-social phenomenon, being represented by an illegal agreement between two parties, one of them proposing or promising illegal privileges or benefits, and the other party, being involved in the public service, consenting or accepting them for carrying out or not carrying out some official duties; meeting the elements of an offence provisioned under the criminal law of the Republic of Moldova.

The Republic of Moldova has taken serious steps towards the reduction of corruption, and the results are very promising.

It is well known that in order to assure the quality of an efficient anti-corruption process and good governance, the State needs a complex of relevant attributes, inclusive of:

- A developed legal framework adjusted to international standards;
- An adequate institutional framework;
- A co-operative and pro-active civil society;
- Efficient international co-operation.

At the moment, Moldova has them all, as well national anti-corruption policies. But I think that this is not enough. We still need a more efficient implementation of the anti-corruption programmes and the establishment of some new advanced practices.

Control, prevention and combating of corruption are priority elements of various programmes based on certain engagements assumed before the international community (the Republic of Moldova – European Union Action Plan, the Millennium Challenges, etc.). The unconditional political obligation to fight against corruption is also denoted by the implementation in the Republic of Moldova of the National Strategy for the Prevention and Combating of Corruption, approved by the Decision of Parliament no. 421-XV dated 16 December 2004.

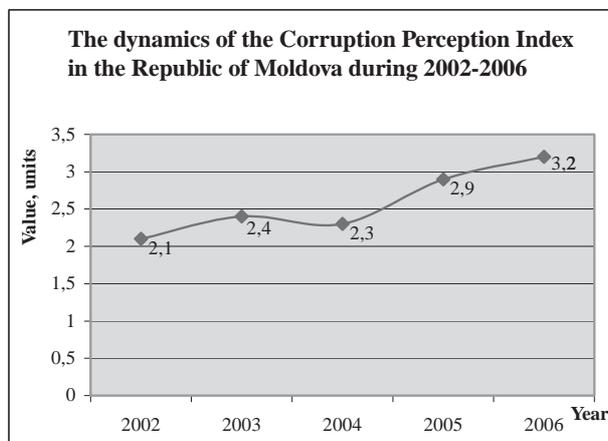
* Lieutenant, Superior Inspector of the Anti-corruption Programs and European Integration Section, General Directorate for Analytics, Prognosis and Prevention, Center for Combating Economic Crimes and Corruption, Republic of Moldova.

The first results of these activities showed up at the end of 2005; they were evaluated in public discussions during the National Conference organized on 9 December 2005 with the theme “Progress and Perspectives in Combating Corruption”. The complexity and the growing magnitude of corruption places this problem on the top of all serious problems of the Republic of Moldova.

A. Moldova Performance Diagnostic

The year 2005 may be considered a revolutionary stage in the fight against corruption and it continued in 2006 as well. This fact is confirmed by the increase in efficiency in combating this malicious phenomenon and by the results achieved in the Corruption Perception Index.

This index, published annually by Transparency International (TI), denotes modest progress in the field of prevention and combating of corruption in the country owing to the involvement of public institutions, civil society and the private sector in the fight against corruption.



Thus, in 2006, according to the data of TI, the Republic of Moldova was placed 81 of the 163 countries covered by the listing, the corruption perception index for the country being equal to 3.2. For comparison, in 2005 Moldova was placed 95 out of 159 countries, its index being at the level of 2.9. This fact to a considerable extent denotes both the political will of the government and the efforts of civil society in the field of prevention and combating of corruption in the country.

One of the most important actions that facilitated the fight against corruption was the continuation of efficient implementation of the National Strategy for Prevention and Combating of Corruption in the Republic of Moldova (hereinafter referred to as NSPCC), approved by the Decision of Parliament no. 421-XV of 16 December 2004. By the implementation of annual action plans, the achieved results were to a substantial degree owed to the efficient combination of all available means for the combating of corruption: combating, prevention and collaboration with civil society.

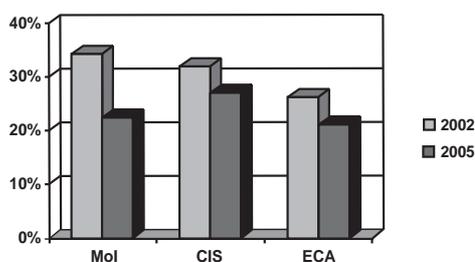
1. World Bank Institute's (WBI) Control of Corruption Indicator (Republic of Moldova)¹

Year	1996	1998	2000	2002	2004	2006
Raw Score	-0.26	-0.36	-0.73	-0.91	-0.96	-0.65

Scale:
(-2.5 = worst score,
2.5 = best score)

Moldova's WBI "Control of Corruption" score fell sharply between 1996 and 2004. Since then, it has improved little by little.

Bribe Frequency
Percent of firms saying unofficial payments are frequent



2. The EBRD-World Bank Business Environment and Enterprise Performance Survey (BEEPS)²

The graphs display the responses to four survey questions included in the WBI's Control of Corruption Indicator.

(i) Bribe Frequency

Approximately 34% of firms in 2002 reported that "irregular additional payments" were often necessary to get things done. That number declined to approximately 20% in 2005.

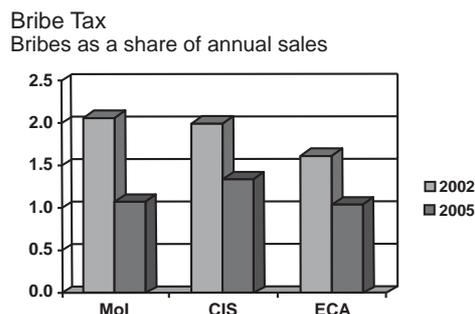
¹ Source: Kaufmann D., A. Kraay, and M. Mastruzzi 2007: Governance Matters VI: Governance Indicators for 1996-2006

² Source: <http://siteresources.worldbank.org/INTECAREGTOPANTCOR/Resources/BEEPS2005-at-a-glance-Final-Moldova.pdf>

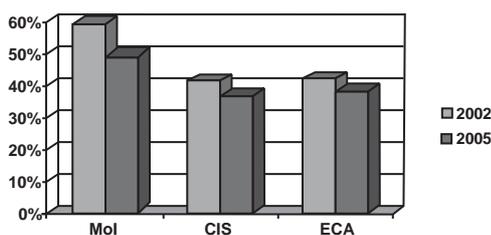
(ii) Bribe Tax

We can also observe some improvement in the so-called “bribe tax” (percentage of total annual sales that firms pay in unofficial payments to public officials), which has decreased from approximately 2.2% in 2002 to 1.5% in 2005.

Although in absolute terms bribery associated with influencing the content of legislation is low (3% of firms identified it as a problem), the trend between 2002 and 2005 is negative.



Corruption as a Problem Doing Business
Percent of firms indicating corruption as a problem doing business



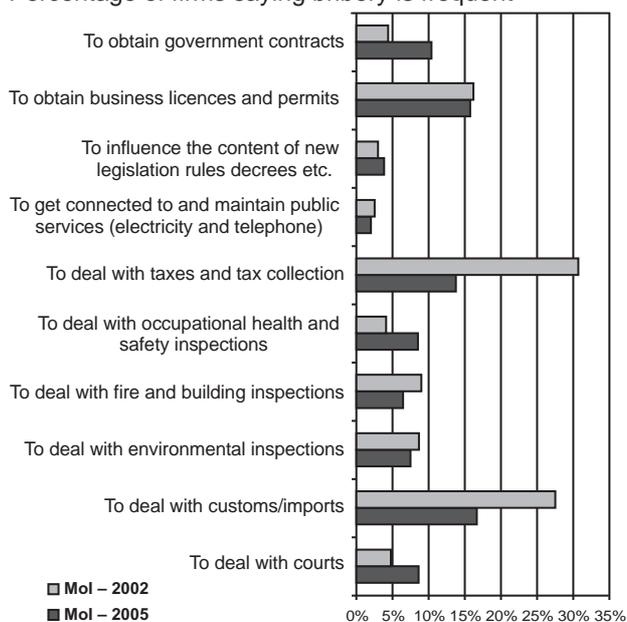
(iii) Corruption as a Problem Doing Business

In 2002, 60% of firms identified corruption as a significant obstacle. That number fell to 50% in 2005.

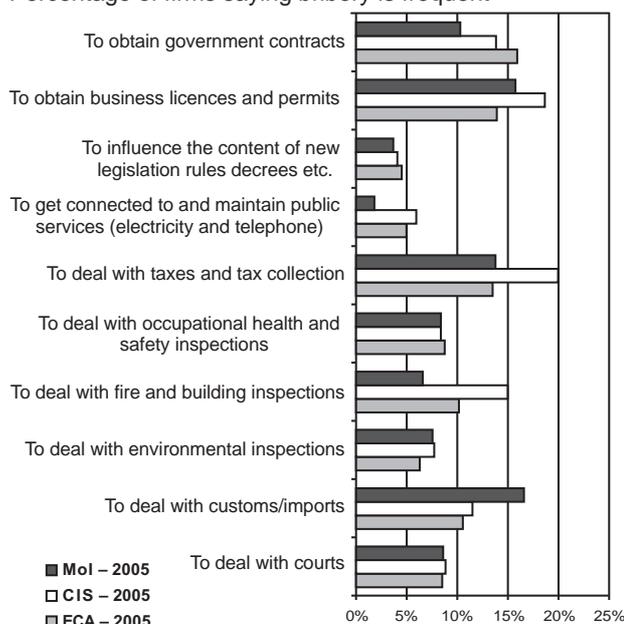
Between 2002 and 2005, we have witnessed an increase in corruption associated with government contracts, judicial rulings, and occupational health/safety inspections.

Between 2002 and 2005, there has been a decline in corruption associated with tax collection and administration and the customs service. However, in *absolute* terms, the survey firms reported that bribery was most frequent in the customs service, tax collection and administration, and business licensing. Regulatory uncertainty is exceptionally high in Moldova. Almost 70% of firms in Moldova report that uncertainty about regulatory policies makes it difficult to do business. High levels of regulatory discretion create ample opportunities for petty corruption. Between 2002 and 2005, we witnessed an increase in the number of firms reporting that judicial assessments are unaffordable, slow, unfair, and corrupt. In 2002, roughly 30% of firms reported that the judiciary was a significant obstacle to “doing business” in Moldova. By 2005, that number rose to 50% of high levels of corruption in the municipal police.

Unofficial Payments in Sectors—Over Time
Percentage of firms saying bribery is frequent



Unofficial Payments in Sectors—Across Countries
Percentage of firms saying bribery is frequent



3. Nations in Transit: Corruption³

Year	1999	2001	2002	2003	2004	2005	2006
Score	6.00	6.00	6.25	6.25	6.25	6.25	6.00

7 = worst, 1 = best

4. Key Points

The introduction of the National Anti-corruption Strategy and the corresponding Action Plan in January 2005 signalled a very promising year in the fight against corruption. Indeed, all involved public institutions and agencies, as well as the civil society, got off to a very active and convincing start in the implementation of the Anti-corruption Action Plan. The main efforts have been geared toward bringing anti-corruption legislation in line with international norms and practices and toward outlining the competences of each of the many institutions involved to avoid duplication of activities. Concrete measures have also been undertaken to limit the spread of corruption among civil servants. Moldovan civil society and international organizations that monitor corruption are unanimous in saying that some progress has been achieved in preventing and fighting corruption. Despite the fact that certain public services (such as health care, education, the police, and the customs services) suffer from high levels of corruption, studies have demonstrated that public tolerance toward corruption in Moldova is decreasing. *The country's rating for corruption improved from 6.25 to 6.00 owing to the encouraging steps undertaken both by the Moldovan government and by civil society in the fight against corruption, notably through the implementation of the Action Plan; yet the awaited large-scale effects are still not felt in Moldovan society.*

The government advertises contracts through the National Public Procurement Agency. Calls for tenders are advertised on the Internet. All state acquisitions with public funds are organized through this agency. A website facilitates public access to tenders and is meant to increase the transparency of the process.

5. Public Perception and Attitudes Towards the Corruption Phenomenon in Moldova, July 2007⁴

The most recent survey carried out in our country showed how frequently Moldovan inhabitants were asked to pay a bribe when addressing a state employee: a doctor (40%), a teacher (16%), police officer (14%), a professor (11%), and customs officer (10%). Almost half of the respondents declared that they had been asked to pay bribes during the last year. During the last three months (April, May, June 2007), 33% had to pay bribes, 30% to make presents and 24% to give different favours. The public perception of the corruption phenomenon within the customs service and the police force has decreased a little, but both still remain on the list of the most corrupt institutions.

The results of the 2007 survey show that both corruption and low income are in fourth place among the most important problems that exist in Moldova at the moment.

The multitude of data provided by international bodies proves that corruption is still a serious danger for our country, although some progress has been made.

II. CURRENT PROBLEMS RELATING TO CORRUPTION IN THE CRIMINAL JUSTICE SYSTEM AND THEIR SOLUTIONS

The Center for Combating Economic Crimes and Corruption (CCECC) plays an essential role in the prevention and combating of corruption. It is the main body in the country responsible for the prevention and combating of corruption, and was created on the basis of the Decision of the Government of the Republic of Moldova no. 158 from 11 February 2002. The Law no. 1104-XV on the Center for Combating Economic Crimes and Corruption was adopted on 6 June 2002, and entered into force on 27 June 2002. It grounds the organization and functioning of the institution.

³ <http://www.freedomhouse.org/template.cfm?page=47&nit=396&year=2006>

⁴ Source: carried out by IMAS-inc Marketing & Sondaje, financed by MOLICO Project of the Sida, European Commission and Council of Europe.

The legal framework of our country, besides the aforementioned Strategy for the Prevention and Combating of Corruption also includes:

- Constitution of the Republic of Moldova, adopted on 29 July 1994;
- Criminal Code, Law no. 985-XV, 18 April 2002;
- Criminal Procedure Code, Law no. 122-XV, 14 March 2003;
- Administrative Contraventions Code, 29 March 1985;
- The Decision of the Government on some measures to prevent corruption and protectionism (no. 615 from 28 June 2005);
- Law on Fighting Against Corruption and Protectionism (Law no. 900, 27 June 1996);
- Law on Operative Activity of Investigation (Law no. 45-XIII, 12 April 1994);
- Law on Public Service (Law no. 443-XIII, 4 May 1995);
- Law on the Declaration and Monitoring of the Income and Assets of State Dignitaries, Judges, Prosecutors, Public Servants and Certain Persons holding Managerial Positions (Law no. 1264-XV, 19 July 2002);
- Law on State Protection of Victims, Witnesses and Other Parties in Criminal Proceedings (Law no. 1458-XIII, 28 January 1998);
- Law on the Procurement of Goods, Works and Services for Public Needs (Law no. 1166-XIII, 30 April 1997);
- Law on the prevention and control of money laundering and terrorism financing (Law no. 1166-XIII form 30 April 1997).

Corruption, already considered a transnational phenomenon, has its roots in the lowest levels of power. Growing in manifestations, it wins more and more territory by attacking public institutions and even law enforcement bodies.

The opportunities for corruption are many and State bodies continue to develop new anti-corruption policies. In the view of prevention and combating of corruption within the public sector, the Decision of the Parliament no. 421-XV of 16 December 2004 was adopted. It is provided that:

- All central public administration authorities must provision in their activity programmes concrete activities to prevent corruption and protectionism;
- The deputy minister (or deputy director) has responsibility for corruption and protectionism prevention within the institution;
- The aforementioned deputy minister or (or deputy director) will organize:
 - The internal control of compliance by employees with the provisions of the legislation, in view of prevention of corruption cases and monitoring of the implementation of institutional measures for the prevention of corruption and protectionism;
 - The receiving of information from different sources (audience, anonymous letters, the hotline, e-mail etc.) about corruption offences by the employees of the respective public institutions, its examination and undertaking of the necessary measures and presenting to the competent law enforcement bodies the mentioned documentation (or information);
 - The presentation to the Center for Combating Economic Crimes and Corruption (to the Secretariat of the Monitoring Group of the implementation of the National Anti-corruption Strategy) once in a term of informative notes on the undertaken measures in the respective field, inclusive of the activities taken in common with other authorities, as well as some proposals for the amelioration of the existing situation.

A. Problems and Solutions at the Investigation and Prosecution Levels

1. Supervision of Investigation and Prosecution Officers

Solution: The investigation process begins with a complaint from a citizen, or from an article in a newspaper etc. The citizens' complaints are examined according to the law on petitioning by which a complaint must be examined in 15 days, up to a maximum of 30 days. If a petition is not signed, it is examined by the institution only in the case of existence of any threats to the security of the State or public order. In order to improve supervision of officers and civil servants, all public institutions are obliged to have security departments responsible for internal supervision (auditing and management). When these do not exist, the human

resources departments exercise this function. In addition, there is a deputy minister in each ministry responsible for measures to combat corruption and nepotism.⁵

As well, complaints on the activity of public employees can be made on the hotline of the institutions or if it refers to the employees of the Center, citizens can complain at the General Prosecution Office which supervises compliance with the law of the law enforcement bodies.

2. Lack of Harmonization with International Standards

In line with attained positive achievements some difficulties were also encountered. So, regardless of the fact that the Republic of Moldova has signed the Civil and Criminal Conventions against Corruption, ratified by the Laws no. 428 of 30 October 2003 and no. 542 of 19 December 2003, the national legislation still misses multiple important amendments that are urgently required for its adjustment to the provisions of the respective conventions. Thus, the problem may be characterized by a slow process of harmonization of national legislation on corruption compared to the international legislative developments in this field.

Solution:

- Adjustment and priority implementation of international anti-corruption norms;
- Acceleration of adoption of draft laws elaborated in compliance with the Action Plan of Implementation of the National Anti-Corruption Strategy for the years 2005 and 2006;
- Intensification of efforts aimed at efficient implementation of normative regulations on corruption in practice;
- Elaboration of efficient mechanisms of implementation and use of anti-corruption legal frameworks.

3. Complexity and Uncertainty of Law

The abundance of legislation has made the law very complex and, indeed, uncertain. Inter-ministerial coordination is inadequate. The recent amendment to Article 106 of the Criminal Code shows, however, that the legislature has become more aware of the importance not only of securing convictions but also of detecting, seizing and confiscating the proceeds of criminal offences, including the confiscation of assets of their equivalent value. (Conclusions of the GRECO Second Evaluation Round).

Solution:

- Review of existent legislation by the specialized bodies and by the subdivision of the CCECC that gives anti-corruption expertise to the normative acts (a relatively new responsibility of the CCECC);
- Capacity consolidation of the law enforcement authorities in the assurance of quick reaction and efficiency in the investigation and examination of corruption-related criminal cases and efficient co-operation with other responsible bodies.

4. Difficulty of Investigation of the Corruption Phenomenon among Top-Ranking Officials

Solution:

- Intensification of the activity of law enforcement authorities in the detection and documentation of corruption schemes among top-ranking public officials;
- Raising the efficiency of mechanisms of information about corruption acts and implementation of Law no. 1458-XIII dated 28 January 1998 regarding State protection of victims, witnesses and other persons providing assistance in the process of criminal investigation.

5. Civil Monitoring of the Activity of Law Enforcement Bodies

Solution: The Republic of Moldova, with the help of international bodies, is in the process of setting up a Civil Council that will supervise the activity of the CCECC and will represent civil society.

6. Interim Measures

The provisions on interim measures are not entirely satisfactory and are sometimes contradictory.

⁵ Following an examination of the measures to implement the National Anticorruption Strategy, the government decided on 11 July 2006 to strengthen internal supervision of the activities of public officials. On 6 September 2006 the Strategy for Internal Control and Audit was adopted.

Solution: To revise and harmonize the existing legislation on confiscation and interim measures so that the instrumentalities of corruption and other related offences, as well as the proceeds and their equivalent value, can be confiscated.

7. Disposal of Frozen Assets

If need be, the public authorities, such as the Ministry of the Interior, the CCEEC or the Public Prosecutor's Office, should be able to use or dispose of seized or frozen assets and participate in the sharing of confiscated assets, which is not the case at the moment.

Solution: It should be envisaged that a special body entrusted with managing seized or frozen assets will be established and that the rules on the use and distribution of such assets should be changed.

8. Few Disclosures

Very few money laundering cases have been disclosed.

Solution: To make every effort to ensure that the links between organized crime and money laundering are taken into account in all aspects of the fight against corruption, especially by making it easier to identify the existence of such links and by strengthening the contribution of the anti-money laundering arrangements to fight against corruption, and by ensuring that institutions and professions required to declare their suspicions receive instructions and training to assist in the detection and reporting of acts of corruption.

In 2004, Moldova adopted a National Strategy for the Prevention and Elimination of Corruption and an Action Plan.⁶ The Strategy is led by the Council for the Co-ordination of the Fight against Crime and chaired by the Head of State. A monitoring group made up of deputy ministers and deputy directors of administrative authorities was set up in February 2005 to monitor implementation of the Strategy and the Action Plan. The secretariat of this group is provided by the CCEEC. These bodies assess the effectiveness of anti-corruption measures by regularly analysing the information provided by people with specific responsibility for preventing corruption and nepotism (deputy ministers or deputy directors).

B. Problems and Solutions at the Trial Level

1. Sentencing

The analysis of sentences often demonstrates that the punishments determined by the courts are not proportional to the gravity of committed crimes and to the size of inflicted damages.

Solution: Review of legislation in order to establish more concrete punishments. Example: to avoid in legislation expressions like: "from two to five years of imprisonment" as it gives opportunities for corruption.

2. Delays in Disposing Cases

Another problem consists of the delayed examination of corruption-related criminal dossiers by the courts, leading to the reduction of the efficiency of the criminal law and of the efforts of the criminal pursuit organs for the combating of corruption and related crimes.

Solution: Intensification of the activity of the courts, and the establishment of specific regulations that would better organize the activity of the courts.

3. Restricted Use of Special Investigative Techniques

The Code of Criminal Procedure only authorizes the use of special investigative techniques in corruption cases with aggravating circumstances. They are accordingly not available in ordinary corruption cases which are punishable by a maximum of five years' imprisonment, in cases involving trading in influence or

⁶ This strategy comprises three main focal points: 1) the concept, causes and consequences of corruption in Moldova; 2) measures for preventing and eliminating corruption, especially improvements to the legislative framework and its actual application, prevention of corruption in public institutions and political life, and closer co-operation between public institutions and civil society; and 3) the machinery for implementing the Strategy.

accounting offences, or for identifying the proceeds of such offences. Such a state of affairs can only be prejudicial to the quality of the proceedings and the trial.

Solution: To bring the legislation on special investigative techniques in line with the provisions of the Criminal Law Convention on Corruption (ETS no. 173).

4. Public Awareness of Court Sessions and Decisions

Solution: To make video recordings of the courts' sessions.

5. Investigation of Judges

Investigation of corruption cases among judges is considered very difficult due to the fact that in order to begin criminal proceedings it is necessary to ask the approval of the Supreme Council of Magistrates which meets once a month.

Solution: To establish new regulations that would make investigation and prosecution easier in regard to judges.

III. GENERAL MEASURES TO PREVENT CORRUPTION

The objective reality has already proved the fact that corruption can not be stopped only by criminal and restrictive methods. The prevention of corruption is an extremely important aspect that may stop the spreading of this social drawback, if properly employed; in other words, if the preventive measures are focused not on the exterior manifestations of corruption but on the generating factors. So, preventive activity is determined not only by the increase in public concern at the growing number of corruption crimes but also by the limited effect of criminal and suppressive measures of combating corruption.

The CCECC uses the following instruments in the view of diagnosing corruption acts:

- Assessment of corruption risk within institutions;
- Advice of experts on the anti-corruption legislation;
- Public opinion polls;
- Criminal analysis and prognosis.

Anti-corruption education is also among the most important preventive activities. It is carried out systematically by the Center's employees in co-operation with civil society.

The recent amendments of the legislation have directed the CCECC's corruption prevention activity towards providing anti-corruption expertise to the national legislature and assessment of corruption risk within central and local public institutions.

Thus, at the end of 2006, the CCECC, in common with the NGO "Centre for Analysis and Prevention of Corruption (CAPC)", developed the Methodology and the Guide for giving anti-corruption expertise to legislative acts. The European experts (Jean Pierre Bueb and Quentin Reed) endorsed these acts, expressing their great appreciation for the initiative and the quality of the documents. *They noted that Moldova was an example, from this perspective, for the countries of the European Union, as well as for the members of the Council of Europe.* The correct implementation of the methodology in its two stages of the legislative process (by CCECC at the elaboration stage and by CAPC before the adoption by Parliament in its second hearing) will substantially contribute to the development of a coherent, simple and understandable legal framework. Moreover, this instrument will increase the capacity of the CCECC and the non-governmental sector to disclose the vulnerabilities to corruption and to the development of preventive measures by identifying the omissions, repetitions and ambiguity of the provisions of the legislation, as well as the possible corruption risks at the implementation level.

IV. INTERNATIONAL CO-OPERATION IN CORRUPTION CASES

International co-operation is a very important component of the process of prevention and combating of the corruption phenomenon.

International legal frameworks to which Moldova is a party include:

- The UN Convention against Corruption, signed 27 September 2004, ratified by Law no. 158-XVI, 6 July 2007;
- The Criminal Law Convention on Corruption, ratified on 30 October 2003 by the Law no. 428-XV. In concordance with the Convention, the Criminal Code in force delimits corruption in public and private areas and defines notions of passive and active corruption;
- The Civil Law Convention on Corruption, ratified by Law no. 542-XV, of 19 December 2003;
- The Additional Protocol to the Criminal Law Convention on Corruption, ratified by Law no. 157 of 6 July 2007;
- The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and the Financing of Terrorism; ratification act: Law no. 914-XV, 15 March 2002.

The participation of the Republic of Moldova in the Anti-Corruption Initiative of the Stability Pact for South-Eastern Europe (SPAI) should also be mentioned. Taking into consideration the objectives and recommendations of SPAI, the activities aimed at suppression of corruption at the regional level fit harmoniously into the process of European integration, constituting a considerable part of it.

A very important role in the monitoring of the use of international legal instruments is played by the Group of States Against Corruption (GRECO). In 2006 the second anti-corruption evaluation cycle of the Republic of Moldova was carried out. Based on the Report for the Republic of Moldova 15 recommendations that must be implemented not later than the 31 May 2008 were elaborated and presented.

The CCECC became a member of the International Association of Anti-Corruption Authorities, in October 2006, in Beijing, China, during the First Annual Conference and General Assembly. It has the scope of facilitation and of efficient implementation of the UN Convention against Corruption.

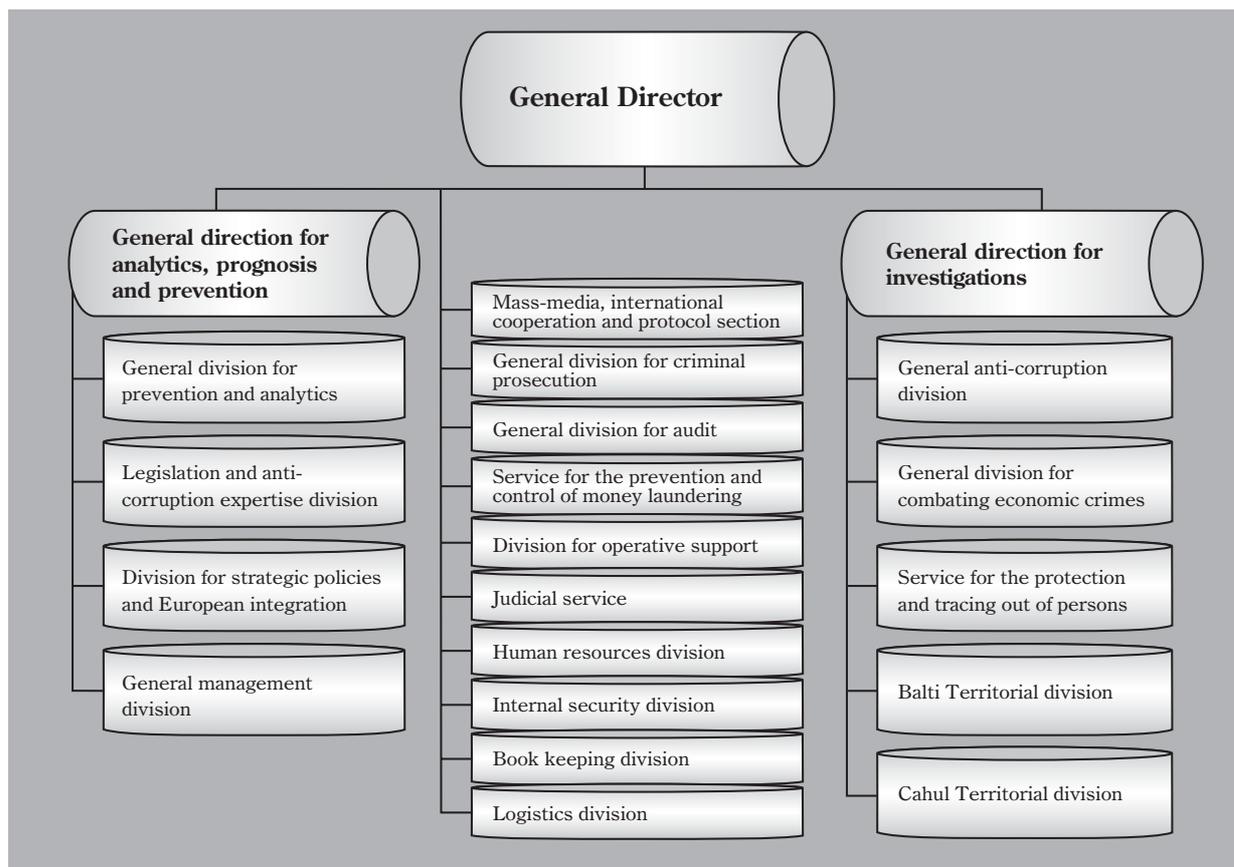
V. CENTER FOR COMBATING ECONOMIC CRIMES AND CORRUPTION AND ITS INVESTIGATIVE AND PROSECUTORIAL AUTHORITY

With the adoption of the Law on creation of the Center for Combating Economic Crimes and Corruption in Moldova an institution provided with a complex system of authority in detection of economic crimes, beginning with collection and documentation of information, performance of controls, initiation of criminal investigations, and criminal prosecution, and ending with presentation of the dossiers to the prosecution authorities for further examination by the judiciary, was created.

The activity of this authority consists of the prevention, detection, investigation, and removal of economic, financial and tax violations; combating corruption and protectionism; combating the legalization of property and laundering of illegally obtained money; ensuring the anti-corruption expertise of legal drafts and governmental normative acts and their compliance with State policy in the field of prevention and combating of corruption.

The Center for Combating Economic Crimes and Corruption was created on the basis of the Decision of the Government of the Republic of Moldova no. 158 of 11 February, 2002.

The strategic orientation of the CCECC consists of the concentration of the efforts against corruption with the scope of assuring the effective functioning of the rule of law and democracy, as well as economic and social development of the State.



A. The Tasks of the Center

- (i) Preventing, disclosing, investigation and suppression of financial-economic and tax offences;
- (ii) Counteraction of corruption and protectionism;
- (iii) Counteraction of legalization of material assets and laundering of illegally gained money;
- (iv) Carrying out of anti-corruption examination of draft legal acts and draft normative acts of the Government in the view of establishing conformity with State policy on prevention and counteraction of corruption.

The tasks of the Center are exhaustive and can not be amended unless by virtue of the law itself.

B. Counter Activity

- Effectuation of the operative investigative activity and criminal prosecution of corruption offences, money laundering and economic and financial crimes;
- Investigation of corruption and economic and financial contraventions and sanctioning the perpetrators;
- Disclosure of some fiscal contraventions and offences and sanctioning the culprits.

The General Anti-corruption Division's responsibilities include the multilateral operative and complex investigations aimed at combating corruption and protectionism; removal of causes and favouring conditions; determination of priority activities in order to detect, eradicate and anticipate acts of corruption and protectionism depending on the methods and tools used by the infringers. The service duties of this Division also include operative coverage of the major branches of the national economy, public and law enforcement authorities concerning documentation of illicit activity of corrupted public officers, and the revealing of methods and schemes of corruption.

The General Division for Combating Economic Crimes was established within the Center in the year 2004. The basic tasks of the division include: detection, eradication, combating and prevention of economic corruption crimes that represent a threat to the economic security of the State, public property and the interest of the consumer. In order to assure a successful performance of functional duties, the Division's activity includes the following specific fields:

- combating of infringements related to tobacco products, bakeries, the consumption market, contraband and illicit traffic of goods;
- combating of infringements related to the circulation of ethylic alcohol and its derivative products;
- combating of infringements in medical and pharmaceutical institutions, in the institutions of education, in state budget institutions, in the sphere of precious metals and delinquent firms;
- combating of infringements in the field of transportation, informational technologies and advertising, construction and ecology;
- combating of infringements related to the power sector and energetic resources; and
- combating of infringements on the stock market, in the insurance companies, in industry, in the sector of ferrous metals and humanitarian aid.

C. The General Division for Criminal Prosecution

The results of the law enforcement authorities to a significant degree depend on the results of the General Division for Criminal Prosecution, which is one of the main subdivisions of the Center. The major tasks of the Division comprise detection, documentation and investigation of corruption-related crimes, as well as qualitative performance of criminal prosecution of the cases held by the Center. After the adoption of the Law on the Status of Criminal Prosecution Officers the role of the General Division for Criminal Prosecution has significantly increased.

VI. CONCLUSION

During the last two years of activity, the CCECC proved its capacity of development of its own anti-corruption policies.

The multitude of actions implemented by the Moldavian authorities aimed at combating corruption has been evaluated by the GRECO experts during the Second Evaluation Cycle for Moldova. It was mentioned that Moldova has made a considerable improvement in reforms and numerous laws were adopted in all fields of activities. Many things are still waiting to be done.

The efficient implementation of Anti-Corruption Plans will improve the achievements of the country in combating corruption and will serve as a real premise for social and economic development and will assure the acceptance of the Republic of Moldova into the family of countries with strong democratic values.

CORRUPTION CONTROL IN THE CRIMINAL JUSTICE SYSTEM OF THE PHILIPPINES

*Froilan L. Cabarios**

I. CONTEMPORARY STATE OF CORRUPTION IN THE CRIMINAL JUSTICE SYSTEM

The present state of the Philippine criminal justice system is indeed alarming and the alarm is continuously intensifying in spite of concerted efforts to initiate reforms, from both the government and non-government sectors of the community, which are equally driven by a unified purpose to establish a criminal justice system that is truly responsive to the escalating demands of the changing times.

According to the latest Transparency International Corruption Perception Index, the Philippines ranked 121 in 2006 and 131 in 2007 of the 180 countries included in the survey. However, the Philippines' score was unchanged at 2.5 points with 10 indicating lowest level of perceived corruption. The slippage was due to the fact that other countries have made improvements in dealing with corruption.

The guarantees provided under the Constitution, *inter alia*, the right to life, property and liberty; free access to courts and adequate legal assistance; the so-called Miranda rights; the right to counsel; presumption of innocence; and the right to a speedy trial, remain but melodious words if significant attention is given to the state of the criminal justice system nowadays.

However, the guarantees under the fundamental law presuppose the assumption that the State affords every citizen the ways and means by which he or she can claim these rights and make them effective. Lamentably, almost always, a legal proceeding is required in order to avail of and fully realize these constitutional rights.

In view of the prevailing conditions besetting the criminal justice system, it is no wonder that President Gloria Macapagal-Arroyo herself has initiated concrete action on the issue of corruption and has included in her principal schema of government socio-economic concerns on social justice.

Various studies, both foreign and local, have yielded almost one and the same conclusion out of several issues, concerns and ramifications attending the mortifying criminal justice system. Blame has always been ascribed to inefficiency, incompetence, irresponsibility, gender-insensitivity and insufficient budgetary allocations. It appears, however, that the enumeration of the factors crushing the criminal justice system can be simplified as it boils down into one factor, *id est*, corruption.

Corruption contemplates abuse of public trust; the act of bribing; the act of profiteering; immorality, breach of faith, breach of trust, bribery, complicity; and conduct involving graft.

Technically, it is an act done with intent to give advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive because an act may be corruptly done though the advantage to be delivered from it is not offered by another. (*Magallanes vs. Provincial Board*, 66 Official Gazette 7839).

It involves certain acts of unduly taking advantage of one's office for personal gain or purpose at the

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expense of another and in blatant violation of the law. Significantly, the end result of the dilemma continuously intensifies and reinforces public apathy and consequent loss of faith in the country's justice system. It creates the impression that justice is for the powerful and mighty, bright and wealthy people who have the capacity to buy justice at their price and in the way that favours them, or in any manner that satisfies the palate of the corruptor.

It is with apprehension that the writer admits, for once, that the tentacles of graft and corruption which have penetrated the offices and agencies of the bureaucracy, coupled with political will, bring us a substantial leap in crossing over this agonizing dilemma.

Consequently, every individual playing a vital role in spinning the wheels of justice shares is responsible and liable for removing corruption from the system. It is therefore imperative to closely scrutinize every sector involved in the system and analyse the complexity of corruption in every phase of the system. Inevitably, a review and evaluation of performance of the five pillars (enforcement, prosecution, court, correction and community) of the criminal justice system would help us disclose and depict how corruption has entwined itself into the system in our country. But more importantly, the study would help and guide us in identifying key solutions to prevent if not totally eliminate this nefarious system.

II. LEGAL FRAMEWORK

A. Salient Philippine Laws on Corruption

1. The 1987 Constitution

It is a declared policy of the Philippine Government to fight against corruption and the same is clearly laid down in its fundamental law mandating that "the state shall maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption" (Sec. 28, Art. II, 1987 Constitution). This policy is founded upon the fundamental principle that a public office is a public trust, whereupon all civil servants must serve the people with "utmost responsibility, integrity, loyalty, and efficiency, act with patriotism, and justice, and lead modest lives" (Sec. 1, Art. XI, id).

2. The Revised Penal Code

The Revised Penal Code is a compilation of laws, which defines and penalizes acts such as those committed by public officials in the performance of their official duties. Some of the offences are: direct bribery (Art. 210); indirect bribery (Art. 211); qualified bribery (Art. 211-A); corruption of public officials (Art. 212); frauds against the public treasury (Art. 213); and malversation of public funds or property (Art. 217).

3. The Law on Forfeiture of Ill-Gotten Wealth

Republic Act No. 1379 was enacted by the Philippine Congress to authorize the forfeiture in favour of the State of property of a public officer or employee which is manifestly out of proportion to his or her salary as such public official or employee and his or her other lawful income and the income from his or her legitimately acquired property.

In this respect, the 1987 Constitution finds support under Art. XI Sec. 15 thereof which states that "[t]he right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel."

4. The Anti-Graft and Corrupt Practices Act

Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, is the most important anti-corruption law in the country. It essentially punishes acts constituting betrayal of public trust since the offenders, as public officials and employees, are mandated to protect government coffers and fiscal resources.

First and foremost, the law penalizes not only the acts or omission enumerated therein, but also such other acts that may lead to the commission of graft and corrupt practices. The acts punishable under the law are in the nature of *malum prohibitum* so that it is the commission of the acts defined by law and not its character or effect that determines violation thereof.

Secondly, it applies to public officers and to private individuals alike; not only in cases where there is a proven conspiracy, but also when a private citizen induces a public official or employee into committing any of the prohibited acts.

Finally, the anti-graft law is stern and punishes acts which do not necessarily result in damage or injury to the government so that the mere act of persuading, inducing or influencing another public officer to perform an act constituting violation of rules and regulations duly promulgated by competent authority constitutes a violation of the law.

5. Other Related Laws

(i) *Republic Act No. 6713*

Under Section 7 of the law (Republic Act No. 6713), otherwise known as the Code of Conduct and Ethical Standards for Public Officials and Employees, there are other prohibited acts and transactions, at least analogous to those enumerated under the anti-graft law and similarly imposed upon public servants.

(ii) *Executive Order No. 292*

The order is also known as the Administrative Code of 1987 which provides for 30 disciplinary grounds against any officer or employee of the civil service. While the matter is administrative in character, it equally serves as a checking and monitoring mechanism on bureaucratic malfeasance, misfeasance and nonfeasance.

(iii) *Republic Act No. 7080*

This particular legislation defines and punishes the act of plunder; amassing, accumulating or acquiring ill-gotten wealth by a public officer in the aggregate amount or total value of at least PHP50M (Philippine pesos) through the means or schemes enumerated therein.

B. Relevant Agencies and Institutions

There are courts, tribunals and government agencies that undertake the implementation and/or investigation and adjudication of corruption cases which may be criminal, civil or administrative in nature.

Specifically, the Office of the Ombudsman is mandated to serve as the lead agency in the total war against graft and corruption with the ultimate objective of restoring integrity and efficiency in the government service.

1. Office of the Ombudsman

The Ombudsman functions as the key implementer of anti-graft and corruption laws, specifically for gathering of evidence, and investigation and prosecution of corruption cases involving high-ranking public officials.

(i) *Mandate*

As protectors of the people, they shall act promptly on complaints filed in any form or manner against officers or employees of the Government, or of any subdivision, agency or instrumentality thereof, including government-owned or controlled corporations, and enforce their administrative, civil and criminal liability in every case where the evidence warrants it in order to promote efficient service of the Government to the people (Section 13, R.A. No. 6770; see also Section 12 Article XI of the 1987 Constitution).

The Ombudsman shall give priority to complaints filed against high ranking government officials and/or those occupying supervisory positions, complaints involving grave offences as well as complaints involving large sums of money and/or properties (Sec. 15, R.A. No. 6770).

(ii) *Five Major Functions*

(a) Power of Investigation

Firstly, the Ombudsman has the power to investigate anomalies and inefficiency. The Ombudsman exercises unique prerogatives. He or she does not only conduct the preliminary investigation of cases which may be filed at his or her Office. He or she even has the authority to conduct the fact-finding investigation to gather evidence.

The Ombudsman administers oaths, issues subpoena and takes testimony in any investigation or inquiry. He or she has the power to punish for contempt and grant immunity to any vital witness. He

or she is the only authority other than the courts of law who may order the examination of the bank accounts of a person under investigation pursuant to Section 15 of the Republic Act No. 6770.

(b) Prosecution

The Philippine Ombudsman has the power to prosecute graft cases before the courts. He or she has the power of Special Prosecutor to prosecute cases in the Sandiganbayan. He or she deputizes regular prosecutors to handle cases in the regular courts.

(c) Administrative Adjudication

The Ombudsman also holds disciplinary authority over all elected and appointed officials, except members of Congress and the judiciary and impeachable officials. With this power, he or she may conduct administrative proceedings and impose administrative penalties where the erring public official or employee may be suspended or dismissed from public service.

(d) Public Assistance

Under the law, he or she may require public officials and employees to render assistance to the people. This traditional role of all Ombudsman systems is very much performed by the Philippine Ombudsman such that it has acted upon and successfully secured relief in multiple instances of requests.

(e) Graft Prevention

The Office of the Ombudsman embraces the study and adoption of ways and means to minimize, if not to eliminate, opportunities for committing corruption, and to heighten people's awareness of the evils and solicit their co-operation in its eradication.

2. The Sandiganbayan

(i) Jurisdiction

The *Sandiganbayan* is also known as the anti-graft court, which exercises exclusive original jurisdiction over criminal cases committed in relation to office involving

- (a) High-ranking officials (i.e. public officers assuming positions with salary Grade 27 or higher);
- (b) Members of Congress and officials thereof classified as Grade 27 and higher under the Compensation and Position Classification Act of 1989;
- (c) Members of the judiciary, without prejudice to the provisions of the Constitution;
- (d) Chairmen and members of Constitutional Commissions, without prejudice to the provisions of the Constitution;
- (e) All other national and local officials classified as Grade 27 and higher under the Compensation and Position Classification Act of 1989;
- (f) Other offences or felonies committed by the public officials and employees mentioned in subsection (a) of this section in relation to their office;
- (g) Civil and criminal cases filed pursuant to and in connection with Executive Order Nos. 1, 2, 14 and 14-A.

(ii) Procedure

The procedure prescribed in Batas Pambansa Blg. 129, as well as the implementing rules that the Supreme Court has promulgated and may hereafter promulgate, relative to appeals/petitions for review to the Court of Appeals, shall apply to appeals and petitions for review filed with the *Sandiganbayan*. In all cases elevated to the *Sandiganbayan* and from the *Sandiganbayan* to the Supreme Court, the office of the Ombudsman, through its special prosecutor, shall represent the people of the Philippines except in cases filed pursuant to Executive Orders Nos. 1, 2, 14 and 14-A.

“In case private individuals are charged as co-principals, accomplices or accessories with the public officers or employees, including those employed in government-owned or controlled corporations, they shall be tried jointly with said public officers and employees in the proper courts which shall exercise exclusive jurisdiction over them.”

“Any provision of law or Rules of Court to the contrary notwithstanding, the criminal action and the corresponding civil action for the recovery of civil liability arising from the offence charged shall at all times

be simultaneously instituted with, and jointly determined in, the same proceeding by the *Sandiganbayan* or the appropriate courts, the filing of the criminal action being deemed to necessarily carry with it the filing of the civil action, and no right to reserve the filing of such civil action separately from the criminal action shall be recognized: Provided, however, that where the civil action had heretofore been filed separately but judgment therein has not yet been rendered, and the criminal case is hereafter filed with the *Sandiganbayan* or the appropriate court, said civil action shall be transferred to the *Sandiganbayan* or the appropriate court as the case may be, for consolidation and joint determination with the criminal action, otherwise the separate civil action shall be deemed abandoned.”

3. The Commission on Audit

This is a constitutional body possessing the power, authority and duty to examine, audit and settle funds and accounts pertaining to government.

4. The Civil Service Commission

The Civil Service Commission (CSC) is the central personnel agency of the Philippine government. One of the three independent constitutional commissions with adjudicative responsibility in the national government structure, it is also tasked with rendering final arbitration in disputes and personnel actions on Civil Service matters.

(i) Responsibility

Recruitment, building, maintenance and retention of a competent, professional and highly motivated government workforce truly responsive to the needs of the government's client - the public.

5. Regular Courts

In corruption cases involving low-ranking officials, defendants are prosecuted before the regular courts, i.e. Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts, depending on the gravity of the offence charged. In these cases, the Prosecutors of the Department of Justice (DOJ) are deputized by the Ombudsman to handle them.

6. Presidential Commission Against Graft and Corruption (PCAGC)

The Commission, acting as a collegial body, shall have the authority to investigate or hear administrative cases or complaints against all presidential appointees in the government and any of its agencies or instrumentalities (including members of the governing board of any instrumentality, regulatory agency, chartered institution and directors or officers appointed or nominated by the President to government-owned or controlled corporations or corporations where the government has a minority interest or who otherwise represents the interests of the government), occupying the positions of assistant regional director, or an equivalent rank, and higher, otherwise classified as Salary Grade 26 and higher, of the Compensation and Position Classification Act of 1989 (Republic Act No. 6758).

In the same manner, the Commission shall have jurisdiction to investigate a non-presidential appointee who may have acted in conspiracy or may have been involved with a presidential appointee or ranking officer mentioned in this subsection. The Commission shall have no jurisdiction over members of the Armed Forces of the Philippines and the Philippine National Police.

7. Disciplining Authorities

This can be achieved under special laws and bodies, e.g. the National Police Commission (NAPOLCOM) for members of the police force.

8. The Presidential Commission on Good Government

The Presidential Commission on Good Government (PCGG) is a special body with quasi-judicial functions created under Executive Order No.1 issued by President Corazon C. Aquino on February 28, 1986. Three basic tasks have been entrusted to the Commission:

- (i) the recovery of ill-gotten wealth accumulated during the Marcos regime;
- (ii) the investigation of such cases of graft and corruption as may be assigned by the President; and
- (iii) the adoption of institutional safeguards to prevent corruption in Government.

The principal activity of the Commission is to prosecute cases vigorously to a successful conclusion: the recovery of ill-gotten wealth and, pending judicial determination of the ownership thereof, to preserve and maintain the assets. More particularly, its functions are: to gather, evaluate and investigate information regarding ill-gotten wealth to issue sequestration, hold and/or freeze, or to lift such orders as may be warranted to preserve, maintain and prevent dissipation of sequestered assets to file and prosecute cases whether civil or criminal for the recovery of ill-gotten wealth to promote sustained efficiency and maintain the integrity of all its transactions.

C. Strategies to Effectuate Anti-Graft and Corruption Laws

The strategies in combating corruption encompasses the measures and procedures employed by all other disciplining authorities as it basically responds to the requirements of due process. The two general strategies are: the Confrontational Approach and the Psychological Approach.

1. Confrontational Approach

The confrontational approach involves administrative and criminal investigation and prosecution of erring government officials and employees. It includes the fact-finding and intelligence operations within the limits of the law to build-up the evidentiary requirement against the corrupt public servant. In the Philippine setting, it is only the Ombudsman, other than the courts of law, which may order the examination of the bank accounts of persons under investigation, pursuant to Republic Act No. 6770, Sec. 15.

From case build-up, there ensue two possible actions. The first is the conduct of preliminary investigation for the purpose of prosecuting a criminal action. If the evidence gathered during the fact-finding operations would sufficiently support the case, a criminal action shall be filed with the *Sandiganbayan* for high-ranking officials and in the ordinary courts for low-ranking officials.

The second possible action is the conduct of formal administrative investigation by the Ombudsman, the appropriate head of the agency or of any other specialized disciplining authorities as may be appropriate in the matter.

During the conduct of administrative proceedings, respondents may be ordered to suffer preventive suspension up to a maximum duration of six months at the discretion of the disciplining authority and when warranted by the attending circumstances.

If found guilty of the charge, the public official or employee is given a penalty of reprimand, fine, suspension or dismissal from the public service with forfeiture of benefits.

(i) Outline of Procedure at the Office of the Ombudsman

1. Filing of complaint
2. Evaluation of complaint
3. Fact-finding investigation (in administrative cases)
4. Preliminary Investigation
5. Formal Administrative Investigation (in administrative cases)
6. Issuance of Resolution
7. Notice to Parties
8. Motion for Reconsideration
9. Appeal
10. Execution

(ii) Outline of Procedure at the Regular Courts

1. Prosecution of Offences
2. Preliminary Investigation
3. Arrest/Apprehension
4. Posting of Bail
5. Arraignment
6. Pre-trial
7. Trial
8. Judgment

9. Motion for New Trial/Reconsideration
10. Appeal
11. Execution

2. Psychological Approach

This strategy of combating corruption in the criminal justice system involves the revival and/or revitalization of sound moral values known and acceptable to the community. It considers the cultural and social orientation of individuals in a particular locality or of the entire nation in general. It addresses the psyche of the Filipinos as it goes directly to the milieu of Philippine society.

Moral values that are fitting and becoming of a public servant are cultivated among the citizenry to strengthen them against temptations of wrongdoing or misdeeds both in the bureaucracy and in the community. This approach harmonizes with the government's effort to renew public servants' moral personality which calls for internal transformation of the public servant.

Through constant dialogues, seminars and workshops on team-building, values formation, gender-sensitivity, social interaction and other related activities, the members of the bureaucracy are kept conscious and aware of their vital role and solemn missions as civil servants. In this manner, the entire community is being mobilized to co-operate, participate and initiate moves on their own and do their humble share in fighting corruption in the system.

One important point must be emphasized: the success of fighting against corruption in the criminal justice system can not and shall not be measured by the number or percentage of prosecuted cases and/or the number of convicting verdicts for we might have been prosecuting innocent persons while the real culprits remain at liberty to repeat their misdeeds.

In summation, the confrontational approach bulldozes the wrongdoing and provides for redress of the wrong done to the people of the Philippines. While the psychological approach, it restores and strengthens the sound moral values of the Filipino people. This tactic does not only mean to provide redress for the wrong done to the State which is only analgesic in nature. Instead, in a wider perspective, it provides for a lasting solution to the issues on graft and corruption by transforming the moral make-up of the people. It is founded upon the principle that corruption cannot take root in an environment of integrity.

III. SPECIFIC PROBLEMS RELATING TO CORRUPTION IN THE CRIMINAL JUSTICE SYSTEM

A. Problems in the Prosecution and Trial Stage

The problems that impede the intelligent investigation, prosecution and trial of corruption cases, as well as in the effective implementation of corruption laws, may generally include the following:

1. Lack of proper co-ordination between the investigators, prosecutors, judges and witnesses;
2. Technical inefficiency of key players (law enforcers, judges and prosecutors) in the performance of their respective duties;
3. Obsolete rules of procedure that entail unnecessary delay in the disposition of cases;
4. Lack of effective community-based information and education programmes and activities;
5. Involvement of partisan politics in the appointment of law enforcers, prosecutors, judges and other related personnel that disturbs the integrity and autonomy of the judiciary and other agencies;
6. Meager budgetary allotment to court personnel, law enforcers, prosecutors and public defenders;
7. Inadequacy of training in investigation and handling of evidence;
8. Non-appearance of witnesses during preliminary or formal investigation;
9. Failure of police officers to effect arrest. (Frequently, police officers file a return stating that the warrant of arrest could not be served for the reason that the accused could not be contacted at the given address despite several attempts);
10. Difficulty of securing the presence of police witnesses and when they do appear in court, they are not prepared;
11. Lack of communication skills when testifying.

The role of prosecutors in the criminal justice system cannot be underrated. Their cardinal duty is to uphold and advance the interests of the State within its jurisdiction. It is their task to evaluate police reports, resolve cases by filing the appropriate information and/or dismissing the complaint. In this respect, they are considered to have a wider range of discretion than any other police officer considering that the prosecutor may keep the case or otherwise open it for further action. However, as a working institution, the prosecution system has its own flaws and problems.

On the other hand, the Public Attorney's Office (PAO) offers a wider range of legal services, particularly to indigent parties. While it remains an attached agency of the Department of Justice for purposes of programme and policy co-ordination, the PAO principally functions as defence counsel in civil, criminal and/or administrative cases. This circumstance however poses a serious challenge to the integrity of the criminal justice system itself since public prosecutors are under the direct control and supervision of the Secretary of the Department of Justice.

B. Additional Problems at the Trial Stage

The Supreme Court of the Philippines stands at the zenith of the judicial department of the government. Under its control and supervision is the *Sandiganbayan*, an Anti-Graft Collegiate Court which has the exclusive jurisdiction to try and decide criminal cases involving violations of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019), The Law on Forfeiture of Ill-Gotten Wealth (Republic Act no. 1379), and certain defined crimes under the Revised Penal Code. The regular courts on the other hand handle corruption cases similarly under the same control and supervision of the Supreme Court. The most common problems encountered at the trial stage are the following:

- (i) clogging/congestion in case dockets;
- (ii) delay in the disposition of cases;
- (iii) inefficiency and incompetence of judges/hearing officers;
- (iv) obsolete rules of procedure;
- (v) a lack of sound database management systems.

C. Citation of Related Cases

1. Judge Convicted of Taking a Bribe

On 29 October 1999, the Office of the Ombudsman filed a case for Direct Bribery against a Municipal Trial Court Judge in San Fernando, Pampanga, the Philippines, after an entrapment conducted by the operatives of the National Bureau of Investigation (NBI). The entrapment was recorded by a television network. The judge allegedly received PHP5,000 of a PHP41,000 bribe to dismiss the case of the accused in a criminal case for theft and exhibition of indecent and obscene shows. After due notice and hearing, the *Sandiganbayan* (Anti-Graft Court) sentenced the judge to suffer the indeterminate penalty of six months and one day to two years, four months and one day of imprisonment.

2. Court Upholds Ouster of Anti-Graft Lawyer

This matter involves dismissal of a Special Prosecution Officer of the Office of the Ombudsman for gross neglect of duty after the commission of several acts of mishandling a number of criminal cases. The Office of the Ombudsman meted out the penalty of dismissal from service. The Special Prosecution Officer was accused of mishandling criminal cases involving two counts of malversation of public funds.

The *Sandiganbayan* stressed her ineptitude in prosecuting the case. Among other things, the anti-graft court noted that while the testimony of the lone witness was dependent on the testimony of other personalities, neither was presented by the prosecution to the court. There were even evidentiary gaps committed by the prosecution, particularly missing folders containing the inspection of accounts. Upon elevation of the case, the Court of Appeals upheld the propriety and legality of the dismissal.

D. Public Attorney's Office (PAO)

The PAO is an agency under the umbrella of the Department of Justice. With the recent advent of Republic Act No. 9406, it was identified as an attached agency of the department for purposes of programme and policy co-ordination only. It has 16 regional and 258 district offices, which are usually found at the justice halls of cities and municipalities in the Philippines. In furtherance of its mandate, the PAO has a workforce of 1,048 lawyers and 852 support staff who are ready to serve the 34 million low-income Filipinos (39.9% of the

population) and are appearing before 2,258 courts nationwide, excluding appearances to quasi-judicial bodies.

Despite its meager budgetary allotment, the agency has managed to render a quality and responsive public service as it has been a recipient of the PASADA Award (Public Service Delivery Audit Activity) for its very good performance in extending free legal services to indigent clients. The Award was bestowed upon the PAO by the Civil Service Commission. In addition various awards, commendations and recognitions have been given to the agency's Chief Public Attorney, the Honourable Persida V. Rueda-Acosta, the most recent of which is the upcoming ceremonial awarding of the International Gusi Peace Prize in the Social Justice and International Humanitarian Law category.

The existence of the agency strengthens the sovereignty of the people as it provides immediate legal assistance to qualified clients including, but not limited to, case documentation for complaints against any public official. The increasing number of clientele accommodated and assisted by the PAO makes manifest the inevitable conclusion of the public's continuing trust in the agency known for its integrity and sincere public service.

In this way, the office offers its humble contribution in winning back the trust of the people in the government which had been destroyed by the nefarious consequences of corruption.

IV. RECOMMENDATIONS

In a general perspective, combating corruption requires development of sound moral values among the key players in the criminal justice system, coupled with a sincere political will to eliminate corrupt practices. In particular, we can enumerate some of the most prominent recommendations on the substantive, procedural and administrative issues besetting the criminal justice system.

A. Recommendations on the Substantive Issues

- (i) Legislative measures to integrate and systematize the co-ordinative functioning of courts with court-related agencies;
- (ii) Enhancement of mandatory continuing legal education;
- (iii) Criminalization of the private sector's involvement in corrupt practices;
- (iv) Exemption of corruption cases from bail and ineligibility of the accused to any form of executive clemency;
- (v) Review of laws that tend to cause delay in the disposition of cases and simplification of the rules of procedure;
- (vi) Promotion of community-based campaigns against corruption; and
- (vii) Enhancement and promotion of fiscal autonomy and integrity of the judiciary.

B. Recommendations on the Procedural Issues

- (i) Adoption of a continuous trial system; and
- (ii) Maximizing the use of the pre-trial stage.

C. Recommendations on the Administrative Issues

- (i) Inculcation and internalization of the case-flow management system;
- (ii) Increase funds for more competitive compensation for personnel performing key roles in the criminal justice system;
- (iii) More effective disciplinary action against judges and court personnel;
- (iv) Elimination of partisan politics in the appointment of judges, prosecutors, law enforcers and other government personnel involved in the justice system; and
- (v) Relevant training for judges, prosecutors, public attorneys and law enforcers.

PROPOSALS TO THAILAND'S POLICY-MAKERS: TOWARDS MORE EFFECTIVE CORRUPTION CONTROL

*Supakit Yampracha**♦

I. INTRODUCTION

Thai people are now increasingly conscious of the negative effects of corruption which have weakened Thai society for so long. According to surveys by Transparency International from 1995 to 2006, Thailand has long been considered one of the most corrupt nations.¹ Moreover, the 2000 national survey found that Thailand's household heads rank corruption in the public sector as the third most serious national problem, following the poor economy and cost-of-living and closely followed by drugs.² This information obviously determines the severity of the problem and the urgent need for some corrective measures.

Contemporary Thailand has fought corruption for more than three decades. During those times, many strategies, either preventive or suppressive, were tried but failed. Do Thai people have to realize that corruption is always a parasite on society and learn to live with this heinous thing peacefully? As one of Thailand's criminal justice practitioners, I have to answer "no" to the former question. Corruption is a man-made problem; therefore, it must be solved by a man-made solution.³

Experiences from countries which have succeeded in eradicating corruption show that successful anti-corruption strategy should be enforcement-led, which relies more or less on the effectiveness of the criminal justice system. After taking a short break from my workload as a trial judge and spending time reviewing papers and reports from the previous courses on corruption control in criminal justice which addressed effective corruption control in other countries, such as Hong Kong, Singapore and the USA, and studying the text and legislative guide for the implementation of the United Nations Convention against Corruption (UNCAC), I have discovered that the substantive and procedural criminal law of Thailand have a lot of ground to cover in order to tackle corruption effectively.

The objective of this paper is to ask Thailand's policy-makers to re-examine the legal system in some aspects of substantive and procedural criminal law. I am confident that after re-examining these aspects thoroughly, Thailand's criminal law system will be transformed into enforcement-friendly laws that give the practitioner the necessary teeth and cutting edge in corruption control.

The following questions in sections II to VIII represent seven features of law that need to be re-examined, which are:

- A. Investigating Authority
- B. Competent Court
- C. Suitable Amount of Penalty

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♦ I am grateful to my friend and colleague, Judge Naruemon Sattayaprasert, for her insightful comments on the earlier drafts. My special thanks go to my wife, Ratchanee, for being a perfect wife and mom so I could steal family time to write, for typing the first draft of the paper and for enabling me to concentrate all my energies upon writing.

¹ <http://www.transparency-thailand.org>

² Pasuk Phongpaichit *et. al.*, Corruption in the Public Sector in Thailand: Perceptions and Experience of Households, Chulalongkorn University, Bangkok, August 2000, p.7.

³ Transparency International Thailand Newsletter, May 2000, p.1.

- D. Mitigation for Guilty Plea
- E. Statute of Limitations
- F. Right to Remain Silent
- G. Burden of Proof and Standard of Proof.

II. SHOULD THE NATIONAL COUNTER CORRUPTION COMMISSION (NCCC) HAVE THE POWER TO INVESTIGATE ALL CORRUPTION CASES?

From a political standpoint, the establishment of a specialized agency sends a signal that the government takes anti-corruption efforts seriously. However, dedicated anti-corruption institutions are more likely to be established where corruption is, or is perceived to be, so widespread that existing institutions cannot be adapted to develop and implement the necessary reforms.

Prior to 1975, Thailand's anti-corruption activities fell under police jurisdiction. Although the law provided for heavy punishment if officials were convicted (see table in part IV of this paper), loopholes made detecting and prosecuting corruption difficult, and regulations hampered police investigations. To strengthen the effort to combat corruption, the Counter Corruption Commission (CCC) was established in 1975 to be an anti-corruption agency of the government under the Office of the Prime Minister. Its activities were divided into three areas: suppression (complaint investigation), prevention and public relations, but it also had limited effectiveness.

Established by the 1997 Constitution (the so-called "People's Constitution") and the Organic Act on Counter Corruption, B.E. 2542 (1993) as the constitutional body which is separate from the executive and reports directly to the National Assembly, the National Counter Corruption Commission (NCCC) has been charged with functions in three areas:

1. The declaration and inspection of assets and liability.
2. Corruption prevention.
3. Corruption suppression.

In the corruption suppression area specifically, the NCCC has a lot of duties and responsibilities to inquire into corruption cases and any other offences which are as follows:

- a) removal from office
- b) criminal proceedings for persons holding political positions and other government officials
- c) disciplinary proceedings
- d) inquiry into unusual wealth
- e) inquiry according to the Offence Relating to the Bid to the Government Agencies Act 1999
- f) monitor the distribution of partnership and shares of Ministers.⁴

The NCCC has very broad duties in inquiring into all kinds of corruption offences committed by every level of government official. As a result, the NCCC has a severe caseload problem. In 2003, about 2,000 corruption cases were submitted but only 1,200 cases were inquired into fully and disposed; certainly some were cases submitted in previous years, leaving about 6,000 cases pending for the next year.⁵ This problem derives from the NCCC organizing law: the Organic Act on Counter Corruption (OACC) especially Section 45 which states that in conducting factual inquiries, the NCCC may appoint an inquiry sub-committee which shall consist of one member of the commission and competent officials. With nine commissioners and a thousand cases pending for inquiry, it is an impossible mission.

Thai academics suggested the amendment of Section 45 by removing the requirement that an inquiry sub-committee shall consist of one member of the commission.⁶ This will directly reduce the caseload of

⁴ <http://www.nccc.thaigov.net/nccc/en/duty.php>

⁵ NCCC Annual Report, 2003.

⁶ Thaweekiat Meenakanit *et al.*, Measures to Prevent and Suppress Corruption, in Resource Material of the Second National Symposium of Justice Administration, Ministry of Justice of Thailand, September 2004, pp.270, 273.

each commissioner and hopefully speed up the inquiry process. Alternatively, some researchers recommended the amendment of Section 19 (3) of the OACC, which mandated NCCC powers and duties to inquire into whether a state official (not person holding a political position) has become unusually wealthy or has committed an offence of corruption, by adding a clause stating that the NCCC does not have to investigate the case from the outset but can mainly rely on the investigation file prepared by the agency of the alleged official.⁷

While the above two recommendations were based on an assumption that the NCCC should have the monopoly duties in investigating corruption cases, the third one called for a radical change. Some researchers claimed that due to problems of ineffectiveness and the caseload of the NCCC, and the fact that since the establishment of NCCC the government no longer has any effective organs to serve its policy to fight against corruption, the executive branch of the government should have its own investigative authority while the NCCC should exercise its power only in the case of corruption conducted by politicians and high-ranking government officers.⁸

To make the best choice, firstly, the policy-makers must remind themselves that the NCCC has been established as an independent organization, free from a chain of command of the executive branch, because of the failure of the past anti-corruption body, which was under the mandate of the Prime Minister's Office. Secondly, if centralized corruption control policy is an ultimate goal, setting up a parallel investigating authority will cause more harm than good. Lastly, it is easier to appeal to the legislators for the amendment of only one or two sections of the current law than enacting a new law and amending the current law simultaneously.⁹

III. SHOULD THAILAND ESTABLISH SPECIALIZED COURTS TO TRY CORRUPTION OFFENCES?

The establishment of specialized courts is to ensure that specific or technical problems will be solved by an appropriate judge, therefore, a judge of the specialized courts is appointed from judges who possess competent knowledge of the specific matters. There are four specialized courts in Thailand: the Labour Court, the Tax Court, the Intellectual Property and International Trade Court, and the Bankruptcy Court. As of today, there is no permanent specialized court for all corruption cases.¹⁰

Unlike Thailand, Indonesia, Pakistan and Sri Lanka have specific courts to deal with corruption cases. The advantage in this is that the presiding judge will devote more time to corruption cases and through consistent practice, gain the experience necessary to speed up trials, as well as conduct efficient proceedings.¹¹

Even though Thailand has no corruption court of general jurisdiction, the Supreme Court's Criminal Division for Persons Holding Political Positions (hereinafter "special division") has been established since 15 September 1999 by provision of the 1997 Constitution and the Organic Act on Criminal Procedure for Persons Holding Political Position B.E. 2542 (1999) for the purpose of expeditious and fair trial of corruption offences committed by politicians.

The special division of the Supreme Court has the power and duty to try and adjudicate a case against

⁷ Committee for the Constitutional Amendment, Guidelines for the Amendment of the Constitution Concerning the National Counter Corruption Commission, November 2006, pp.56-59.

⁸ Pongpat Riengkraue, The Establishment of the Executive Anti-Corruption Body, research proposal submitted to the Office of Justice Affairs, Ministry of Justice, 2005.

⁹ According to Section 250 of the 2007 Constitution, which entered into force 23 August 2007, the NCCC has duties to investigate only corruption offences conducted by politicians and high ranking government officials. However, a new investigative authority for lower ranking officials has not yet been established.

¹⁰ The Supreme Court of Thailand, 2004, p.12.

¹¹ Report of the Course: Current Problems in Responding to the Corrupt Activities of Public Officials at the Investigation and Trial Stages and Solutions for Them, in Resource Material Series No.56, UNAFEI, pp.549-550, 560.

persons holding a political position having been accused of becoming unusually wealthy, committing an offence of malfeasance in office according to the Penal Code, committing an offence of dishonesty in office, or corruption according to other laws, including a principal, an instigator or a supporter of such offence.

The quorum of the special division of the Supreme Court consists of nine Justices of the Supreme Court who hold a position of not lower than Justice of the Supreme Court, and are elected by a plenary session of the Supreme Court Justices on a case by case basis. A judgment will be made by a majority of votes, provided that each Justice constituting the quorum will prepare a written opinion and make oral statements to the meeting before making a decision. Orders and decisions of the Supreme Court's Criminal Division for Holders of Political Positions will be disclosed and final.¹² However, if there is fresh evidence material to the case that would likely lead to the acquittal of the alleged offenders, they can appeal to the plenary session of the Supreme Court.¹³

While the procedures of the general criminal court are spelled out in the Criminal Procedure Code, the procedures for criminal proceedings in the special division are stated in the 1999 Organic Act and Rules on Criminal Procedure for Persons Holding Political Position B.E. 2543 (2000), which are different from ordinary criminal proceedings in some aspects. For example, for the proceeding in the special division, data recorded in or processed by computer is admissible as evidence¹⁴ and the court may permit the hearing of a witness outside the court conducted by means of video-conference,¹⁵ although these procedures have not yet been endorsed by the Criminal Procedure Code. The most important features of criminal proceedings in the special division of the Supreme Court is that the trial is founded upon an inquisitorial system, rather than an accusatorial one, by which the court must mainly rely on the inquiry file of the NCCC; however, the quorum of justices may conduct an investigation in order to obtain additional facts or evidence as it thinks proper.¹⁶

The Supreme Court's special division is not a specialized court in principle, even though it has a special criminal proceeding. Justices of the division are chosen from all Justices of the Supreme Court on a case by case basis; therefore, experience in trying and adjudicating corruption cases is not required. Undoubtedly, all Justices of the Supreme Court have at least thirty years' experience on the bench; however, not all Justices have experience in corruption cases. Moreover, while conducting criminal trials in the division, the Justices still have responsibility to try other kinds of cases.

From 1999 to 2006, only four cases were submitted and disposed by the special division. This figure raises an issue of efficiency for the establishment of the division. It is about time for the policy-makers to re-examine the structure of this division, in order to enhance both effectiveness and efficiency. The division should be restructured to be a genuine specialized court for corruption cases which must consist of Justices appointed from among the Justices of the Supreme Court who possesses competent knowledge of corruption control measures in order to create expertise and consistent practice.

Statistics indicate that there were about 400 to 600 corruption cases submitted to the courts of justice each year,¹⁷ therefore it will be impossible for the special division to try all of those cases even if it has competent judges. The solution to this problem may be the establishment of a permanent special division in the courts of appeal consisting of competent appellate judges and being charged with the duty to try and adjudicate corruption offences committed by state officials who do not hold a political position. The decisions of this new division can be appealed to the special division of the Supreme Court. As a result, the current special division will perform its duties both as the court of first instance for corruption offences committed by politicians and the court of appellate jurisdiction for offences of corruption conducted by other state officials.

¹² *Supra* note 10, pp.14-15.

¹³ Constitution of the Kingdom of Thailand 2007, Section 278 paragraph 3.

¹⁴ Rules on Criminal Procedure for Persons Holding Political Positions B.E. 2543 (2000), Rule 13.

¹⁵ *Supra* note, Rule 20.

¹⁶ *Supra* note 10, pp.18-19.

¹⁷ Annual Judicial Statistics, Thailand, from 1993 to 2005.

IV. ARE THE PENALTIES FOR CORRUPTION OFFENCES TOO LENIENT TO DETER CORRUPTORS?

Traditionally, it has been believed that punishment as a social institution (or penalty) has changed in relationship to the prevailing beliefs about humankind in general and about criminals in particular. For example, the eighteenth-century classical schools of criminology, founded on the utilitarian beliefs of free will and the capacity for rational thought, viewed crime as the outcome of citizens concluding that the benefits of committing a crime outweigh the risks of significant punishment. The consequence of such criminological thinking called for the imposing of sanctions of sufficient severity to deter real and potential offenders.¹⁸

Rational Choice Theories of Crime, which have been the foundation of crime control policy in many countries for three decades, shared a view of humans as the “rational man”, like the classical school of criminology. According to this prevailing theory, the fear of future suffering is enough to deter the rational, free-acting citizen from engaging in criminality.¹⁹

Deterrence, therefore, is economic analysis *par excellence* since it focuses on the behaviour of individuals as rational actors. It treats the offender as a rational economic actor influenced by the pricing system of punishments. Punishment will act to deter the person sentenced (individual or specific deterrence), so that the person will desist from offending through fear of repetition of the penalty in future, and in addition, the punishment will deter other like-minded people (general deterrence).²⁰

Aiming at controlling corruption through deterrence, Section 30 of the UNCAC requires that States Parties make the commission of an offence established in accordance with the convention liable to sanctions that take into account the gravity of that offence.²¹ Moreover, paragraph 5 of the same section also requires States Parties to take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of offences established in accordance with the Convention.

Persons who commit corruption offences in the Thai public sector are liable for the punishments outlined in the following table.²²

Law, Section	Behaviour	Object/Funds	Punishment (prison; fine)
PC ²³ 143	Trading in Influence	Property or Other Benefit	Up to 5 Years; Up to 10,000 baht ²⁴
PC 144	Give, Offer, Agree to give	Property or Other Benefit	Up to 5 Years; Up to 10,000 baht
PC 147	Misappropriates	Anything	5 Years to 20 Years or life; 2,000 to 40,000 baht
PC 148	Misuses power	Property or any other benefit	5 Years to 20 Years or life or death (lethal injection); 2,000 to 40,000 baht
PC 149	Demand, Accepts	Bribe	5 Years to 20 Years or life or death; 2,000 to 40,000 baht
PC 150	Demand, Accepts (before being appointed)	Bribe	5 Years to 20 Years or life; 2,000 to 40,000 baht

¹⁸ Gregg Barak, *Integrating Criminologies*, Allyn & Bacon: MA, 1998, p.74.

¹⁹ *Ibid*, pp.189-192.

²⁰ Martin Wasik, *Emmins on Sentencings*, Blackstone Press: London, 2001, p.46.

²¹ Thailand signed the UNCAC on 9 December 2003 but has not yet ratified it.

²² Revised and updated from table printed in Report of the Course: Current Situation of and Recent Trends in the Corrupt Activities of Public Officials, and Criminal Legislation against Corruption, Resource Material Series No.56, UNAFEI, p.545.

²³ Penal Code.

²⁴ As of 1 October 2007, the exchange rate is about thirty-four baht for one US dollar.

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PC152, 153	Embezzles	Any kind of benefit	1 Year to 10 Years; 2,000 to 40,000 baht
PC 154 to 156	Misuses of power in collecting taxes and fees or auditing		5 Years to 20 Years or life; 2,000 to 40,000 baht
PC 157	Misuses power		1 Year to 10 Years ; 2,000 to 40,000 baht
PC 167	Give, Offer, Agree to give (to judicial officer)		Up to 7 Years; Up to 14,000 baht
PC 200	Misuses power (in judicial office)		1) 6 Months to 7 Years; 1,000 to 14,000 baht 2) life or 1 Year to 20 Years; 2,000 to 40,000 baht
PC 201	Demand, Accepts (in judicial office)	Bribe	5 Years to death; 2,000 to 40,000 baht
PC 202	Demand, Accepts (in judicial office) (before being appointed)	Bribe	5 Years to death; 2,000 to 40,000 baht
SBSA ²⁵ 10	Misuses power to approve or consider a bid		1 Year to 10 Years; 20,000 to 200,000 baht
SBSA 11	Misuses power to prevent fair bid competition		5 Years to 20 Years or life; 100,000 to 400,000 baht
SBSA 12	Same behaviour as sec. 10, 11 committed by a political position holder		7 Years to 20 Years or life; 140,000 to 400,000 baht
NCCC Law 100	Conflict of Interest		Up to 3 Years; Up to 60,000 baht

Comparatively, in Singapore, a country which has been considered to have a sufficiently deterrent punishment, a single charge attracts a maximum fine of \$100,000 or an imprisonment term not exceeding five years, or both. For offences involving government contracts or those involving bribery of a Member of Parliament, the maximum jail term is extended to seven years, although the maximum fine remains at \$100,000. A penalty equal to the amount of bribe shall also be imposed.²⁶

Obviously, the sentence of imprisonment prescribed by Thailand's Penal Code takes into account the seriousness of the offences of corruption and should be considered a sufficiently deterrent punishment. However, in practice, the court seldom imposes a fine on corruption offenders due to the provision of Section 20 of the Penal Code which states that for an offence liable for the punishment of both imprisonment and fine, if it thinks fit, the courts can impose only imprisonment. This can reduce the deterrent effect of the existing provisions. Moreover, even in the case that the courts impose a fine for a corruption offence in the penal code, the amount of the fine, revised in 1959, is too low. The government should consider amending laws concerning fines for corruption offences in order to maintain the deterrent effect of current provisions.

Given that the court is unlikely to want to pass the maximum sentence, the next question is: what level of sentence would properly reflect the seriousness of the offence? It is of great importance for the court to

²⁵ Act on Offences Relating to the Submission of Bids to State Agencies B.E.2542 (1999).

²⁶ Chua Cher Yak, Corruption Control: More than just structures, systems and process alone, Visiting Expert's Paper, Resource Material Series No.65, UNAFEI, p.234.

gauge the seriousness of one offence in relation to another, and to distinguish between each offence. This is a demanding task for the court, but it is central to the sentencing decision.²⁷

Due to the fact that judges have different backgrounds and experiences, they can pass different sentences for offences of a similar nature and offenders of similar characteristics. In order to create a uniform sentencing practice, Thailand should formulate and promulgate sentencing guidelines.²⁸

While the court is responsible for fixing the length of the custodial sentence and for announcing that term in open court, the actual period to be served by the offender is affected by the operation of early release arrangements and, in some cases, by subsequent decisions made by a parole board.²⁹ As a result, the deterrent effect of a custodial sentence carefully estimated by the court will be reduced by the discretionary power of the executive branch. This problem in Thailand is worsened by severe overcrowding, a situation that welcomes the administrative power of correctional officers to allow earlier release of prisoners. This, consequently, widens the gap between custodial time served by the offender and sentenced term of imprisonment pronounced by the court.³⁰

In order to maintain the deterrent effect of the punishment calculated carefully by the courts, Thailand's policy makers should promptly promote alternative measures to custodial sentences to solve the problem of prison overcrowding, and it should consider adopting the British model of early release³¹ which is subject to the good behaviour of offenders when in custody. Offenders who receive custodial sentences know at the time of their sentencing, pending good behaviour, what their actual release date will be. Mixing all factors together, hopefully, prison time served and time pronounced will be roughly equal.

The final remark is that deterrence is difficult to measure. Is the fine and prison sentence a deterrent to bribery? The answer depends upon the personalities of those involved, the amount of money of the bribe, and the likelihood of detection and conviction. It very likely deters some and does not deter others. So the question is whether increased efforts at detection and prosecution, accompanied by increased penalties, will have a greater deterrent effect than current penalties, and whether the increased costs associated with these efforts will be justified.³²

V. SHOULD A GUILTY PLEA FROM A CORRUPTION OFFENDER LEAD TO A DISCOUNTED PENALTY?

There are matters of mitigation personal to the offender which it is appropriate to take account. The most important and most frequently relied upon matter in mitigation is the offender's guilty plea. The reason why the courts grant a substantial discount on sentence for a guilty plea, in the majority of cases, is that defendants who plead guilty help to shorten trials, reduce court backlogs and save the costs of legal aid. Moreover, a decision to plead guilty will indicate the offender's regret for the offence.³³

In Thailand, according to Section 78 of the Penal Code, a timely guilty plea may attract a penalty discount of up to one-half and in practice the courts consistently discount one-half of the punishment for a timely guilty plea for all offenders. Aiming to enhance the deterrent effect of punishment in corruption offences, the Thai government approved the Penal Code Amendment Bill, which has amended Section 78 in order to diminish the power of the court in discounting sentence for a guilty plea from up to one-half to only up to one-fifth in corruption offences.

²⁷ *Supra* note 20, p.54.

²⁸ There are sentencing guidelines for judges in each of the nine regions around the country. However, these guidelines are not uniform and mandatory. Moreover, they are not disclosed to the public.

²⁹ *Supra* note 20, p.150.

³⁰ Research conducted in the past indicated that if the time imposed by the court was life imprisonment, the time served was about 12 years.

³¹ *Supra* note 20, pp.150-157.

³² Anthony Didrick Castberg, Current Problems in the Fight against Corruption and Some Possible Solutions: US Perspective, Resource Material Series NO.56, UNAFEL, p.407.

³³ *Supra* note 20, pp.66, 75.

Obviously, the upcoming amendment of the Penal Code will allow the courts to impose a longer jail term on corruption offenders, but as I discussed before, time served by offenders in Thailand is a lot shorter than time pronounced by the court. As long as prison overcrowding is an overwhelming problem and laws concerning early release and parole are not yet revised, diminishing the power of the court to discount sentences can, at its best, increase only minimally the deterrent effect of the punishment. In contrast to this uncertain minimal advantage, diminishing the court's power only in relation to corruption offences will inevitably raise an issue of discrimination.

VI. IS THE CURRENT STATUTE OF LIMITATIONS FOR CORRUPTION OFFENCES LONG ENOUGH TO BRING ALL CORRUPTORS TO JUSTICE?

The length of the period of limitation for corruption offences in Thailand ranges from between one to twenty years depending on the gravity of the offence; the majority of corruption offences carry a statute of limitations of twenty years calculated from the day an offence is committed. According to the Penal Code and the Criminal Procedure Code, prosecution and punishment for an act shall be barred when the period of limitation has elapsed.

In practice, investigation and prosecution of corruption in Thailand often begin after the retirement or the removal from office of government corruptors. Therefore, questions have been asked in Thailand's academic and political arena as to whether the period of limitation set by the current law is long enough to bring corruptors to justice. Some practitioners and politicians have called for the abolishment of the time limit for the prosecution of corruption offences. Alternatively, the government has drafted the penal code amendment law to extend the time limit for corruption to thirty years but maintain the same method in calculating the time.

In my opinion, extending the time period for corruption offences without changing the penalty for those offences can be considered a betrayal of the generally accepted principle that time limitation for an offence should depend on the seriousness of the offence. The suitable option for Thailand should be revision of the method of calculation so that time limit will not begin to run until the commission of the offence becomes known to the investigative authorities. While maintaining the current length of time, which depends on and reflects the seriousness of each offence, changing the calculation method can truly extend the time permitted for investigation and prosecution.

VII. SHOULD SUSPECTS OF CORRUPTION OFFENCES ENJOY THE RIGHT TO REMAIN SILENT?

Thailand has followed the old British system of allowing suspects to exercise their right to remain silent when questioned by investigators. However, when the case comes to court, the offender will have had ample time to concoct a story, which does not allow the prosecution sufficient time to verify its truthfulness. In the end, it defeats the objective of the criminal justice system of enabling full facts to be presented to the court so as to arrive at a fair decision.

Undoubtedly, the right of silence must be respected by the criminal justice system because it is a fundamental human right that no person shall be compelled in any criminal case to be a witness against himself, however, in establishing a better balanced system, the accused must be warned before invoking the right to remain silent that adverse inferences may be drawn against him or her from his or her failure to mention certain facts.

If Thailand wants to break the secrecy of crimes like corruption, it should follow the new British system which has been used for more than a decade and has provided that adverse inferences may be drawn against the accused in certain circumstances from his or her failure to mention certain facts. In adopting this model, a revised version of the caution should also be promulgated to strike a better balance between the human rights of suspects and the public interest in the investigation of crimes, which provides for the suspect to be told as follows:

"You do not have to say anything. But it may harm your defence if you do not mention when questioned something that you later rely on in court. Anything you do say may be given in evidence."

VIII. IS IT POSSIBLE TO SHIFT THE BURDEN OF PROOF AND REVISE A STANDARD OF PROOF IN CORRUPTION LITIGATION?

In criminal cases, there is a perception that an individual defendant is pitted against the weight of the State in the form of the prosecution. Since the individual's liberty and/or life are at stake, the law adopts a protective and paternalistic approach. The rules on the legal burden and standard of proof are such that the prosecution had the onus of proving guilt beyond reasonable doubt, and the defendant is very rarely put to proof.

Thailand also adopted this standard for general criminal cases, including corruption cases, as indicated in Section 227 paragraph 2 of the Criminal Procedure Code that where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him or her. However, a criminal trial in the special division of the Supreme Court for politicians is based on an inquisitorial system by which the court mainly relies on the investigation report of the NCCC and may conduct an investigation as the quorum think proper, therefore, the division does not confront the burden and standard of proof problems.

In my opinion, using civil proceeding to address problems of proof in corruption offences also has at least two disadvantages. Firstly, we may not ask for mutual legal assistance in civil proceedings. Secondly, civil sanctions may not deter corrupt officials as sufficiently as criminal punishment. Bearing in mind these disadvantages and realizing that experiences in some countries show that the offence of illicit enrichment is less difficult to prove than other corruption offences, Thailand should consider criminalizing illicit enrichment.

IX. CONCLUSION

Effective corruption control requires not only effective laws and seriousness in law enforcement but also co-operation from and co-ordination among the public sector, the private sector and the people. Therefore, while contemplating the weaknesses in anti-corruption legislation which this paper suggested, Thailand's policy-makers also have to formulate other preventive measures, such as how to reform the management system and the remuneration payment of the government, how to deprive the corruption opportunities, how to educate people to know the wickedness of corruption and seek co-operation from them.

Being aware that corruption in Thailand is a never-ending problem, it is, therefore, all the more necessary that all sectors of Thai society do not relent in their efforts and determination to coalesce and work towards the common goal. As I mentioned before, corruption is a man-made problem, and it is with high hopes and belief that I write that there exists a man-made solution for curing this cancerous growth in Thai society.

APPENDIX I
LIST OF THAILAND'S ANTI-CORRUPTION LEGISLATION

**I. LAW ON CORRUPTION OFFENCES
OF THE PUBLIC OFFICIALS AND PROCEEDINGS**

1. Penal Code; passive/active bribery, embezzlement, misappropriation, abuse of power, trading in influence
2. Act on Offences Relating to the Submission of Bids to State Agencies B.E.2542 (1999)
3. Organic Act on Counter Corruption B.E. 2542 (1999); conflict of interest offences, corruption cases criminal proceeding and unusual wealth inquiry proceeding, assets and liabilities declaration
4. Organic Act on Criminal Procedure for Persons Holding Political Position B.E. 2542 (1999) ; criminal proceeding and unusual wealth inquiry proceeding for politicians
5. Criminal Procedure Code; criminal proceeding for public officials

II. LAW ON CORRUPTION OFFENCES IN THE PRIVATE SECTOR

1. Penal Code; embezzlement, breach of trust, fraud
2. Act on Trade Competition B.E. 2542 (1999); anti-monopoly law, liability of managing directors and managing partners
3. Act on Offences Relating to Registered Partnerships, Limited Partnerships, Private Companies, Associations and Foundations B.E.2499 (1956); fraud, breach of trust by managing directors or managing partners
4. Act on Securities and Securities Exchange Market B.E.2535 (1992); fraud, embezzlement, breach of trust of directors or managing directors of public companies

III. LAW ON CORRUPTION-RELATED OFFENCES

1. Taxation code; tax evasion
2. Money Laundering Control Act B.E. 2542 (1999); corruptions offences are predicate offence for money laundering offences, civil forfeiture proceeding
3. Witness Protection Act B.E. 2546; witness protection measures, obstruction of justice offences: intimidating or doing any harm to witnesses (not offences in themselves but being aggravating factors)

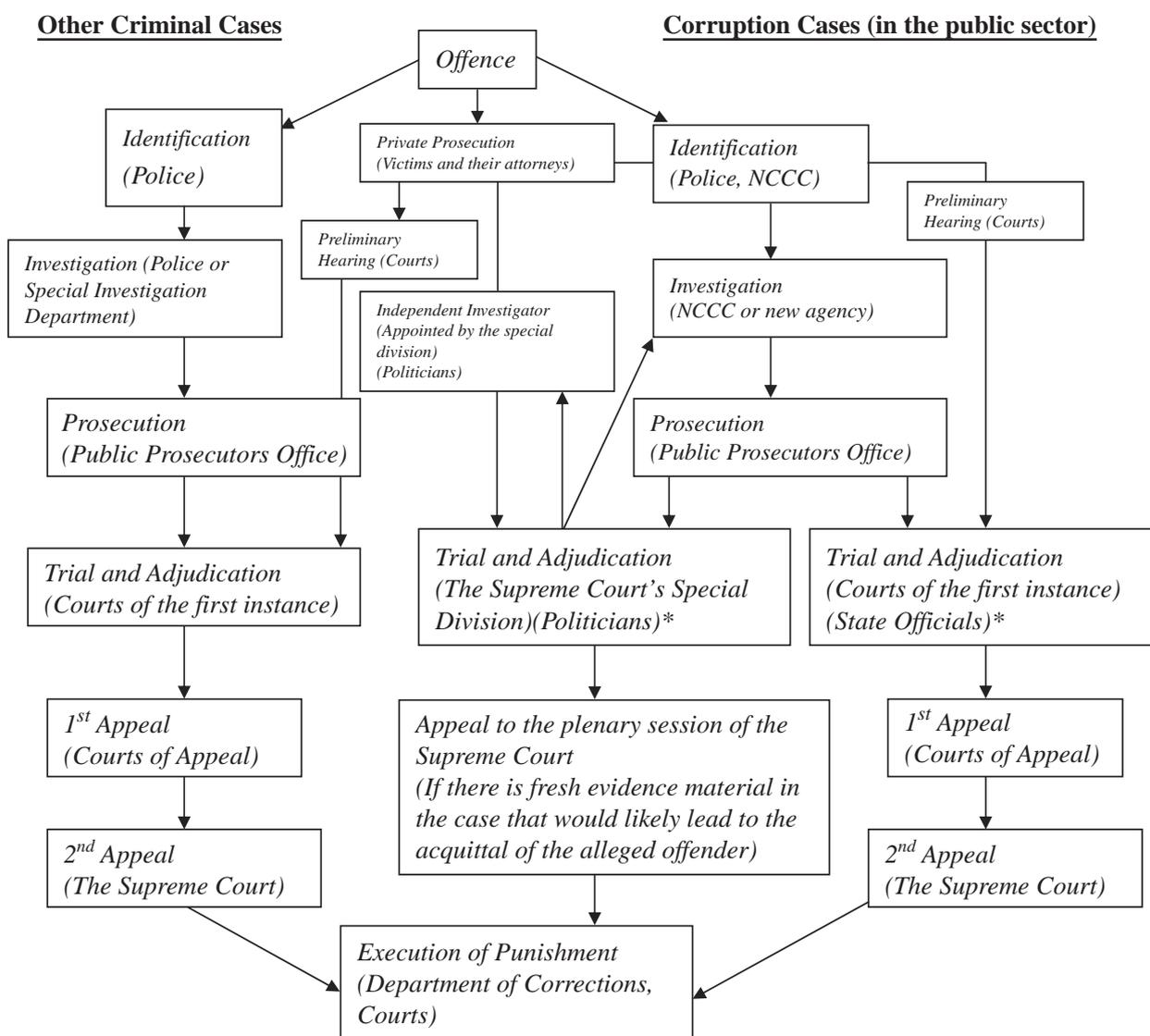
IV. LAW ON INTERNATIONAL CO-OPERATION

1. Extradition Act B.E. 2472 (1929) and many Bilateral Extradition Acts
2. Act on Mutual Legal Assistance in Criminal Matters B.E.2535 (1992)

V. OTHER LAWS ON PREVENTIVE MEASURES

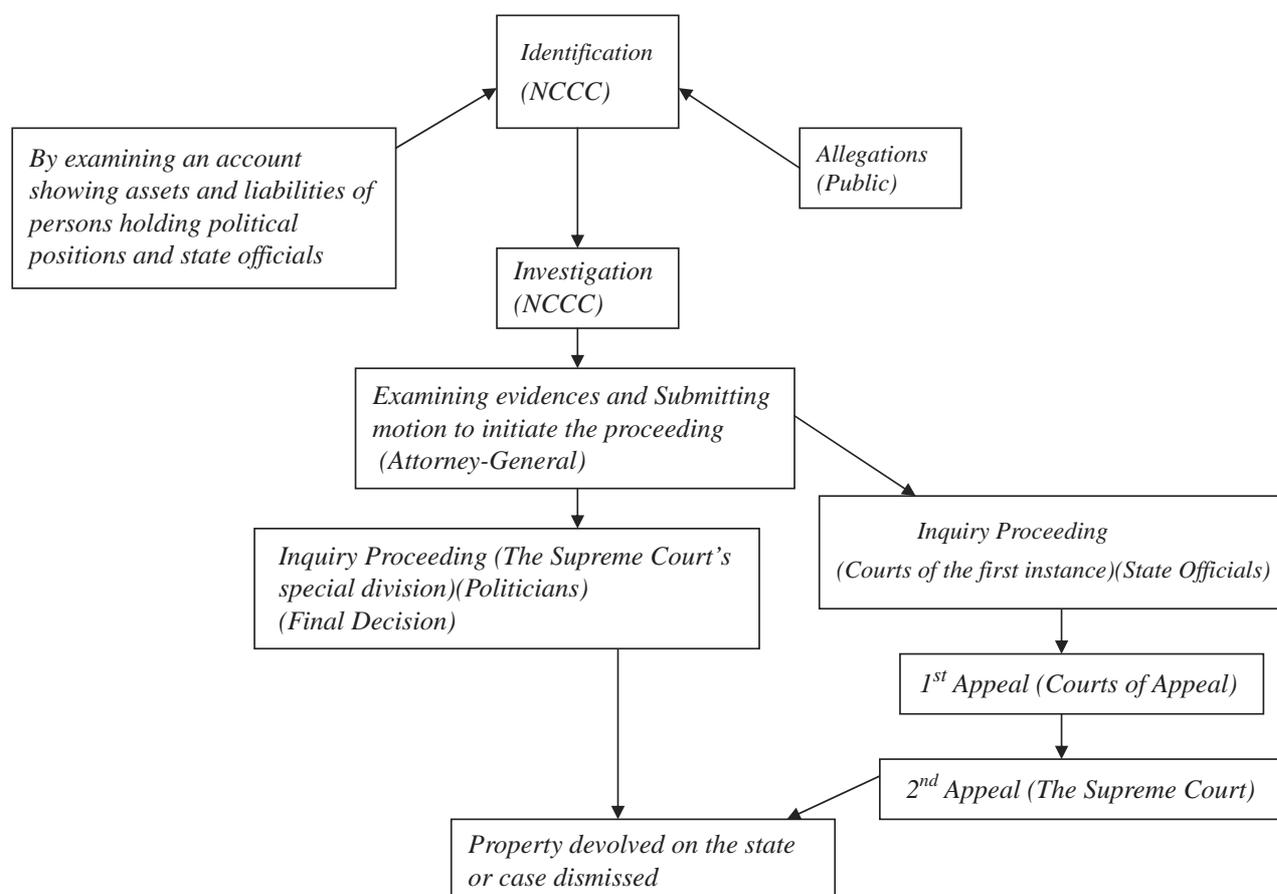
1. The 2007 Constitution; Provisions related to public officials' code of conduct
2. Organic Act on Political Parties B.E. 2550 (2007); control mechanism of political parties' funding, spending and donations
3. Organic Act on Ombudsmen B.E. 2542 (1999); monitoring state officials' exercise of power, check and balance
4. Act on Management of Partnership Stakes and Shares of Ministers Act B.E.2543 (2000); prevention of conflict of interest
5. Official Information Act B.E. 2540 (1997); people's rights to access public information, disclosure of public information

**APPENDIX II: Flow Charts of Criminal Justice Proceedings of Thailand
(including corruption cases)**



* Including any lay person who is a principal, instigator or supporter of that offence.

**APPENDIX III: Flow Charts of Unusual Wealth³⁴ Inquiry Proceeding of Thailand
(Non-Criminal Proceeding)³⁵**



³⁴ Unusual wealth means having an unusually large quantity of assets, having an unusual increase in assets, having an unusual decrease of liabilities or having illegitimate acquisition of assets as a consequence of the performance of duties or the exercise of power in office or in the course of duty.

³⁵ For the unusual wealth inquiry proceeding, the accused have to prove that assets considered disproportionate to their income were not obtained through corrupt practices, otherwise proved, those assets will be considered as corruptly acquired property and will be devolved on the State.

REPORTS OF THE COURSE

GROUP 1

CRIMINALIZATION, ISSUES IN THE INVESTIGATION AND PROSECUTION OF CORRUPTION, HANDLING OF ASSETS, MUTUAL LEGAL ASSISTANCE AND EXTRADITION

<i>Chairperson</i>	Mr. Sharada Bhakta Ranjit	(Nepal)
<i>Co-Chairperson</i>	Mr. Shigeru Nomura	(Japan)
<i>Rapporteur</i>	Ms. Santanee Ditsayabut	(Thailand)
<i>Co-Rapporteur</i>	Mr. Dejan Milenković	(Serbia)
<i>Members</i>	Ms. Mary Ndayikunda	(Burundi)
	Mr. Shoichiro Kato	(Japan)
	Mr. Mwangupiri Samuel Ngosi	(Malawi)
	Mr. Marito Magno	(Timor-Leste)
<i>Visiting Experts</i>	Ms. Catherine Volz	(UNODC)
	Mr. Tony Kwok Man-Wai	(Hong Kong)
<i>Advisers</i>	Deputy Director Takeshi Seto	(UNAFED)
	Prof. Kayo Ishihara	(UNAFED)

I. INTRODUCTION

Group 1 started its discussion on 5 November 2007. The group elected, by consensus, Mr. Sharada Bhakta Ranjit (Nepal) as its chairperson, Mr. Shigeru Nomura (Japan) as its co-chairperson, Ms. Santanee Ditsayabut (Thailand) as its rapporteur, and Mr. Dejan Milenković (Serbia) as its co-rapporteur. The group was assigned to discuss the following topics:

1. Criminalization, focusing on the discrepancies in the respective countries' legislation with regard to the UNCAC requirements;
2. Investigation and prosecution:
 - 2.1 Collecting information of corruption;
 - 2.2 Witness protection;
 - 2.3 Legal obstacles to effective investigation;
3. Freezing, seizure, confiscation and recovery of assets:
 - 3.1 Identifying and tracing proceeds of corruption;
 - 3.2 Freezing, seizure and confiscation of proceeds of corruption;
 - 3.3 International co-operation in locating the proceeds of corruption;
4. Mutual legal assistance;
5. Extradition.

The outcome of the group discussion, by topic, was as follows.

II. CRIMINALIZATION, FOCUSING ON THE DISCREPANCIES IN THE RESPECTIVE COUNTRIES' LEGISLATION VIS-À-VIS UNCAC REQUIREMENTS

The group agreed to discuss the domestic law of each country in compliance with the mandatory requirement of criminalization under UNCAC.

All countries have the offence of bribery of national public officials under UNCAC Article 15. However, the definition of "public official" is varied. In some countries, such as Thailand and Nepal, the definition of public official under their penal law is narrower than provided in Article 2 of the UNCAC. It is noted that the definition of public official in Burundi, Japan, Serbia and Malawi covers all requirements under the UNCAC. In Timor-Leste, a public official is called a "public agency or entity" which includes non-government agencies that provide a public service.

With regard to the offence of active bribery of foreign public officials in UNCAC Article 16, almost all countries except Nepal and Thailand criminalize such acts either under the penal law or other specific laws,

such as the Anti-Corruption Law in Burundi and Malawi, and under the Unfair Competition Prevention Law in Japan. Thailand has interpreted the term “public official” to cover only Thai public officials. Therefore, at present, it cannot punish the act of giving a bribe to a foreign public official.

The offences of embezzlement, misappropriation and other diversion of property are criminalized in all countries by various means.

Most countries have an anti-money laundering law. However, it is noted that not all offences provided in the UNCAC are predicated offences under such laws. It is worth noting further that even though some countries do not have a money laundering law, such as Nepal and Timor-Leste, a particular act of money laundering is penalized under their penal law.

The group concluded that the offence of obstruction of justice is penalized in all countries, but with different approaches. In the case of giving a bribe to a witness (Article 25(a) of the UNCAC) the law in some countries, such as Japan and Thailand, still has a gap. Some countries would have this offence in the Penal Code. It should be noted that under the Corrupt Practice Act of Malawi, once the act is committed, there will be two offences; the obstruction of justice offence can be treated under the Corruption Practice Act and the Penal Code as well. This act is penalized in Serbia under the Penal Code and the Law on Public Order.

III. INVESTIGATION AND PROSECUTION

A. Collecting Information of Corruption

After extensive discussion, participants agreed that in each country there are various methods of collecting information on the corruption issue. Most countries collect information through the reports of citizens, or related agencies; rumours; NGOs; media, internet, etc.

However, some participants highlighted the problem of encouraging the public to report corruption and give information to relevant governmental agencies. Japanese participants pointed out that there is a whistleblower protection law in Japan, which was recently enacted to protect persons who report illegal acts, including corruption cases. If there is an unfavourable treatment resulting from the reporting or if there is any damage to the reporter, it can be compensated. The whistleblower protection law protects employees who report corruption in their company.

After discussion, a Japanese participant explained the methods of the tax investigation agency. He said that without any warrant, investigators can visit a bank for investigation and access account information and transactions as well as customer information on opening a new account and the signatures and handwriting of the customer. The investigator may also open desk drawers and take any evidence. If there is a suspicion that there are other tax evaders in the same institution, they can investigate further. In Japan, banks co-operate voluntarily. If a Bank does not co-operate, an investigator will have to obtain a court order to access such information.

This information initiated discussion on the issue of bank secrecy. It was pointed that in almost every respective country police or other governmental agencies need court orders or a warrant to search or seize bank records and other information.

The group had the benefit of the presence of Ms. Catherine Volz, a visiting expert from UNODC. She made two points on bank secrecy. Firstly, usually the obligation to maintain secrecy is between the bank and the customer, and the law establishes bank secrecy. Also, bank clerks have a duty not to tell the customer that the police are looking for information on a bank account.

B. Witness Protection

The group also welcomed the presence of Mr. Tony Kwok Man-wai, a visiting expert from Hong Kong, to give his view as well as his experience regarding the special unit on witness protection in Hong Kong.

Besides Serbia and Thailand, the other represented countries have no specific law to protect witnesses, although general police protection or protection measures during trial may be provided. It is noted that confidentiality is provided in the Anti-corruption Law of Burundi as well as the Ombudsman Law of Timor-

Leste. Furthermore, the Burundi law only mentions the protection of witness by stating that the authority who receives information from the witness needs to protect the witness. However, there are no specific measures provided by law on how to protect the witness.

The Witness Protection Act, 2003 of Thailand provides a comprehensive regime on witness protection and can be highly regarded by other countries considering the issue. The measures under this law include providing safe accommodation for the witness, relocation, giving allowances and compensation, changing identity, etc. Those measures are extended to people who have close relationships with the witness such as his or her parents, spouse or children. The Office of Witness Protection was established in the Ministry of Justice to take care of this matter. However, the effectiveness of enforcing this law is to be considered.

The Serbian participant presented an effective enforcement regime on witness protection in his country. In Serbia, there is a special law to protect an associate in criminal proceedings, meaning not only witnesses but victims, suspects, expert witnesses, accused, witnesses' associates, convicts, and closely related persons such as friends. A special unit to implement the said law was established under the Internal Affairs Ministry. It is a legal obligation and government duty to protect witnesses regardless of the desire of individual witnesses. To implement this law, the group recognized that it requires a large budget. However, the group agreed that such budget is worth spending to curb corruption where its consequences are more expensive. Besides, an effective witness protection law can encourage members of organized crime groups to report the crime and co-operate with the law enforcement authorities.

C. Legal Obstacles to Effective Investigation

The issue of legal obstacles to effective investigation produced extensive and lively discussion among the participants. During the discussion participants agreed that immunity is one legal obstacle to effective investigation and that every country has immunity for some social circles.

However, this issue has resulted in different types of implementation and various practices in each country. For example, in Nepal a special commission under a special law can investigate and prosecute anybody, including high-ranking officers, except when the House of Representative is in session. If the House of Representatives is in session the investigation and prosecution authorities need permission from the speaker of the house.

On the other hand, in some countries, persons under immunity cannot be arrested and prosecuted without permission of parliament. However, practice showed that there is no problem with getting the permission for arrest or prosecution like in Serbia and Japan. In some countries it is difficult to obtain permission for investigation.

In Burundi, after getting permission, high-ranking officers have the privilege to be tried in the Supreme Court.

As an additional topic, participants agreed that even where no specific immunity is given by law, there are practical problems with the investigation and prosecution of high-ranking officials.

It was pointed by some participants that as a solution, the immunity law should be abolished because of its frequent misuse by high-ranking officials. Also, raising public awareness, education, the involvement of NGOs and generating political will are very important issues in defeating this obstacle.

IV. FREEZING, SEIZURE, CONFISCATION AND RECOVERY OF ASSETS

During discussion on this topic, Ms. Volz gave guidance on the meaning of freezing, seizure, confiscation and recovery of assets according to the UNCAC's requirements.

A. Identifying and Tracing Proceeds of Corruption

It is mentioned that in some countries, banks are required to report all suspicious transactions to the relevant authority which is a very helpful technique because authorities can then analyse the movement of the fund and who was involved in the transactions. Moreover, in some countries, an order to freeze a bank account can be obtained immediately after the authority receives such information from a financial institution.

Most countries have an asset declaration system. However, the difficulties often occur where people conceal money in the name of their spouse, relatives, or extra-marital partner. Criminals further conduct other business to launder money. The group exchanged knowledge of some particular types of business that are frequently used to launder money, such as through Chinese restaurants in Europe or casinos in Nepal. The group noted that identifying and tracing the proceeds of crime becomes very difficult and requires much more sophistication due to the advanced technology at the disposal of criminals.

B. Freezing, Seizure and Confiscation of Proceeds of Corruption

The group discussed the difference between criminal forfeiture and civil forfeiture as well as the positive and negative aspects of both systems. For example, a conviction is needed to confiscate the property of the convicted person. Therefore, if the defendant dies, there will be no further action on his or her property. While the standard of proof in civil forfeiture is lowered to preponderance of evidence, it is arguable whether or not this violates human rights. Many countries have both systems.

In all countries, freezing and seizure are always used to preserve property during investigation. Most countries need to obtain a court order in conducting the freezing and seizure. The group noted that in case of tax evasion in Japan, the frozen or seized property can be used to pay the amount of evaded tax.

The group also discussed the issue of maintenance of the seized properties in which some type of property is difficult to preserve. In such cases, we would sell the property and reserve the proceeds of the sale instead.

There are also problems in the process. For example, in Serbia, under court orders, police can search and seize some assets but if the police do not submit a report and the assets to a prosecutor within 90 days, that asset should be returned to the owner. Sometimes, the 90 day period is not long enough to complete the process of international co-operation between Interpol and the domestic authority.

C. International Co-operation in Locating the Proceeds of Corruption

The group recognized that international co-operation in some areas, such as exchanging information, identifying the proceeds of crime, etc., can be obtained through the diplomatic channel. The need for a decent legislative regime is necessary to effectively co-operate with other countries to trace and retrieve the proceeds of crime. Moreover, international instruments, either multilateral or bilateral, can be a basis for efficient co-operation in this matter.

Some countries can provide assistance only if a treaty exists between the requesting country and the requested country while other countries, such as Japan, Thailand and Serbia, can provide co-operation on the basis of reciprocity where there is no treaty. However, not in conformity with UNCAC requirements, once Thailand confiscates any property per request from other country, the confiscated property would be vested in the Kingdom of Thailand according to the provision in the Mutual Legal Assistance in Criminal Matters Act.

International co-operation can be provided by Serbia under bilateral treaties and the Criminal Procedure Code of Serbia which devotes one chapter to international co-operation and allows for recovery of assets to the requesting State. Therefore, the group noted that there would be no need to have special law if the present legislation already established a proper legal basis for international co-operation.

V. MUTUAL LEGAL ASSISTANCE

The group recognized that most countries, if they can, give assistance to other countries even where there is no treaty. In such cases assistance is provided on a reciprocal basis. However, where a treaty exists between the requesting country and the requested country, we have to firstly look at the treaty's requirements. Then, if the assistance requested is not covered by the treaty, domestic law regarding mutual legal assistance or international co-operation will be applied. The term 'treaty' includes international conventions, and regional as well as bilateral treaties.

Further, the group discussed the type of assistance which can be provided according to Article 46 paragraph 3 of the UNCAC. It should be noted that in most countries, Interpol plays a very significant role in international co-operation regarding criminal matters, especially by providing member countries with

necessary information through the Interpol channel in each country. However, from the discussion, in some countries, the Interpol channel can be employed only in the investigation stage. The evidence obtained through Interpol is not admissible or it will be objected to by the defendant in the court trial. In such circumstances, the formal process of mutual legal assistance would be necessary.

Almost all kinds of assistance stated in Article 46 paragraph 3 of UNCAC can be provided by all countries either by treaty, diplomatic negotiation or national law. Nevertheless, the group recognized that in some countries assistance that would involve the private sector or another person's property, such as requesting information on bank records or asking to seize property, might be difficult or impossible to provide.

The group then touched upon the problem of mutual legal assistance. The practical problems were presented as follows:

1. Language difficulty. In some countries, the request for mutual legal assistance has to be translated to the requested state's language, as well as English. Therefore, there is a need to hire outside translators which is very expensive. Furthermore, the requesting officer cannot check the quality of the translation.
2. Delay. A request for mutual legal assistance is a formal matter. Therefore, it takes time for the document to go through each step. The poor communication between the Central Authority and Competent Authority can cause delays in the process as well.
3. Limited resources. If the requested state requires extensive time, it may also cause delay as the requested country may have not enough human resources to complete the assistance. Normally the cost of delivering assistance would be borne by the requested country; in case of a large amount of expenses, the requested country might seek consultation with the requesting country.
4. Different domestic regimes. Basic requirements for mutual legal assistance can be expected in every country. In detail, the national law of each country may require specific forms of evidence to be admissible in court. It is difficult to know in advance the requirement in the requested country regarding mutual legal assistance requests.

VI. EXTRADITION

The group recognized the UNCAC's requirement to make corruption offences under UNCAC, as discussed earlier, extraditable offences.

In some countries, such as Burundi, Malawi and Timor-Leste, extradition would be solely based on a treaty while some countries, such as Japan and Thailand, can provide extradition on the basis of reciprocity as well.

Countries which are already a party to the UNCAC, such as Burundi, fully comply with the 'extradite or prosecute' principle. Burundi cannot extradite its own nationals. Therefore, in such cases, instead of extradition, the fugitive would be prosecuted in Burundi. For Japan and Thailand, it is possible to extradite their own nationals, but only to countries with which they have existing treaties.

The group took note of all common requirements for extradition. It is well observed that the double criminality principle is a standard rule for extradition in all countries. Extradition cannot be provided in cases of political and military offences.

The group further discussed other factors that would bar extradition. It is found that in Thailand the Penal Code imposes the death penalty in serious corruption offences. Even though so far the death penalty has never been imposed in corruption cases, Thailand would encounter obstacles if it requested extradition from a country where the death penalty no longer exists.

It was mentioned that if a country still does not criminalize any mandatory offence under UNCAC, that country would not be able to provide extradition for such offences because of the double criminality principle noted earlier.

VII. RECOMMENDATIONS

In conclusion, all participants agreed with the following suggestions:

1. Encourage all countries which have not yet ratified the UNCAC to do so and to fully implement it as soon as possible;
2. All countries should formalize their domestic laws to accommodate the mandatory requirements of the UNCAC, especially in the area of criminalization, international co-operation and asset recovery;
3. National legislation should be enacted to ensure the protection of witnesses and whistleblowers in corruption cases;
4. There is a need to regulate in law the right of the citizenry to access information of public importance held by public authority bodies, with the purpose of the fulfillment and protection of the public interest and to attain a free democratic order and an open society;
5. Countries should seek co-operation from various channels such as Interpol, Europol, or any other inter-organization network to acquire useful information in order to prepare a formal mutual legal assistance request;
6. Countries should encourage the use of UNODC toolkits presented by UNODC visiting experts in preparing requests to other countries for Mutual Legal Assistance;
7. Through a public education programme, raise awareness of the corruption problem in all societies and call for concert action from the public;
8. Improve investigation techniques by using advanced equipment to detect corruption as well as training law enforcement officers on best practices in investigating this specific crime. An asset declaration system for high-ranking officials and 'lifestyle checking' should be emphasized;
9. Make it easier for the public to report corruption, by providing contact with the relevant authorities via email, telephone, and anonymous reporting, etc;
10. Strengthen international co-operation by utilizing existing informal networks among law enforcement agencies in different countries to benefit the formal process of mutual legal assistance and extradition as much as possible;
11. Where necessary, legislation and procedures providing for excessive immunity of high-ranking officials in corruption cases should be amended. To achieve such a purpose, national authorities must engage civil society to take action in supporting the amendment;
12. Countries should engage in capacity building for law enforcement officers on how to effectively protect witnesses as well as provide programmes to educate witnesses on how to protect themselves;
13. The above recommendations depend on sufficient allocation of resources from the government to combat corruption;
14. The above recommendations further depend on strong political will and the promotion of good governance.

GROUP 2

CRIMINALIZATION, INDEPENDENCE AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM, SPEEDY TRIAL, APPROPRIATE SANCTIONS AND PREVENTIVE MEASURES

<i>Chairperson</i>	Ms. Fonachu Helen Ike	(Cameroon)
<i>Co-Chairperson</i>	Mr. Amadou Bocar Touré	(Mali)
<i>Rapporteur</i>	Mr. Supakit Yampracha	(Thailand)
<i>Co-Rapporteur</i>	Mr. Froilan Legaspi Cabarios	(Philippines)
<i>Members</i>	Mr. Dado Achmad Ekroni	(Indonesia)
	Ms. Ivy Chatha Kamanga	(Malawi)
	Ms. Oxana Bologan	(Moldova)
	Mr. Takuji Ogawa	(Japan)
	Mr. Makoto Shibata	(Japan)
<i>Visiting Experts</i>	Ms. Catherine Volz	(UNODC)
	Mr. Tony Kwok Man Wai	(Hong Kong)
<i>Advisers</i>	Deputy Director Takeshi Seto	(UNAFEI)
	Prof. Jun Oshino	(UNAFEI)
	Prof. Shintaro Naito	(UNAFEI)

I. INTRODUCTION

Group 2 started its discussion on 5 November 2007. The group elected, by consensus, Ms. Fonachu Helen (Cameroon) as its chairperson, Mr. Amadou Bocar Touré (Mali) as its co-chairperson, Mr. Supakit Yampracha (Thailand) as its rapporteur, and Mr. Froilan Legaspi Cabarios (Philippines) as its co-rapporteur. The group, which was assigned to discuss the above five topics, agreed to conduct its discussion in accordance with the following agenda:

1. Criminalization, focusing on the discrepancies in the respective countries' legislations vis-à-vis UNCAC requirements;
2. Independence and integrity of criminal justice bodies and personnel;
3. Measures to ensure speedy trials;
4. Effective and appropriate sanctions;
5. Raising public awareness and other preventive measures.

II. CRIMINALIZATION

A. Definition of "Criminalization"

At the beginning of this session, the group tried to define the term "criminalization" and agreed that criminalization means the process by which behaviours and individuals are transformed into crime and criminals. In the context of fighting corruption, the United Nations Convention against Corruption (UNCAC) requires States Parties to introduce criminal and other offences to cover a wide range of acts of corruption, to the extent these are not already defined as such under domestic law. The criminalization of some acts is mandatory under the convention, which also requires that States Parties consider the establishment of additional offences.

B. Mandatory Offences

All countries have enacted laws against embezzlement, misappropriation or other diversion of property by public officials. Thus, the main issue seemed to be the criminalization of active bribery of foreign public officials and officials of public international organizations. Japan and Mali have criminalized this behaviour under their domestic law. Other participants stated that their country's domestic legislation would have to be revised to meet the requirements of Article 16 of the Convention. Actually, this process is ongoing in Moldova.

The criminalization of bribery of domestic officials did not pose any serious problems, since all countries have provisions to criminalize this conduct. However, in Malawi, a small amount of money or property given

to a public official is not considered a bribe. Therefore, the group further discussed the distinction between giving a gift and giving a bribe.

Although all countries have a law to punish money laundering, the group noted that in order to fulfill their obligations under the Convention, there is a need for States Parties to expand the scope of predicate offences. Most countries have legislation that criminalized the laundering of proceeds of corruption in some way or another; however, it is yet to be seen if their legislation covers all the offences established by this Convention.

Most countries include obstruction of justice as a criminal offence in their legislation. However, in Thailand, intimidating or doing any harm to influence the witness is not an offence in itself but will be considered aggravating circumstances of the basic offence. Therefore, Thailand needs to revise its domestic law to criminalize the obstruction of justice as required by Article 25 of the UNCAC.

C. Non-mandatory Offences

To some extent, all countries have enacted laws against trading in influence, abuse of authority by public officials, and bribery and embezzlement in the private sector. No country has criminalized passive bribery of foreign public officials. There are illicit enrichment offences in Indonesia and Malawi. In Thailand and Philippines, illicit enrichment *per se* is not a crime but may trigger civil proceedings aimed at devolving the corruptly acquired assets on the State.

Even though under UNCAC some offences are non-mandatory and are left to the discretion of the States Parties, the group acknowledges the advantages of making some of these offences mandatory. Regarding this matter, international mutual legal assistance becomes an essential point to consider, because investigators have to gather evidence outside their own jurisdictions.

III. INDEPENDENCE AND INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

A. Definition of “Independence” and “Integrity”

The group began this session by distinguishing the definitions of “independence” and “integrity”. These terms are sometimes used interchangeably, but in order to clarify the discussion topic, there must be some distinction. Finally, the group agreed upon the definition that independence, generally, means freedom from any undue interference and integrity means having good virtues or moral uprightness. Integrity pertains to the character of the personnel involved in the criminal justice system.

B. Importance of Independence and Integrity of Criminal Justice Bodies and Personnel in the Field of Corruption Control

The group recognized that the independence and integrity of criminal justice bodies and personnel is an essential element of any anti-corruption system, since if the criminal justice system is corrupt all efforts to combat corruption are in vain. Moreover, effective investigation, prosecution and adjudication of corruption cases require citizen co-operation. Certainly, the public will not co-operate with the criminal justice system if the system cannot be trusted. In order to increase public trust in the system, justice must not only be done but must also be seen to be done.

C. Current Situations of the Independence of Criminal Justice Bodies and Personnel

The group agreed that independence of criminal justice bodies and personnel can be evident in their appointments procedures, placement systems, and working conditions, as well as whether or not they have security and independence in their budgets and resources.

While the group also agreed that in most countries independence of the various anti-corruption agencies (in terms of the appointments procedure and placement, security of tenure and autonomy in budget matters) is provided by law, often by the Constitution, in practice this is not the case. There is a possibility that much undue influence is exerted by high-ranking officials and politicians.

In Japan, Malawi, Moldova and the Philippines anti-corruption personnel, investigators, prosecutors and judges, as the case may be, are appointed by the executive but this does not pose a serious problem of independence in these countries.

In Indonesia, the problem of independence of criminal justice personnel is due to their lack of security of tenure.

In Mali, public prosecutors are not as independent as judges. Their positions are not secured. The Minister of Justice can influence their decision at any time. Moreover, they can be removed or transferred at any time without cause.

In Thailand, independence of anti-corruption agencies is guaranteed by the constitution, but there is a possibility for political interference in the selection process of the investigation authority, the National Counter Corruption Commission (NCCC).

In Cameroon, besides the lack of security of tenure, judges and prosecutors are appointed, promoted, transferred and disciplined by the executive branch. The Higher Judicial Council still needs to be given absolute independence, since for now it is presided over by the Chief Executive, who is the President of the Republic. Therefore, there is a need for a real independent judicial system separated from the Ministry of Justice.

D. Current Situations of the Integrity of Criminal Justice Bodies and Personnel

There was a general consensus that integrity of the criminal justice bodies and personnel can be perceived by transparency in the selection and promotion process, the existence of a code of conduct for criminal justice personnel, transparency in the assignment of cases and proceedings, the procedure for reviewing of decisions and the requirement of the declaration of assets and income by personnel.

The average level of integrity of criminal justice personnel in all participating countries is fair. The promotion procedure is usually based on seniority and a merit system. There are codes of conduct for criminal justice personnel in most countries. Assignment of cases is managed by the supervisors of each agency so that officials cannot select their own cases. The investigation process is usually confidentially conducted; however, when the case comes to court, public trial is the fundamental principle in all countries, subject to some exceptions such as matters of security and sensitivity (e.g. family cases, sexual offences).

In all countries, the decisions of criminal justice personnel can be reviewed by the higher officer in each organization; e.g. the chief public prosecutor and higher courts. Moreover, the separation of the investigation, prosecution and adjudication process generates a system of checks and balances.

The greatest concern regarding integrity of the criminal justice bodies and personnel is the requirement for declaration of assets and income. Only Moldova requires all public servants to disclose their assets. In most countries, this procedure only applies to high-ranking state officials, including high-ranking criminal justice personnel. Therefore the group discussed further the extension of the declaration of assets requirement to lower ranking state officials. The issue of what sort of sanctions, criminal or disciplinary, should be imposed for false declarations or failure to disclose was also canvassed and it was agreed that perhaps this would need to be tailored by each country to its own situation.

IV. MEASURES TO ENSURE SPEEDY TRIALS

A. Importance of Speedy Trials in Corruption Control

The laws in all countries guarantee the right to a speedy trial for all accused, however, the concrete measures to ensure this right in each country are different. For example, in Philippines, the case against the accused will be dismissed if his or her right to a speedy trial is violated. There is a general consensus that justice delayed is justice denied. Delayed trials also diminish public trust in the criminal justice system.

Corruption cases attract a lot of media and public attention. Therefore, if trials for corruption cases are delayed, the cases will lose much of their deterrent impact, not only the special deterrent to the actual corruptor but also the general deterrent to the would-be offender and the public as a whole.

B. Situation of Delay of Corruption Trials and Contributing Factors

Having a specialized court for corruption cases, like the Philippines, Indonesia and Thailand, contributes to speedy trial of these cases. However, there are other factors which account for the delay of trials in other

countries besides the lack of a specialized court. Also, the group noted at the beginning that simply establishing an anti-corruption court may not ensure speedy trials.

Accusatorial style of trial is the prevailing system in most countries. However, in the Supreme Court Criminal Division for Persons Holding Political Position of Thailand, inquisitorial trial is used. Regarding the accusatorial trial, trial delay can be caused by the court, the public prosecutor or the defence counsel.

In most countries, the courts are overburdened. In Cameroon, Malawi and Thailand, judges have to record witnesses' testimony by themselves, either by handwriting or tape-recording respectively. This procedure causes an unnecessary delay. Trials in Cameroon, Mali and Malawi are prolonged partly due to the fact that witnesses sometimes do not speak the official language of the court. Therefore, translation is required. In this context, insufficient resources of the court can delay the trial as well.

Unlike the Philippines, there is no time limit for concluding a trial in the law of Cameroon, Indonesia, Mali, Malawi, Moldova, Thailand and Japan. Alternatively, Indonesia sets a time limit for detention during trial. This restriction, in practice, encourages the judge to conclude the case within the detention time limit.

Effective accusatorial trial requires judges to fulfill the role of competent passive referee. The judge shall be armed with the full knowledge of the rules of evidence and other related legislation. If judges are not well-trained, they cannot control the procedure. Also, in this system, the prosecution has the burden of proving all elements of crime beyond a reasonable doubt, which is a very demanding task, especially in very complex, high profile corruption cases. Proving such cases requires both reliable witnesses and a large quantity of documents. This will inevitably extend the time period of the trial.

Trial delay by the defence counsel is inevitable if one counsel handles many cases at the same time. Also the defence counsels sometimes bring applications for adjournment based on flimsy reasons or raise endless objections aimed at delaying the hearing of cases.

Japan, the Philippines and Thailand have adopted pre-trial conference/arrangement procedures in which before the trial, judge, prosecutor and defence counsel will try to narrow down the issues that must be proven by witness testimony or other evidence. Also, this procedure requires both parties to disclose its evidence to one another, to ensure that there will be no surprises during the trial and to fix the trial period. Obviously, this procedure can speed up trial in those countries.

Even though Cameroon and Moldova have not yet adopted the pre-trial conference procedures, their laws provide the defence counsel access to the prosecution evidence before and during the trial.

Discussed above are factors that account for trial delay in many countries. However, there are some causes specific to each country. For example, in Japan, trial delay is partly due to the expectation of the public that conducting a trial is a process to find the whole truth. Therefore, the prosecution sometimes asks the witness to testify in too much detail to facts related to elements of the crime.

C. Measures to Ensure Speedy Trials

The group discussed five measures to ensure speedy trials for corruption cases.

1. Specialized Court or Division for Corruption Cases

The advantage of the establishment of a specialized court or division is that the presiding judge will devote more time to corruption cases, and through consistent practice, gain the experience necessary to speed up trials, as well as conduct efficient proceedings.

Specialized courts may adopt special procedures which are not used in ordinary court, such as strengthening the effects of the judges' order.

However, the participants did not reach a consensus on this issue, as it was also argued that the designation of special courts will raise new issues of independence. Moreover, it was noted that the existing courts have more fundamental issues like manpower and resource problems to grapple with before the consideration of specialized courts.

2. Pre-trial Conference/Arrangement/Meeting

Pre-trial conferences involving prosecutors, defence attorneys and the judge, to discuss/determine issues involved in the particular case and agree on lines of argument to be pursued, may speed up the trial process. For this procedure to be effectively applied, it is necessary for all the parties to understand the issues involved and also to take steps to avoid its abuse.

3. Limitation of Trial Duration

It may be necessary to set a trial time limit in law or judicial regulation and to establish effective procedures for self-monitoring of the operation and productivity of judges. This will improve accountability in the system and enhance speedy trials. Furthermore, it is recommended that trial judges should endeavour to conclude all trials of corruption cases within a reasonable time period, prescribed by law or regulation. However, in view of inherent variations in the complexity of cases and the different situation of each country, the presiding judge should submit a report to the supervisor for cases exceeding the relevant period, to explain the underlying circumstances of the case and the reasons for the delay.

4. Training for Judges

Periodic group training courses may be required to update judges' knowledge and to share their experiences of trends in corruption cases, and the necessary legal and procedural adjustments for efficient and speedy trial of these cases. Such training courses will also enable each judge involved to identify when and how to intervene to minimize delays that could arise due to defence dilatory tactics.

5. Modernization of Judicial Proceedings

It is necessary that trial courts keep abreast of developments in information technology and acquire the necessary equipment, such as digital video recording, to improve the speed and accuracy of the documentation of trials.

V. EFFECTIVE AND APPROPRIATE SANCTIONS

A. Sanctions for Corruption Practices in Each Country

1. Criminal Sanctions

Criminal sanctions for corruption cases principally comprise the death penalty, imprisonment, fine, suspension of sentence, forfeiture and/or confiscation of assets and costs. Imprisonment terms may include life imprisonment.

2. Accessory Penalties

On the other hand, accessory or collateral sanctions may include dismissal from service, suspension or disqualification from holding public office, forfeiture of benefits from government service, public censure and civil interdiction.

3. Administrative/Disciplinary Sanctions

A guilty public servant may also be dealt with by administrative sanctions in the form of dismissal or suspension from service, reprimand, admonition, reduction of salary, demotion, forced retirement, payment of fine and forfeiture of benefits.

Unlike other countries, in the Philippines and Thailand, an administrative case for corruption pending before an administrative agency or disciplining authority may proceed separately and distinctly from the criminal action, so that the public official may be terminated from service in the administrative action irrespective of the outcome of the criminal case and even if the same is the acquittal of the accused.

B. Effective and Appropriate Sanctions for Corruption Offences

The UNCAC provision sheds light on the matter of determining whether or not the impossible penalties in corruption cases are effective and appropriate, stating for this purpose that sentences in corruption cases should be proportionate to the crime committed and deterrent enough to send a message to other would-be offenders.

Members of the group unconditionally acceded that the impossible penalty for corruption cases does not

really matter. What counts most is whether or not the enforcement of the law on the matter carries with it the necessary impact and desired deterrent effect upon the conscience, emotion and perception of public servants and of the general public as well. However, an effective enforcement of the law would also mean, and it presupposes, an efficient and effective prosecution and adjudication or trial of the case. It is humbly submitted that this formula creates a real deterrent effect in fighting corruption. However, results may vary in every jurisdiction depending on how they address or manage the situation.

On the other hand, Japan is viewed as relatively lenient in imposing sentences on corrupt individuals. However, non-criminal sanctions must also be taken into consideration as the effects are far more exacting in nature, such as outright loss of the offender's job, and public humiliation, a consequence which may even render reintegration to the community almost a fantasy.

C. Sentencing Guideline

The inconsistency of judges in the imposition of penalties within their respective jurisdictions poses a threat in the effective enforcement of the law, which in turn weakens the deterrent effect thereof. For a similar crime committed, one judge may impose the penalty of imprisonment, while other judges may impose a lesser punishment, after taking into consideration some mitigating circumstances, and some could possibly order the suspension of the sentence. Notably, the inconsistency in sentencing may indicate to the public that offenders are punished by chance or that they are at the mercy of the hearing magistrate and are not punished on the gravity or merit of the case.

None of the participating countries has formally and officially adopted a sentencing guideline to ensure uniformity and promote a sentencing pattern. Accordingly, a sentencing guideline may be adopted, most probably promulgated by the highest court that exercises administrative supervision and control over the subordinate courts nationwide. A legislative action on the matter is not necessary as the administrative action is more convenient, expedient and practical.

It is therefore recommended that the sentencing guideline shall provide for the minimum sentence imposable for the crime committed as well as an incentive for an accused to plead guilty and voluntarily cooperate with and provide material information and evidence for the prosecution to indict other accused. In this manner, it is earnestly expected that more perpetrators, while being held accountable for their own acts, are at the same time very likely to be encouraged to participate in the effective and efficient prosecution of the case.

In the meantime, the group highly recommends the courts to maintain a database of judgments promulgated to serve as a ready reference for future sentencing of the same offence and to further ensure uniformity in sentencing the offence.

D. Amnesty of Offenders

Generally, amnesty of offenders in corruption cases is frowned upon considering the gravity and nature of the offence and the possibility of reducing the impact or deterrent effect of anti-corruption laws. It is further considered that if corruption is a serious problem in a country, it is not the right time to propose the rehabilitation and/or amnesty of offenders; rather it is time for deterrence. Corruption is an act of serious breach of the trust of the state. Offenders have already lost their personal integrity by committing such nefarious acts.

However, there will come a certain point when the prevailing circumstances would suggest the grant of an amnesty. There is no hard and fast rule to determine the exact situation but the proper authorities may exercise their sound discretion to recommend the grant of amnesty as well as the procedure and requirements thereof.

VI. RAISING PUBLIC AWARENESS AND OTHER PREVENTIVE MEASURES

A. Importance of Public Awareness of Corruption

It is a widely accepted principle that sovereignty resides in the people so that all powers of the government emanate from them. This is also the reason why the people take interest in the government. The government is believed by the people to be mandated to protect and serve their general welfare.

In this light, the general public is concerned about the propriety and efficiency of the performance of each government official or employee. Every misfeasance, nonfeasance and malfeasance in the discharge of their respective functions constitutes a breach of its mandate. Corruption in the government, particularly in the administration of justice, disrupts economic development and social advancement of the people. This necessarily requires an effective preventive measure to at least control, if not eradicate, this despicable act. The collaborative effort of the entire citizenry is indeed indispensable.

B. Recommendations for Raising Public Awareness and Other Preventive Measures

1. Measures to Increase Public Awareness

Generally, the methods used in promoting public awareness include *inter alia* educational programmes through tri-media intervention; access and education through computers and other electronic gadgets; training, workshops, seminars or focus group discussions; poster-making, debate, slogan-making, etc. contests; and gathering members of various non-government organizations and other civic groups to strengthen their active roles as close observers of the system.

The indispensable role of tri-media in information dissemination and education is beyond controversy. It may include related discussions on the television, opinion columns in the newspapers and commentary programmes on the radio. Media has been considered the bridge of the government in reaching out to its people and the nation's voice to redress its grievance with the government.

Noticeably, the sensationalized nature of the reporting of corruption cases contributes to the campaigns against corruption. In most countries, creative advertisements are broadcast on television and radio and printed in the newspapers, ensuring almost blanket coverage of the issue. It was also suggested that new devices should be introduced in order to reach people in remote areas.

Use of technology is a popular mode of information dissemination and education nowadays. Most countries have adopted it as lawful means of sending or filing complaints regarding corruption offences. In the same manner, the Internet is a source of access for the general public regarding anti-corruption laws, campaigns and other pertinent information.

Training and seminars can be used as a way of preventing corruption. It may include appropriate lectures for judges, law enforcers, prosecutors, lawyers, court staff and other key players in the criminal justice system. The goal is not only to enhance their efficiency but also to widen and strengthen their capability in fighting corruption within their own houses.

During the discussion, it appeared that in Moldova, the Philippines and Thailand, students from all levels are also involved in the anti-corruption campaign and actively participate in related activities and prize contests. Young students are malleable and can be molded into responsible and honest citizens who can grow into future leaders of the people.

In a country that is ruled by the people, the emergence of anti-corruption groups is very likely. They serve as watchdogs over the acts and performance of public servants, especially those in elected offices. It is good that civil society takes its own initiative in carrying out anti-corruption campaigns through various activities and ultimately promotes public awareness thereof. In this manner, not only are the people provided with necessary information, they are also encouraged to take a stand and collaborate with other organizations for the same cause.

2. Preventive Measures

Most commonly, a public servant is bound by certain laws, rules and regulations in the conduct of its official functions. This includes prohibition of certain acts. The group recommends that restrictive provisions applicable to civil servants should not only be restrictive in nature, but must also be preventive in character. Hence, a review of the procedural and administrative laws must be undertaken as the need arises.

In the Philippines, there is a Standard Code of Conduct applicable to all government officials and employees, aside from the ethical standards applicable to members of the judiciary and lawyers. On the other hand, in other countries, such Code of Conduct is not uniformly applied to all public officials and

employees. In Thailand, the Code of Conduct for public officials is under the drafting stage in view of the recent advent of their constitution.

A random efficiency and integrity audit in all government offices is recommended by the group. This has been done in the Philippines and has had a substantial impact upon the entire bureaucracy.

Complainants in corruption cases are more often reluctant to file formal complaints and much more to testify thereon. In the Philippines, the anti-corruption authorities take appropriate action and dispose anonymous complaints by all legal means. The public official or employee concerned are furnished with a copy of the complaint and directed to submit his/her comment thereon. The authority resolves the matter based on the merits of the case and evidence on record.

Thailand adopts a money reward system as a positive motivation for key players in the criminal justice system to prevent them from engaging in any corrupt act and to resist accepting bribe that may be offered by offenders.

There is a need to improve transparency in the procurement processes of all countries. Monitoring and reporting schemes must be established.

It has also been proven in most of the countries that the declaration of assets is an effective investigative method and would more likely yield a successful prosecution of corruption offences. In some countries, the liabilities of the public servant concerned are also declared. Most participants recommend that the declaration should be applied to all public servants regardless of their rank and the nature of their appointment into office.

A zero tolerance policy in investigating, prosecuting and adjudicating corruption cases is ideal and is considered by the group a mandatory guiding principle in dealing with corruption cases to create the desired impact or deterrent effect. Under this policy, everyone must stand on an equal plane. The policy, however, requires a strong political will.

It is recommended that a job rotation policy, especially for positions with implications for financial and budgetary concerns be adopted. Imposing a fixed period for a specific assignment and then rotation or transfer to another assignment would prevent the civil servant concerned from exercising monopoly and would therefore help to prevent temptation.

Corruption, basically, has a systemic character, its resources being concealed even at the level of legislative acts. In other words, corruption becomes even more dangerous when it is based on an evasive, confusing or underdeveloped legal framework. Efficient combating of corruption is impossible without preliminary cleaning of the legal framework by removal of all norms that generate corruption and raise the probability of corrupt acts. In this sense, a specific and an especially important action is the analysis of the degree of corruptibility of drafts of legal acts. This procedure was successfully introduced in the Republic of Moldova, being among the few countries to have such a practice.

We can also mention the assessment of corruption risk within institutions, as a preventive mechanism, as used in the Republic of Moldova.

It is also important for parents to start educating their children on how to be responsible and law-abiding citizens. Family is the fundamental unit of the society and parents must take advantage of molding their children with sound moral values. There is a need for a mental overhaul concerning the general public. While advocating for an increase in salary, low remuneration shall not be interposed as a valid excuse in committing corrupt acts. This psychological approach of preventing corruption stems out from the principle that corruption has no place in an environment of honesty and integrity.

VII. GENERAL RECOMMENDATIONS

Diseases happen everywhere, but humans still try to devise prevention and cure. The problem of corruption is much the same. By preventing and correcting mistakes we lead to change.

In its final discussion, the group came up with five general recommendations regarding the main themes of this course, as follows.

1. Fighting corruption requires the unconditional commitment of the political leadership. This is particularly important where corruption has spread among the political elite;
2. There is need for proper national legislation, an independent and efficient criminal justice system and appropriate and comprehensive policies of various aspects, focusing especially on creating public awareness of the evil of corruption;
3. Effective deterrence of corruption can be ensured only through effective investigation, prosecution and adjudication;
4. Building a culture that is averse to corruption is central to the integrity of both the private and the public sectors;
5. Corruption is not a problem limited to a single country, but a global problem which requires strong co-operation among the various countries in order to combat it. The challenge facing the international community is to ensure that the UNCAC does not remain a mere aspiration but becomes an efficient functioning instrument; member countries should domesticate these principles through an enabling act. In addition, making some optional offences mandatory would enhance international mutual legal assistance.

APPENDIX

COMMEMORATIVE PHOTOGRAPH

- *137th International Training Course*
 - *Tenth International Training Course on the Criminal Justice Response to Corruption*
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UNAFEI

The 137th International Training Course



Left to Right:

Above:

Mr. Ang (Singapore), Prof. Yamada

4th Row:

Ms. Shibuki (Staff), Ms. Tomita (Staff), Mr. Matsumoto (Chef), Mr. Iwakami (Staff), Mr. Nakayasu (Staff), Mr. Takagi (Staff), Mr. Kitada (Staff), Mr. Yamagami (Staff), Mr. Kosaka (Staff), Mr. Shirakawa (Staff)

3rd Row:

Ms. Tsuruoka (Staff), Mr. Shimizu (Japan), Mr. Nakamoto (Japan), Mr. Hashimoto (Japan), Mr. Yokoyama (Japan), Mr. Soenarto (Indonesia), Mr. Jayasuriya (Sri Lanka), Mr. Iizuka (Japan), Ms. Ono (JICA), Ms. Ota (Staff), Ms. Hosoe (Staff)

2nd Row:

Mr. Matsuoka (Japan), Mr. Labador (Philippines), Mr. Navarro (Panama), Mr. Abani (Niger), Mr. Chalunda (Malawi), Mr. Penalzoa (Mexico), Ms. Sudti-autasilp (Thailand), Mr. Mokone (Botswana), Ms. Tangsiri (Thailand), Ms. Correa (Brazil), Ms. Singh (South Africa), Mr. Hendradi (Indonesia)

1st Row:

Mr. Cornell (L.A.), Mr. Kawabe (Staff), Prof. Ishihara, Prof. Sugiyama, Prof. Tatsuya, Prof. Oshino, Mr. Pelletier (USA), Director Aizawa, Mr. Vlogaert (EU: Belgium), Deputy Director Seto, Prof. Naito, Prof. Kamano, Prof. Sugano, Mr. Fujii (Staff), Mr. Nakasuga (Staff)