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**Reports of the Seminar**

# 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. 77.

This volume contains the work produced in the 138th International Senior Seminar which was conducted from 17 January to 15 February 2008. The main theme of the 138th Seminar was "Effective Legal and Practical Measures for Combating Corruption: A Criminal Justice Response".

Corruption poses a serious threat to the stability and security of societies, particularly when corrupt practices prevail in the public sphere. Illegal diversion of scarce resources adversely affects the quality and quantity of basic services provided to citizens, and jeopardizes a State's sustainable economic, social and political development. It discourages economic investment, and breeds feelings of distrust and unfairness towards the public authorities and amongst private businesses. In short, corruption undermines the values of democracy, justice and the rule of law, and may ultimately disrupt the foundation of a State.

Globalization in the commercial sphere has brought about the internationalization of corruption, thus making the problem even more complex. Bearing in mind the enormous negative impact of corruption and its increasing transnational aspects, the international community recognizes the importance of tackling this phenomenon collectively at an international level. Since the mid-1990s, several multilateral instruments against corruption have been adopted, the most important being the adoption on 31 October 2003 by the UN General Assembly of the United Nations Convention against Corruption (hereinafter referred to as "UNCAC" or the "Convention"), whereby setting a new benchmark for this global issue. The UNCAC entered into force on 14 December 2005 and as of February 2009, more than 130 states have become parties to the Convention and many others are going through the ratification process. In addition, mindful of the links between transnational organized groups and corruption, corruption provisions were stipulated in the United Nations Convention against Transnational Organized Crime adopted in November 2000.

Needless to say, the role of the criminal justice system is crucial in the fight against corruption. Successful detection, investigation, prosecution, adjudication and punishment of corrupt offenders contributes greatly to the prevention and eradication of corruption. Also, suppression from the financial point of view, through depriving the offenders completely of crime proceeds by means of confiscation, is necessary and quite effective as a deterrent.

However, these are not easy tasks to accomplish. First, corruption is normally committed by a very limited number of consensual parties to their mutual satisfaction. Therefore, it is very difficult for the criminal justice authorities to obtain information on corruption allegations and to investigate them. Second, since those involved in corruption are often powerful, for example, high-ranking officials, politicians or rich businessmen, and frequently try to jeopardize criminal proceedings by using their influence to tamper with witnesses and evidence, or bribe, or put pressure on, criminal justice personnel. Third, as corruption and subsequent laundering of proceeds frequently involve sophisticated methods to disguise illegal transactions, it is necessary to have highly skilled investigators to identify, trace, freeze and confiscate the crime proceeds. Fourth, increased transnational elements in corrupt practices and subsequent laundering of crime proceeds have made these tasks more complex and difficult, due to national laws not being updated, jurisdictional problems and the differences in the criminal justice systems and legislation.

In this regard, the UNCAC introduces a comprehensive set of standards, measures and rules that States Parties can apply to strengthen the legal and regulatory regimes to fight corruption. Once the measures stipulated in the Convention are fully implemented, criminal justice authorities will be empowered with useful legal weapons to detect, investigate, prosecute, adjudicate and

punish corrupt offenders and to confiscate illegal benefits and return them to their legitimate owners. In addition, where there is an international element, international co-operation between States Parties will be enhanced. This should make it much more difficult for offenders to take advantage of the difficulties inherent in the investigation, prosecution, etc. of cases involving several jurisdictions.

UNAFEI, as a regional institute of the United Nations Crime Prevention and Criminal Justice Programme Network, decided to hold this Seminar in order to review each country's criminal justice system, and explore how it could be strengthened, with special attention to the UNCAC.

In this issue, in regard to the 138th Seminar, papers contributed by visiting experts, selected individual presentation papers from among the participants, and the Reports of the Seminar are published. I regret that not all the papers submitted by the Seminar participants could be 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. 77, Ms. Grace Lord.

March 2009

Keiichi Aizawa
Director of UNAFEI

# RESOURCE MATERIAL SERIES
# NO. 77

Work Product of the 138th International Senior Seminar

"EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE"

**UNAFEI**

# VISITING EXPERTS' PAPERS

## COMBATING CORRUPTION IN HONG KONG

*Jeremy Lo Kwok-chung**

### I. INTRODUCTION

**A. The Era of Abuse**

Before 1974, Hong Kong was plagued with corruption. It was endemic within the police and other disciplined services. It existed within all departments of the government as well as in commerce and industry. The people of Hong Kong were rightly angered by what they saw: a corrupt society that strangled free enterprise and made a mockery of government and what it stood for.

**B. The Public Outcry**

The last straw came in 1973 when a senior police officer named Peter Godber, who had been under investigation by the police anti-corruption branch for corruption, fled Hong Kong by abusing his senior position in the police force. A Commission of Enquiry under the chairmanship of Mr. Justice Alistair Blair-Kerr was established to investigate the Godber incident, recommending that the task of investigating corruption be removed from the police and put into the hands of an independent agency.

**C. The Inception of the ICAC**

The Independent Commission Against Corruption (ICAC) was formed as a consequence. Its mandate was clear: to investigate and pursue corruption wherever it existed and to bring the corrupt to justice regardless of the amounts involved or the personalities or social standing of the perpetrators and to investigate corruption independently of, and unfettered by, any regulatory ties to government. By virtue of its establishing legislation the ICAC is only answerable to the Chief Executive of the Hong Kong Special Administrative Region.

**D. Anti-Corruption Laws**

It was realized at the outset that to make corruption a high-risk crime and to confer the necessary powers of investigation essential for fighting corruption, strong and effective legislation was required. This legislation, in the form of the Independent Commission Against Corruption Ordinance and the Prevention of Bribery Ordinance, achieved those objectives. The ICAC Ordinance established the organizational infrastructure of the ICAC and the Prevention of Bribery Ordinance defined the various crimes of corruption and established ICAC's powers of investigation.

**E. The Three-Pronged Approach**

The Commission of Enquiry recognized that corruption was not simply a crime to be investigated but an ideology that needed to be eradicated from society. Consequentially the fight against corruption was not limited to investigation and prosecution, but encompassed a systematic strategy of prevention and education.

The ICAC Ordinance stipulates the duties of the ICAC to receive and consider complaints alleging corrupt practices and to investigate offences described in section 12 of the ICAC Ordinance. This became the basis for the formation of the Operations Department. The Ordinance further empowered our Commissioner to examine the practices and procedures of government departments and public bodies to prevent corruption, which has become the core function of our Corruption Prevention Department. The third prong of the Commission, known as the Community Relations Department, performs the duty of

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educating the public against the evils of corruption and enlisting public support in combating corruption.

1. The Role of the Operations Department

The Operations Department enforces the anti-corruption laws by committing modern, sophisticated resources and dedicated, highly trained investigators to rooting out criminal corruption and bringing the perpetrators to justice. This process itself indirectly fosters corruption awareness among the community at large through consequent publicity in the news media. But the Operations Department also plays a more direct and proactive role in promoting alertness to the dangers of corruption in specific areas of both the public and private sectors.

2. The Philosophy of the Corruption Prevention Department

The Corruption Prevention Department of the ICAC has a statutory responsibility to minimize opportunities for corruption in both the government departments and public bodies. This is done primarily through conducting assignment studies to examine the relevant practice and work procedures of government departments and public bodies, to revise their work methods if they are conducive to corruption, and to make recommendations against abuse.

*(i) Procedural Simplicity*

Providers of public services are advised to adopt the simplest procedures possible for processing applications for their services. They are also advised to adopt the clearest criteria possible to determine approval or otherwise. The purpose is to reduce queuing time and to minimize human discretion, therefore taking away the incentive to bribe.

*(ii) Transparency*

The public must be informed of their rights to service and the ways and means to lodge a complaint if they are not satisfied with the service they get.

*(iii) Accountability*

The system should enable each public officer to be held accountable for what he or she does at work or for his or her omissions.

The Corruption Prevention Department adopts a 'partnership approach' with government departments and public bodies, and would advise them to install within their organizations a "Corruption Prevention Review Mechanism" to conduct regular reviews covering procurement or licensing matters, or other operational procedures. Client departments are also encouraged to set up an "Integrity Steering Committee" to look into matters pertaining to the integrity of staff. The Integrity Steering Committees have worked very well, especially in the Disciplined Services Departments, including the Police and Customs. They promote a healthy life-style and help their staff to handle financial matters, including cases of serious indebtedness. They have contributed to a decline in complaints against the public sector.

The Corruption Prevention Department also provides consultative services to the Government for the formulation of new legislation, policies and procedures to ensure that corruption prevention safeguards are built in at an early stage. Furthermore, it acts as an adviser to the Civil Service Bureau of the Hong Kong Government in the compilation and review of the Hong Kong Civil Service Regulations.

The Civil Service Regulations require all government officials to maintain a high level of integrity. Civil servants are required to observe a Code of Conduct. There are strict regulations restricting the acceptance of gifts or loans. All government officials are required to declare their investments on their first appointment to the Civil Service. On assignment to a senior or sensitive post, an officer may be required to update his or her declarations on a regular basis. Investment restrictions are also imposed on the holders of certain positions to avoid possible conflicts of interest. Public officers are not allowed to use confidential or unpublished information obtained in their official capacity to make profits. Failure to meet these requirements will render an officer liable to disciplinary action, dismissal from the service, and, in serious cases, criminal proceedings.

3. Function of the Community Relations Department

The Community Relations Department, the third constituent department of the ICAC, is vested with the

responsibilities of:

(i) educating the public against the evils of corruption; and
(ii) enlisting and fostering public support in combating corruption.

The public sector does not survive on its own, separate from the community. Public sector integrity can be established and sustained only if the general public demand, treasure and support a probity culture for the public sector and also for themselves. The Community Relations Department's work programme to educate the broader public and the Commission's task to strengthen public sector integrity are, therefore, mutually reinforcing.

Public education aside, the Community Relations Department also makes dedicated efforts to help enhance integrity in the public sector. Such efforts include:

(i) Developing Codes of Conduct for government officials and staff of public bodies;
(ii) Conducting "experience-sharing sessions" using real-life cases to illustrate how public officers in their everyday work may come across corruption pitfalls;
(iii) Introducing an "Ethics Officer Programme" to government departments and public bodies, whereby a senior officer in each organization will be assigned as an Ethics Officer to plan and oversee anti-corruption strategies for the organization. Regular meetings are arranged for Ethics Officers from different organizations to discuss ethical management issues.

**F. The Success of the Three-Pronged Strategy**

The ICAC's work on enforcement, prevention and education are complimentary to each other. Practical experience gained from the investigation and detection of significant cases are carefully studied and analysed. The results are used not only to construct preventive measures for the relevant organizations; representative cases are also turned into action drama series. To date, the ICAC has, in collaboration with a TV station, produced 13 series of action-packed anti-corruption stories broadcast to millions of viewers in Hong Kong and abroad.

**G. The Down Side**

Whilst the establishment of ICAC was seen as a positive step to strike hard against a corrupt society, there were strong feelings of apprehension towards ICAC from within the government departments, particularly the then Royal Hong Kong Police Force. Syndicated corruption in the police, especially at middle and junior ranks, was entrenched. With numerous police officers being arrested on a regular basis, friction between the police and ICAC became critical. At one time, it reached a crisis point: in 1977, following the successful smashing of a drug cartel which operated from a fruit market under the protection of a large number of corrupt police officers, about a hundred members of the police force stormed the ICAC headquarters in an attempt to intimidate its officers and to disrupt its work. The successful ICAC operation and the subsequent storming of the ICAC offices clearly showed the level of entrenched corruption within the government. The incident shocked the entire community. The then Governor of Hong Kong decided to declare a partial amnesty against all corruption offences that pre-dated 1 January 1977.

**H. Corruption in the '80s**

Despite the setback brought about by the amnesty, the determination to eradicate syndicated corruption from within the government continued, but during the early years, it was far from the only priority. The early eighties witnessed the Hong Kong economy fluctuating considerably. These changes of fortune gave root to various banking and private sector corruption scandals, some of which have become infamous in the history of Hong Kong. One such investigation, namely the *Carrian* case, was pivotal to the introduction of much stricter systems of regulation within the banking industry. Another investigation, namely the *Overseas Trust Bank (OTB)* case, exposed one of Asia's largest-ever syndicated cheque kiting frauds. Corruption, it was said in those days, was the oil that lubricated the engines of business. The OTB case was a clear example of how corruption and cronyism came together to allow this scam to take place. A cheque kiting scheme disclosed that at one stage cheques worth over HK$500 million were in circulation; this should have been impossible by even the most basic of banking compliance standards. It was, however, made possible through the forming of close, dubious and corrupt associations with senior officials of the bank.

In the late 1980s another scandal hit Hong Kong. The Deputy Director of Public Prosecutions (DDPP) was arrested and later convicted of corruption. The investigation was extremely scandalous. Ironically, the DDPP used to sanction ICAC investigations for prosecution. In the investigation against the DDPP, the ICAC had to obtain legal support and advice from private practice lawyers. The case effectively endorsed the true independence of the ICAC.

**I. Corruption in the '90s**

Corruption by its nature is a secretive crime and therefore its investigation, of necessity, needs to be secret. In the '90s, one case, which involved the smuggling of several hundred million dollars worth of contraband cigarettes, was made possible through the corrupt connivance of a former member of the Hong Kong Customs and Excise Department who was also a senior triad office bearer. The case in question went on to reveal a complex smuggling syndicate that was run from Hong Kong and involved Singapore, the Philippines, Taiwan and mainland China. This case also illustrated the significant overlap that can occur between public and private sector corruption. Contraband goods could not have been generated without the corrupt support of senior members of a leading tobacco company and the corrupt complicity of the triad Customs officer. While this case was under investigation, a principal witness was murdered in Singapore in what was a classic triad killing designed to frighten away other potential witnesses. Despite these setbacks, the ICAC successfully smashed the syndicate and convicted several members of the syndicate and corrupt officials from the tobacco company for offences of corruption, perversion and conspiracy to murder.

**J. Independence**

The establishment of the ICAC in Hong Kong signified a new revolution in combating corruption. It established a role model that has been used by many jurisdictions. The early turbulent years were a steep learning curve, both ethically and ideologically, for all sectors of Hong Kong society, and practically, for the ICAC itself. The ICAC is a forward-looking organization and corruption today poses as great a threat as it did back in the early 1970s. What has changed is the nature and form of corruption.

The ICAC is an independent agency separated from the rest of the government, which means that we are free from any interference by the government or anybody else in conducting our investigations. This is absolutely true and absolutely essential. In my 28 years' service I have never come across or heard of any undue interference from whatever quarters in our operations. Provided there is reasonable suspicion, we will investigate any person or organization without fear or prejudice. This statutory obligation is written into our constitution. Nor can anyone order us to stop an investigation. Once it is commenced, the full investigative process must be conducted.

## II. THE NATURE OF CORRUPTION IN HONG KONG

**A. Anti-Corruption Laws**

Hong Kong differs from many jurisdictions in that its principal anti-corruption legislation – the Prevention of Bribery Ordinance (POBO) – not only proscribes corruption in the public sector, but in the business sector as well. Hong Kong is a major international centre for commerce and finance, and it is vital that business interests should not be adversely affected by corruption. The law ensures that those who wish to avail themselves of the commercial advantages that Hong Kong has to offer are able to do so on a level playing field, protected by provisions similar to those aimed at ensuring clean government.

**B. Public Sector Corruption**

The most common public sector corruption offence, under Section 4 of the POBO, concerns government officials and non-government public officers unlawfully soliciting or accepting advantages in return for performing or abstaining from performing their official duties (transactions in which both the official and the person offering the advantage are liable).

**C. Private Sector Corruption**

Corruption in the private sector is, in the main, proscribed by Section 9 of the POBO, which provides that an agent (that is to say, someone acting for or on behalf of another – usually, but not always, an employee), who, without his principal's consent, solicits or accepts an advantage in connection with his principal's affairs, commits an offence. As with the Section 4 offence, both the offeror and acceptor are liable. A typical example of the Section 9 offence is that of a bank officer who grants a loan to a client in return for a secret

kickback from the client, say ten percent of the value of the loan. It is this type of scenario that frequently leads ICAC investigators beyond the parameters of criminal corruption into the area of commercial fraud. Throughout its thirty-four year history, the ICAC has investigated and brought to court numerous cases of corruption-related fraud. A close look at the ICAC's Operations Department provides some insight into the strategies and resources deployed by the Commission in tackling both public and private sector corruption and related crime.

## III. THE PROCESS OF INVESTIGATION

### A. Corruption Reports

Members of the public who wish to report corruption may do so in person, either at the ICAC's headquarters or at one of its regional offices situated at convenient locations throughout Hong Kong. Alternatively, they may make reports by telephone, letter or e-mail. Whatever the means of reporting, all reports are considered daily by the Operations Department directorate. Those which fall within the ICAC's purview and appear suitable for investigation are allocated to Investigating Sections. Once an investigation has commenced, it can only be terminated in one of two ways: either by prosecution under the authority of the Department of Justice after legal advice, or with the agreement of the Operations Review Committee on the basis that no further investigative action is warranted.

### B. An Oversight – The Operations Review Committee

The Operations Review Committee (ORC) is one of four advisory committees with responsibility for overseeing various aspects of ICAC work. The ORC presently comprises 17 members, including the Chairman. Four of these are *ex-officio* members – the Commissioner of the ICAC, the Commissioner of Police, the Secretary for Justice and the Director of Administration (a central Government officer). The remainder, including the Chairman, are prominent members of the community appointed by the Chief Executive from a variety of professional backgrounds on the basis of their undoubted integrity and sense of civic responsibility. The Committee, which meets approximately every six weeks, reviews all completed cases, as well as ongoing investigations, with particular reference to the use of resources and the exercise of special powers by the Commissioner. The Committee advises the Commissioner on matters within its purview, and may draw to the attention of the Chief Executive, on an ad hoc basis, any issues it considers appropriate. In any event, the ORC submits a full report to the Chief Executive annually on all matters within its purview.

### C. Powers of Investigation

ICAC officers can exercise a variety of powers granted under the ICACO, the POBO and other legislation. These include, but are not limited to, the power to:

- examine bank accounts;
- require a suspect to produce material for investigation;
- obtain information from the Inland Revenue Department;
- require a suspect to furnish under a statutory declaration details of assets acquired or disposed of by him or her;
- require any other person to furnish information relevant to a suspected POBO offence under a statutory declaration or on oath;
- search premises and seize evidence;
- restrain property believed to be proceeds of corruption;
- arrest and detain suspects in the Commission's detention centre (for up to 48 hours, following which they must either be charged and brought before court, or released, either on bail or unconditionally);
- require a suspect to surrender his or her travel documents pending investigation.

With the exception of the power to arrest and detain, the above powers usually require judicial authority in the form of a warrant, notice or order.

### D. Special Power of Investigation against Disproportionate Assets or Lifestyle

This paper would not be complete without mention of a controversial but especially powerful weapon in the ICAC's arsenal when investigating corrupt government officers. Even today it is possible for a corrupt civil servant, if he or she covers his or her tracks well enough, to amass an illicit fortune without leaving any evidence of its origins. Specific acts of corruption can be notoriously difficult to prove; cash bribes, for

example, cannot be traced back to the person who paid them. And so the wily government officer who has been careful to conceal the source of his or her corrupt wealth would be immune from prosecution were it not for Section 10 of the POBO. Under this provision, a government officer who possesses assets disproportionate to, or maintains a lifestyle incommensurate with, his or her official emoluments – that is to say (in simple terms) possesses or spends more than he or she has earned legitimately during his or her government service – commits an offence, unless he or she is able to explain how he or she legitimately acquired those assets or was able to maintain such a lavish lifestyle.

This offence carries a maximum penalty of 10 years' imprisonment and a HK$1,000,000 fine, and the provision has been used by the ICAC sparingly but to devastating effect over the years. Although the provision has been challenged as being inconsistent with the Hong Kong Bill of Rights (in that it places the burden of proof on the defendant rather than the prosecution), the Hong Kong Court of Appeal has ruled otherwise (*Attorney General v. Hui Kin Hong. Court of Appeal No.52 of 1995*), citing in support of that ruling the United Kingdom Privy Council ruling in the appeal case of *Mok Wei Tak v. The Queen*. And so Section 10 of the POBO remains on the statute book – an ominous deterrent and formidable instrument of justice, without which corruption in the Hong Kong Government service might well be far more serious than it is today.

## IV. SPECIALIZATION & PROFESSIONALISM

Because corruption is often committed by people who are highly educated, and the offences are invariably complicated, investigating corruption would require a high degree of professional training and specialized skill. As we all know, corruption is a secretive crime, and we need a good intelligence-gathering system. Let us take a look at the establishment of the Operations Department where we can find a number of specialized units providing operational support to our frontline investigators.

### A. The Surveillance Unit

We put considerable resources into our surveillance capability (H Group) which account for about 10% of our total investigative resources. Our dedicated and powerful surveillance unit has played a very important role in many of our successful operations.

### B. The Technical Support Unit

Apart from the surveillance team, our technical support unit also plays a very important role in the collection of crucial evidence in most of our cases.

### C. The Witness Protection and Firearms Unit

This unit is mainly responsible for the centralized planning, administration and implementation of all witness protection programmes. Selected officers are trained to carry firearms and learn breaching techniques for assisting other officers in executing arrest and search operations.

### D. The Informants' Handling and Undercover Operations Unit

The officers of this unit are assigned to potential informants or casual contacts in the active collection of intelligence in identified corruption-prone areas. In order to collect evidence, they will be deployed as undercover agents for infiltrating criminal syndicates.

### E. The Central Intelligence Unit

This unit provides strategic and tactical intelligence analysis in support of covert operations conducted by the department and they also carry out research projects to facilitate strategic analyses to probe into targeted corruption-prone areas.

### F. The Financial Investigation Unit

Because of the complexity of asset tracing and money laundering investigations, we now have a number of in-house investigative accountants who can offer professional expertise in this type of investigation.

### G. Computer Forensics Research and Development

The rapid development of Information Technology can be a very useful tool for investigation as well as for corrupt offenders. We have a specialized computer forensic and research unit to hopefully keep us one

step ahead, although we can never be sure of that.

**H. Local Partners**

We see the value of a partnership approach with other local law enforcement agencies, including the Police, Customs & Excise, and Immigration and Correctional Services. In the old days, when the ICAC arrested a government official, this might not have been welcomed by his or her head of department, who blamed the ICAC for involving the department in a scandal. If the dark days of corruption teach us anything, it is that turning a blind eye to corruption simply will not do. The problem will only grow bigger. We are pleased that heads of departments, particularly the law enforcement agencies, have changed that attitude. Indeed, many of our most successful cases originated from their complaints or as a result of joint investigations.

## V. CURRENT THREATS

What are the current threats facing the ICAC? I believe there are areas the ICAC must pay attention to. First, although we have eliminated most overt types of corruption, the conniving nature of corruption with satisfied customers unwilling to complain remains a constant challenge to us. Secondly, corruption is becoming more and more difficult to investigate. With advanced technology and global mobility, today's criminals have never had it so good, nor could they ever before so easily conceal the evidence of their crimes and their ill-gotten gains. Thirdly, organized crime has become a real threat and we must not allow its link to corruption to grow; they would make extremely dangerous allies.

## VI. AN OVERVIEW

**A. Corruption-Free**

The Hong Kong experience in building an integrity system for the public sector is essential in the history of the ICAC. The ICAC in the discharge of its duties has helped keep Hong Kong fair, just, stable and prosperous.

The US-based Heritage Foundation has rated Hong Kong as the world's freest economy for 13 consecutive years, most recently in 2007. One of the reasons for awarding this honour to Hong Kong is that the Heritage Foundation considers Hong Kong "virtually free of corruption". We would interpret this complimentary remark to mean that in our region, corruption is very much under control, and that there is no longer any syndicated corruption in our public sector.

We also believe that our probity culture has contributed to Hong Kong's sustained development and economic growth. Over the past 20 years, despite an unprecedented Asian economic crisis, Hong Kong's economy grew by an average of 5.1% in real terms, against a world growth of 3.7%.

**B. Corruption in the Private Sector**

As a law enforcement agency, we will not be complacent about our work. Looking ahead, we see the need to expend greater efforts to combat private sector corruption, which offences are also covered by the POBO. Statistics show that corruption reports involving private enterprises have also stabilized in recent years. However, as Hong Kong has evolved from a manufacturing base to a leading world financial centre, we must be able to safeguard the integrity of our securities and futures markets.

**C. Corruption Trend**

As for the public sector, we are aware that corruption is no longer confined to the traditional *quid pro quo* "bribe for favour" type of offences. Corruption in a more subtle form seems to be on the rise, namely "misconduct in public office" (MIPO).

Misconduct in public office as a common law offence has been in existence since the 18$^{th}$ century. It has all along been challenged as ill-defined, too wide in scope and lacking clarity. In Hong Kong, the first prosecution under this offence by the ICAC took place in 1998. To date, 38 public officers have been prosecuted for MIPO offences related to acceptance of advantage, resulting in 18 convictions so far.

Arising from two landmark cases respectively in 2002 and 2005, the Hong Kong Court of Final Appeal has come to a clearer definition of MIPO. Five elements are listed to constitute this offence:

- A public officer;
- In the course of or in relation to his or her public office;
- Without reasonable excuse or justification;
- Willfully misconducts himself or herself, by act or omission, for example, by willfully neglecting or failing to perform his or her duty; and
- Where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from responsibilities.

We believe the Hong Kong Court of Final Appeal has come a long way in addressing MIPO offences. The ICAC will come in as and when there is a MIPO case "connected" with corruption, even if the act of corruption cannot be proven in the context of POBO provisions. It is of course up to the ICAC and our legal advisers to prove to the court that there is corruption involved. We will keep watch on the application of the CFA's definition of MIPO and re-assess the situation in light of further experience to be gained from actual operation.

## VII. CONCLUSION

The ICAC of Hong Kong is a special force established outside and independent of the Civil Service of the Hong Kong Special Administrative Region. The Hong Kong Civil Service is faithful and efficient, and they know their job is to ensure that the people of Hong Kong may freely pursue their social, political and economic goals, or legitimate objectives as they would determine for themselves. In our view, they can be relied upon to meet the toughest challenges. Amongst other government agencies, the Hong Kong Police Force, which was the immediate reason for the birth of the ICAC, will bear testimony to both the strength and the virtue of the public service. They serve with demonstrated integrity, without fear or favour, and ICAC colleagues are gratified that over the past three decades, we have contributed to this end.

Ultimately, success in our work rests not with ICAC officials.

The key to success is community support.

# FIGHT AGAINST TRANSNATIONAL CORRUPTION AND INTERNATIONAL CO-OPERATION

*Jeremy Lo Kwok-chung**

## I. INTRODUCTION

Last year, Hong Kong celebrated the tenth anniversary of its reunification with the mainland. Like Macao, now in its ninth year, both Special Administrative Regions can proudly pronounce to the world that the "one country, two systems" philosophy is working successfully.

One example of this success is the way in which the mainland has led us in the implementation of the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC).

Today, these two international instruments assist in creating a framework of laws that enable the law enforcement fraternities to work more closely as partners in the fight against transnational corruption and crime, both of which have become defining issues of the 21st century.

In the past 20 years, technological advancement and globalization have opened up vast opportunities for the perpetration of transnational corruption and crime, particularly in the form of money laundering. Nowadays, law enforcement is facing a more complex and sophisticated challenge from criminals who have extended their activities across jurisdictional boundaries. These criminals are taking advantage of increased business activities, rapid movements of money, telecommunications and computer links. This reality is reflected in the UNTOC, and was emphasized by the former United Nations Secretary General, Mr. Kofi Annan, who said at Palermo on the occasion of the Convention being opened for signing, that "If crime crosses all borders, so must law enforcement."

Organized crime has become more and more difficult to detect as its activities operate across sovereign borders, involving multiple jurisdictions and different judicial systems. This is especially true when obtaining the evidence necessary for the prosecution of offenders. The problem is that no one single jurisdiction can act and defend alone against organized crime. There is, therefore, an urgent need to put in place international agreements between the various jurisdictions that would enable the exchange of crime information, the obtaining of evidence, the restraint and confiscation of crime proceeds, and the return of fugitives.

## II. INTERNATIONAL CO-OPERATION

International law enforcement co-operation is the key to ensuring that perpetrators of transnational crimes have zero opportunity to shun investigation and escape justice. The ICAC in Hong Kong are no strangers to such kinds of co-operation. When the ICAC was set up in 1974, many corrupt police officers, government officials and organized crime figures fled Hong Kong, taking with them much of their criminal proceeds. The case which led to the setting up of the ICAC concerned a Chief Superintendent of Police who, whilst under investigation for corruption, fled the jurisdiction to return to England. The corrupt officer was subsequently extradited back to Hong Kong to face prosecution, only after the ICAC receiving valuable assistance from the Royal Canadian Mounted Police and Interpol in gathering the necessary evidence.

However, not all the ICAC efforts were successful, as in this case. Some of its attempts have not been

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fruitful, and a number of our corrupt fugitives remain at large today. The limited mutual legal assistance arrangements available in the old days hindered our investigations. Rendition of fugitives from abroad was even more difficult. At that time, formal legal co-operation between jurisdictions was not common. The concept of mutual legal assistance was very much an idea in some jurisdictions whose time had yet to come.

In spite of such difficulties and constraints, the ICAC has, since 1974, successfully extradited back to Hong Kong 35 fugitives. In the past 20 years, the ICAC had made over 164 requests to Interpol for assistance from overseas agencies.

## III. UNCAC AND UNTOC

Let me turn to the two important Conventions. The UNCAC and the UNTOC were both ratified by the Central People's Government of China, and were extended to the Hong Kong Special Administrative Region last year. They are powerful instruments and are fundamental to the future development of an international mechanism for tackling transnational corruption and crime. Much of what we seek under the relevant provisions can be achieved by reviewing our own criminal justice systems, and, where necessary, reforming them to enable compliance.

When you read the two Conventions, you will find that they were given much thought when they were drafted. They each contain a roadmap for countries who wish to put in place a legal framework for combating transnational corruption and crime. Once implemented, these laws will improve the effectiveness of a government's enforcement efforts within its own borders and outside. The key areas on which the two Conventions made provisions are:

- Law enforcement co-operation
- Joint investigations
- Special investigation techniques
- Special provisions for witnesses
- Anti-money laundering measures
- Mutual legal assistance
- Extradition
- Training and capacity building.

In this paper, I will focus on these eight key areas and share with you the experience of the Hong Kong ICAC.

### A. Law Enforcement Co-operation

Apart from the formal setting of Mutual Legal Assistance, a vital part of the spirit of law enforcement co-operation relies on inter-agency liaison, involving, as a first step, the sharing of crime information and intelligence. This level of co-operation can be extended to assisting each other in investigations, including establishing the identity, whereabouts and activities of persons suspected to be or who have been involved in criminal activities, tracking the movement of crime proceeds, and locating the final destination and disposal of illicit monies.

In Hong Kong, the ICAC, through investigations, has come by information and intelligence concerning the activities of criminal groups operating locally as well as overseas. The International Liaison Section, whose main responsibility is to maintain close contact with our counterparts in other jurisdictions, may pass on crime information and intelligence on a confidential basis, as part of our international co-operation initiatives.

### B. Joint Investigation

An important aspect of law enforcement co-operation is joint investigation. This is where two or more jurisdictions join hands to effectively investigate cross-border crime.

Let me cite an example. In 2000, the ICAC commenced an investigation into the conduct of a Hong Kong based emigration consultant who was suspected to have formed a corrupt relationship with a member of the Australian Immigration and Multicultural Affairs Department to facilitate emigration of unqualified Hong

Kong citizens to Australia. Upon assistance from an Australian authority, the ICAC identified offences linked to the consultant and others in Hong Kong. When we were set to lay charges against the consultant, he left Hong Kong illegally to escape prosecution. Eventually, he was located and arrested in the United States of America on an international arrest warrant. Following discussions and negotiations amongst the agencies from the three jurisdictions, the consultant was extradited to Australia, instead of Hong Kong, to face prosecution for similar offences he had committed there. The offences involve corruption and offences under Australian immigration law. You will see that the assistance roles were reversed. At the beginning of the investigation, Australia rendered assistance to Hong Kong. Towards the end of the investigation, Hong Kong found itself rendering assistance to Australia. At the end of the day, it matters not who prosecuted the consultant, so long as justice was done. It is all the more important that through co-operation, investigations into transnational crime can be vigorously pursued.

**C. Special Investigation Techniques**

As law enforcement co-operation leads to joint investigations, the natural development would be the employment, where necessary and justified, of special investigation techniques. This may include the use of undercover agents drawn from law enforcement agencies of different jurisdictions who, under special arrangements, are allowed to operate in the jurisdictions as part of a joint investigative effort. The UNCAC specifically provides for the investigation of corruption offences through the use of special techniques such as controlled deliveries, electronic surveillance and undercover operations. Article 20 of the UNTOC contains a similar provision and requires parties to the Convention to enter into agreements to allow for the use of such techniques.

Special investigation techniques are crucial to effective detection of syndicated corruption and organized crime. One of the successful ICAC cases in recent times was an investigation into a syndicate involved in the sale of diplomatic passports and corruption-facilitated money laundering. The key to its success hinged on the assistance of a Russian speaking agent from the United States of America. He was invited to Hong Kong, posing as a member of the Russian mafia who was interested in purchasing genuine diplomatic passports from corrupt immigration officials and seeking the assistance of organized crime figures in Hong Kong to assist in his money laundering business. The undercover operation, aided by covert surveillance and monitoring, was extremely rewarding in infiltrating the syndicate and getting the evidence required for prosecution. After a number of legal battles at court, the ICAC was able to secure the conviction of six syndicated members for offences of conspiracy, corruption, immigration fraud, and money laundering. They included three serving officers from Hong Kong's disciplined services, an immigration official from an African country who came to Hong Kong specifically to sell his country's diplomatic passports, and two organized crime figures. All of them were sentenced to lengthy terms of imprisonment. I have to emphasize here that the syndicate had been operating for a long period of time and very little could be done by any law enforcement agencies, simply because the syndicate refused to do business with local people. It was only through the introduction of the US undercover agent that the ICAC was able to put the major syndicate players behind bars.

**D. Special Provisions for Witnesses**

Both the UNCAC and UNTOC have placed much emphasis on the need for jurisdictions to provide special measures for the protection of informants and witnesses. In bringing criminals to justice, it is necessary to encourage people to report crime, and this may require an assurance to the informant that his or her identity will not be revealed. When informants become witnesses, there should be regimes in place to cater for such witnesses, where appropriate, to testify anonymously. In the more serious and organized corruption and crime cases, there is a frequent reliance on accomplice witnesses to testify in a court of law. Any such testimony may place an accomplice witness at risk, and there is a need, for the purpose of a successful prosecution, to offer the witness sufficient protection against any threats to his or her health and well-being. A witness protection programme, appropriately staffed, funded and supported by legislation, would ensure the safety of witnesses and increase the chances of a conviction against the criminals. In Hong Kong the Witness Protection Ordinance has proven to be effective legislation in inspiring the confidence of the public and enlisting witnesses to come forward to testify for the prosecution.

**E. Anti-Money Laundering Measures**

Money laundering is acknowledged as a worldwide problem. It is linked to underlying criminal activities that generate the assets laundered, and enables criminal activities to continue. Against this background, the

UNCAC and the UNTOC require governments to put in place offence provisions to combat money laundering, and measures for the restraint and confiscation of the proceeds of crime. Bribery is considered an effective means to facilitate money laundering, and its significance cannot be overstated. Not surprisingly, both Conventions have placed heavy emphasis on the importance of having anti-money laundering legislation to ensure that effective measures are put in place to tackle the growing problem. In this context, investigative experience tells us that it is often the connections made through financial transaction records that allow hidden assets to be located, and that establish the identity of the criminals and the criminal syndicate responsible.

A starting point for any country is the 40+9 Recommendations of the Financial Action Task Force which are designed to raise awareness of money laundering within the banking and financial systems and other areas of commercial life, and to require the reporting of suspicious transactions by such institutions.

There must also be laws to provide the means within a jurisdiction for such a jurisdiction to freeze and confiscate proceeds flowing not only from crimes committed within its own borders, but also those committed in other jurisdictions. In this regard, each jurisdiction will need to consider its policy on the sharing and return of such confiscated proceeds.

**F. Mutual Legal Assistance**

Mutual legal assistance concerns the use of the legal process to gather evidence in another jurisdiction. Particularly relevant are the obtaining of depositions from witnesses and the production of documentary records, including data that may be stored on computers. Information that is confidential in nature or is subject to any form of legal protection requires the compulsive nature of the mutual legal assistance process to gain access to it. The obvious type of information that falls into this category and which is crucial to serious organized crime, money laundering, and corruption investigations, are the records of banks and financial institutions. I can tell you that in the ICAC, an enormous part of the investigators' time is spent on tracing the money trail.

In a recent mutual legal assistance case undertaken by the ICAC at the request of the Malaysian government, a search warrant was executed on the office of a certified public accountant in Hong Kong. The search had helped in identifying a convoluted process by which corrupt proceeds were laundered through Malaysia, Hong Kong and Japan en route to Switzerland. The case has illustrated that mutual legal assistance is an important mechanism through which jurisdictions can work together to effectively suppress transnational crime.

To date, Hong Kong has an active and on-going bilateral negotiation programme for the surrender of fugitive offenders and for mutual legal assistance. The Hong Kong SAR Government has signed 21 bilateral agreements on mutual legal assistance, and 16 agreements on the surrender of fugitive offenders. From the ASEAN region, these countries include Malaysia, the Philippines, and Singapore.

**G. Extradition**

In relation to extradition, Article 44(5) of the UNCAC and Article 16(4) of the UNTOC allow the Conventions to be the legal basis for extradition of offenders for offences identified within the Conventions where States Parties have not signed formal extradition treaties. That said, extradition could still be a very complicated issue. Some jurisdictions may need to be able to rationalize matters concerning dual criminality; others may be bound by their domestic laws not to extradite their own nationals. However, countries or jurisdictions must be cautious that they do not allow considerations such as these to become obstacles to their co-operative efforts in dealing with transnational criminals.

As mentioned earlier, transnational crime is a fact of life and a growing industry. While there are practical and legal difficulties, I believe that under the two Conventions, governments can ably work together towards the setting up of an effective cross border law enforcement net, which leaves no opportunities and loopholes for criminals to operate and for crime to flourish between jurisdictions.

**H. Training and Capacity Building**

Effective law enforcement requires highly skilled and professional investigators of good integrity. Training and capacity building is a vital process towards the making of such professional people. Law

enforcement officials from different jurisdictions who have the benefit of being trained together develop an understanding of each other's jurisdictions, legal constraints, enforcement problems, and at the same time exchange ideas and experiences with a view to identifying solutions to take matters forward. Such training will further foster closer working ties. The ICAC has all along been promoting such a practice and culture, and has opened up its training and command courses to law enforcement personnel from overseas. In the opposite direction, the ICAC sends its officers overseas for training and development.

The success of a cross-jurisdictional investigation is often determined by a good and usually respected inter-agency relationship. For that purpose, the ICAC regularly organizes seminars and conferences with our overseas counterparts that can be traced back to the early nineties. More recently, Hong Kong joined the Anti-Corruption Action Plan for Asia-Pacific promulgated by the Asian Development Bank and the Organization for Economic Co-operation and Development. The ICAC also represents the Hong Kong SAR Government at the Anti-Corruption and Transparency Task Force of the Asia-Pacific Economic Co-operation, better known as 'APEC'.

## IV. INTERNATIONAL AND MAINLAND LIAISON

In 1997, a section known as J4 was established in the ICAC. The J4 section deals with all operational liaison matters between the ICAC, mainland China and Macau on the one hand, and most other overseas law enforcement agencies on the other.

### A. The Mutual Case Assistance Scheme

As early as 1988, mutual agreement was reached between the ICAC and the mainland GDPP for the purpose of regulating the process by which the two agencies assist each other in operational matters, including making cross-border enquiries. In 1996, a formal agreement on a Mutual Case Assistance Scheme was signed which enables both agencies to interview witnesses, collect evidence and exchange intelligence in each other's jurisdiction. This agreement was subsequently endorsed by the Supreme People's Procuratorate, which has become a party to it. The effectiveness of this scheme is best illustrated by the following example:

1. The "*Shum Yip*" Case – A Fine Example of the Scheme

In 1998, a general manager of a mainland-funded cross-border transportation company was prosecuted for soliciting and accepting more than $11 million in bribes from Hong Kong vehicle owners for awarding mainland vehicle licenses. During court hearings, the defendant suddenly raised a line of defence which required rebuttal evidence to be obtained from a mainland company immediately. Within 24 hours, the ICAC was able to liaise with the GDPP who cleared the way for ICAC officers to collect the required evidence in Guangzhou to rebut the defence. The trial was then concluded swiftly resulting in the conviction of the defendant who was sentenced to 3 and a half years' imprisonment.

### B. International Liaison

On the international front, J4 is normally the first point of contact for overseas law enforcement agencies who seek ICAC's assistance. Regular liaison meetings are held with the Hong Kong representatives of the United States Federal Bureau of Investigation, the Royal Canadian Mounted Police and the Australian Federal Police.

### C. Visits and Conferences

The J4 section deals with most of the official visits to the ICAC by members of overseas agencies, including design of visit programmes and other logistical arrangements. It also serves as the secretariat for regional seminars and international conferences hosted by the ICAC.

### D. ICAC Anti-Corruption Newsletter

J4 is also responsible for liaison with prominent members of overseas law enforcement agencies who from time to time contribute articles to the ICAC Anti-Corruption Newsletters, which are published online at quarterly intervals. So far, nine quarterly issues have been published and apart form the major law-enforcement agencies, the following have also contributed to the ICAC Newsletter:

| Countries | Agencies |
|---|---|
| Botswana | The Office of Directorate on Corruption & Economic Crime |
| Brunei | Anti-Corruption Bureau |
| India | Central Vigilance Commission |
| Kenya | Kenya Anti-Corruption Authority |
| Malawi | Anti-Corruption Bureau |
| Malaysia | Anti-Corruption Agency |
| Nigeria | Nigerian Code of Conduct Bureau |
| Pakistan | National Accountability Bureau |
| South Africa | National Anti-Corruption Unit, South African Police |
| Swaziland | Anti-Corruption Commission |
| Tanzania | Prevention of Corruption Bureau |

## V. THREE DECADES OF EXPERIENCE IN INTERNATIONAL CO-OPERATION

In 1974, the ICAC was set up as a direct result of the escape from Hong Kong of Chief Police Superintendent Peter Godber. His eventual extradition back to Hong Kong to stand trial for corruption was the first major task of the ICAC and marked the beginning of our nearly three decades of international co-operation with overseas jurisdictions. Such international co-operation never ceases to expand in its scope and complexity.

I would like to share with you some examples of our cross-boundary investigations in which you will see the expanding scope and complexity of international co-operation at play.

### A. Cases where the Initial Information/Complaint came from Overseas Agencies

1. Australian Immigration Case

In November 2000, the ICAC received a complaint from the Department of Immigration and Multi-cultural Affairs (DIMA) of the Australian Government that a Hong Kong Migration Consultant had offered advantages to a DIMA officer for approving migration applications handled by the former. In July 2001, the Department of Justice agreed to lay charges against the Migration Consultant and a warrant for his arrest was obtained.

2. US Human Smuggling Case

In mid-1998, the Immigration & Naturalization Service (INS) of the US Government passed information to the ICAC concerning a Hong Kong citizen whom they suspected to be the head of a syndicate which had corruptly arranged for illegal immigrants from the mainland to be smuggled into the US through Hong Kong. In early 2000, following intensive enquiries which involved the co-operation of the INS and FBI, the syndicate, consisting of two US passport holders and six Hong Kong citizens, were convicted of forgery and conspiracy to defraud. They were sentenced to substantial terms of imprisonment.

### B. Cases where Overseas Agencies have rendered Assistance in ICAC Investigations

1. Fake US Bond Case

In March 2001, the ICAC arrested a US businessman and a German lawyer for corruptly obtaining credit facilities from banks by using fake US Treasury bonds and other valuable securities. The US Treasury assisted the ICAC by carrying out forensic examinations on certain valuable securities seized from the suspects. These examinations verified that they were false instruments. They eventually pleaded guilty to conspiracy to defraud and other charges.

2. Sierra Leone Immigration Case

In late 1997, a Sierra Leone immigration officer travelled to Hong Kong and solicited advantages from individuals in return for providing passports and visa facilities. He was arrested during an ICAC undercover

operation when he handed the sum of $40,000 to an undercover officer. The Sierra Leone Government fully supported the ICAC; in particular, they verified that the passports that were to be sold by the suspect would have been considered genuine. The suspect was eventually convicted of corruption charges and sentenced to seven years' imprisonment.

**C. Cases concerning Mutual Assistance in Undercover Operations**

1. Customs & Excise Case

In late 1997, the ICAC was conducting an investigation of an international money laundering and smuggling syndicate which had offered protection money to a Customs & Excise officer. The core members of this syndicate and the corrupt C&E officer were extremely surveillance conscious and alert to infiltration by outsiders. The ICAC approached the FBI who provided an American Russian officer to act as an undercover agent. The agent successfully carried out several illicit business dealings with the syndicate and the C&E officer. In late 1998, the two syndicate heads and the C&E officer were convicted and sentenced to imprisonment terms ranging from four to five years. In the course of this investigation, the undercover agent also obtained evidence against two Hong Kong immigration officers, both of whom were convicted at separate trials and sentenced to four and ten years' imprisonment respectively.

2. Computer Products Smuggling Case

In early 1998, the FBI in turn sought the assistance of the ICAC to deploy undercover agents to obtain evidence in Hong Kong against a corrupt US Customs Officer who was involved in smuggling US computer products from Hong Kong to Los Angeles. The operation was successfully concluded and the two former US Customs officers were sentenced to 30 months' imprisonment by a Los Angeles court. A US lawyer received three years' probation and, at the time of writing, three other members of the smuggling syndicate are still awaiting sentencing.

**D. Cases of Simultaneous Joint Operations**

1. Korean Credit Card Case

In April 2001, an international syndicate involved in the manufacturing and uttering of counterfeit credit cards, through bribery of insiders in banks and retail shops, was smashed in a joint operation by the ICAC and the Korean Police. The operation was triggered by intelligence obtained by the ICAC in Hong Kong. This operation involved the simultaneous arrests of six syndicate members in Hong Kong and Korea. Three suspects were convicted in Korea. The Hong Kong suspect went on trial and received 30 months' imprisonment.

2. UK Credit Card Case

In September 1998, the ICAC and the UK police carried out a simultaneous arrest operation. The suspects were believed to be members of an international counterfeit credit card syndicate. One suspect was convicted in a Hong Kong court and two others were convicted in a UK court for offences in connection with counterfeit credit cards. The ICAC Chief Investigator in charge of this case was subsequently awarded the title "Law Enforcement Officer of the Year 1999" by the International Association of Financial Crimes Investigators.

**E. Extradition Proceedings and Letter of Request**

1. The *Carrian* Case

This is a landmark case which first went overt in 1985. Subsequent proceedings involving extradition of defendants (from the UK and France) and the gathering of evidence from various jurisdictions (the UK, the US, Switzerland, France, Singapore and Malaysia) lasted for 15 years. This major case could not have succeeded were it not for the co-operation and assistance rendered by all countries concerned.

2. Wanted Person in Australia

In 1993, a senior engineer of a construction consultant company absconded from Hong Kong after an ICAC investigation into suspected bribery in relation to several construction projects. Through assistance by Interpol and the Australian police, he was arrested in April 1999 in Sydney. In July 2001, he was finally convicted in Hong Kong and received five years' imprisonment.

3. Wanted Person in Canada

In 1995, a manager of an IT company who had migrated to Canada was wanted by the ICAC for suspected corrupt activities with several software suppliers. With the assistance of the Royal Canadian Mounted Police the person was eventually arrested in Canada in 2001. He was extradited back to Hong Kong, pleaded guilty and was sentenced to three years' imprisonment.

## VI. CONCLUSION

Corruption knows no boundaries. The increasing globalization of crime we are presently witnessing - characterized by ease of international travel, advances in information technology and the availability of manifold options for secretly "relocating" dishonestly-acquired wealth – highlights, more than ever before, the importance of co-operation between law enforcement in different jurisdictions.

In conducting cross-boundary investigations, the main hurdles faced by the ICAC and other law enforcement agencies are the differences between jurisdictions insofar as legal, social and economic environments are concerned.

To overcome these hurdles, the co-operation that comes from a genuine understanding of the needs of each of our jurisdictions and a genuine desire to mutually assist each other in our common aims are most important. Parochial attitudes in this rapidly developing world are outdated and counter-productive. Jurisdictions must now actively seek out a partnership approach to cross-boundary, regional and international crime.

I believe this seminar provides an excellent opportunity for us to share our experience. I am grateful for the invitation to speak to you, and, through international co-operation, I look forward to seeing you again in the near future, and working with you in partnership to fight corruption, and making our world a cleaner place to live in.

# INTERNATIONAL MUTUAL LEGAL ASSISTANCE IN SWITZERLAND

*Pascal Gossin**

## I. DEFINITION

Whereas borders do not create barriers for criminals, they do present obstacles to authorities who are prosecuting offences. A foreign judicial authority may not, for example, order a bank in Switzerland to freeze a deceiver's account and hand over the relevant banking documents as evidence. Sovereignty precludes the carrying out of an official act on behalf of a foreign state. However, thanks to the instrument of international mutual assistance in criminal matters, states may help each other in the fight against international criminality. If a judge has to investigate a case abroad, he or she will ask the judicial authorities of the country concerned to handle the case on his or her behalf. The requested state will give mutual assistance by executing on its territory the official acts requested and by forwarding the results to the requesting state in a specific criminal case. Mutual assistance comprises the hearing of witnesses, securing and handing over of evidence and documents as well as objects and assets, search of premises and seizure of property, and the confrontation and service of summons, judgments and other court documents.

Within the meaning of active mutual assistance a Swiss judge may spontaneously transmit information or evidence which he or she has gathered during his or her own investigation to a foreign prosecuting authority. However, he or she may not transmit evidence which is within the scope of secrecy (banking documents, for example). However, the Swiss judge may also transmit information which is within the scope of secrecy if it is of such a nature as to enable his or her foreign colleague to make a request for mutual assistance to Switzerland.

There is a difference between the mutual assistance between judicial authorities and the exchange of information on a police-to-police basis, as no coercive measures are applied, and it is simply information that is supplied (for example, interview of informants by police, supplying extracts from public records and the crime register, information about telephone subscribers, the holders of post office boxes, owner of vehicles, the identity of persons or enquiries regarding addresses).

## II. PRINCIPLES OF MUTUAL ASSISTANCE

The condition for granting mutual assistance is that a criminal procedure is in existence in the requesting state. Switzerland may grant mutual assistance to any state by virtue of its Federal Act on International Mutual Assistance in Criminal Matters (IMAC). If Switzerland has not concluded a mutual assistance treaty with the requesting state, it will, as a rule, only grant the request if the requesting state guarantees reciprocity.

Coercive measures may be ordered in the execution of a mutual assistance request (search of premises, seizure of evidence, summons to appear with a warning of compulsion in the event of non-appearance, hearing of witnesses as well as the lifting of the legal obligation to keep certain facts secret) if the offence described in the request is also punishable in Switzerland (principle of dual criminality).Therefore, Swiss banking secrecy is not absolute. This banking secrecy does not, for example, protect a suspect in a case of corruption, as the requested state would receive banking documents (extracts from bank accounts) as evidence.

Mutual assistance will not be granted if the subject of the investigation or procedure is an act which is

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regarded by Switzerland as a political offence. Assistance will therefore be denied if the proceedings abroad are carried out to prosecute or sentence a person on account of his or her political opinions, his or her belonging to a certain social group, or his or her race, religion or nationality. IMAC stipulates however that crimes will not be regarded as political offences if they were aimed at the extermination or suppression of an ethnic group, or if the crime is particularly reprehensible (aircraft hijacking, hostage taking). A request will also not be granted if the subject matter is a military offence (insubordination, desertion).

Grave defects in the foreign procedure (violation of the principles contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights) will lead to mutual assistance not being granted.

Mutual assistance is no longer possible for the same offence if the defendant was acquitted or if the sentence was served either in Switzerland or in the state where the offence was committed (*non bis in idem* – the principle of double jeopardy).

As a rule, no mutual assistance is granted for fiscal offences (withholding taxes or fiscal duties). However, mutual assistance may be granted in cases of excise or tax fraud (fraudulent evasion of duty and taxes by using false, forged or untrue information, documents, etc). In cases of doubt the FOJ will ask the Federal Tax Administration for advice. Further exceptions are applicable in cases with the USA concerning organized crime, in order to exonerate the defendant, as well as in cases of administrative assistance in customs offences.

Mutual assistance is granted under the reservation that the authorities of the requesting state will only use the information obtained for investigative purposes, or as evidence for the prosecution of offences for which mutual assistance is admissible (rule of speciality). Also excluded is the indirect use of the results obtained through mutual assistance by prosecuting authorities giving unofficial information to tax or customs authorities.

Mutual assistance is governed by the principle of proportionality. However, this does not mean that a requesting State may only seek assistance after it has exhausted its own internal means of investigation. Mutual assistance proceedings should help the criminal proceedings in a requesting state; therefore all documents will be handed over if a connection with the charges brought forward cannot be excluded.

Objects and assets (valuables) deriving from the offence (proceeds of crime) may be surrendered to foreign authorities so that they can be forfeited by a foreign court, or returned to the rightful owner, if, as a rule, a final, executable order has been made by a criminal, civil or administrative court in the requesting state. In exceptional cases, Switzerland may waive this requirement if the criminal source is obvious, as in the *Abacha Case*.

## III. MUTUAL ASSISTANCE PROCEDURES IN SWITZERLAND

### A. Channel of Transmission

There are different channels for the transmission of mutual assistance requests to Switzerland:

- Member states of the European Convention on Mutual Assistance in Criminal Matters (ECMA) send their requests directly or via their Ministry of Justice to the Swiss Federal Office of Justice (FOJ).
- If no treaty is in existence, then as a rule, transmission should be through the diplomatic channel. The representative of the foreign state in Switzerland sends the request directly to the FOJ.
- Direct contact between the foreign authority and the competent Swiss authority is provided in the Additional Treaties to the ECMA concluded with Germany, Austria, France and Italy, and it is also possible with all other States in urgent cases.

Swiss authorities transmit their requests - if no direct contact is provided for - via the FOP to the relevant foreign authority.

**B. Form and Contents of Mutual Assistance Requests**

These requests shall contain the following information:

- The name of the authority making the request. As a rule these requests are made by judicial authorities; in common-law countries requests for mutual assistance are made by the police as they have no examining magistrate (investigating judge) and the public prosecutor is only competent when the indictment is filed.
- The subject matter of the foreign proceedings and the reason for the request (description of the official acts requested).
- Identifying data of the person who is the object of the criminal proceedings.
- Legal evaluation of the facts in the requesting state.
- Description of the essential facts (place, time and circumstances). The requesting authority does not have to prove that its description is accurate; it is sufficient if reasonable suspicion is shown. The requesting authority may not be required to explain what should be revealed by the request. However, so-called fishing-expeditions to obtain evidence are inadmissible. Evidence may not be collected at random and without material clues (for example the freezing of all assets in Switzerland and the handing over of the banking documents without information regarding the whereabouts of these assets).

**C. Handling of Mutual Assistance Requests**

The FOJ (Unit for Mutual Legal Assistance) summarily examines if the request for mutual assistance meets the necessary formal requirements. If not, the FOJ asks the requesting authority to rectify or amend the request. In urgent cases the FOJ may order provisional measures (for example the freezing of accounts or seizure of assets) as soon as a request has been announced. The FOJ then fixes a time limit to the requesting state within which the formal request must be submitted.

If the request meets the requirements and if mutual assistance is not obviously inadmissible (for example in the case of military offences), the FOJ will forward the request as a rule to the competent cantonal judicial authority for execution. If investigations are required in several cantons, the FOJ may charge one single canton with the execution (the managing canton). In practice most of the requests for mutual assistance are executed by the cantons. However, the FOJ may also delegate the execution of a request to the federal authority which would be competent had the offence been committed in Switzerland. For example, the request can be transmitted to the Federal Public Prosecutor of Switzerland (in cases of acts of terrorism or corruption of federal civil servants) or to the Federal Customs Administration (in cases of violation of the Federal Customs Act). If several cantons are involved as well as if the canton charged with the execution does not render a decision within the appropriate time, or if the case is complex or of particular importance, the FOJ may execute the request for mutual assistance itself.

The executing authority examines whether the substantive requirements to grant mutual assistance have been met and orders in the decree to enter into the case the mutual assistance measures that were requested and which are admissible. With this decree, the mutual assistance proceedings start and shall, as a matter of principle, be executed to conclusion without interruption. If all measures are executed and the proceedings are completed, the executing authority shall issue a final decree stating in detail the reasons for which mutual assistance was granted and to what extent, i.e. which documents or assets may be surrendered to the requesting state. A simplified execution of the mutual assistance proceedings, without a final decree, is possible if the holder of documents, information or assets consents in writing to their being handed over to the requesting state.

The parties to the foreign proceedings (police officers, examining magistrates, defendants, legal representatives) may be allowed to attend the execution of the request provided that the law of the requesting state would only admit the evidence obtained by mutual assistance if said persons were present (common-law practice) or if their presence would considerably facilitate the foreign criminal proceedings. Their presence simply means that the parties to the foreign proceedings may be present at the execution of the request. They are not allowed to officiate themselves; official acts are the sole prerogative of Swiss civil servants.

**D. Legal Remedies**

The decree to enter into the case may not be appealed against. In principle, appeals may only be made against the conclusive (final) decree. Also incidental (interim) decrees are subject to appeal only at the conclusion of the proceedings together with the appeal against the conclusive decree. Therefore legal remedies for the persons affected by mutual assistance measures are possible at the end of such proceedings. Excluded are those incidental decrees which - by seizure of assets or valuables, or because of the presence of persons involved in foreign proceedings - cause immediate and irreparable prejudice (for example if a company is closed because its bank account had been frozen). The rulings of the cantonal as well as federal authorities providing mutual assistance may be challenged before the Federal Criminal Court. Furthermore, an appeal against the decision of the Federal Criminal Court may be lodged with the Federal Supreme Court, but only if that decision concerns the seizure or release of objects or assets or the transmission of confidential information, and the case in question is a particularly important one. Mutual assistance to the requesting state is granted as soon as the conclusive decree is enforceable.

The FOJ as federal supervising authority is entitled to appeal as are persons who are directly affected by a mutual assistance measure. Therefore, a bank which was asked to surrender bank account documents regarding a particular customer is not entitled to appeal for its client; only the account holder has that right. The deadline for the appeal against the conclusive decree is 30 days (Federal Criminal Court) or 10 days (Federal Supreme Court).

## IV. STATISTICS

| | Foreign request for mutual assistance* | Swiss request for mutual assistance |
|---|---|---|
| 1996 | 1437 | 974 |
| 1997 | 1953 | 1206 |
| 1998 | 1628 | 1189 |
| 1999 | 1713 | 1229 |
| 2000 | 1532 | 1106 |
| 2001 | 1575 | 1050 |
| 2002 | 1593 | 1169 |
| 2003 | 1589 | 1276 |
| 2004 | 1670 | 1250 |
| 2005 | 1609 | 1287 |

* The requests for mutual assistance emanating from neighbouring States that are transmitted directly to the competent Swiss judicial authority (direct contact) are only partially contained in these statistics.

# EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: THE FRENCH SYSTEM

*Thomas Cassuto**

*XVIII – "When the country is confused and in chaos, loyal ministers appear."*
Lao Tsu, *Tao Te Ching (Book of the Way and its Virtue),* 6th c. BC

*"O, that estates, degrees, and offices*
*Were not deriv'd corruptly, and that clear honour*
*Were purchas'd by the merit of the wearer!*
*How many men should cover that stand bare!*
*How many be commanded that command!"*
William Shakespeare, *The Merchant of Venice,* Act II, scene 9

This paper outlines the French system for combating corruption from the viewpoints of preventive justice and criminal justice. The two are complementary and rely on common institutions.

## I. STRENGTHENING THE LEGAL SYSTEMS OF CORRUPTION PREVENTION

### A. Introduction

Corruption is a serious problem affecting democracy and the economy and engendering grave consequences for the security of goods and persons. Corruption is to economic life and public life what doping is to sports, namely an illicit, camouflaged means of breaking the rules to gain undue advantage.

The conventional definition of corruption is based on the concepts of a corruptor, a corrupted party, and a corruption pact.

These have become standard definitions under the influence of international law, particularly the United Nations Conventions.

However, corruption is actually more complicated and should be described as a corruption system, for purposes of critical analysis of an abnormal, antisocial phenomenon as well as for detection and suppression. Corruption is not an isolated fact, nor is it an end in and of itself. Rather, it is a means of securing benefits. A corruption pact is forged from the converging interests of the corruptor and the corrupted party.

A corruption system corresponds to a set of anomalies in the source, conditions of conclusion and terms of performance of a contract (public in particular), as well as in the personal and financial relationships of the various protagonists. The economic and financial anomalies combine with laundering or reverse laundering of money or assets. More generally, these anomalies are often only subsidiary offences in the act of corruption. For example, favouritism is frequently the main objective for the parties to a corruption pact. This pact is fulfilled through manipulative accounting, embezzlement by the corruptor and laundering by the corrupted party.

Prevention, like the fight against corruption, can only be dealt with by gaining a thorough understanding of these different aspects - the economic links, personal ties, and the factual sides of the functioning of a corruption system.

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Several cases tried in France from the 1990s to 2000 underlined the extent of the phenomenon, its role in political party financing and its foothold in a variety of economic sectors. The so-called public procurement scandals involving secondary schools in the Paris region, that of the public housing agency *Office Public d'Habitations à Loyers Modérés* or of naval shipbuilder *Direction des Chantiers Navals* illustrate the risks of corruption in the functioning of public institutions, as well as the resulting detrimental effects on the safety of goods or buildings and the strain of extra costs on government finance.

Corruption is common practice at international level and until recently may have been encouraged - wrongly - by certain States or even justified by certain observers referring to it as a necessary evil.

However, the scale of the affairs exposed in recent years led to a long succession of measures designed to set strict rules for transparency and regularity in transactions, prevention of corruption and stronger instruments for corruption detection, suppression and punishment.

Practices took these instruments completely on board and adopted a system approach to the fight against corruption.

In an edict in 1302, King Philip the Fair prohibited royal officers from demanding or accepting gratuities in any form. The French Revolution made combating corruption a principle. The 1789 declaration of the rights of man and the citizen criticized "the ignorance, neglect, or contempt of the rights of man [which] are the sole cause of public calamities and of the corruption of governments". And of course Shakespeare made it a major theme of his play *The Merchant of Venice*. In truth, corruption shows contempt for and willingness to sacrifice the common good for personal gain.

Corruption must be combated.

**B. Definition**

The definition of corruption under French law is classic in its principle. Its scope has been broadened. Two types of corruption are defined. Passive corruption is the soliciting or receiving of an undue advantage of any kind by a person in order that that person perform an act in the course of his or her business activities. Active corruption is promising or giving an undue advantage of any kind to a person in order that that person perform an act in the course of his or her business activities. By this definition, the punishment of the corrupt party or the corruptor may be envisaged separately. The definitions of active corruption and passive corruption both make reference to the corruption pact, which is the pivotal factor in proving corruption. To date, a gratuity given after the fact or a gratuity received after the fact cannot be characterized as an act of corruption. It may well be considered a sign of corruption, but never a sufficient demonstration. Legally, it is necessary to demonstrate that the agreement between the corruptor and the corrupted party preceded the latter's act.

This distinction can have unfortunate effects.

The fact is that public authorities and companies alike increasingly warn their employees that they should refuse gratuities in any form or gifts from business partners, except possibly those of modest value offered in customary or formal circumstances (e.g. end-of-year or official ceremonies).

The definition of corruption was broadened in scope following several legislative reforms. Now acts of corruption committed by officials of the European Communities, the European Union Member States, foreign States and public international organizations are punishable in France.

Corruption between players in the private sector is also punishable. The labour code punishes corruption of employees from another company.

This broader legal definition of corruption reflects a reality and corresponds to the implementation of international legal instruments adopted notably in the European Union and the United Nations. A particular feature in the latter case is that punishment of a foreign official does not require compliance with the dual criminality rule.

**C. Means of Corruption Control**

1. In the Field of Public Law

Regulation of political life is a first approach. Many reforms have been implemented to clarify the financing of political parties, verify elected officials' personal wealth and, of course, prevent risks of conflicts of interest.

Hence, holding elected office is absolutely incompatible with certain public functions. In addition, the number of elected offices that a single person can hold simultaneously is now limited.

Control over financing of electoral campaigns and political parties has been stepped up with the creation of the *Commission Nationale des Comptes de Campagne et des Financement Politiques* (National Campaign Accounts and Political Financing Commission). Party financing is partly public, proportionate to election results and capped for the presidential elections and other major elections. Private funds must be collected by an intermediary or agent and the amount a single donor can contribute is limited. Funds to finance electoral campaigns can only be donated by individuals.

Elected officials and members of the government have to report their personal wealth at the beginning and end of their term of office. These reports are published in the *Journal Officiel*.

2. Regulation of Public Activities

Public agents are bound by such obligations as disinterested service, discretion and, of course, respect for the rule of law. Compliance with these obligations by definition excludes any behaviour that could characterize an act of passive corruption or participation in a corruption system.

Ethics commissions in each administration oversee the updating, interpretation and effective implementation of these rules. One of these commissions' essential functions is to render decisions on the transfer of civil servants to the private sector. Placement in non-active status is subject to authorization. In the event of resignation, failure to comply with incompatibility is subject to sanctions.

Certain public activities are watched with particular care. The most important are oversight of public procurement or exposed sectors such as real estate and, more generally, any administrative departments issuing mandatory administrative permits (e.g., residence or building permits). A number of procedures have brought to the fore the vulnerability of agents and the pressure sometimes exerted on them by repeated enticements from the public. Under certain circumstances, the low pay of public agents may encourage them to yield to the temptation.

The risks are naturally higher in the field of procurement awarding. In such cases, the administration's economic power may persuade on the one hand private contractors to spontaneously initiate a corruption process in order to circumvent procurement rules or, on the other, public agents to solicit compensation in exchange for organizing public procurement award procedures on the basis, for example, of proportionality criteria. The scandal of the *Ile de France* secondary school contracts offers a perfect illustration. The victims were the taxpayers, who had to pick up the bill, the common interest, which generally loses out when contracts are poorly performed, and the competing bidders, who were either in effect excluded or refused to go along with the scheme.

Three major reforms have been implemented in this area since 2001 to guarantee transparency in procurement award procedures and to enable the administration to intervene more effectively, in particular by retaining some flexibility in smaller contracts, for example. Still, two series of difficulties may arise. First, overconfidence in the formal strictness of contract award procedures risks leaving room for spurious unofficial systems to be put together. Second, the string of reforms adversely affects proper implementation of the law over time, especially with regard to enforcement, and leads to excessive red tape which may discourage economic operators.

Tax and customs administrations also seem particularly vulnerable because they often have confidential strategic information and exercise significant financial power in deciding whether or not to adjust a taxpayer's liability or destabilize a competitor by conducting overzealous audits.

**D. Prevention Measures and Upstream Investigations**

There are a number of institutions, independent bodies and oversight mechanisms that work to detect and combat corruption. They play a role in both dissuasion and suppression, entertaining a special relationship with the judicial institutions.

1. Institutions, Independent Bodies and Oversight Mechanisms

The institutions are listed below but are not described in detail. Further information can be found on their websites (some of which are multilingual).

- *The Service Central de Prévention de la Corruption* (Central Service for the Prevention of Corruption), attached to the Ministry of Justice, performs functions which include training, assistance and promoting corruption control. It draws up an annual report covering various topics.
  http://www.justice.gouv.fr/index.php?rubrique=10017&ssrubrique=10028&article=12081
- *The Mission Interministérielle d'Enquête sur les Marchés* (Inter-Ministerial Unit for Procurement Investigations) and the public service delegation conventions.
  http://www.finances.gouv.fr/mission_marches/
- TRACFIN, the unit responsible for collecting intelligence on opaque or suspicious financial transactions and, where necessary, referring its findings to the courts.
  http://www.tracfin.minefi.gouv.fr/
- FICOBA, the central record of bank accounts, under the authority of the Ministry for the Economy, Finance and Employment, is consulted to identify all bank accounts held in France by an individual or corporate entity.
- The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), part of the Ministry for the Economy, Finance and Employment, has broad auditing and investigation powers, particularly in the area of competition.
  http://www.finances.gouv.fr/DGCCRF/
- The devolved government services (regional prefectures) have power to control the administrative acts and finances of local authorities.
  http://www.interieur.gouv.fr/sections/a_l_interieur/les_prefectures/votre_prefecture
- *The Commission Nationale des Comptes de Campagne et des Financements Politiques*, the national agency controlling electoral campaigns and political financing.
  http://www.cnccfp.fr/
- *The Commission pour la Transparence Financière de la Vie Politique* verifies that elected officials do not gain personal wealth irregularly while in office.
  http://www.commission-transparence.fr/
- *The Conseil de la Concurrence*, an independent administrative authority, plays an indirect role in combating corruption by taking action against anticompetitive practices, which often underpin corruption pacts.
  http://www.conseil-concurrence.fr/user/index.php

The work accomplished by nongovernmental organizations should also be mentioned. Their reports are useful indicators, providing guidance for political policies. Two NGOs - Ethifrance, a limited company with SCIC status (common-interest co-operative) and an independent agency which supplies extra-financial analysis and specializes in Corporate Social Responsibility (CSR) audits for investors, and the French chapter of Transparency International - joined forces to draft a 2005-2006 report on major French companies' anti-corruption policies and procedures.

Certain results for France are worth mentioning. A questionnaire was sent to SBF 120 companies (introduced on 8 December 1993, the SBF 120 index contains the 40 stocks from the CAC 40 index and 80 stocks listed on the Premier Marché).

A summary was compiled of the 20 replies received (from AGF, Air liquid, Alcatel, Accelor, Axa, BNP Paribas, Carrefour, Dexia, EADS, Essilor International, France Télécom, Klepicue, La Faye, Michelin,

Renault, Sanofi, Aventis, Scor, Véolia Environnement, Société Générale, Sodexho, Ste Microtechnics, Suez, Thalès, Total).

- 50% of the companies that responded had to deal with issues of corruption (25% passive corruption, 12.5% concerning active corruption of "high-level" public agents);
- 58% of the companies in the sample cited procurement as the most exposed function;
- 37.5% of the companies reported having been approached in extortion attempts "in certain countries". 29% reported being approached for a bribe in Asia; 21% in Africa; and 17% in South/Central America and Eastern Europe;
- 58% of the companies in the sample reported having set up an internal alert system.

The international law firm, Simmons & Simmons, and Control Risks, a specialized risk prevention consultancy, periodically publish a joint survey on corruption: *International Business Attitudes to Corruption*. Interviews are conducted with 350 company heads in seven countries (France, the United States, China, Brazil, the Netherlands, Great Britain and Germany). According to one of the surveys, one out of three French companies lost a contract during the past 12 months for refusing to pay a bribe.

Only 10% of French companies, if faced with corrupt practices, would be prepared to expose these activities to the authorities.

Consulting firm PricewaterhouseCoopers publishes an index measuring economic, legal and ethical transparency vs. capital cost and access in 35 countries world-wide, rated on the basis of several components including corruption (the Opacity Index – www.opacityindex.com).

As a means of raising employee awareness and enhancing the effectiveness of corruption prevention systems, the *Service Central de Prévention de la Corruption* (SCPC) offers French private-sector companies the possibility of signing partnership agreements. Their purpose is to establish dialogue and information exchange, propose improvements in corporate codes of conduct and, at company request, take part in awareness-raising sessions for personnel most exposed to risks of corruption. This approach is the counterpart to the prevention measures implemented within the administrations. Through it, employees are better informed of their legal rights and duties and the means to protect themselves and their company against the risks of corruption.

Transparency in combating corruption is the subject of developments in various applicable legal standards and voluntary guidelines. In particular, the OECD's Guidelines for Multinational Enterprises sets forth standards of this kind recommended to enterprises. In 2004, a tenth principle was added to the United Nations Global Compact, specifically on the challenge of corruption. Lastly, the United Nations Merida Convention, which entered into effect in 2005, draws the signatory States' attention to the challenge of information and dialogue with civil society.

One might conclude that effectively combating corruption in all its forms is an integral part of Corporate Social Responsibility (CSR) policies founded on enforceable standards and guidelines. Unfortunately, a Novethic/SCPC survey shows that, overall, reporting on the fight against corruption is not satisfactory, whether in annual or sustainable development reports or in corporate website postings.
http://www.unglobalcompact.org/docs/issues_doc/7.7/BACbookFINAL.pdf

In addition, at urging by both the FATF and the European Union, financial institutions (e.g., banks, insurance companies, stock brokerage houses), accounting professionals (e.g., accountants, auditors) and legal professionals (e.g., lawyers, notaries) have in recent years been required to declare dubious transactions, violations and suspicious transactions that could be linked to a laundering operation.

Under article L 562-1 (11) of the monetary and financial code, auditors and accountants are required, under the sanctions set forth in article L 563-6, to report any sums or transactions suspected of illicit source to TRACFIN (unit for intelligence processing and action against secret financial channels), worded as follows:

- "Any sums entered in their books which might derive from [...] corruption";
- "Transactions involving sums which might derive from [...] corruption".

They must additionally comply with a general obligation of vigilance pursuant to article L 563-3 by which *"any major transaction involving sums of a unitary or total amount greater than a sum determined in a Conseil d'Etat decree and which, without coming within the scope of Article L. 562-2, is subject to unusually complex conditions and does not appear to have any economic justification or lawful purpose, must be subject to special scrutiny"*, requiring due diligence (R. 563-2 of the CMF: €150,000).

An analysis of TRACFIN annual reports casts doubt on the extent to which this has materialized given the low rate of participation by accounting professionals in the declaration system compared with the overall volume of declarations received. Still, taking into account their rising participation and the relative newness of the legislation, this mechanism will undoubtedly become a significant source of information.

Article L 820-7 of the commercial code imposes criminal penalties on any person failing to disclose *"any criminal facts he is aware of"* to the Public Prosecutor.

Each year, there are 500 information reports, including 200 in Paris. Nevertheless, experience shows that in virtually all cases declared are "obscuring offences" (misappropriation of corporate assets, forgery, etc.).

The duality of declaring "suspected of illicit origin" to TRACFIN and "criminal facts he is aware of" to a Public Prosecutor's office, beyond posing a semantic problem, does call for extreme caution in making the appropriate choice or simultaneous declarations, in that according to case law a declaration must be made to the Public Prosecutor's office even if the criminal character of the offence cannot as it stands be defined with accuracy (Court of Cassation, Criminal Chamber, 15 September 1999).

Accounting professionals are likewise directly concerned by Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, to be adopted in national law by 15 December 2007, on the use of the financial system for the purpose of money laundering and terrorist financing (3rd Directive).

The Directive broadened the scope of declaration to serious crimes defined as *"all offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year"*.

Such declarations constitute a first-rate information collection source for the detection of corruption activities. The reporting procedures may vary. Declarations are submitted to TRACFIN by financial institutions and by certain legal and accounting professionals. In some cases, they must be transmitted directly to the Public Prosecutor. Declarations may be cross-cut by TRACFIN, which then transmits the files in which suspicion of laundering is most strongly substantiated to the Public Prosecutor. The Public Prosecutor evaluates the next steps and may decide to request an investigation by police services or the opening of a judicial investigation.

The exercise of control and administrative penalties for breaches of legal provisions may be brought before the administrative judge and before financial and administrative jurisdictions (court of auditors for national public corporations, the central government and bodies supported by public funding and regional chambers of accounts for budget management of local authorities). Whenever criminal offences are established, every public body, every government service or civil servant has the obligation to notify the Public Prosecutor.

Article 40, 2nd paragraph of the code of criminal procedure provides that *"every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents"*.

At European level, institutions also take part in the prevention of corruption. The European Court of Auditors carries out public audits on the management of European funds. It works closely with the national courts of auditors. OLAF, for its part, is an investigative service operating independently of the Commission

(the European Union's executive body). OLAF has broad investigative powers within the Commission's services and can assist national services in their inspections and investigations.

Prevention of corruption is based, then, on a complete arsenal of suppression and dissuasion. This is where the concept of a corruption system becomes crucial. There is every reason to link up prevention of corruption with the punishment of such kinds of behaviour but also with activities that are closely related or associated. By extension, several offences can be included. This further entails broadening the scope of sanctions to target the proceeds of crime. That is why the French penal code grouped a number of offences together under a chapter on "breaches to the duty of honesty".

- Improper demands or exemptions in relation to taxes: article 432-10 of the penal code;
- Active and passive corruption: articles 432-11, 433-1 of the penal code; articles 435-1, 435-2, 435-3 and 435-4 for foreign public agents or members of public international organizations; article 445-1 of the penal code for corruption of persons not exercising a public function;
- Influence peddling: articles 432-12 and 433-1 of the penal code;
- Unlawful taking of interest: article 432-12 of the penal code;
- Offence against freedom of access and equality for candidates in respect of tenders for public service and delegates public service (favouritism); article 432-14 of the penal code;
- Unlawful taking of interest by a former civil servant; article 433-13 of the penal code;
- Misappropriation of public funds; article 432-15 of the penal code.

The last reform to date is particularly worth mentioning. The Act of 13 November 2007 incorporated two articles on corruption in the private sector:

"Article 445-1. - Making or tendering, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to obtain from a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, the performance or non-performance of any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations, is punished by five years' imprisonment and a fine of €75,000.

The same penalties apply to giving in to any person referred to in the above paragraph who solicits, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to carry out or refrain from carrying out any act referred to in the above paragraph, in violation of his legal, contractual or professional obligations".

Taking associated offences into account is a key factor in the detection of corruption activity. These offences include:

- Money laundering: article 324-1 of the penal code;
- Financing of terrorism: article 421-2-2 of the penal code;
- Misappropriation of corporate assets and embezzlement: article 314-1 of the penal code, articles L 242-6 and L 241-3 of the *code des sociétés*;
- Insider trading: article L 465-1 of the monetary and financial code;
- More generally, offences of disclosure of confidential information (breach of professional secrecy): article 226-13 of the penal code, etc.

French criminal law recognizes the liability of legal persons, which must be envisaged wherever possible.

The criminal law allows the identification, the seizure and the confiscation of the proceeds of crime, and also the pronouncement of the prohibition against sentenced persons taking part in public or political activities, etc.

Naturally, the actual sanction and the publicity around procedures constitute effective tools in preventing corruption and a driving force in modernizing institutions and administrative procedures.

2. Prevention Mechanisms

Within the Administration, various mechanisms contribute to the detection and prevention of corruption:

- Internal hierarchical control. This is an inherent principle in any administration and an obvious mechanism in matters of control.
- Control of expenditure. This mechanism is generally multifaceted. The main administrations have inspection services which the Minister concerned can utilize to order an administrative investigation, the findings of which may be grounds for legal action.
- Distinction between authorizing officers and paymasters, the latter incurring financial liability when expenses paid are irregular.
- Ethics commissions, which participate in the prevention of conflicts of interest, which can be the underside of an incipient corruption system, particularly those based on influence peddling.
- Drafting and dissemination of codes of conduct along with appropriate training can also raise public agents' awareness of risks, promote whistleblowing procedures and, of course, explain the risks incurred in the event of breaches of ethical obligations when these constitute offences. A number of codes were drawn up in the national police force, the General Tax Directorate and the postal service (public enterprise). A code is currently being drafted by the *Conseil Supérieur de la Magistrature* (High Judicial Council).
- Increasingly, the accent is placed on the level of initial and continuing training of public agents. Promotion of the concept of a risk identification strategy is also necessary, although such an approach is all too rare.
- Disciplinary (administrative) action for breaches of legal obligations, even when they do not constitute an offence. Such measures are scaled according to the seriousness of the offence. They may complement criminal or financial penalties.
- The status of public agents must also be the focus of particular attention. The level of remuneration may be a risk factor. Another factor that can foster abuse is the absence of job rotation within an administration or geographically: prolonged proximity with local or habitual contractors can favour the development of corruption systems. Refusing job mobility - perhaps implicitly a refusal of promotion - may point to participation in a corruption system: the material gain generated by promotion may be far more limited than the benefits reaped in an illicit manner. A permanently small-scale administrative structure or the existence of local monopolies limit the effectiveness of hierarchical control and can also foster the emergence of corruption systems.
- Generally speaking, a blurring of the distinction between a public agent's personal, private activities and his professional activities may lead to non-compliance with ethical principles and rules of professional conduct, the first step towards participation in a corruption system.

Managers and public agents must be constantly attentive and vigilant. Corruption is an occult phenomenon breeding silent victims. Hence, there is every reason to fear that the persistence of established situations is an aggravating risk factor in the emergence of corruption systems. Prevention can only be effective if control procedures are real, effective and regular.

## II. THE FRENCH ANTI-CORRUPTION SYSTEM

*"Wisdom and goodness to the vile seem vile:*
*Filths savour but themselves."*
William Shakespeare, *King Lear* (1606)

Corruption is a particularly complex phenomenon to define. A corruption pact is in fact characterized by identifying the counterpart of the irregular act agreed by the corrupted party, namely, compensation.

First of all, anti-corruption enforcement generally covers the economic and financial sphere. In a sophisticated corruption system, funds or assets are transferred on several levels and at different points in time. Funds are "blackened", i.e. removed from official channels, by the corruptor and then laundered by the corrupted party. Each level may call for extremely opaque and complex arrangements. Furthermore, the

transactions may occur before or after the corrupted party's irregular act. As a result, the reach of investigations is vast, in both scope and time.

Judicial anti-corruption activity thus calls for varied technical competencies, in addition to a capacity for combining and co-ordinating those competencies.

The globalization of trade offers a favourable environment for corruption to develop. The logical consequence is the globalization of law. The second corollary is the opportunity offered to strengthen anti-corruption instruments.

This aspect necessitates close analysis of the international approach to a complex criminal phenomenon, likewise transnational.

In a global approach to corruption systems, legal action can be reoriented in light of the evidence collected. Several investigations can be conducted at the same time, and the findings of those investigations may be useful in supporting various aspects of a case.

The French legal system, rooted in the French Revolution and given form by Napoleon, served as a model for numerous other legal systems, particularly in Europe. A particularity of the system, sometimes arousing Britons' envy, is the examining magistrate. As a rule, the criminal justice system is composed of judges and the services of the Public Prosecutor (181 throughout France, under the authority of 33 Prosecutors General) subordinated to the Ministry of Justice. Commonly, the Public Prosecutor institutes and conducts criminal proceedings and supports the indictment at trials. The judge's role is to apply and interpret the law, reach a verdict and set the sentence.

Criminal offences are broken down into three categories: *crimes* or felonies (the most serious tried by a *Cour d'Assises* composed of professional judges and a jury), *délits* or misdemeanours (punishable by imprisonment for not more than ten years and tried by the *tribunal correctionnel* or magistrates' court), and *contraventions* or petty offences (the least serious may be tried by the *tribunal de police* or police court).

The code of criminal procedure provides that felony cases (the most serious) must commence with a preliminary examination by an independent *magistrat du siège* or "judge of the bench". The code also provides that the Public Prosecutor may request an examination in criminal cases of a serious, or above all, particularly complex nature.

The examining magistrate has broad powers: search, seizure, appointment of expert witnesses, placement under judicial examination, filing of formal charges—i.e. delivery of evidence, issuance of warrants, particularly arrest warrants, and detention orders against defendants. Since 1 January 2000, the magistrate is no longer empowered to place a defendant in pre-trial detention, but is competent to refer the case to another magistrate, the *juge des libertés et de la détention*, who can order imprisonment.

Contested by some, the examining magistrate has come to the fore as a full-fledged jurisdiction, essential and particularly effective in handling cases of corruption. One of the most telling examples in recent years was the *Elf Aquitaine* case, which led to the conviction of several senior executives and managers after a corruption system was uncovered. A distinctive feature of this case was the probe into the acquisition of a refinery in Germany. The French trial clearly revealed acts of influence peddling to Germany, but the enquiry in that country did not uncover any facts proving the allegations.

Over the last five years, an average of roughly 150 cases a year have been tried in France for acts of corruption or in the same category. Some acts are committed in a local context, others on a national scale and still others involve international transactions.

The grounds for conviction were generally the following offences (see above):

- Improper demands or exemptions in relation to taxes: article 432-10 of the penal code;
- Active and passive corruption: articles 432-11, 433-1 of the penal code; articles 435-1, 435-2, 435-3 and 435-4 for foreign public agents or members of public international organizations; article 445-1 of

the penal code for corruption of persons not performing a public function;
- Influence peddling: articles 432-12 and 433-1 of the penal code;
- Unlawful taking of interest: article 432-12 of the penal code;
- Offence against freedom of access and equality for candidates in respect of tenders for public service and delegation of public service (favouritism); article 432-14 of the penal code;
- Unlawful taking of interest by a former civil servant: article 433-13 of the penal code;
- Misappropriation of public funds: article 432-15 of the penal code;

Most of these offences are punishable by imprisonment for 10 years and a fine of €375,000, to which are naturally added any compensatory damages that may be awarded to injured parties for the loss suffered. The idea is that the corrupted party's wrong is at least equal to that of the corruptor.

These provisions were gradually amended for transposition into French law of the principles established by the European Union's Convention on the Fight against Corruption of 26 May 1997, the Council of Europe's Criminal Law Convention on Corruption of 21 January 1999 and of course the United Nations Convention against Corruption, adopted on 31 October 2003.

Adopted in the national law, this international system harmonizes legislation, thereby facilitating judicial co-operation between States. Such co-operation is a vital factor in combating corruption. In economic and financial areas as well, the entry into force of particularly effective international instruments helped broaden co-operation. These forms of co-operation are fully consistent with the French anti-corruption system.

**A. Structuring of Anti-Corruption Implementation by French Judicial Authorities: Specialization and Centralization**

Corruption and connected offences are considered relevant to the economic and financial sphere. Since 1994, efforts have been made for the specialization of judges. In each court of appeal at least one court has jurisdiction to hear economic and financial cases. Where that jurisdiction is concurrent with that of geographically competent courts, regionally-based poles of expertise are established. In 1999, the *Tribunal de Grande Instance de Paris* (court of major jurisdiction) set up an economic and financial pole which deals through separate sections with serious financial crime, including corruption, and has national jurisdiction for certain misdemeanours such as insider trading, stock-exchange related offences, *délinquance astucieuse* or "smart crime", public health cases, and, more recently, counterfeiting cases.

The members of these sections are examining magistrates and specialists from the Public Prosecutor's office in each of the various branches. The working methods in the poles led to the development of *co-saisine* or "joint referral", enabling several judges to work together on the same case. Even judges specializing in different areas co-operate at times on the same case. Today, we are confronted with more and more cases of counterfeit drug networks that are highly structured, from production sites, transport and distribution channels, especially over the Internet, to the recycling of profits. To combat these networks, a whole range of legal and operational resources have to be implemented which different judges can share with each other.

The law also made provisions for specialized assistants to work with the judges and provide technical expertise in analysing cases or preparing important documents (to commission experts' reports, carry out questioning). They are typically civil servants seconded from other administrations. As a result, officials from such services as taxation, customs, fraud control or Banque de France, as well as doctors, veterinarians and pharmacists are all found in specialized poles.

As part of the fight against corruption, it is often necessary to conduct technical analyses of contracts concluded with an administration. They focus at once on a contract's content, utility, terms and conditions of performance and control and on compliance with award procedures. This long and painstaking task is carried out efficiently by specialized assistants.

In carrying out investigations, the participation of criminal police officers (police officials or gendarmes) is of course necessary. Here again, specialization of investigators is essential. In each regional service, one unit specializes in the economic and financial field and can deal with corruption cases. In 2002, *Groupes d'Intervention Régionaux* (regional task forces) comprising agents from other administrations (taxation,

customs, labour inspectorate, etc.) were set up under the authority of criminal police officers in order to pool investigative and analytical know-how.

In Paris, one of the sub-directorates (*sous-direction*) of the *Police Judiciaire* (criminal investigation department) at the *Préfecture de Police* (police headquarters) has jurisdiction in economic and financial affairs. It is subdivided into several *brigades* or squads, one of which has specific jurisdiction for corruption.

To combat serious financial crime, the Ministry of the Interior created the *Office Central de Lutte Contre la Grande Délinquance Financière* as well as the *Division Nationale des Investigations Financières*, which has its own anti-corruption unit, the *Brigade Centrale de Lutte contre la Corruption*. Lastly, a unit called the *Plate-forme d'Identification des Avoirs Criminels* (PIAC) assists with in-depth investigations to establish the extent of assets held by a person, directly or indirectly, in France and abroad.

As for the organization of the judicial system, the specialization of the chambers charged with trying economic and financial cases is an essential factor in well-ordered proceedings. Once again, judges presiding over these chambers can be aided by specialized assistants.

Finally, the *Service Central de Prévention de la Corruption* can also be empowered to provide expertise or technical support in investigations. Although its members do not have actual investigative powers, they advise judges and investigators on investigative management, options and methods and on analysis of evidence collected.

The examining magistrate prepares cases for trial. Specifically, this involves collecting information, first, to determine whether or not the charges are sufficient for a person to be tried at court and, second, to send the court all evidence on the case necessary for adversarial debate and judgment. The magistrate can also issue or have warrants drawn up to seize assets or block bank accounts. The court deciding on the merits of the case can then permanently confiscate the assets.

Due to his or her role, prerogatives and central positioning in proceedings, he or she can evaluate which options to pursue in the investigation and proceedings, adopt an appropriate overall investigation strategy and co-ordinate the various procedures, especially if he or she plans to appeal to international mutual assistance.

**B. Interlinkage of the Fight Against Corruption Systems**

Generally the most difficult aspect of combating corruption systems is to identify and characterize a corruption pact. Such a pact rarely has a formal structure, and the protagonists have little inclination to disclose its content. The only way to paint a picture as broad and yet detailed as possible is through a multi-axial approach and analysis. The latter presupposes an ability to collect information and process it systematically. Here the poles of expertise are especially justified.

Take an unusual financial transaction, which may be detected by the tax administration, the bank where the account is held or perhaps by the accounting or legal professional involved in setting it up. The receipt of funds in a person's account from a company with which that person has no contractual relationship may be an indication. The tax services may also detect an unusual book entry and check out the reasons. This is how a case of bribery and favouritism was uncovered in Paris. However, an accounting misstatement and the absence of apparent economic reason for the transaction do not suffice to characterize an offence.

Investigative methodology follows several avenues. The relationships between individuals have to be examined, the financial transactions between various contractors pinpointed and the content of the acts themselves analysed. An example: investigation established that a number of contractors and intermediaries had habitual relations with an administration official. The first clue: they often had meals together, but it was impossible to discover who paid. Procurement contracts were periodically awarded for a large construction project. Some of these contracts had no real reason for existing, in others the specifications were not adapted to the administration's requirements or were for excessive amounts. In some cases the contracts lacked strict control and, worse still, poor performance was not penalized by the administration. Lastly, it was established that "cover" or "courtesy" quotations were drawn up by third party companies as evidence of genuinely competitive bidding.

The sole explanation for such anomalies is the existence of a corruption system. Investigation will help not only put a stop to these practices but bring the actors in these systems to court by characterizing offences of favouritism, interference with public procurement rules, misappropriation of public funds, forgery and forgery uttering (invoices), and bribery.

In the case mentioned, four contractors, an officials, two service providers (engineering firms), an employee and an "intermediary" were convicted by the Paris correctional court.

Civil servants themselves sometimes report acts of corruption, graft or bribery. Very often, however, the information disclosed is insufficient to characterize a corruption pact. The first step is to assess the reliability of the information and determine a broader scope of investigation.

The next step is to examine the contracts or awards issued by an administration - all of them or, if too numerous, a sample representative of the amounts involved. It is then worth looking for recurring factors such as more frequent co-contractors. Trends in contracts or the significance of their underlying principle must be explored. Thereafter, economic and financial investigations are conducted to understand the environment surrounding the administration's partners, examine the financial, accounting and economic situation, and then cross-check information. It is frequently found that some of those co-contractors for the administration have contacts with each other.

The existence of cross-subcontracting phenomena is often an indication of anti-competitive arrangements. If so the analysis should be refined by examining the contents of invoicing between entities and verifying evidence of the counterpart supplied (provision of goods or services). Outsourcing by the administration of such services as consulting, auditing or training, raises the risk of misappropriation. It is difficult to criticize the contents or quality of the deliverables supplied. However, statements by agents having allegedly received them often shed invaluable light on the matter.

In a more general respect, attempts to gain unlawful advantage through corruption often imply several different offences including: misappropriation of funds to illegally extract the money and create a "slush fund"; document forgery and irregular recording of accounts to justify the alleged financial transactions; and the use of concentration accounts held in offshore banks by close friends or relatives, typical of a money-laundering process. All of these offences must be dealt with in order to penalize acts of corruption even when the pact is not characterized.

At the end of the 1990s, for instance, a local authority relied heavily on a consulting firm to manage the switch to the 35-hour workweek. To get around the rules governing assistance contract awarding, the contracts were divided up between contractor A and other contractors invoiced by contractor A on a subcontracting basis, minus a commission of around 5 to 10%. The principal was not notified of the subcontracting agreements, which had no formal existence. The heads of several companies acknowledged having agreed to take part in the scheme in order to overcome temporary financial difficulties. Such acts, described as forgery, forgery uttering or granting undue advantage, characterize a corruption system. The case was tried at the Nanterre court of major jurisdiction in December 2007.

Another instance was uncovered in the course of an affair known as the *European VAT fraud*. During the examination phase, the magistrate received an anonymous letter implicating the main protagonist in the affair and a gendarme. The information was sent on to the investigators, a service of the gendarmerie (military police force) near where the suspected police officer was implicated. Precautionary measures were taken to avoid the risk of leaks. First a wiretap was ordered on a person possibly in contact with the gendarme, apparently also implicated in the fraud. Phone conversations were intercepted showing that gendarme passed on confidential information. With the judge's consent, he in turn was wiretapped and his work space placed under video surveillance. The investigators established that he rendered very numerous "services" to criminals and sold information on enquiries in progress, in addition to other illicit activities. It also appeared that he accessed army databases for no legitimate reason. After he was apprehended, placed under judicial examination for charges including passive corruption, and imprisoned, he admitted to having received amounts averaging more than €50,000 a year in that way, far more than his official income. In this affair, it was found that the gendarme had been serving in the same unit for many years and never applied for a transfer.

The more international in scale affairs of corruption become, the greater the complexity of the cases involved.

**C. Challenges at Stake and Prospects in International Co-operation**

In 1996, magistrates across the European Union, and notably in Switzerland, launched the Geneva Appeal to alert public opinion and government authorities about shortcomings of mutual assistance in criminal matters and the lack of co-operation in criminal matters between the Member States.

Eleven years went by, and meanwhile the face of the world was transformed as information circulated faster and faster and means of communication expanded. Criminal organizations took advantage of these transformations. The transnational reach of criminal activities seemed even more evident in terrorist acts, drug trafficking, trafficking in human beings, illicit arms trafficking or money laundering. Corruption is very often a key instrument at the heart of such activities.

The legal framework has changed.

Innovations in the law have picked up speed: increasing numbers of instruments devised by various institutions; ever more technical, complex standards; the rise of international criminal courts. The way they function prompts us to think about mechanisms to achieve more effective justice while respecting the loftiest fundamental principles of the European Convention on Human Rights.

There have been operational transformations as well: co-operation has developed between judicial and police authorities, co-operation networks have been set up, the European Arrest Warrant (EAW) has revolutionized the handling of procedures, and the best practices review was put in place and should come into general use.

These changes bring into view a range of prospects. All the new instruments have to be digested and rendered compatible with the differing legal cultures of the Member States' judicial authorities. The principle of mutual recognition must come into broader application to serve as a sound basis for operations. A pan-European outlook and the principles underlying these changes must be promoted in third countries, especially the European Union's neighbours. Efforts must be made to enhance the effectiveness of procedures by allowing any national court to which a case is referred to be fully vested with the quality of "European judge". The formulation of European criminal law by means of instruments and through its practical implementation, in particular by the mechanism of communitization under the Third Pillar, constitutes an instrument of sovereignty.

The disclosure of corruption systems on an international scale reveals that the phenomenon to be combated is both serious and complex, and that it is a fact at all levels in governments and international organizations.

What makes this phenomenon all the more serious is that it affects the EU's institutions right at the core of their operations, destabilizes relations between actors and discredits the institutions in the eyes of citizens and economic operators. Corruption tends to dissuade contractors from bidding, weakening the quality of the goods and services supplied to the institutions.

What makes the phenomenon complex is that the victims are often unaware that they have been victimized, given the perpetrators' discretion and the paucity of evidence. This type of behaviour has to be approached by analysing the other phenomena to reveal indications of corruption. In other words, schemes such as misappropriation of corporate assets to fill slush funds with hidden money must be analysed as extensively as possible. The conditions under which public contracts are awarded must be scrutinized. Lastly, the relationships between contractors and public agents, conflicts of interest, must be dealt with attentively.

The centralization of European institutions and the lack of independent investigation and prosecution services can impede protection of the Union's financial interests against the threat of corruption.

The French courts have jurisdiction, but to the extent that the functions are exercised in Brussels, most proceedings are dealt with in Belgium. Nevertheless, French courts and in particular the Paris economic and financial pole may be solicited to handle requests for mutual assistance.

The issue of international mutual assistance in criminal matters was for years subject to the principle of reciprocity and extremely general bilateral or multilateral conventions. The references were the Council of Europe Conventions of 13 December 1957 on extradition and of 20 April 1959 on mutual assistance in criminal matters.

Thanks to significant progress made with respect to European integration and the commitment to forging an area of freedom, security and justice defined in Tampere in 1999, an ambitious programme was conceived and developed for judicial co-operation founded on the principle of mutual recognition. Meanwhile, with the aggravation of terrorism and organized crime, sophisticated texts were adopted giving judges access to appreciably more effective investigative means and tools for co-operation. Co-operation also became more flexible with the 1990 convention implementing the Schengen Agreement, which authorizes a judicial authority to transmit any requests directly to another judicial authority.

The list of such international instruments is long. The most important are the United Nations Convention against Transnational Organized Crime of 15 November 2000 and the United Nations Convention against Corruption of 31 October 2003, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 and its Additional Protocol of 16 October 2001. The Convention on the Protection of the European Communities' Financial Interests of 26 July 1995 is a counterpart to the Schengen Agreement of 19 June 1995, which organized police and judicial co-operation between EU Member States. It was followed by the European Union's Convention on the Fight against Corruption of 26 May 1997. The Council of Europe's Criminal Law Convention on Corruption of 21 January 1999 incorporates the main points of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Alongside these major Conventions, other noteworthy instruments concern the fight against money laundering, seizure, freezing and confiscation of criminal assets. They are an effective complement to the anti-corruption arsenal, enabling penal authorities to strike at the heart of organized criminal structures. If States co-operate under good conditions, it becomes feasible to identify assets located abroad rapidly and request that they be frozen pending possible confiscation in the future.

In the *Elf* case discussed earlier, with the Swiss authorities' efficient aid under mutual assistance, enough information was collected to track down the concentration accounts used to pay multiple intermediaries secret commissions. Transactions could also be traced back to offshore bank accounts, an arrangement unmasking their fraudulent nature.

Last but not least, the European Union Framework Decision of 13 June 2002 on the European Arrest Warrant was a genuine revolution in the field of judicial co-operation. Since then, the average time limit for surrender of a person sought is less than 60 days, whereas in France it is 26 days.

The European Arrest Warrant gives new impetus to criminal proceedings initiated because it ensures that persons sought will be surrendered rapidly - often faster now than it takes to find elements of proof - as soon as they are located.

1. Example One

In 2003, Belgian police officials uncovered unusual links between European public officials and companies in which confidential information was disclosed in exchange for various advantages. The Belgian authorities referred the matter to France on 13 May 2006. By 7 June 2006, the records noted and evidentiary items seized as requested were made available to the Belgian authorities. This example illustrates the speed of the reaction.

2. Example Two

In 1999, a member of the European Parliament lodged a complaint in Belgium and made allegations of

misappropriations committed within the framework of a Community programme. Some individuals had allegedly benefited from fictitious jobs and reimbursement of expenses unrelated to any activity in the Commission's interest. A former prime minister and former commissioner was accused of acts of corruption and misappropriation of Commission funds. At the request (one of several) of Belgian authorities, that person was heard in France. The request was submitted on 6 June 2002 and then executed and returned in January 2003. Here again, the response to the requesting authorities was particularly swift.

3. Example Three

On 19 March 2003, OLAF transmitted a report to the Paris Public Prosecutor on the operation of company X which worked with one of the Commission Directorates. On 4 April 2003, a judicial investigation was opened, and the European Commission instituted civil action for damages on grounds of breach of trust.

The facts concerned sales activities developed since 1996 with "retail outlets" located in several EU countries, some of which had corporate existence and others not. Conventions were signed between the Directorate and the various retail outlets, without a financial audit. The end result was that the Directorate subcontracted the sale of information to companies and ad hoc structures.

"Flush funds" were apparently set up to siphon off Community budget revenue. In this manner, the use of fictitious invoices could be characterized. The amounts embezzled totalled several million euros.

For the trial, letters rogatory were issued to Luxembourg, Italy and Spain. The variable times of response to these requests considerably delayed the progression of the proceedings. The facts gathered did, however, highlight the existence of a system of embezzlement of Community funds which could only have been accomplished through a corruption system, in other words, with the acquiescence of high-ranking Community officials.

## III. CONCLUSION

Mutual judicial assistance must henceforth be considered a common undertaking. In the biggest cases, work accomplished in either a requesting or requested State must be available to ensure a sufficiently broad scope. Work carried out at the request of a third State can be used to expose the existence of new corruption systems in the requested State. Certain information in the possession of the requesting State may be useful in instituting separate legal proceedings in the requested State.

For more dynamic co-operation, direct exchanges are necessary and must be encouraged. Networks have been established, especially at European level, and for more than fifteen years France has been a host country for liaison magistrates, who facilitate information exchange, ensure that requests are appropriately formulated and assist in their proper execution.

The fight against corruption calls for constant awareness and vigilance, as well as an unfailing commitment to suppression. It requires procedural competency-building and adaptation of the national and international anticrime tools to respond to changes in organized crime and to the challenges posed by globalization of trade and its counterpart, globalization of law.

# PARTICIPANTS' PAPERS

## EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE

*Marco César dos Santos Sousa**

### I. INTRODUCTION

This paper intends to analyse the current situation of the Federative Republic of Brazil regarding corruption: its consequences; preventive and repressive measures; and the native legal system.

Corruption has existed since the birth of organized society and stands as an unwanted reality which undermines the effectiveness of public policies and the economic growth of a country, in developed nations as much as in those still developing.

Since the beginning of Brazil's re-democratization, in the late 1970s, there was a progressive densification of corruption indictments and also an increase in the feeling that it had spread desperately, as a social metastasis. The increase in indictments was certainly a result of a truly socio-cultural and behavioural transformation of the Brazilian people, who woke up and faced the problem, trying to reach another level of relationship with their government, demanding transparency and ethical principles; fair punishment; and the recovery of the damages caused to society.

The Brazilian government, aware of the current need to provide a better response to people's claims regarding corruption, has designed policies to combat corruption systematically. Brazilian society has witnessed the articulated and integrated way in which corruption is being tackled in the country today, with the co-operation of all the state defence agencies in this endeavour. As a result, never before have so many illicit schemes been uncovered and so many corrupt people been arrested.

In order to maximize the preventive and repressive measures against corruption and to follow international development on this matter, the Brazilian government has been increasing and consolidating its relationship with other countries, aiming for mutual co-operation and integration.

### II. THE STRUCTURE OF THE GOVERNMENT OF THE FEDERATIVE REPUBLIC OF BRAZIL

The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities, as well as the Federal District, is a Legal Democratic State and is found on sovereignty, citizenship, the dignity of the individual, the social values of labour and free enterprise, and political pluralism.

The exercise of power within the structure of the Brazilian Federative Republic is attributed to distinct and independent entities, each with its own particular function, with further provision for a control system among them, so as not to allow the possibility of procedures that are in disagreement with the Law or the Constitution. The executive, legislature and judiciary are the three branches of government.

The executive branch is exercised by the President of the Republic, assisted by the Ministers of State. It is responsible for carrying out the aims of the State, by applying the policies and programmes towards this purpose.

The federal legislative power is exercised by the bicameral body that is the National Congress, which has

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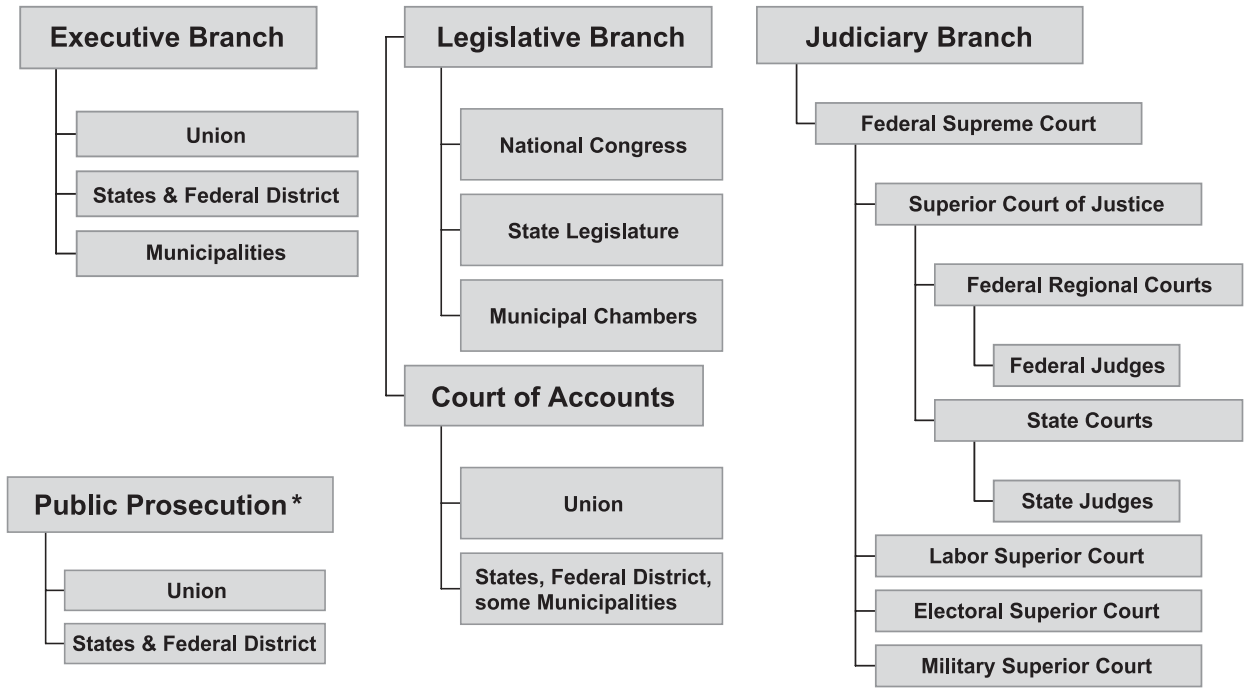
two houses: the Chamber of Deputies and the Federal Senate. It is responsible for the elaboration of laws. The Legislative Branch can also reckon upon the National Accounts Court's aid for guidance in carrying out inspection procedures of the national entities with regards to accounts, finance, budget, operations and assets.

The judiciary has its functional, administrative and financial autonomy guaranteed by the Constitution. It is responsible for the solution of conflicts among citizens, entities and the State.

Every branch of government has its own internal control system to audit the accounts, finances, budgets, operations and assets of the Union and of entities of direct and indirect public administration, to ensure legality, legitimacy, economic efficiency, and accountability in the use of grants and in granting tax relief or expanding tax incentives.

Based on these principles, the Federal Court of Accounts and the State Courts of Accounts, acting in concert with legislative bodies, exercise external control of all branches and of all organs and agencies at every level of Brazilian government.

**BRAZILIAN ADMINISTRATIVE STRUCTURE**




## III. MATERIAL AND PROCEDURAL WARRANTIES ESTABLISHED BY THE CURRENT FEDERAL CONSTITUTION

The Representatives of the Brazilian People, on 5 October 1988, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, and promulgated the country's present Federal Constitution.

The extensive fifth article of the Constitution establishes material and procedural warranties, entitled Fundamental Rights and Guarantees – Individual and Collective Rights and Duties, some of which are important to quote:

(i) No one shall be obliged to do or refrain from doing something except by virtue of law (II);

(ii) No one shall be submitted to torture or to inhuman or degrading treatment (III);

(iii) The home is the inviolable refuge of the individual, and no one may enter therein without the consent of the dweller, except in the event of "*flagrante delicto*" or disaster, or to provide help, or, during the day, by court order (XI);

(iv) 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 (XII);

(v) There is no crime without a previous law to define it, nor a punishment without a previous legal combination (XXXIX);

(vi) Penal law shall not be retroactive, except to benefit the defendant (XL);

(vii) 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 executed against them, up to the limit of the value of the assets transferred (XLV);

(viii) The law shall regulate the individualization of punishment and shall adopt the following, among others (XLVI):
   a) deprivation or restriction of freedom;
   b) loss of assets;
   c) fine;
   d) alternative rendering of social service;
   e) suspension or deprivation of rights.

(ix) No one shall undergo legal proceeding or sentencing save by the competent authority (LIII);

(x) Litigants, in judicial or administrative processes, as well as defendants in general, are ensured of the adversary system and of full defense, with the means and resources inherent to it (LV);

(xi) Evidence obtained through illicit means are unacceptable in the process (LVI);

(xii) No one shall be considered guilty before the issuing of a final and unappealable penal sentence (LVII);

## IV. CORRUPTION IN THE FEDERATIVE REPUBLIC OF BRAZIL

The first records of corruption in Brazil date from the 16th Century, during the period of Portuguese colonization. In those days, it was common, among public officials, who were responsible for the surveillance of contraband and other misdemeanours, to illegally trade in Brazilian products, such as wood, spices, gold, diamonds, etc.

In the new period of Brazilian history, when independence had been declared and the Republic proclaimed, new forms of corruption were born.

One such form of corruption was related to the attainment of contracts from the government for public work. The trading in influence resulted in easy illegal money for the corrupted public officials.

Another form of corruption was electoral corruption. To be part of politics represented a guaranteed way to quick and easy enrichment, without, most of the time, any obligation towards promises made during the campaign period. During that period, in the early years of the Republic, emerged the "halter vote", or the vote forcefully imposed by the landlords on their employees and dependents. Creative forms of forcing the votes were born, such as an unusual one in which voters received one shoe during the election process and the other after the results.

From 1964 to 1985, Brazil was under a military dictatorship. In that period, there were many records of administrative misdemeanours, such as abuse of functions, trading in influence and embezzlement of public property by public servants. The government established censure, which restricted the important role of the free press in questioning and exposing the illegal activities of public servants.

With the end of the dictatorship in 1985 a re-democratization occurred, and civil society mobilized itself, demanding immediate changes, one of which was a direct vote for president.

In 1992 Brazilian history reached a watermark in corruption scandals with the "impeachment" of President Fernando Collor. A young, popular and charismatic President, with innovative ideas, Fernando Collor was caught in a massive scheme of misappropriation of money, based on blackmail and involving resources of the Federal Administration.

In recent years, Brazilian society has lived with frequent corruption scandals, exposed by the media. The government of Luis Inácio Lula Da Silva, our current President, was shaken by an enormous political crisis created by the "*Mensalão*" scandal. This was a scheme in which some politicians were accused of receiving money from the government to vote on projects according to the government's interests.

Brazilian people have witnessed the strengthening of the "fourth power", represented by the press, nowadays responsible for the exposure of many cases of corruption via the Public Administration. The press is assuming its natural social role, contributing to Brazil's development. This role, nevertheless, is a consequence of Brazil's wake-up call, and its government has an important role in this new reality. The effective work done by some institutions and state agencies in combating corruption has provided all the information contained in the scandals printed and broadcast by the press. The courageous initiative of the government shows its disposition to change the course of history.

Repressive measures have been adopted with notable results in many areas. Large investments have been made in preventive measures, such as the creation of Control and Inspection Agencies, which are responsible, among other things, for the inspection of the use of public property and assets, for the creation of methods that provide transparency of all public activities, and for encouraging public thirst for the acquisition of knowledge of government activities.

Discussion with civil society transformed corruption into the main theme of many types of manifestations, from professional seminars, in which are discussed technical issues on its combat, to academic theses, advertisement campaigns, songs and movies.

## V. BRAZIL'S FIGHT AGAINST CORRUPTION

The Brazilian government established an effective politics of systematic resistance to corruption, in which initiatives of preventive character are privileged, and are used in conjunction with repressive actions of dismantling of organized groups which have acted for such a long time in the Public Administration.

In order to confront the problem in an integrated and articulated form, the government encouraged the union of all the defence organs of the State in this work. The result was the uncovering of many scandals of illicit schemes that defrauded the Public Administration and effective arrest of corrupt public agents.

In the Executive, three institutions currently assume the leadership in the war against corruption: The Public Prosecution Service, the Federal Police and the Office of the Controller General. In recent years, such institutions have earned respect nationally and internationally, due to their effective work in the fight against corruption, accomplished in an absolutely impersonal way, without any interference by political parties that could compromise their performance.

### A. Institutional Mechanisms

1. Public Prosecution

The Constitution of 1988 created the Public Prosecution Service, with the function of defending the juridical order, the democratic regime, social and individual inalienable interests, and taking care of the fulfillment of the law. It is a permanent institution, essential for the jurisdictional function of the State, and holds functional, administrative and financial autonomy.

The Brazilian Constitution, in its Article 129, attributes to the Public Prosecution Service the following functions: to promote, privately, the public penal action; to promote the civil inquiry and the public civil action, for the protection of the social and public patrimony, of the environment and other collective and diffuse interests; to send on the notifications on the administrative procedures of its competence, demanding information and documents to inform it; and to perform external control of police activity.

2. Federal Police Department

According to the Federal Constitution, in Article 144, first paragraph, and the Law No. 10,683, of 28 May 2003, in Article 27, seventh paragraph, it is attributed to the Federal Police Department: to forbid and verify penal infractions against the social and political order or on detriment of assets, services and interests of the Union or its autarchic entity and public companies, as well as other infractions which practice cause interstate and international repercussions and demand uniform repression. It carries out, exclusively, the functions of Judiciary Police of the Union. On the use of its attributions, the Department that investigates, looking for the repression and prevention of crimes, fulfills a strategic role in the fight against corruption all over Brazilian territory.

The Federal Police Department has been developing important and effective progress in the fight against corruption. It is important to quote that since January 2003, more than a hundred Special Operations of the Federal Police were carried out with the specific aim of combating corruption. As a result, 2,097 people were arrested, among which 825 were public servants. More than 80 of these operations were on a large scale, focused at dismantling entire criminal groups, most of which had been operating for a long time prior to the formation of the current government.

The dismantled criminal organizations were specialized in crimes against the tax order, money laundering, fraud in public procurement and embezzlement of public funds, with the participation of public servants of the three branches, including social welfare tax auditors, which caused large losses to the state treasury.

As an example, Special Operation Hurricane, carried out by the Federal Police, was revealed on 13 April 2007, showing a new angle of Brazilian justice to its society. In this operation, in which 400 agents participated, not only "*Bicheiros*" (owners of a kind of clandestine lottery in which names of animals are substituted for numbers) and lawyers accused of illegal gambling, but also civil and federal police officers; judges and high court judges, who were suspected of selling sentences; and a member of the Federal Public Prosecution, were arrested. This operation started when a judge from Rio de Janeiro authorized telephonic interception. By the infiltration of some undercover agents, some important documents were photographed and information gathered on the investigation. The investigation resulted in 25 arrests, and in addition the capture of two tons of documents, 19 weapons, more than 500 pieces of jewellery, 51 luxury cars and a few million *reals* in cash.

The Federal Police has occupied a noticeable position in the government's strategies, redeeming society's credibility in the Public Administration, which was weakening progressively with the strengthening of organized crime. By highlighting the spurious relationship between illicit actors and public servants, the Federal Police revives trust in the government's repressive measures and spreads throughout the Public Administration, preventively, the idea of punishment as consequence for corrupt acts.

Since 1997, many actions taken by the Federal Police have caused cuts in the institution's own flesh, since many "bad cops" were uncovered in investigations related to organized crime. Between 2003 and 2004, at least 110 federal police officers were formally accused.

During 2007 the Federal Police intensified its actions against tax order and financial crimes. As of June 2007, 166 special operations had been executed, resulting in the arrestments of 2,126 people, among which were contractors, currency dealers, smugglers and other suspects, including 220 public servants.

Most of these operations were attained by the Federal Police with the aid of the Brazilian Federal Revenue Secretariat. At least 60% of the missions resulted in formal accusations against withholders involved in money laundering and tax evasion schemes. This new strategy reveals that the institution, besides scattering criminal organizations, many of which had ramifications in the Public Administration, also became a strong way to enhance the Federal Treasury's gathering, by recovering public money through legal sanctions applied to the defrauder.

As of 10 December 2007, the Federal Police executed 179 Special Operations, resulting in 2,693 arrests, among which 308 were public servants, including 14 federal police officers. Some of them are worth noting:

*(i) Operation ANANIAS*

The Federal Police, in association with the IBAMA – Brazilian Environmental Institute, on 2 March unleashed this operation in order to arrest 30 members of a gang specialized in crimes against the environment, which acted near Altamira City. After seven months of intense investigation, a complex scheme involving lumberjacks, auditors and public servants was scattered.

*(ii) Operation CENTIPEDE*

The Federal Police, on 20 April, executed this operation in order to break up a gang which had committed, for more than 10 years, crimes such as notarial frauds, illegal occupancy of Federal property, crimes against the financial system and corruption of public servants.

*(iii) Operation HEAVEN*

The Federal Police, in association with the Norwegian Police, on 9 May executed this operation in order to combat a Norwegian criminal gang, specialized in money laundering, using the real estate investment market from Rio Grande do Norte State. Many arrests were made in the northeastern States of Rio Grande do Norte and Paraíba, and also in Norway.

*(iv) Operation FREUD*

This operation was executed on 19 June and was developed by the Social Security Task Force, formed by the Federal Police, the Federal Public Prosecution and the Social Security Ministry. Sixteen people were arrested, accused of participation in a gang responsible for defrauding the Social Security in Minas Gerais State. Twenty-five court orders for search and seizure warrants of residences, offices and doctors' offices were executed in the metropolitan area of Belo Horizonte City. The gang was composed of National Health and Security Service servants, including expert doctors, auditors and counterfeiters who acted to obtain fraudulent National Health and Security Service benefits. Most of the frauds involved psychiatric illnesses. During the investigations many auditors' offices were identified. They were used to attract interested people to obtain National Health and Security Service benefits – illness assistance and disability retirement – in a deceitful way.

*(v) Operation MATAMENTO*

This operation was executed on 27 June in the northern city of Marabá. It aimed to accomplish 18 arrests and to execute 20 search and seizure warrants, sent off by the State Justice of Pará. Fifteen people were arrested, among which were six military policemen and a business-woman of that city. They seized about U$ 90,000,00 (ninety thousand dollars) in cash, two kilos of cocaine and many weapons. The initial investigations showed the participation of military police officers in drug trafficking and in an extermination group, which was responsible for at least 10 deaths in that year alone.

| **FEDERAL POLICE DEPARTMENT** | | | |
|---|---|---|---|
| **Detentions in 2007** | | | |
| **Operations** | **Total** | **Public Servants** | **Federal Police Officers** |
| **179** | **2.693** | **308** | **14** |

3. Office of the Controller General

The Office of the Controller General (CGU) was created by Law No. 10,683 on 28 May 2003, and acts in all the agencies and entities of the Federal Executive as the central agency for internal control and audit, disciplinary action and ombudsman action. It also develops actions to promote transparency and prevent corruption, which are at the core of the Federal Government's proposed policy and basic target programme. In addition to acting in all phases of control, the Office of the Controller General also focuses on the execution of typical functions of an anti-corruption agency.

The Office's structure includes the Secretariat for Corruption Prevention and Strategic Information - the SPCI - which concentrates actions towards corruption prevention and promotion of transparency within the scope of the Federal Government. This Secretariat is also responsible for the co-ordination of specific activities to prevent corruption of foreign public officials in international business transactions, and for the monitoring of the implementation of the OECD, OAS and UN international conventions against corruption.

Also included in the office's structure is the Federal Secretariat of Internal Control, responsible, among other functions, for the monitoring and the evaluation of the execution of government actions, the application of budgetary allocations in the execution of such actions, and the administrative performance of those public officials responsible for their implementation.

In order to stimulate the discussion and open it up to civil society, the office created the Council for Public Transparency and Fight against Corruption. Composed of 20 members and an equal number of representatives of public authorities and of entities from civil society, among which associations of workers, contractors, lawyers, journalists and churches, it is responsible for the discussion and suggestion of measures for perfecting and reinforcing mechanisms and policies for transparency in public administration and for fighting corruption.

One of the top priority actions of the Office of the Controller General is to ensure Brazilian society is aware of the importance of the participation of citizens in controlling the use of public resources. Many programmes and activities were carried out in an attempt to incite such participation, in order to form a vigilant and an active society, which worries and fights to maintain rectitude in public expenses.

Some of these main programmes and activities are worth noting:

*(i) Program of Auditing based on Randomized Public Selection*

Every month, 60 municipal areas are selected in a random and impersonal way for an inspection of the utilization of their federal resources. More recently, this mechanism's aim was amplified, in order to select and inspect, randomly, larger federal programmes which are executed by State Governments.

*(ii) Program for Training Public Officials*

A broad programme was developed for training municipal administrative servants, in order to avoid mistakes made as a result of lack of knowledge of the rules that govern the execution of public expenses. This programme was initiated with many regional seminars and, in a short time, it intends to provide distance training mechanisms, available throughout the entire Republic.

*(iii) Mobilization of Civil Society*

This programme is directed at community leaders and members of the various local councils in charge of monitoring and inspecting the execution of social programmes carried out by federal resources. It intends to develop and perfect the inspection actions carried out by the councils and the community bodies.

*(iv) "Keep a Sharp Eye on Public Money" Guide*

Teaches citizens their civil rights; the responsibilities and duties of Municipal, State and Federal Agencies and Offices; the destination of public funds; the ways to inspect use of funds; and other information regarding the use of public money. It is available in print or on the Office's webpage:
http://www.cgu.gov.br/olho_vivo/Recursos/Publicacoes/arquivos/cartillha_olhoVivo.pdf.

*(v) Transparency Portal*

This mechanism provides a list of all the Federal resources transferred throughout the country. The portal is freely available for consultation by any interested citizen, at www.portaldatransparencia.gov.br, and all the information is presented in simple and accessible language, to guarantee comprehension.

*(vi) Program for Qualification in Disciplinary Administrative Processes*

Due to the lack of specialized public servants capable of detecting and investigating embezzlement and other transgressions in the public sector, this programme prepares public agents to carry out such tasks, in order to reduce impunity.

*(vii) Auditing within the Federal Administration*

During 2003 and 2004, the Office carried out 6,000 audits in Federal bodies and passed on to the Court of Accounts over 2,500 Special Balance Sheets.

*(viii) National Program of Capacity Building and Training for the Combating of Corruption and Money Laundering*

This programme was developed within the scope of the National Strategy to Combat Corruption and Money Laundering. It is directed at public agents involved in combating corruption and money laundering, such as judges, police authorities, prosecutors and tax agents.

In order to perfect and improve the instruments and the techniques used in prevention and combat of corruption, the Office of the Controller General maintains convention and partnership with public offices, civil society and non-governmental organizations (NGOs), such as:

*(a) Project Fighting Corruption in Brazil*

This is a convention between the Office of the Controller General and the Embassy of the United Kingdom in Brazil, in order to perfect Brazilian auditors' capacity to identify illegal practices and embezzlement of public resources.

*(b) Technical Co-operation between CGU and Brazil Transparency (NGO)*

This is a convention of technical co-operation between the Office of the Controller General and Brazil Transparency, an NGO, in order to provide technical aid regarding the definition of strategies and mechanisms to prevent corruption.

*(c) UNODC Convention*

This is a convention between the Office of the Controller General and the United Nations Office on Drugs and Crime, in order to assist the Brazilian government in the realization of a Global Forum to combat corruption (Brasília, June 2005), and in establishing mechanisms to enable public servants with auditing and investigation techniques to formulate a national integrity system and a national strategic plan against corruption.

4. Department of Asset Recovery and International Legal Cooperation

The Department of Asset Recovery and International Cooperation, subordinated to the Ministry of Justice, was created by Decree No. 4,991 on 18 February 2004. This department is responsible for identifying threats, defining effective and efficient policies, and developing an anti-money laundering culture. The main objective is to recover assets sent abroad illegally and the products of criminal activities, such as those deriving from illegal drug trafficking, illegal weapon trafficking, corruption and misappropriation of public funds, etc.

The DRCI is the competent agency to link, integrate and propose government actions and to co-ordinate the Brazilian's State's action on combating money laundering, transnational organized crime, recovery of assets and international legal co-operation; to negotiate agreements and co-ordinate the execution of international legal co-operation; and to instruct, issue opinions on and co-ordinate the execution of active and passive international legal co-operation, including international letters rogatory, etc.

5. Financial Activities Council Control

The Financial Activities Council Control (COAF), subordinated to the Ministry of Finance, was created by Law No. 9,613 on 3 March 1998. This council is responsible for disciplining, enforcing administrative penalties, and receiving, examining and identifying suspected illegal activities linked to money laundering.

6. Civil Police of the Federal District

According to the Federal Constitution, Article 144, fourth paragraph, it is attributed to the Civil Polices, excepting the Union attributions, the functions of the Judicial Police and the investigation of penal infractions, excluding military crimes. As the Federal Police Department, the Civil Polices are also responsible for the investigation, repression and prevention of crimes. Each state, territory and the Federal District has its own Civil Police, with precinct jurisdiction.

The Federal District is the Capital of Brazil and, therefore, the political, judicial, legislative and administrative centre of the country. In order to fulfill its role in the public security system, the Civil Police of the Federal District has excelled at constant improving of investigative procedures, with emphasis on the intelligence and technical police fields. In 2008, the Institution celebrated its 200th anniversary, proud of its unrestricted respect of fundamental rights, its full integration with society, its honesty, its impartiality, its pro-activity, and its total engagement with the preservation of the public order and the safety of the citizens and the endowment.

Through the last years, the Civil Police of the Federal District has played an important role in the battle against corruption, unleashing many operations in order to dismantle organized groups of criminals responsible for a great amount of losses to the State Treasury. Some of these operations are worth highlighting:

*(i) Operation AQUARELA*

A Task Force, formed by the Civil Police of the Federal District and the Federal Public Prosecution, executed this operation in order to arrest suspects of committing crimes against the Public Administration, embezzlement of public funds, money laundering, bidding fraud and criminal association. Among the suspects was a former president of a State Bank. As a result, 20 people were arrested in Brasília and in other states of Brazil. During the operation, some weapons; 130 computers; 95 expensive watches; many precious stones; 200,000 US dollars in cash; and hundreds of documents were seized. It is assumed that approximately 30 million US dollars were deviated.

*(ii) Operation TENTACLES*

The Civil Police of the Federal District, on 28 April 2005, executed this operation in order to arrest a gang formed by tax auditors; retired tax auditors; accountants; lawyers; entrepreneurs; and some other public servants from the State Treasury Agency, who were accused of crimes, among which money laundering; criminal association; influence trafficking; active corruption; crimes against the tax order; and others. As a result, 13 people were arrested and later accused in public criminal prosecutions. It is assumed that approximately 25 million US dollars were deviated from the State Treasury.

*(iii) Operation GALILEU*

The Civil Police of the Federal District Police, on November 2004, initiated an investigation which led to a gang specialized in committing frauds on official examinations for government posts and for private universities. The leading member was a public servant, who confessed to some of the frauds. The group used to sell the answers to the examinations, the theme of the compositions and, sometimes, even the inclusion of the lists of those who passed, charging the candidate from 25,000 to 35,000 US dollars. As a result, 80 people were arrested, among whom were a military police officers and some public servants.

## VI. BRAZIL'S CRIMINAL PROCEDURES

According to the Federal Constitution, in its Article 144, the investigation of criminal activities, excluding military crimes, is attributed to the Federal and the Civil Polices, as explained above.

After the occurrence of a crime, once the Federal or the Civil Police, according to its attributions, is informed, an inquiry is initiated by written orders of the competent police authority in order to gather evidence. The inquiry may be initiated by the Chief of Police *ex officio*; at the request of victims; or at the demand of the judge or the public prosecutor. After the investigation is completed, a report is made by the Chief of Police in charge, including information of all the evidence gathered.

The inquiry with its final report is submitted to a public prosecutor, who can demand other investigative actions, accept the evidence in order to formally accuse the suspect or the indicted one, or suggest the closure of the case. If the public prosecutor agrees that the evidence gathered is enough to prosecute the suspect or the indicted, a formal accusation is issued and the penal action is started. If the formal accusation is received by the competent judge, then the indicted is prosecuted and adjudicated.

The Federal Constitution establishes some prerogatives to Public Authorities, determining special attributions to prosecute and adjudicate them.

According to Article 52, it is a private attribution of the Federal Senate to process and adjudicate the President and the Vice-President of the Republic, on responsibility crimes; and the State Ministers and the Navy, Army and Air Force commanders on the same crimes, connected to those. The Federal Senate is also responsible for processing and adjudicating the Federal Supreme Court Ministers; the members of the National Council of Justice and of the National Council of the Public Prosecution; the Chief of the Federal Public Prosecution and the General Attorney of the Union, for responsibility crimes.

Congressmen and Senators can only be adjudicated by the Federal Supreme Court (Article 53). This court has also the attribution to process and adjudicate the President and the Vice-President of the Republic; the members of the National Congress; its own Ministers and the Chief of the Federal Public Prosecution, for common penal infractions. The process and the adjudication of the State Ministers; the Navy, Army and Air Force commanders; the members of the Superior Courts and of the Union Court of Accounts; and the Chiefs of Diplomatic missions, with permanent nature, for common penal infractions and for responsibility crimes, are also attributions of the Federal Supreme Court.

The Superior Court of Justice is responsible for processing and adjudicating the State and the Federal District Governors, for common crimes; the Chief Judges of the State and of the Federal District Courts; the members of the State and of the Federal District Courts of Accounts, the Federal Regional Courts, and the Electoral and Labor Regional Courts; the members of the Municipal Councils or Courts of Accounts and the members of the Union Public Prosecution, who officiate on Courts, for common and responsibility crimes.

The Federal Regional Courts are responsible for the process and adjudication of Federal Judges and members of the Union Public Prosecution, excepting the attribution of the Electoral Justice.

The Federal Judges are responsible for the process and adjudication of all cases of interest to the Union, of an autarchic entity or to a federal public enterprise, as a defendant, a plaintiff or opponent, excluding the cases of bankruptcy; of labor accidents; and those attributed to the Electoral or Labor Courts. The same responsibility works for political crimes and penal infractions which caused damage to the endowments, services or interests of the Union or of its autarchic entities or public enterprises, excluding misdemeanours and the responsibility of the Electoral and Labor Courts. In some cases specified by law, the process and adjudication of some crimes against the financial system and against the economic and financial order are also the Federal Judges' responsibility.

The Union Public Prosecution is composed of the Federal; the Labor; the Military; and the Federal District and Territories Public Prosecution.

The Federal Public Prosecution performs its duties in cases in which the Federal Supreme Court, the Superior Court of Justice, the Federal Regional Courts, the Federal Judges, and the Electoral Courts and Judges are responsible.

The other cases are processed and adjudicated by the Federal District and Territories and the State Judges. The prosecution of these cases is performed by the Federal District and Territories Public Prosecution.

## VII. BRAZIL'S PREVENTIVE MEASURES AGAINST CORRUPTION

The consequences of corruption on society are visible: the engagement of economic development and of political legitimacy, and the gradual weakening of democratic institutions, moral values, and the trust of the people in the public services, etc. Such factors contribute to the strengthening of organized crime and to the worsening of social problems.

Conscious of the necessity to improve constantly in the war against corruption, the government, hitting the mark, is following the evolution of international society in treating the problem. For this reason, Brazil has enlarged its relationship with other countries, aiming at integration and mutual co-operation.

It concerns the Office of the Controller General, through the Secretariat for Corruption Prevention and Strategic Information, to follow the implementation of the conventions and international commitment assumed by Brazil which have the aim of preventing and fighting corruption.

The main conventions signed and confirmed by Brazil are:

*(i) United Nations Convention against Corruption - UNCAC*

The United Nations Convention against Corruption was signed on 9 December 2003, in the city of Mérida, México, ratified on 15 June 2005, and promulgated by the Brazilian government by means of Decree No. 5,687 on 31 January 2006. It had basically the aim of: promoting and fortifying the measures to prevent and fight corruption more efficiently and effectively; promoting, facilitating and supporting international co-operation and technical assistance in preventing and fighting corruption, including the recovery of assets; promoting integrity; and the obligation of rendering accounts and the right conduct of matters and of public assets. Legal mechanisms were established, for the first time, for the repatriation of assets and resources sent to other countries, obtained by means of corrupt acts.

*(ii) The Organization of the American States (OAS)*

The Inter-American Convention against Corruption was signed on 29 March 1996, ratified on 10 July 2002, and promulgated by the Brazilian Government by means of Decree No. 4,410 on 7 October 2002. It has the object of promoting and fortifying, in the signatory countries, the necessary mechanisms to help to prevent, detect and punish corruption, when proceeding in the public functions, as well as corrupt acts specifically linked to such functions.

*(iii) Organization for Economic Co-operation and Development - OECD*

This convention was signed on 17 December 1997, ratified on 15 June 2000, and promulgated by the Brazilian government by means of Decree No. 3,678 on 30 November 2000. It works specifically on fighting corruption of foreign public employees in international commercial transactions. It constitutes an instrument that defines the duties of Governments, companies, public accountants, lawyers and the civil society of the signatory nations of the Treaty.

## VIII. BRAZIL'S LEGAL REGIME FOR COMBATING CORRUPTION

### A. The Federal Constitution

This important document, composed of 250 articles, with many paragraphs, sections and items; 55 amendments and six revision amendments, regulates the country's entire legal system and guarantees the free exercise of the executive, the judicial and the legislative branches, the public prosecution and the constitutional powers of the units of the Federation.

The Federal Constitution shows an important concern for proper conduct by civil servants and the probity of public affairs. That concern is reflected especially in Article 37, which sets forth the basic principles of direct and indirect public administration in the branches of the government of the Union, the states, the Federal District and the municipalities, which are: lawfulness, impersonality, morality, publicity and the principle of efficiency.

The Constitution, in its Article 37, Item XXII, paragraph 4, stipulates that persons guilty of government misconduct shall lose their political rights and public office. They will not be allowed to transfer personal property and will be required to reimburse the Public Treasury in the manner and to the degree prescribed by law. They may also face criminal prosecution.

The Federal Constitution also holds public servants liable for damages caused to third parties when those damages were intentionally inflicted or caused by negligence.

It prohibits the use of any image, name or symbol that amounts to self promotion in advertising the actions, programmes, works, services and campaigns of public agencies.

### B. Ordinary Laws applicable to Public Servants

*(i) Law No. 1,079, of 10 April 1950 and Decree-Law No. 201, of 27 February 1967*

These legal mechanisms provide political-administrative penalties (loss of position and disqualification from any government job or position for a period of up to five years) and criminal penalties (imprisonment for up to 12 years) for public servants whose dishonest conduct is harmful to Government. The first mechanism is applied to misconduct practiced by the President of the Republic, Ministers of State, Judges of

the Federal Supreme Court, the Attorney General of the Republic, and the Governors and Secretaries of State. The second one is applied to misconduct and political-administrative violations practiced by mayors and members of city/town councils.

*(ii) Law No. 6.880, of 9 December 1980*

This law, the Statute of the Military Servants, introduced the principles of military ethics, some of which are worth quoting: to love truth and the responsibility as the basis of personal dignity; to perform one's duties with authority, efficiency and integrity; to serve and to enforce the laws, regulations, instructions and orders received from the competent authorities; to maintain faultless public and private conduct; and to refrain from using position or the rank in order to obtain personal advantages of any kind, or in order to guide personal or private business.

*(iii) Law No. 8,027, of 12 April 1990*

This law contains the rules of conduct for Civil Public Servants of the Union, autonomous government entities and public foundations. It spells out the duties of every civil public servant, such as reporting violations of the law, omissions and abuse of power; penalties varying from warning, suspension for up to 90 days and dismissal, applied in cases of administrative wrongdoing by public civil servants; and the civil, administrative and criminal liability incurred for irregularities in the exercise of functions and duties.

*(iv) Law No. 8,112, of 11 December 1990*

This law sets up the juridical regime governing civil servants employed by the Union, the autonomous governing agencies and the federal public foundations. It regulates the filling of government positions, job stability, prohibitions, rights and duties of public servants, such as: to be loyal to the institutions one must serve; to observe the rules and regulations; to behave in a way compatible way with administrative morality; etc.

*(v) Law No. 8,137, of 27 December 1990*

This law establishes crimes against the tax order and the economic order and against the consumer relationship. The third article defines as crimes conduct against the tax order, such as: to request, require, demand or obtain, for oneself or for anyone else, direct or indirectly, even if from outside of the public position or before being invested with it, but because of it, improper advantage; to accept the promise of such advantage, in order to omit to register or to charge tax or social dues, or to charge such partially; and to support, directly or indirectly, a private interest before the financial administration, using the benefits of the public position.

*(vi) Law No. 8,429, of 3 June 1992*

This law establishes penalties for acts of government impropriety committed either by public servants or private individuals and harmful to public property. Those acts are divided into three categories:

a) illicit enrichment whereby one gains illicit assets by virtue of one's office, mandate, function, employment or government business (Art. 9);

b) acts harmful to the public treasury whereby one causes a loss of assets, diverts funds, embezzles, squanders or destroys public property or the effects of public entities (Art. 10); and

c) acts that violate the duties of probity, impartiality, lawfulness and loyalty to public institutions (Art. 12).

*(vii) Law No. 8,730, of 10 November 1993*

This Law stipulates that disclosure of assets and income is mandatory for positions, employment and service in the executive, legislative and judicial branches.

*(viii) Decree No. 1,171, of 22 June 1994*

This Decree approved the Code of Professional Ethics for Civil Public Servants in the Executive Branch of the Federal Government. It provides for:

a) the creation of an Ethics Commission in all offices of the direct and indirect Federal Government;

b) the rules of professional responsibility and legal ethics;

c) the public servant's main duties, such as integrity, advising one's superior of any and every act or

fact against the public interest; refraining from engaging in any function or exercising any power or authority, whose purpose diverges from the public interest;

d) prohibitions on public servants, such as prohibiting the use of one's position to obtain any kind of advantage or receive any kind of financial assistance in exchange for the performance of one's official functions.

*(ix) Law No. 9,613, of 4 March 1998*

The Law of Money Laundering Offenses established provisions on the criminal offence of laundering or concealment of assets, rights and values, and also implemented the rules to criminalize bribery of foreign public servants.

*(x) Law No. 9.784, of 29 January 1999*

This Law stipulates the rules applied to the Disciplinary Administrative Process, providing some principles which are implicit in the Federal Constitution, such as proportionality, decency and reasoned judgment.

*(xi) Supplementary Law No. 101, of 4 May 2000 (The Accountability Fiscal Act)*

This supplementary law introduced rules regarding public funds, which aimed to achieve accountability in fiscal management.

*(xii) Decree No. 4.081, of 11 January 2002*

This Decree approved the Code of Ethical Conduct for Public Servants serving in the Office of the President and in the Office of the Vice President of the Republic.

**C. Crimes against the Public Administration**

Brazil's Criminal Code, Federal Law No. 2,848 of December 1940, in its Title XI, defines conduct which can characterize crimes practiced by public agents against the Public Administration. This title is, originally, divided into three chapters: crimes practiced by public servants against the administration in general; crimes practiced by private individuals against the administration in general; and crimes against the administration of justice.

In order to accomplish the adaption of Brazilian law to the commitments assumed in the Convention on Combating Corruption of Foreign Public Officials in International Business Transactions, Law No. 10,467 of 11 June 2002, was promulgated. This Law added Chapter II-A to the Title XI of Brazil's Criminal Code, which defines the crimes practiced by private individuals against a foreign public administration.

It is worth outlining some of these crimes, such as those noted below.

1. Crimes Practiced by Public Servants against the Administration in General

*(i) Embezzlement of Public Money (Article 312)*

To embezzle money, assets or any movable personal property, private or public, or to divert it, for himself or anyone else, by the public servant who has its possession as a result of his or her official position. Punishment is reclusion from two to 12 years and fine.

The same punishment will be applied, if the public servant, although not possessing the money, the asset or the property, subtracts it or assists, in any way, the subtraction, for his or anyone else's benefits, taking advantage of the benefits provided by the public position.

*(ii) Insertion of False Data in Information Systems (Article 313-A)*

For the authorized employee to insert or to facilitate the insertion of false data, or to alter or to exclude, improperly, correct data from the Public Administration computer systems or databases, in order to obtain improper advantages for his or her or anyone else's benefit or to divert it, for him or herself or anyone else, or to cause damage. Punishment is reclusion from two to 12 years and fine.

*(iii) Irregular use of Public Revenues or Budgets (Art. 315)*

This crime is to forward public revenues or budgets to a different destination from the one established by law. Punishment is confinement from one to three years or fine.

*(iv) Bribery (Art. 316)*
To demand, for him or herself or for anyone else, direct or indirectly, even from outside of the public position or before being invested with it, but because of it, improper advantage. Punishment is reclusion from two to eight years and fine.

The same article defines the Exaction as being the conduct of demanding a tribute or social tax by the public servant who knows or should know it is improper, or when proper, uses serious or shameful means of collecting, unauthorized by law. Punishment is reclusion from three to eight years and fine.

Also, the conduct of diverting, for his or her or anyone else's benefit, the result of an improper collection due to the public treasury. Punishment is reclusion from two to 12 years and fine.

*(v) Passive Corruption (Art. 317)*
To request or receive, for him or herself or for anyone else, direct or indirectly, even from outside of the public position or before being invested with it, but because of it, improper advantage, or to accept the promise of this advantage. Punishment is reclusion from one to eight years and fine.

The punishment is increased to a third if, as a result of the advantage or of its promise, the Public Servant postpones or doesn't practice any "*ex officio*" act or practices it violating his or her functional duty.

This crime includes the practice, omission of practice or delay of practice of an "*ex officio*" act, violating a functional duty, yielding to someone else's request or influence. Punishment is confinement from three months to one year or fine.

*(vi) Facilitation of Contraband or Embezzlement (Art. 318)*
This crime refers to conduct which facilitates, with the violation of a functional duty, the practice of smuggling contraband or the commission of embezzlement. Punishment is reclusion from three to eight years and fine.

2. Crimes Practiced by Private Individuals against the Administration in General

*(i) Influence Trafficking (Art. 332)*
To request, require, demand or obtain, for him or herself or for anyone else, advantage or the promise of this advantage, in order to influence a public servant in the performance of his or her duties. Punishment is reclusion from two to five years and fine.

The punishment is increased by a half, if the agent declares or insinuates that the advantage is also assigned to the public servant.

*(ii) Active Corruption (Art. 333)*
This is to offer or promise improper advantage to a public servant, in order to induce him or her to practice, omit or postpone an "*ex officio*" act. Punishment is reclusion from one to eight years and fine.

The punishment is increased by a third if, as a result of the advantage or of its promise, the public servant postpones or omits an "*ex officio*" act, or practices it, violating a functional duty.

3. Crimes Practiced by Private Individuals against a Foreign Public Administration

*(i) Active Corruption in an International Business Transaction (Art. 337-B)*
To promise, offer or give, direct or indirectly, improper advantage to a foreign public servant, or to someone else, in order to induce him or her to practice, omit or postpone an "*ex officio*" act related to a foreign business transaction. Punishment is reclusion from one to eight years and fine.

The punishment is increased by a third if, as a result of the advantage or of its promise, the public servant postpones or omits the "*ex officio*" act, or practices it, violating a functional duty.

*(ii) Influence Trafficking in an International Business Transaction (Art. 337-C)*
To request, require, demand or obtain, for him or herself or for anyone else, directly or indirectly, an

advantage or the promise of this advantage, in order to influence in a foreign public servant an act, related to an international business transaction, in the performance of his or her duties. Punishment is reclusion from two to five years and fine.

The punishment is increased by a half if the agent declares or insinuates that the advantage is also assigned to the foreign public servant.

*(iii) The Concept of Foreign Public Servant (Art. 337-D)*

For penal purposes, a foreign public servant is a person who, even if temporarily or if not on a remunerated basis, holds a position, job or plays a public role in state entities or in diplomatic representations of a foreign country.

It is equivalent to a foreign public servant, the person who holds a position, job or plays a public role in companies controlled, directly or indirectly, by the State of a foreign country, or in international public organizations.

## IX. MONEY LAUNDERING

The crime of money laundering is global in character and an estimated 500 billion to 1.5 trillion US dollars is laundered annually. In this process, in order to legitimate all the capital earned through criminal acts, the money runs through countries' financial and economic systems, compromising the security of its financial and economic order, stimulating the practice of serious crimes such as terrorism, drug trafficking, weapons trafficking, extortion, corruption, etc.

In order to try to prevent and punish those who use the money laundering process to conceal or disguise the nature, origin, localization, disposition or movement of assets, rights or properties derived, directly or indirectly, from criminal acts, many countries have promulgated specific laws with the intention of incriminating money laundering-related conduct.

In Brazil, Law No. 9,613, of 4 March 1998 was promulgated with the intention of defining a new special type of crime; to prevent the use of the national financial system as an instrument for laundering; to institute a national financial intelligence agency (Financial Activities Council Control – COAF); and to create administrative, penal and procedural rules to prevent and punish related crimes.

The first article defines the main types of criminal conduct, which are complemented by the antecedent crimes, and which can generate a product or illicit gain that could be an object of capital laundering.

In its Article 4, the law establishes that the judge may order "*ex officio*" or by request of the public prosecution or the police authority, the restraint or seizure of assets, rights and properties belonging to the defendant or registered under his or her name, if there is evidence that they are the object of the related crimes.

According to Article 7, in case of conviction, these assets are declared to be forfeited in favour of the Union safeguarding, however, the victim or a third party with good faith rights. Another consequence of the conviction is the suspension of the right to hold offices of any nature in the public service, or positions as directors, members of management or administration councils of any of the legal persons referred to in Article 9 of the Law, for a period corresponding to double the term of imprisonment stipulated by the judicial sentence.

It is worth pointing out that owing to the fact that there is material concurrence between the prior crime and the crime of money laundering, the penalties applied to each of the crimes must be added up. Therefore, in the case of conviction for both the prior and the money laundering crime, the sentence provided for the latter shall be applied cumulatively with the sentence provided for in the Criminal Code for the former.

The Law also establishes that if there is an international treaty or convention and a request from a competent foreign authority, the judge will order the restraint or seizure of assets, rights and properties belonging to the defendant or registered under his or her name, if there is evidence that they are the object of the related crimes, committed abroad. Even in the absence of international treaties or conventions, this order can be declared if the requesting government promises Brazil reciprocity.

The creation of the Financial Activities Council Control, a national financial intelligence agency, was a major step in combating corruption. This Council has the purpose of instructing and applying administrative punishments; to receive, examine and identify the occurrence of suspected illicit activities defined in this Law; and to co-ordinate and propose co-operation and information exchanging mechanisms, which enable fast and efficient actions on combating the concealment or disguising of assets, rights and properties.

The Council is authorized to demand banking and financial cadastral information from Public Administration offices, regarding individuals involved in suspicious activities. This information will provide material analysis regarding the growth of assets of individuals. According to the results, this information is sent to the responsible organ, in order to start the legal administrative or criminal measures.

In the scope of the Federal Executive, if the individual investigated is a public servant, the Office of the Controller General initiates a confidential administrative inquiry which intends to verify whether the growth of the assets is compatible with the declared income. If proved that it is not compatible, than the Office initiates a Disciplinary Administrative Process, which can result in administrative punishments, such as dismissal.

The information gathered by the Council may help identify the author and co-author of the related crimes; the localization of the laundered assets and properties; their condemnation and the consequent confiscation of the profits, instruments and proceeds of the crimes.

The financial intelligence system that feeds the Council relies on the collaboration of the Federal Prosecutor's Office; the Office of the Controller General (CGU); the Federal Police Department; the Brazilian Central Bank (BACEN); the Securities and Exchange Commission (CVM); and the Superintendence of Private Insurance (SUSEP) and the Secretariat of Complementary Social Security (INSS) of the Social Security Ministry, which regulate and supervise the sectors under their responsibility.

This co-operation travels back and forth, since the exchange of data can provide the organs who feed the system with the information necessary to trace, block and retrieve assets concealed or disguised; to identify and block suspicious financial transactions; to initiate criminal investigation and, if the case, to propose the institution of prosecution.

## X. OPERATION TENTACLES

This investigation was initiated in 2004, with the initiation of an inquiry to verify criminal news originating in a State Treasury Agency, according to which some treasury auditors were committing crimes against the tax order, defined in Article 3, II, of Law No. 8,137 of 27 December 1990.

During the investigation, which involved over 80 suspects, among whom were tax auditors, retired tax auditors, accountants, lawyers, entrepreneurs, and some other public servants from the State Treasury Agency, telephone interception was authorized by a competent judge.

By this measure, the scheme elaborated by the leading characters of the group could be discovered, lighting up the functions of each member. As the investigation improved, it was doubtless that the suspected group formed a criminal organization, with the purpose of growing rich by the damage caused to the State Treasury.

The investigation defined many kinds of illicit conduct practiced by the participants of the criminal organization. The two leading characters, tax auditors, framed tax assessments against companies, in order to "negotiate" the value of the tax or the annulment of the tax assessments. The accountants involved were responsible for persuading the entrepreneurs to accept the proposal of bribery, and for intervening in the transaction.

The auditors prepared formal tax defences, based on tax assessments they had filed themselves, which were filed against the State Treasury by the lawyers for the criminal group. As a result, the companies which gave the bribes were able to reduce or even cancel their public debts. One of the senior lawyers was the daughter of one of the leading auditors involved.

All the money received as a bribe was divided among the members of the criminal organization and

carefully laundered. Some of the members deposited the illicit money in relatives' current banking accounts; others acquired vehicles, companies and other properties, in all cases representing amounts incompatible with their incomes. The telephone interception showed that one of the auditors acquired US$4,000 in cash, proving his attempt to conceal illicit money.

The attempt to avoid the production of evidence was constant during the investigation, as the members used deceits such as constantly changing their telephone lines and e-mail addresses; avoiding the use of real names or details of operations on the telephone; and even hiring private investigators to find out about public official investigations occasionally initiated to uncover their activities.

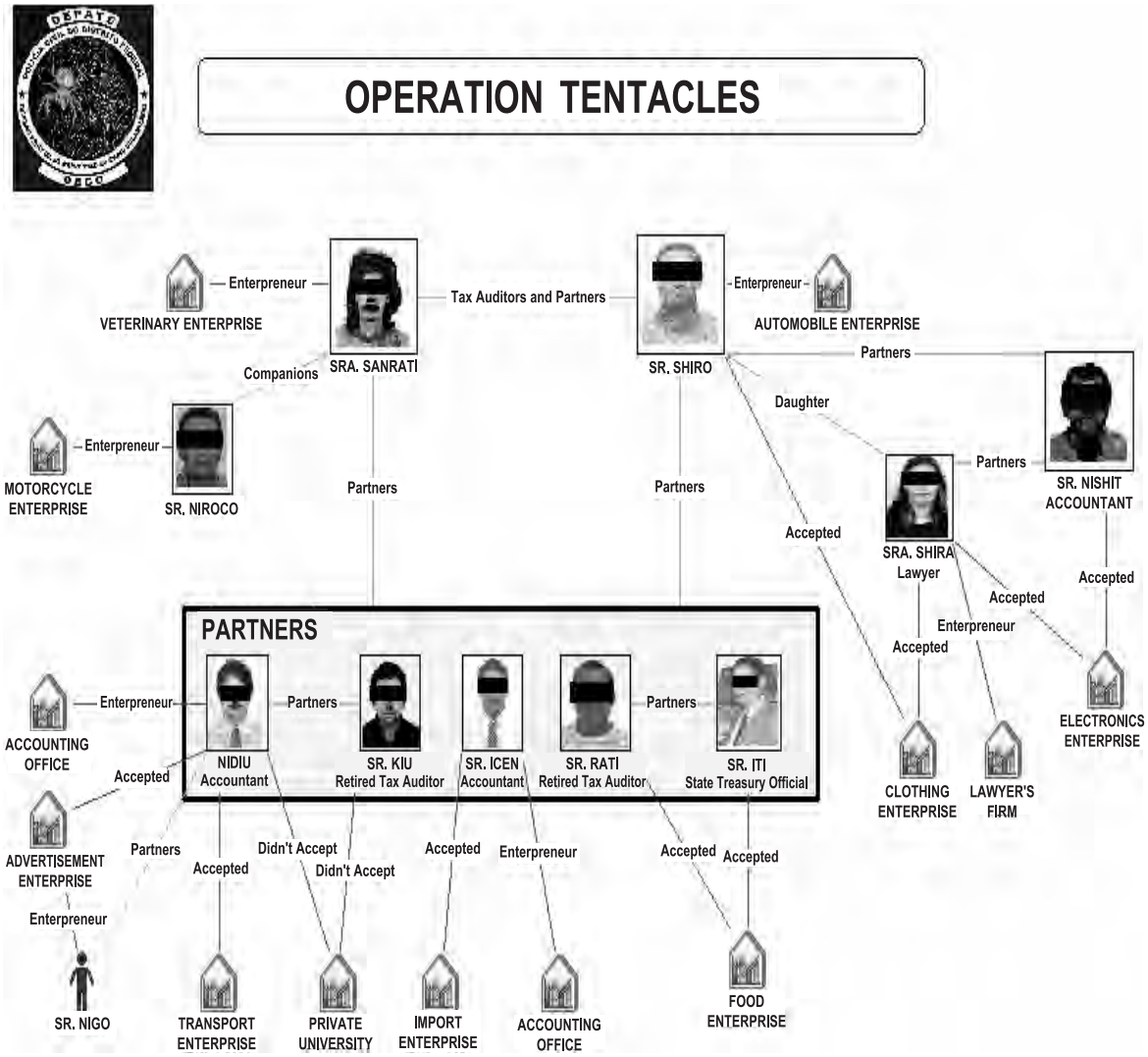
After gathering all the primary evidence, the chief of police in charge of the investigation requested the competent judge for temporary and preventive custody; for search and seizure to be carried out in homes and offices; for the breach of fiscal and banking secrecy; and for the freezing of assets of some of the leading members of the criminal organization.

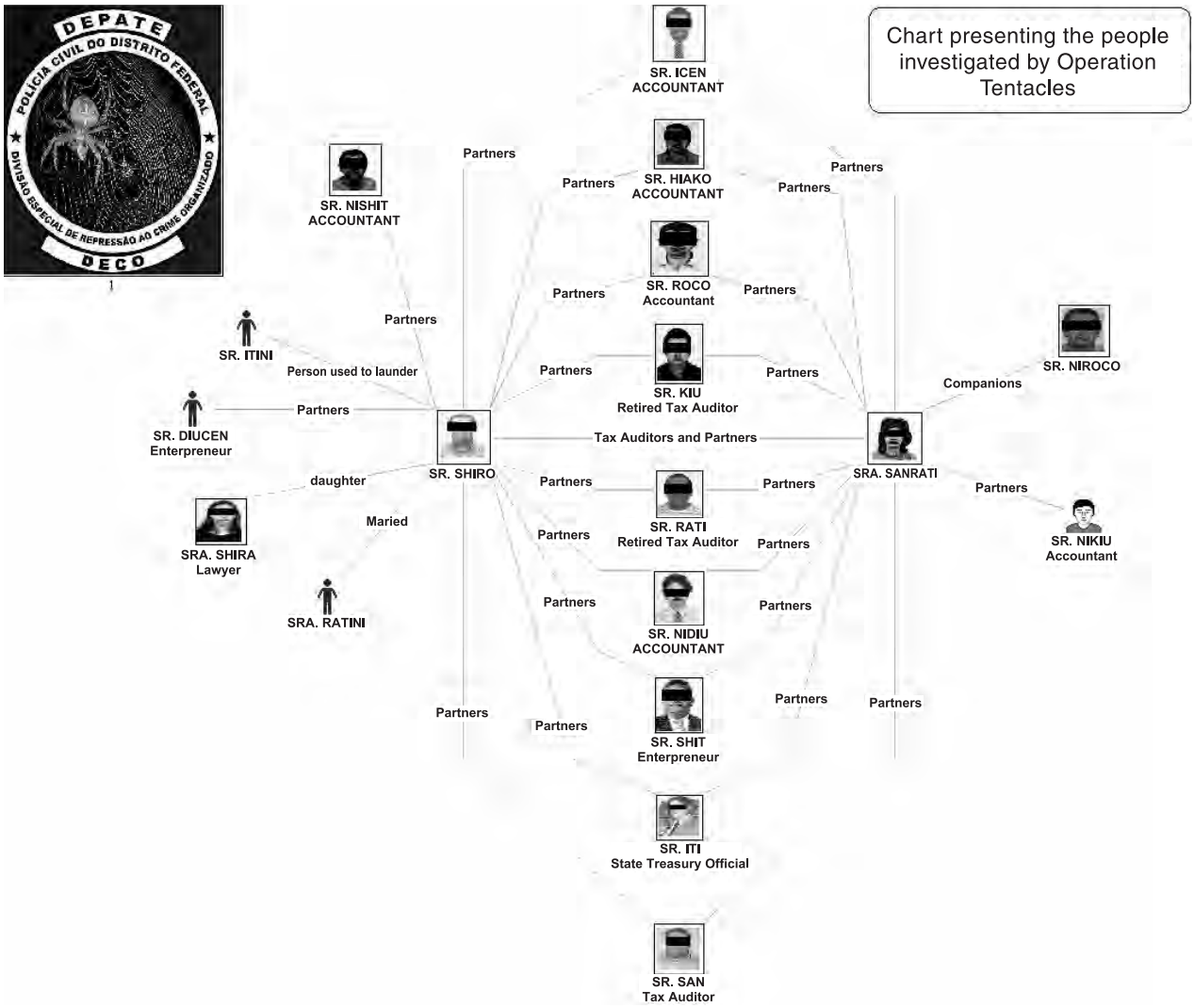
On 28 April 2005, Operation Tentacles was executed, resulting in the arrest of 13 people, who were later accused in public criminal prosecutions of many crimes, among which money laundering; criminal association; influence trafficking; active corruption; crimes against the tax order; and others.

On 23 March 2006, after the due disciplinary administrative process, some of the leading members of the organization were formally dismissed from the State Treasury Agency.

The estimated damage caused to the State Treasury was around US$25,000,000 (twenty five million dollars) in deviated money.

**A. Charts**






## XI. BRAZILIAN STATISTICS

### A. Federal Police Department Statistics 2005

**Exchange of Criminal Information in 2005**

| *REQUESTS* | *NUMBER* | *PERCENTAGE* |
|---|---|---|
| RECEIVED | 26,297 | 68.87% |
| MADE | 11,885 | 31.13% |
| TOTAL | 38,182 | 100% |

**Remarks**

- Exchange of criminal information with the 184 member countries of the International Criminal Police Organization (Interpol), units of the Federal Police Department (DPF), Ministry of Justice and bodies of justice.
- The exchanges of information comprise solicitations, diffusions, memoranda, administrative information, etc.

**Extraditions and Transfer of Prisoners**

| *TYPE* | *NUMBER* |
|---|---|
| 1. ACTIVE EXTRADITIONS[1] | 08 |
| 2 . PASSIVE EXTRADITIONS[2] | 45 |
| 3. TRANSFERS[3] | 04 |

1. The Brazilian State requests the delivery of criminals to the foreign State.
2. The foreign State requests the delivery of criminals to Brazil.
3. By force of the treaty, the convicted criminal serves the sentence in his or her home country.

**Police Inquiries**
**Financial Crimes and Money Laundering**

| | |
|---|---|
| INITIATED INQUIRIES | 1,051 |
| REPORTED INQUIRIES | 379 |
| ON-GOING INQUIRIES | 2,646 |

## B. Financial Activities Council Control (COAF) Statistics – 2005

**Communications Received by the COAF**

| **COMMUNICATIONS OF OPERATIONS RECEIVED BY THE COAF** | | | | | |
|---|---|---|---|---|---|
| **1 – Atypical Operations (Art. 11, clause II, item "b" of Law n. 9.613/98)** | 1998-2002 | 2003 | 2004 | 2005 | Total |
| **1.1 – Sectors Regulated by the COAF** | | | | | |
| Bingos | 2,454 | 19 | 7 | 0 | 2,480 |
| Real Estate Actions | 2,287 | 619 | 630 | 750 | 4,286 |
| *Factoring* | 84 | 1 | 27 | 12,892 | 13,004 |
| Jewelry, Precious Metals and Stones | 9 | 0 | 1 | 0 | 10 |
| Lotteries and Raffles | 382 | 140 | 84 | 101 | 707 |
| Objects of Art and Antiques | 1 | 1 | 2 | 0 | 4 |
| **Subtotal** | **5,217** | **780** | **751** | **13,743** | **20,491** |
| **1.2 – Sectors with Own Regulatory Body** | | | | | |
| Financial System (Central Bank) | 12,198 | 5,494 | 7,090 | 12,589 | 37,371 |
| Insurance (SUSEP) | 275 | 879 | 1,169 | 2,505 | 4,828 |
| Stock Market (CVM) | 20 | 13 | 12 | 178 | 223 |
| Pension Funds (SPC) | 9 | 2 | 28 | 105 | 144 |
| **Subtotal** | **12,502** | **6,388** | **8,299** | **15,377** | **42,566** |
| **Total of Atypical Operations (1.1 + 1.2)** | **17,719** | **7,168** | **9,050** | **29,120** | **63,057** |
| **2 – Operations by Limit or Criterion (Art. 11, clause II, item "a" of Law n. 9.613/98)** | | | | | |
| **2.1 – Sectors with Own Regulatory Body** | | | | | |
| Financial System (Central Bank) | 0 | 33,358 | 76,102 | 129,489 | 238,949 |
| **Total (1+2)** | **17,719** | **40,526** | **85,152** | **158,609** | **302,006** |

**Communications of Suspect Operations on the Financial System by Range of Values of the Communications (2005)**

| Ranges of Value (R$) | | Number | Percentage | |
|---|---|---|---|---|
| From | To | | In the Range | Accumulated |
| 1 | 10,000 | 1,051 | 8.62% | 8.62% |
| 10,001 | 50,000 | 1,273 | 10.44% | 19.07% |
| 50,001 | 100,000 | 835 | 6.85% | 25.92% |
| 100,001 | 500,000 | 2,468 | 20.25% | 46.17% |
| 500,001 | 1,000,000 | 996 | 8.17% | 54.34% |
| 1,000,001 | 10,000,000 | 4,658 | 38.22% | 92.56% |
| 10,000,001 | 100,000,000 | 849 | 6.97% | 99.52% |
| 100,000,001 | - | 58 | 0.48% | 100.00% |
| **Subtotal** | | **12,188** | | 96.81% |
| **Cancelled** | | **401** | | 3.19% |
| **Total** | | **12,589** | | 100.00% |

**Time between the Reception of the Last Communication and the Making of the Report (*Ex Officio* and Others 2005)**

| **Range (in days)** | **Number of Reports** | **Participation** | |
|---|---|---|---|
| | | **%** | **Accumulated** |
| 0 a 3 | 182 | 25.17 | 24,17 |
| 3 a 10 | 215 | 29.74 | 54,91 |
| 10 a 20 | 152 | 21.02 | 75,93 |
| 20 a 30 | 55 | 7.61 | 83,54 |
| 30 a 60 | 58 | 8.02 | 91,56 |
| More than 60 | 61 | 8.44 | 100,00 |
| **TOTAL** | **723** | 100.00 | |

| **National Exchange of Information, by Origin** | | | | | | | |
|---|---|---|---|---|---|---|---|
| **Original Body** | **2003** | | **2004** | | **2005** | | **TOTAL** |
| | **SISPED** | **Others** | **SISPED** | **Others** | **SISPED** | **Others** | |
| Police Authorities | 20 | 102 | 93 | 110 | 147 | 179 | 651 |
| Prosecutor's Office | 101 | 66 | 315 | 93 | 217 | 105 | 897 |
| Bodies of the Government | 25 | 20 | 126 | 19 | 116 | 36 | 342 |
| Judiciary Branch | 2 | 60 | 0 | 107 | 2 | 111 | 282 |
| **Subtotal** | **148** | **248** | **534** | **329** | **482** | **431** | **2.172** |
| **TOTAL** | **396** | | **863** | | **913** | | |

NOTES:
1. "Others" includes fax and memoranda.
2. SISPED – *Sistema Eletrônico de Intercâmbio de Informações* - Electronic System for the Exchange of Information – developed to bring more agility and security to the exchange of information, substituting the memoranda through which the COAF receives information from competent authorities and shares its reports.

| Exchange of Informaion with FIU's and Foreign Authorities | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| **Requests for Information** | **1998/ 1999** | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **TOTAL** |
| Received by the COAF | 22 | 19 | 45 | 99 | 80 | 78 | 87 | 430 |
| Made by the COAF | 4 | 54 | 46 | 57 | 96 | 137 | 70 | 464 |
| TOTAL | 26 | 73 | 91 | 156 | 176 | 215 | 157 | 894 |

**Requests Received by the COAF**

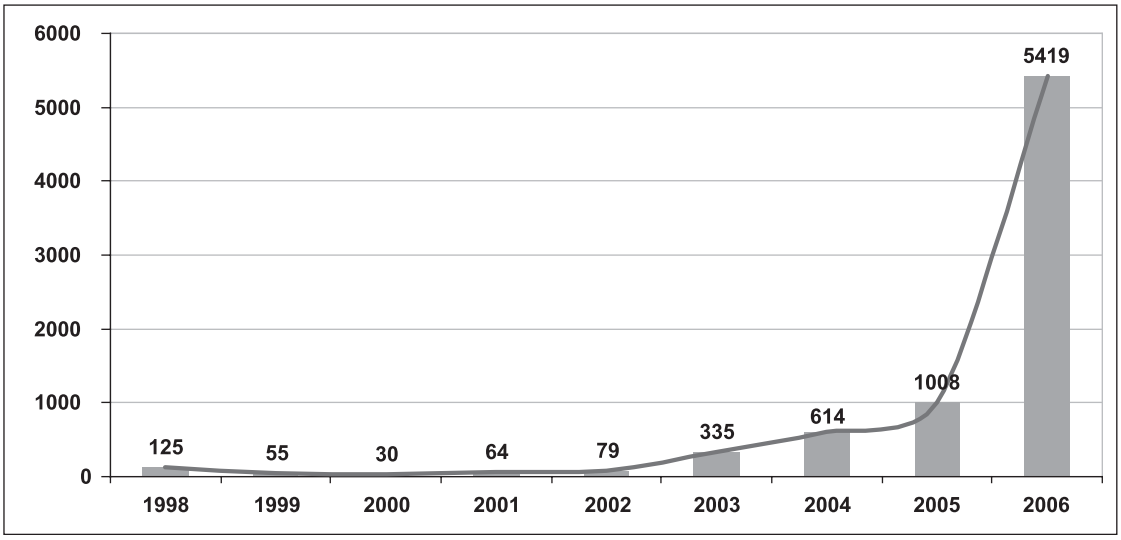
| Country – FIU | % |
|---|---|
| Portugal | 32% |
| USA | 14% |
| Bolivia | 7% |
| Peru | 6% |
| Belgium | 5% |
| Venezuela | 5% |
| Other 16 | 31% |
| **TOTAL** | **100%** |

**Requests Made by the COAF**

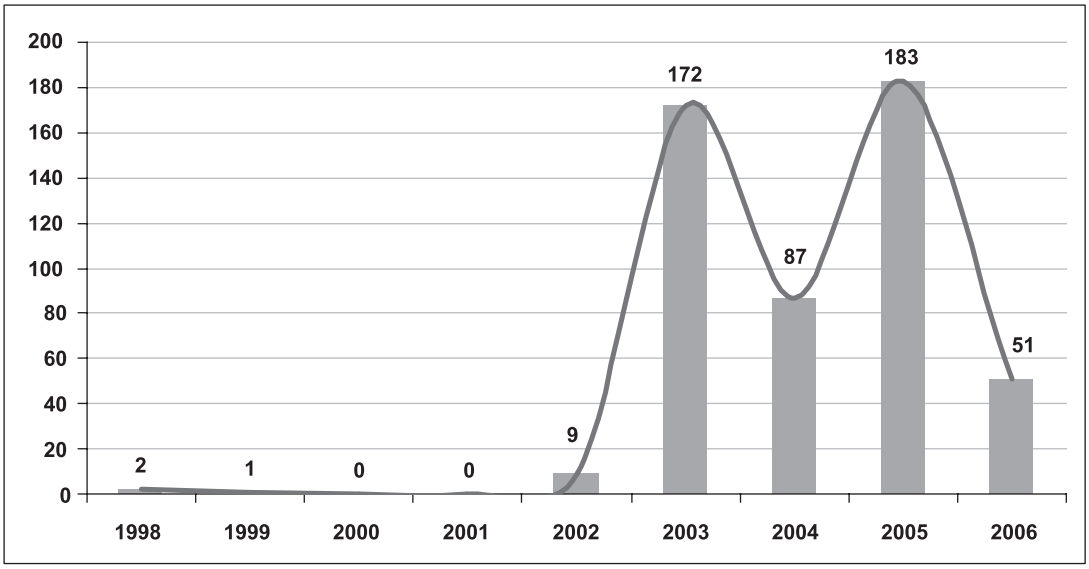
| Country – FIU | % |
|---|---|
| USA | 25% |
| Uruguay | 9% |
| The Cayman Islands | 9% |
| The British Virgin Islands | 7% |
| Italy | 5% |
| Other 24 | 45% |
| **TOTAL** | **100%** |

## C. Department of Asset Recovery and International Legal Cooperation (DRCI) Statistics – 2005

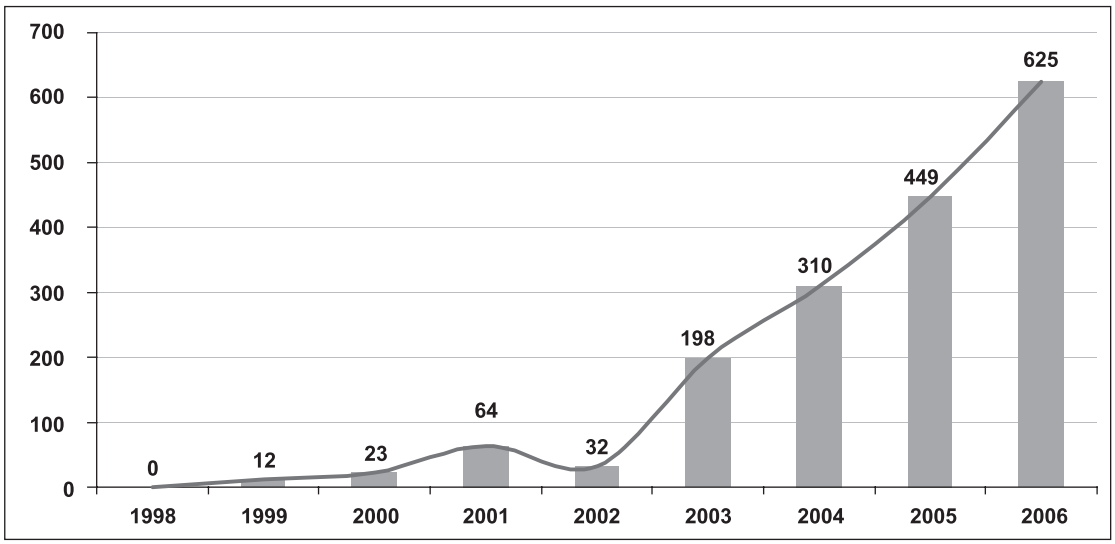
**Statistics on Combating the Money Laundering Offence**
**Investigated and Accused**



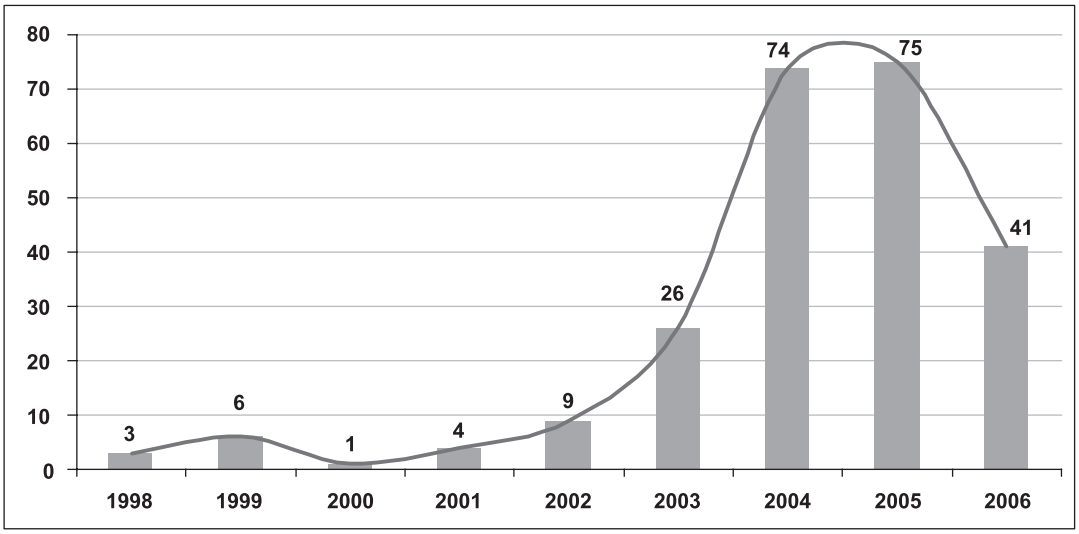
**Convicted**




**Inquiries**




**Penal Actions**



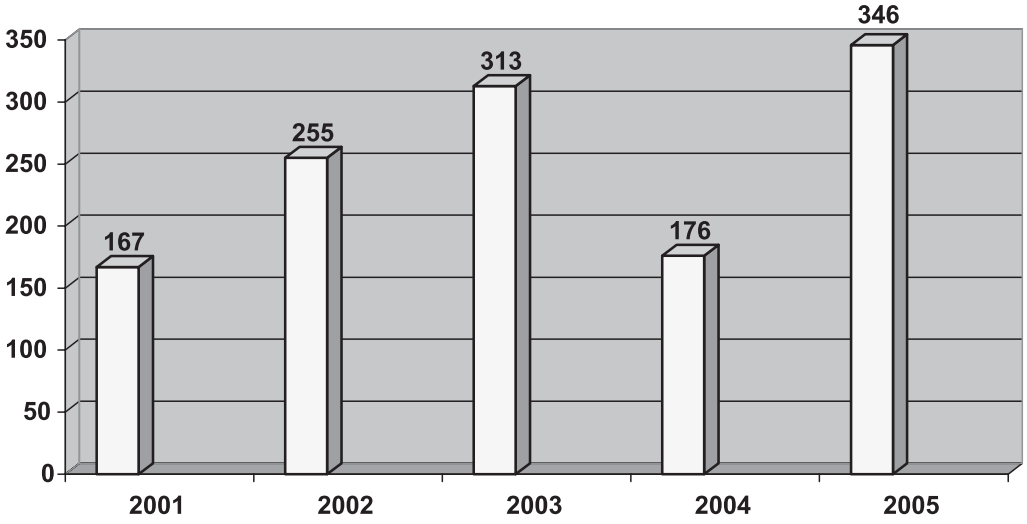
## D. Securities and Exchange Commission (CVM) Statistics – 2005

**Market Surveillance 2005**

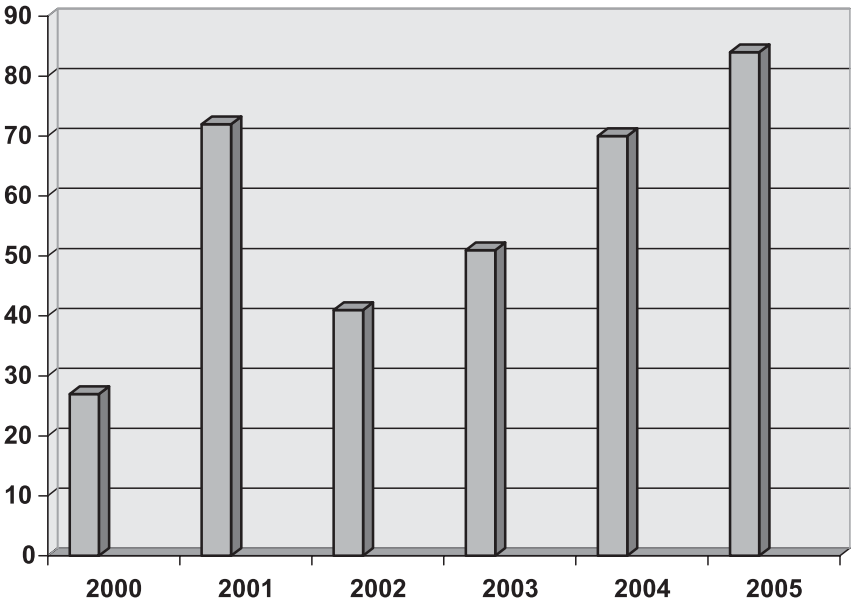
| | |
|---|---|
| **Enterprises opened:** | **764** |
| **Enterprises opened in Bovespa's list:** | **340** |
| **Enterprises incentivated:** | **1,485** |
| **Auditors:** | **418** |
| **Agencies and Distributors:** | **304** |
| **Independent Agents:** | **2,694** |
| **Securities and Exchange Analysts:** | **710** |
| **Investment Funds:** | **5,895** |
| **Non-resident investor pools:** | **372** |
| **Pools Administrators:** | **1,526** |

*Data as of April 2006*

**Inspection Numbers**




**SAP – Sanctionary Administrative Processes**



**Proceeding Statistics 2005**

| | |
|---|---|
| **Sanctionary Administrative Processes (SAP) distributed to the college:** | 77 |
| **Judgements:** | 84 |
| **Commitment Terms:** | 16 |
| *Judgment results:* | |
| **Fine:** | 142 |
| **Warnings:** | 53 |
| **Suspensions:** | 9 |
| **Disabilities:** | 9 |
| **Prohibitions:** | 6 |
| **Acquittals or exclusions:** | 365 |

**Superintendence of On-Site Inspections – SFI**
**Inspections Made and Administrative Inquiries**

| | DESCRIPTION | 2001 | 2002 | 2003 | 2004 | 2005 | 2006(*) |
|---|---|---|---|---|---|---|---|
| 1 | Number of inspections made | 167 | 255 | 313 | 176 | 346 | 300 |
| 2 | Number of administrative inquiries initiated | 18 | 14 | 28 | 17 | 30 | 30 |

(*) Prediction

**Superintendence of Accounting and Auditing Ruling – SNC**
**Auditors Registered**

| | 2004 | 2005 |
|---|---|---|
| Natural Persons: | 113 | 100 |
| Legal Persons: | 309 | 314 |
| In-charge Technicians: | 1,135 | 785 |

**Follow-up of the Independent Auditors Performance (since 1978)**

| Total of registered cases | In 2005 | In 2004 | Since 1978 |
|---|---|---|---|
| Analyses to be concluded | 24 | 10 | ---- |
| Analyses concluded | 19 | 35 | 803 |
| Auditors warned by memorandum | 8 | 10 | 309 |
| Discarded | 7 | 21 | 334 |
| Inquiries and Terms of Prosecution | 4 | 4 | 160 |
| Inquiries to be Judged | 20 | 23 | ---- |

**Auditors Involved in the External Quality Review Program 2005**

| DESCRIPTION | Independent Auditor - Natural Persons | Independent Auditor - Legal Persons | TOTAL |
|---|---|---|---|
| Auditors Selected | 35 | 82 | 117 |
| Auditors Canceled | 4 | 7 | 11 |

## XII. CONCLUSION

Corruption represents a menace to society's steadiness and security, since it weakens the institutions and the values of democracy, ethics and justice. Like a cancer, it spreads throughout many sectors in society, compromising its development. If not treated properly, this cancer might control the whole state body, causing immeasurable damage and loss.

Brazilian society is opening its eyes to the problem and seeing the link between corruption and criminal organizations and the enormous drain on resources sorely needed for education, health, security and infrastructure, caused by it.

A heated debate on the issue has long invaded our daily lives. Corruption has become a theme of recent jokes, songs, movies, and advertisement campaigns and many different layers of society are aware of its costs to the country's political and economic development. This participation, encouraged by the government, plays a vital watchdog role, since the demand and urge for transparency; administrative, legal and social reforms; and rectitude in the State actions, increase.

The Government has invested in this battle and has taken huge and serious steps in developing preventive and repressive measures against corruption. The co-operation of all law enforcement organizations, civil society, non-governmental organizations, and of course, all nations, uniting intention and action against this cancer, can only be successful.

## XIII. REMARKS

The statistics and some of the information used in this essay were provided by officials and directors of the Office of the Controller General (CGU).

# THE FIGHT AGAINST CORRUPTION IN CHILE

*Claudia Alejandra Forner Ortega**

## I. INTRODUCTION

This paper intends to show how corruption crimes and offences are investigated in Chile, identifying the principal agents involved in the investigations, the law governing them (including procedure), and also the tools and techniques available for prosecutors.

It will also try to approximate the problems faced by prosecutors in investigations, and the possible solutions to those problems. Finally, some examples of corruption cases will be given.

To begin, it is necessary to give a brief background of the Chilean political and legal system, so as to provide a context in which the following discussion can be understood.

### A. Legal and Political Background of Chile

1. Political System

Chile is a democratic republic, and has a presidential system of government. The Constitution has been in force since September 1980, and has undergone two large-scale reforms since then.[1]

The President,[2] elected for a period of four years, is head of State and appoints the cabinet. The President cannot be re-elected for a consecutive period. There is a bicameral legislature (congress) with a Senate (upper house) and a Chamber of Deputies (lower house). The Senate comprises 38 members elected for eight years and renewed partially every four years; the Chamber has 120 members who are all elected every four years at the same time as the President. Congress meets in the city of Valparaíso.

2. Geographic and Administrative Division

Chile is a unitary state. It is divided into 15 administrative regions, each of which is headed by an *intendente* appointed by the President. Every region is further divided into provinces with a governor, also appointed by the President. Each province is divided into municipalities, lead by a major (*alcalde*).

3. Criminal Procedure System

Chile thoroughly reformed its criminal procedure system from 2000 to 2005, with the gradual adoption of a new Criminal Procedure Code (CPC) in all regions of the country. The reform changed the agencies involved in the fight against crime and the conduct of investigations. Before the new code was adopted, Chile's criminal system was mainly inquisitorial; the new code introduced an adversarial system and the figure of the public prosecutor.

4. Chile and the Fight against Corruption

*(i) Perception of Corruption*

The fight against corruption is a very important issue in Chile, although there are not as many cases as in other Latin American countries.[3] An explanation for the low level of corruption might be the high intolerance that exists in all sectors of society to it. Nevertheless, as the media coverage and judicial proceedings have,

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* Legal Adviser, Specialized Anticorruption Unit, Public Prosecutor's Office, Chile.

[1] The first major reform occurred in 1989, and the most recent in 2005.

[2] The current president of Chile is Ms. Michelle Bachelet.

[3] In Transparency International's 2006 Corruption Perception Index, Chile is ranked 20 out of 163 countries.

in recent years, highlighted some noteworthy matters in the fight against corruption, serious corruption allegations have surfaced in various public agencies, including the government sports agency, and a recent public opinion poll indicated that the perception of domestic corruption is greater than that registered during a major corruption scandal in 2002.[4]

*(ii) Government Actions to Fight Corruption*

Although there is regulation related to corruption crimes and offences, since the poll indicated a high perception index of this kinds of conduct, in November 2006, President Michelle Bachelet announced an anti-corruption programme and created a commission co-ordinated by the Minister of Economy which includes the head of Transparency International Chile, academics and other officials. This commission has accomplished one of its purposes: drafting a Probity Code that should be mandatory for all public officers while performing their duties. Other tasks, related to legal reform, are still pending, but they are working to achieve their goals as soon as possible.

*(iii) International Conventions Approved by Chile*

Chile signed the United Nations Convention against Corruption (UNCAC) on 11 December 2003 and it was ratified on 13 September 2006, the date when the ratification instrument was deposited at the United Nations.

Previously, Chile had signed and approved the Organization of American States (OAS) Convention Against Corruption, which was enforced on 15 September 1998.

Chile has also signed and approved the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

## II. INVESTIGATION, PROSECUTION AND SANCTIONING OF CORRUPTION CRIMES AND RELATED OFFENCES

### A. Law governing Corruption Crimes, Offences and Misdemeanours

1. Penal Code

This conduct is mainly addressed in the Chilean Penal Code (PC) which is the fundamental law in criminal matters.

There is a special chapter dedicated to corruption crimes and misdemeanours called “de los crimenes y simples delitos cometidos por funcionarios publicos en el desempeño de sus cargos” (Crimes and Misdemeanours Committed by Public Officials Within the Course of Their Duties).

The main crimes and offences contained in the referred chapter are:

- Embezzlement/Misappropriation of Public Funds
- Other diversion of property by a public official
- Fraud affecting public property
- Active and passive bribery of national public officials
- Bribery of foreign public officials and officials of public international organizations
- Trading in influence
- Abuse of functions
- Abuse of authority
- Illicit enrichment.

Sanctions for the most serious offences:

[4] The poll was conducted by the *Centro de Estudios Públicos* (CEP). (See part 6 of the December 2006 poll at http://www.cepchile.cl/dms/lang_1/cat_443_inicio.html).

| Crime / Offence / Misdemeanour | Sanction |
|---|---|
| Embezzlement / Misappropriation of Public Funds | 541 days up to 15 years |
| Fraud affecting public property | 541 days up to 5 years |
| Bribery of national public officials | 61 days up to 3 years |
| Bribery of foreign public officials and officials of public international organizations | 61 days up to 3 years |
| Trading in influence | 541 days up to 3 years |

2. Special Laws

There are other crimes and offences which may be committed by public officials within the course of their duties and these are contained and provided for in special laws.

Money laundering is addressed by a special law (No. 19,913), as are procedures for asset recovery (generally related to economic issues).

**B. Procedure and Intervenient Agents**

The law governing all the stages of the investigation and prosecution of corruption crimes and related offences is principally found in the Chilean Criminal Procedure Code (CPC). As noted above, Chile went through a complete reform of its criminal procedure system from 2000 to 2005, with the adoption of a new CPC. This reform brought changes in the agencies involved in investigations and prosecution of crimes, including corruption.

Before the new code was adopted, Chile's criminal system was inquisitorial, with all powers concentrated in the hands of the criminal court judge: the same judge conducted the pre-trial investigation (through the police), conducted the trial and ruled on the case in the first instance. This was a written procedure.

The reform and the new code introduced an adversarial system and the figure of the public prosecutor and created new Courts, based on oral procedures.

1. The Guarantee Courts and the Criminal Trial Courts

As part of procedural reform, the Organic Code was also modified, in order to incorporate the newly created Guarantee Courts and Criminal Trial Courts, which have replaced the previous criminal courts. The Guarantee Courts are charged with deciding upon criminal procedure issues that involve the fundamental rights of persons involved in criminal investigations. They can also rule in minor cases (those that have associated lower sanctions) such as most of the corruption offences.[5] They are staffed by Guarantee Judges. The Criminal Trial Courts hear cases of criminal offences of all kinds, including corruption. Appeals are heard by Courts of Appeal with further review possible by the Supreme Court.

2. The Public Prosecutor's Office

The new criminal procedure reform has instituted the Public Prosecutor's Office (PPO) as the public agency in charge of investigating and prosecuting alleged criminal activities, including corruption. It has been incorporated into the Constitution, as an independent organism, headed by the National Prosecutor.[6]

The selection process for the National Prosecutor involves the participation of the President, Senate and Supreme Court. A candidate for National Prosecutor is first selected by the President from a list of five possible candidates supplied by the Supreme Court. The President can only nominate the proposed candidate as National Prosecutor providing he or she is approved by a two-thirds majority vote in the Senate. As the three State Powers intervene in the designation, this ensures that political considerations do not influence the investigation and the prosecution of any type of crime, especially corruption.

[5] These judges may rule in cases where the punishment required by the prosecutor is five years or less.

[6] Before the legal reform, there was no Public Prosecutor's Office in Chile, and that role was performed by judges.

The current National Prosecutor, Mr. Sabas Chahuan Sarras, was elected in October 2007, and assumed the post on 1 December 2007. Former National Prosecutor, Mr. Guillermo Piedrabuena Richard, who had been the National Prosecutor since 2000, finished his eight year period at the end of last November. He was the first National Prosecutor in the history of Chile.

The Public Prosecutor's Office is hierarchically organized. There are 18 regional prosecutor's offices, including four for the Metropolitan region of Santiago (the capital city), each with a regional prosecutor and deputy prosecutors who work under him or her.

The National Prosecutor can issue general instructions on different kinds of offences. Of particular importance regarding corruption criminal prosecution is the National Prosecutor's Instruction 29 of January 2007 ("Instruction 29"). However, the National Prosecutor is prohibited from sending instructions to prosecutors on particular cases (only regional prosecutors can intervene in individual cases, due to Article 17 of the Organic Constitutional Law on the Public Prosecutor's Office).

**C. The Investigation**

1. Investigation Phases

Criminal investigations are divided into two broad phases in Chile: (1) the "preliminary investigation" conducted by the prosecutor with the assistance of the police investigators; and (2) the "formalized investigation" which commences once the prosecutor informs a person, in the presence of the Guarantee Judge, that he or she is being investigated for one or more offences. Both procedures will be referred to from then on as an "investigation", since the only difference between them is that when formalized, the suspect is formally notified of its existence, and it can last a maximum of two years.[7]

During their informal phase, investigations are generally known only to the intervenient parties (the prosecutor, the suspect and his or her attorney, and the victim), unless the prosecutor orders secrecy for a maximum period of 40 days. A suspect who learns of an investigation, however, can seek an order from a Guarantee Judge requiring the formalization of the investigation.

There is also the possibility, during the preliminary phase, that the suspect is not at all aware of the investigation, because the prosecutor needs it to be confidential. This preliminary investigation has no time limits. The only limit will be the period during which prosecution might be brought (prescription of the offence).

Once the investigation is formalized, it can last a maximum of two years, unless the Guarantee Judge establishes a shorter period. The investigative data can be made known to all the participants, as explained above. Secrecy can also be ordered by the prosecutor during the formalized phase, in the same terms as detailed before.

Regarding corruption cases, normally there is a long informal stage, so that when the investigation is formalized, there is little risk to the investigation by reason of the disclosure of the case file. In money laundering cases secrecy can be maintained for a maximum period of six months, and one of the basic offences of money laundering can be corruption crimes.

2. Starting an Investigation

Mandatory prosecution is the general rule in Chile, so prosecutors can open a preliminary investigation (i) upon receiving a report of a suspicion; (ii) on their own initiative; or (iii) upon a complaint filed by the victim.

*(i) Report of a Suspicion*

Public officials are subject to reporting obligations contained in particular in the CPC and a law governing public administration. Pursuant to Article 175 CPC, civil servants are required to report any crimes of which

[7] There are some other differences between them, but they refer only to procedure, and do not change the nature of the investigation.

they become aware in the course of their duties. Article 55 of Law No 18,834 on the Administrative Statute Establishing the Obligations of Public Officials (the "Administrative Statute") provides for a similar obligation. Obligations of secrecy or discretion are not an excuse for not reporting an offence.

Sanctions for non-reporting are provided for in the CPC. Pursuant to Article 177 CPC and Article 494 of the PC, failure to report offences is punishable by a fine of between one and four monthly taxation units (*unidades tributarias mensuales*, UTM) [USD 64 to 256], which is low.[8]

A public official who fails to report a crime of which he or she becomes aware because of his or her functions could be subject to administrative responsibility and disciplinary measures under Art. 119 of Law No. 18,834. Public officials are generally aware of their obligation to report suspicions of crimes.

For the general public, the CPC expressly provides that any person with the right to disclose information on suspicions of offences may go to the Public Prosecutor's Office.[9] The regional Prosecutor's Offices have call centres, where reports can be made and information can be obtained on criminal offences.

Reports of most corruption cases originate from agencies with oversight powers, and secondarily from public officials, due to their obligation. Reports from the general public are unusual.

*(ii) Investigation at Prosecutor's Initiative*

If the prosecutor, while investigating other facts, or by chance, finds grounds to suspect that there is a corruption crime or offence occurring someplace, he or she can initiate an investigation by him or herself. Media allegations might be useful to allow this circumstance.

As a prosecutor is also a public official, the obligation contained in Art. 175 CPC also applies to him or her, so he or she must initiate an investigation in those cases.

*(iii) Complaint filed by the Victim*

Although victims can thus file complaints, the notion of a "victim" in corruption cases is not the same as that of a victim of a general crime, because the offence is not perpetrated directly against individuals, but against society as a whole, causing abstract damage.

Regarding corruption crimes or offences, they mostly cause detriment to public property, so a special organism was created to defend and represent the state's interest: The State Defense Council (SDC).

Before reform, the SDC was in charge of the public accusation in all corruption cases. The SDC is now confined to the role of plaintiff in two types of cases: those that are liable to cause the State and any of its agencies an impairment of resources, or those which involve criminal offences committed by government officials in office. Pursuant to Article 41 of SDC law and Instruction 29, prosecutors are required to inform the SDC within 10 business days, if a preliminary investigation starts concerning these cases. If the SDC wishes to file a lawsuit, it has the same rights and obligations as any other plaintiff and does not benefit from any procedural privileges.

3. Investigative Tools and Techniques

Basic investigative techniques available to prosecutors in corruption cases include creation of special investigating prosecutors and units; whistleblower protection; search and seizure; hearing of witnesses in Chile, a Chilean consulate abroad or a foreign court (if foreign bribery is investigated); the protection of witnesses; and restrictions on closing the investigations. Prosecutors can also ask the Court of Appeal for access to various "secret" administrative documents. Bank secrecy lifting and wiretaps are also available in certain circumstances.

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[8] As of December 2007, the value of the UTM was fixed at 34.222 pesos [USD 68.4].

[9] Article 173 CPC. Reports of such actions may also be filed with the police, or with any criminal law court, all of whom should immediately forward such reports to the prosecutor.

Special enhanced investigative techniques (undercover agents, informants, watched deliveries) are not available unless the main offence investigated relates to money laundering, drugs or terrorism.

*(i) The Specialized Anticorruption Unit*

The National Prosecutor set up the Specialized Anticorruption Unit (the "Specialized Unit'), in May 2003. This national multi-disciplinary unit is currently composed of eight lawyers, accountants and financial analysts. It assists, counsels and trains prosecutors investigating cases of corruption. The Specialized Unit also liaises with other agencies such as the Comptroller General, the State Defense Council and the police.

Another specialized unit is in charge of economic crime, money laundering and organized crime.

The Specialized Anticorruption Unit is permanently organizing workshops on different corruption issues, including the UNCAC, for prosecutors throughout the whole country.

*(ii) Specialized Prosecutors*

In addition to the Specialized Unit, 46 of the 669 new Chilean deputy prosecutors are specialized in cases of corruption, in the sense that such cases would generally be assigned to them, although they are not exclusively assigned to such cases.

*(iii) Specialized Police and Investigators*

The *Policía de Investigaciones de Chile* and *Carabineros de Chile* are the only police forces in Chile. Before the criminal procedure reform, they had extensive powers because judges largely delegated investigations to them. They now assist the Public Prosecutor's Office, and carry out investigative measures under the direction and responsibility of the prosecutor and provide him or her with their forensic expertise in investigations.

Both police forces have units specialized in economic and corruption crimes. Because legal persons as such cannot be criminally liable, investigations do not focus on them. The Police would try to identify the individual responsible for the offence.

*(iv) Whistle-blowing and Whistleblower Protection*

Chile has recently adopted a law that addresses the protection of government employees who report irregularities or breaches of the principle of probity.[10] This law focuses on the protection of people who report the lack of probity of Chilean officials. It does not apply to employees of state-owned and state-controlled companies, as State-owned companies are subject to the same labor code as private companies.

It has been less than a year that the law came into force, so it's not possible to make an evaluation of its functioning.

A few Chilean private companies have introduced whistle-blowing safeguards in their codes of conduct, but that is not mandatory for them.

*(v) Witness and Victim Protection*

As noted above, in corruption crimes there is no physical victim to identify, so the protection of victims does not exist in these type of cases. Nevertheless, witnesses may require some protection, so basic witness protection is available in cases of corruption, whereas enhanced protection is available in cases related to drugs, terrorism and money laundering.

The protection is organized by the Victims and Witness Support Division of the Public Prosecutor's Office and the corresponding regional units.

Protection can be granted from the preliminary investigation until six months after the trial. The level of

[10] Law No 20,205 of 24 July 2007, named "Protection to the public official who denounces irregularities and faults to the probity principle" (*Protege al funcionario que denuncia irregularidades y faltas al principio de probidad*).

protection decreases as the criminal process advances: for example, the witness can obtain protection of his or her identity at the beginning of the investigation, but only for 40 days. The identity of the witness cannot be secret at the trial stage because the CPC requires all witnesses testifying in an oral hearing to state their name (Article 307 CPC). The witness's place of residence can be kept secret. At the trial stage, protection must meet the additional criteria of the "seriousness" of the situation.[11]

*(vi) Wiretaps*

Generally, wiretaps are available only for crimes and not for misdemeanors. Although most corruption crimes have imprisonment sanctions, the provision also includes a disqualification from public office as a main sanction jointly with imprisonment sanctions.

The Public Prosecutor's Office has said to the courts that because this is a "main sanction" related to crimes, wiretaps should be available in these type of offences, and most of the Guarantee Judges have authorized them; but it's still not quite common.

Investigative actions that might restrict or affect constitutional rights, such as wiretaps, must be authorized by a Guarantee Judge (Article 9 CPC). It is easier to obtain an authorization from a Guarantee Judge in cases involving alleged violent crimes than in economic crime cases. Because money laundering investigations are subject to special rules, they appear to be generally exempt from this general trend, and where the authorization of the Guarantee Judge has been necessary, it has been obtained in most money laundering cases.

*(vii) Bank Secrecy Lifting*

Bank secrecy is one of the main problems encountered in Chile when investigating alleged acts of corruption and economic crime.

Bank secrecy is subject to a series of apparently overlapping provisions. Restrictions apply to the power of a Guarantee Judge to lift bank secrecy.

Article 154 of the General Banking Law distinguishes between bank secrecy and bank confidentiality. Bank secrecy covers a broad segment of banking operations, such as deposits and placements of any kind performed by the banks, and this protection extends to the movements and balance of current accounts, savings accounts, time deposits and other forms of placement. The remaining banking operations are subject to confidentiality.

Bank secrecy can be lifted by a Guarantee Judge in a corruption case, but the law imposes restrictions. The General Banking Law authorizes the prosecutor, with the approval of the Guarantee Judge, to examine or request the background related to "specific" operations that have been performed by someone formally charged and that have a "direct relationship" with the investigation. A second law, the Bank Current Accounts and Checks Law, also authorizes only the disclosure of "determined financial items" of a current account, at the request of a prosecutor and with approval of the Guarantee Judge.

For some types of offences and situations, Guarantee Judges have the power to fully lift bank secrecy and order full disclosure of potentially relevant bank information. Bank secrecy can be fully lifted by the Guarantee Judge in domestic corruption cases and other cases involving investigations against public officials for offences committed in the discharge of their duties; there is no requirement that the requests relate to specific operations or have a direct relationship with the investigation. Recent legislation has given the Financial Analysis Unit (FAU)[12] the power to obtain the complete lifting of bank secrecy from a judge where money laundering is suspected.

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[11] A "serious" situation requires that a major threat or danger be proven. The court requires that the prosecutor provides concrete evidence that the measure is necessary. The regional unit procures equipment to protect victims and witnesses in an oral hearing, such as folding screens which prevent visual contact between the victim and the accused, or closed television circuits which allow the victim and/or witness to testify in an adjoining room.

[12] The FAU is a constituent of the Ministry of Finance, although it is very independent. It is not related to the Public Prosecutor's Office.

In addition to or as a result of the legal limits on the lifting of bank secrecy in corruption cases, there appear to be significant practical hurdles relating to obtaining bank information. Bank secrecy constitutes, in practice, a major hurdle in economic crime investigations because of the evidentiary burden that must be met in order for a judge to lift bank secrecy (even partially). It can take several days or weeks for the Guarantee Judge to authorize the request of information because he or she requires a great deal of information before authorizing the request and defining the scope of the "specific" information permitted to be disclosed. It can similarly take a significant period to obtain the information from the bank.

(a) Distinction between bank secrecy and bank confidentiality

Banks may disclose the information associated with confidential transactions if a person establishes a legitimate interest provided that the bank considers that such disclosure has no negative impact on the customer's net worth. If the bank hesitates, as it may be likely to do in light of the potential liability and the uncertainty about the status of particular information as secret or confidential, the information can only be obtained with a judicial decision.

Responses to information requests to banks can take one or two months, especially when the bank is concerned about its customer relationship. On the contrary, the request is sometimes answered within a couple of days when a bank fully co-operates and does not require the intervention of the Guarantee Judge.

A bill currently before Congress, the Revised Bill on the Authorization of the Lifting of Bank Secrecy in Money Laundering Investigations, Bulletin No. 4426-07 (the "Revised Bill"), addresses bank secrecy, but only with regard to money laundering. For money laundering cases, the Revised Bill (Art. 4) would add a provision to Art. 154 of the General Banking Law allowing prosecutors, with the approval of a Guarantee Judge, to obtain access to "any information available or copies of any deposits or other investments or credit transactions made by any person, community, entity or de facto partnership under investigation, to the extent that such transactions, at the discretion of the Public Prosecutor's Office, may be connected with, or contribute to ascertain, the perpetration of such offences". A similar provision would relax bank secrecy, but again only for money laundering, under the Bank Current Accounts and Checks Law. These provisions appear to give Guarantee Judges the same power to fully lift bank secrecy in criminal money laundering investigations that they currently have for administrative money laundering investigations by the FAU and other corruption cases.

The access to financial information is of paramount importance for the effective investigation of corruption offences. Bank secrecy constitutes a significant barrier to effective investigation of these cases. The Revised Bill addressing bank secrecy is currently before Congress, but that at present only addresses the complete lifting of bank secrecy in criminal money laundering investigations, so corruption cases should maintain the restrictions named above.

The power of the Guarantee Judge to order access to bank information is significantly more restricted in foreign bribery cases, for example, than in domestic bribery cases and administrative money laundering investigations by the UAF. That's because of the punishment associated with that offence, which does not reach the legal requirements to allow the lifting of bank secrecy.

*(viii) Restrictions on Closing Investigations in Corruption Cases*

As written above, mandatory prosecution is the general rule in Chile so a prosecutor can decide not to initiate or to close an investigation only for reasons specified in the law. These include reasons such as the absence of evidence or a lapse of the limitation period (at the preliminary investigation stage), or the application of a general defence or the *non bis in idem* principle (at the formal investigation stage).

However, although mandatory prosecution is the general rule, there are a number of exceptions.

Under Art. 170 CPC, discretionary decisions to close an investigation (or not to open an investigation) are possible for certain crimes. (The same rules apply under Art. 170 to discretionary decisions to close or not to open a case in the first place.) Art. 170 is applicable to particular for crimes that do not seriously injure the public interest and carry a minimum penalty of less than 540 days. Most corruption crimes and offences are subject to a low level of sanctions, and accordingly, some of the offences potentially fall within the domain of Art. 170.

Instruction 29 provides some guidance with regard to the rules governing the early closure of cases, including under Art. 170 CPC. The Instruction (at 5) contains a general statement which indicates that the criteria for opening and closing cases apply to "offences committed by public officials when exercising their duties and those that affect public property and companies and entities in which the State participates or contributes" and includes a general list of offences of that nature. The Instruction states that prosecutorial discretion is generally excluded for cases of corruption, but the application of the law on issues such as prosecutorial discretion under Art. 170 CPC may depend on a factual and legal analysis of the nature of the participation of the public official.[13]

Under Art. 170, a prosecutor seeking a discretionary closure of a case is required to provide a reasoned decision to the judge who will notify any victims or intervening parties. The judge can overrule the decision to terminate, but only on narrow technical grounds or if the victim objects. Victims and intervening parties can appeal discretionary decisions to close the investigation to higher authorities in the PPO who verify whether the decision is consistent with general policies and applicable norms.

Investigations can also be suspended, such as when a prosecutor is lacking evidence or cannot investigate further unless new evidence appears. Instruction 29 requires that the regional prosecutor approves any suspensions, and that minimal investigative steps -- such as witness hearings or an expert's appraisal of the accounting situation -- are performed before a decision to suspend is made.[14]

As noted above, the formalized investigation commences once the prosecutor informs a person in the presence of the Guarantee Judge that he or she is being investigated for one or more offences. When the formalized investigation is complete, the prosecutor can formally accuse the suspect and ask for a hearing in front of the Guarantee Judge in order to prepare the trial. Additional alternatives to prosecution are generally available during or at the conclusion of the formalized investigation. First, prosecutors can propose the conditional discontinuance of the investigation to the Guarantee Judge (if the suspect investigated does not respect the conditions, the procedure restarts). Second, the suspect and the victim can agree on compensation of the victim unless the prosecutor considers that continuing the criminal procedure is in the public interest. Instruction 29 recommends that conditional discontinuance be used rarely and excludes compensation agreements for offences perpetrated by public officials or against probity. Nevertheless, as this last agreement is made between the victim and the defendant, it might occur even if the Public Prosecutor is against it, but always with the Guarantee Judge's authorization.

4. Mutual Legal Assistance (MLA) and Extradition

*(i) Mutual Legal Assistance*

The general CPC reform discussed above has had a significant impact on the MLA system. In addition, Art. 20 bis of the new CPC provides that foreign requests for MLA shall be handled by the PPO, which shall seek the intervention of a Guarantee Judge as necessary in the same manner as in domestic investigations.

This provision allows prosecutors to supply MLA directly in many cases; judicial intervention is only required in order to provide MLA where it would be required under domestic law, i.e. principally where fundamental liberties are at stake. The ability of prosecutors to provide MLA directly has greatly simplified and accelerated MLA procedures in many cases.

A new MLA unit was created in the PPO in 2004 in order to carry out the new MLA role. It both conducts relations with foreign countries and provides advice to domestic prosecutors on MLA matters.

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[13] Instruction 29 specifically prohibits the application of the principle of opportunity in the case of acts in which a public official has had any level of participation while exercising his or her duties. In this way, although the law does not exclude the application of the principle of opportunity for criminal acts in which public officials have participated, if their action takes place while not exercising their duties, it may be that the fact that they are public officials gives the act a connotation that seriously affects the public interest, or that by the mere penalty, the use of the authority conferred on the prosecutors in Article 170 [CPC] will not be in order. The Instruction does not attempt to apply these principles to the specific nature of foreign bribery or to foreign officials.

[14] Prosecutors can also ask for dismissal without prejudice to the Guarantee Judge, who can authorize it if the suspect is a fugitive, if a related civil action is pending, or because of the mental illness of the suspect.

The new unit is also now the central office for foreign countries seeking MLA. The general changes in the new CPC and the law of evidence have expanded the scope for co-operation including facilitating informal co-operation. Available statistics show a steep rise in instances of MLA in the last two years (from a low number previously).

The new role for prosecutors appears also to have lessened the importance of treaty-based MLA (and its attendant limitations given Chile's treaties). In fact, the absence of a treaty is not an impediment in many cases because MLA can be granted on the basis of reciprocity. The current system has been working effectively and further statutory intervention is not needed at this stage.

There has not been any relevant case law to date.

As discussed above, bank secrecy is a major barrier to effective investigation of economic crime in Chile. It is also a serious problem for MLA. There would not be any barrier to seizure and confiscation in response to an MLA request, but there have not been any actual cases to date. Prosecutors have responded to a number of requests for information about assets held in Chile. In addition, in one case, the Chilean authorities seized the assets of a foreign national in Chile.

*(ii) Extradition*

Article 431 CPC sets forth the criteria for active extradition and requires, *inter alia*, that the offence must carry a minimum prison sentence of at least one year. Regarding the Chilean foreign bribery offence, it does not meet this standard and active extradition is thus currently impossible under the Code provision.

For passive extradition, Arts. 449 CPC and 449 CPC require that:

- The crime or offence is one for which extradition is authorized under applicable treaties or according to international principles;
- The suspect should have been charged or condemned regarding a crime or offence sanctioned with a minimum of one year's imprisonment;
- The offence should be one for which extradition is authorized under applicable treaties.

(a) Case law

In early 2006, Peru formally requested that Chile extradite former Peruvian president Alberto Fujimori to face, *inter alia*, corruption charges in Peru. The Chilean authorities detained Mr. Fujimori and extradition proceedings have been underway. Because of the date of the relevant events, the proceedings are subject to the old criminal procedure code. In July 2007, the first instance judge denied the extradition of Mr. Fujimori, finding that the evidence submitted by Peruvian government was not sufficient to prove the facts argued in the extradition request. The Peruvian government filed an appeal on 13 July. The Supreme Court finally authorized extradition in September 2007, and at the time of writing, Mr. Fujimori is being tried in Peru. He has recently been convicted of human rights and corruption crimes.

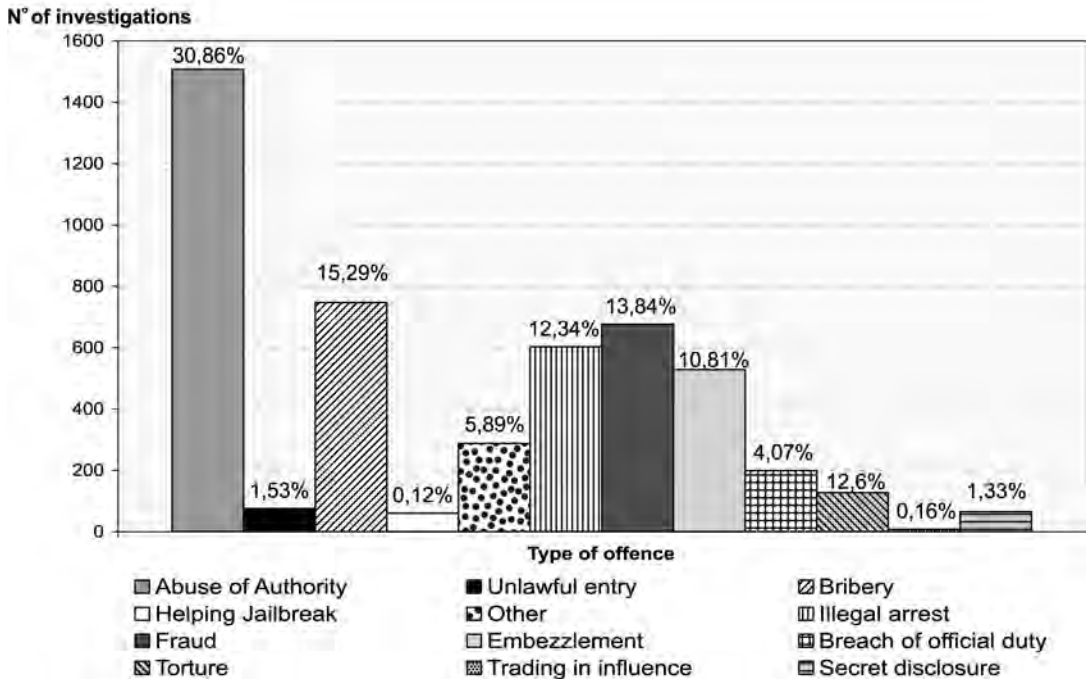
## III. CASE LAW AND STATISTICS

### A. Statistics

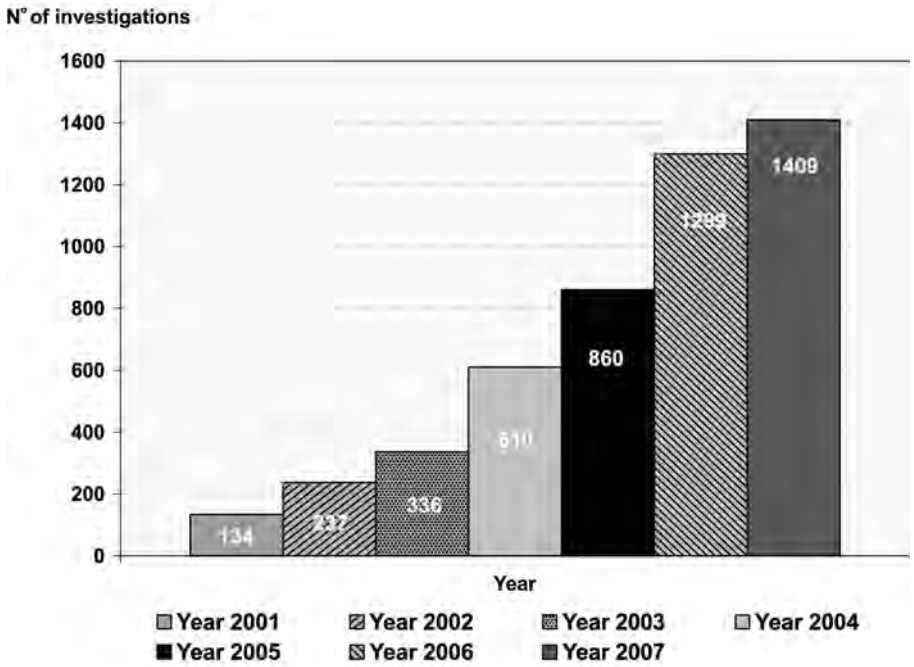
There have been 4,885 investigations opened since the implementation of the new Criminal Procedure Code, (from December 2000 to November 2007) regarding domestic corruption cases, and 3,755 of them have been completed.

Not all the initiated investigations are concluded by judicial ruling, because there are many other kinds of completions. Nevertheless, last year's statistics show that almost 30% of the initiated investigations ended with conviction, although none of them were a high level corruption case.

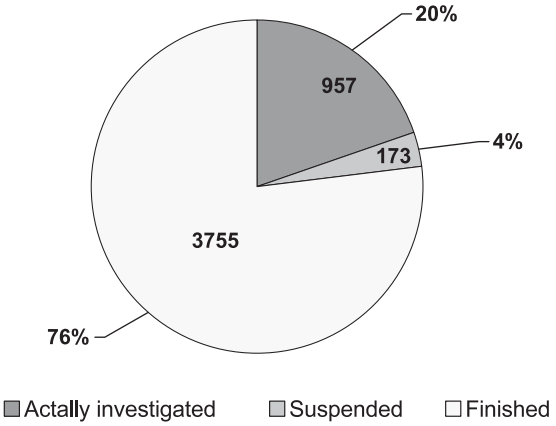
1. Types of Crimes And Misdemeanors Investigated 2000 – 2007: TOTAL 4885




2. Crime and Misdemeanor Investigations Initiated from 2000 to 2007: TOTAL 4.885



3. Current State of the Investigations




**B. Case Law**

1. Domestic Cases

There is no case law regarding high level corruption cases within the new Criminal Procedure Code; nevertheless, there are many investigations in progress, but which have not yet been concluded.[15]

Current investigations affecting high level corruption are being held by prosecutors, regarding:

(i) *Empresa de Ferrocarriles del Estado* (The State Railway Company), related with bribery, embezzlement and fraud; and
(ii) *Programas de Generacion de Empleo* (Labour Generation Program). This is a large-scale, complex investigation related to misappropriation of public funds which were apparently used to finance the political campaign of the current president of the republic and some congressmen, but none of them have yet been concluded. There will likely be a ruling in 2008. It has been formalized, and the oral trial is expected to start by the end of March 2008.

2. Foreign Cases

Regarding foreign bribery, no cases have been initiated since 2000.

## IV. CONCLUSIONS

As a conclusion summary, it can be said that the criminal procedure reform in 2000 changed radically the course of investigations. Currently investigations run faster, and other agents, such as the Public Prosecutor's Office, have appeared.

The Public Prosecutor's Office is an independent organism, so deputy prosecutors can freely investigate without problems.

There is a high corruption perception index among the people; nevertheless, Chile is one of the less corrupt countries in the world, and the first in Latin America.

[15] In the old procedural system, there are a few important cases to mention:
- Former President Pinochet was suspected of committing embezzlement, public fraud and money laundering, but he died before being accused, so the case was closed. In this investigation, the judge had to travel to the United States to locate assets that should have been recovered;
- A civil servant who worked in the Copper State Company was convicted almost ten years after the beginning of an investigation into committing public fraud;
- Several investigations are currently held by court judges regarding the "*Caso Mop*", that affected the Ministry of Public Works, whose head was convicted of fraud. He appealed, and the case is still not concluded.

Sanctions for corruption crimes and offences are not very high, so some of them do not fulfill what's needed for extradition; legislative efforts should be made to raise the sanctions.

There are various tools and techniques focused on the specialized investigation of corruption crimes and offences. Mutual Legal Assistance can be requested directly from the prosecutors, even if there's no treaty between the countries, due to reciprocity.

There is no case law regarding high level corruption cases yet, since the new criminal reform started. Nevertheless, almost 3,755 domestic cases have been completed since then.

# EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE

*Vladimir Georgiev*[*]

## I. INTRODUCTION

Corruption is a global problem and although it appears even in highly developed countries, it is a major problem in developing countries or countries that are going through a transition process. It is manifested most frequently through misuse of official positions and authorizations, especially in the public procurement area, and also through nepotism and cronyism in relation to employment, and taking bribes, etc. Thus it is well known that one of the motives of some candidates for participation in elections refers to the use of their function for the purpose of acquiring significant financial and non-financial means in case they are elected. Unless concrete activities are undertaken in due time, corruption may become systemic and deeply entrenched in all spheres of society – public administration, the judiciary, police, customs authorities, local self-government, etc.

The transitional process, i.e. the process of privatization and denationalization, is still not over in the Republic of Macedonia. The length of this process resulted in an adequate basis or climate for many leinds of malpractice and for corruption. The inefficient actions of the investigative and judicial authorities have further stimulated corruptive behaviour, which has spread not only vertically, but horizontally, in all spheres of society, i.e. in all segments of the national integrity system. Therefore, there was an urgent need for organized steps to establish and strengthen the institutional and legal framework for efficient prevention and suppression of corruption. In order to have an efficient fight against corruption, a comprehensive and systematic approach is necessary.

### A. Multidisciplinary Approach for the Fight against Corruption

Apart from strengthening the criminal justice response to corruption, in order to solve the problem of corruption and the reasons for its appearance more efficiently, a combined and multidisciplinary approach is necessary. The acceptance of repression as the sole reaction to corruption results only in elimination of its effects in individual cases, leaving unaddressed the reasons, motives and circumstances which lead to corruption.

The Law on Prevention of Corruption was adopted in 2002, and the State Commission for Prevention of Corruption was established the same year. The State Commission is a specialized body for preventive actions in the fight against corruption, but also has competencies for detecting misuse by elected or appointed functionaries, officials and responsible persons in public enterprise and other legal entities disposing with state capital and submitting initiatives before competent bodies for dismissal, removal, criminal prosecution or implementation of other measures of accountability.

Reflecting global trends and with the objective of effective preventive action against corruption, the "State Program for Prevention and Repression of Corruption" adopted in May 2007 by the State Commission for Prevention of Corruption (SCPC) is founded on prevention and detection of the reasons and conditions which lead to corruption, as well as on their elimination. This is the second State Program; the first one was adopted in 2003.

Repression remains as a corrective measure in individual cases. In the current social, political and legal

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environment, a repressive reaction is necessary for reinforcing discipline among public officials and citizens, as well as for regaining citizens' trust in public institutions. Also, if cases are finalized with a punitive court decision, the result of effective repression is prevention. But if the criminal justice response is weak, this could encourage corruption.

Apart from these two components, the third component – the educational component – is also necessary. This refers to wide social action for educating all layers of society regarding the negative consequences of corruption as a phenomenon that directly threatens the freedoms and rights of people, as well as destroys the basic principles of the legal state.

**B. State Commission for Prevention of Corruption**

Articles 5 and 6 of UNCAC recommend development and adoption of preventive anti-corruption policies or strategies and practice and establishment of an independent body or bodies for monitoring of the implementation of anticorruption strategies. Macedonia has already achieved this by establishing the State Commission for Prevention of Corruption and developing anticorruption strategy, i.e. the State Program for Prevention and Repression of Corruption with an Action Plan for implementation.

As mentioned before, the SCPC was established in November 2002 as a specialized body to implement the Law on Prevention of Corruption, adopted in 2002. The law was further amended in July 2004, November 2006 and January 2008.

The SCPC is an autonomous and independent body, and has the status of a legal entity. It is composed of seven members, including a President. The members are appointed by the Parliament from the rank of local experts in legal and economic fields. In performing their duties, the SCPC's members are accountable to the Parliament (annual reports are submitted to the Parliament). All professional and technical matters of the SCPC are carried out by its Secretariat, which currently has 17 staff members.

1. Competencies

In accordance with the Law on Prevention of Corruption, SCPC is competent for:

(i) adopting the State Program for Prevention and Repression of Corruption and Annual Programs and Work Plans for implementation of the State Program;

(ii) providing opinions on draft laws relevant for prevention of corruption;

(iii) raising initiatives for conducting a proceeding before competent bodies for dismissal, removal, criminal prosecution or application of other measures of accountability of elected or appointed functionaries, officials and responsible persons in public enterprises and other legal entities disposing with state capital;

(iv) raising initiatives before competent bodies for conducting control over the financial and material work of the political parties, trade unions, foundations and associations of citizens;

(v) maintaining records and overseeing declared property assets and changes in the property situation of elected and appointed functionaries, officials and responsible persons in public enterprises and other legal entities managing state assets and publishing declared property assets on their web-page;

(vi) preparing Annual Reports on its work and the measures and activities undertaken; submitting the Annual Report to the Parliament; forwarding it to the President of the State and the Government; announcing it to the media;

(vii) co-operating with other state bodies in the prevention of corruption and co-operating with corresponding national bodies of other states, and with international agencies and bodies in the field of prevention of corruption;

(viii) undertaking activities in the area of education of the bodies competent to detect and prosecute corruption and other types of crime; etc.

The SCPC also implements the Law on Conflict of Interests, adopted in 2007 and is competent for:

(i) adopting a State Program with an Action Plan for Prevention and Reduction of the Conflict of Interests;

(ii) providing opinions on draft laws of importance for the prevention of conflicts of interest;

(iii) considering cases of conflict of public and private interest determined with this or other laws;

(iv) raising initiatives for implementation of measures of responsibility of the civil servant determined with this law in cases when conflict of interest occurs;

(v) submitting a report on its work and measures/activities undertaken to the Parliament, and forwarding it to the Government and the media;

(vi) co-operating with other state bodies in the prevention of conflict of interest and undertaking activities in the area of education for identification of cases of conflict of interest in accordance to this or other laws; etc.

2. State Program & Action Plan for Prevention and Repression of Corruption

In May 2007, the SCPC adopted the State Program for Prevention and Repression of Corruption & Action Plan. It covers measures and activities to be adopted and implemented within the six pillars of the National Integrity System: (1) the political system, parliament and political parties; (2) the judiciary; (3) the public administration and local self government; (4) the law enforcement agencies; (5) the economic and financial system and the private sector; and (6) civil society, media, and the unions. The SCPC monitors the implementation of the State Program in two ways. First, through the level of implemented activities set in the Action plan and second, through the Performance Monitoring System, designed to allow monitoring of the Key Performance Indicators of the work of selected institutions. Through this, the performance efficiency of the selected institutions can be measured and improved, because inefficiency is considered one of the major reasons for spreading corruption in some segments of the National Integrity System.

3. Work on Cases

The SCPC works on cases on the basis of complaints filed by citizens, institutions, reports from the State Audit Office, and on its own initiative or on the basis of articles in the media. The total number of received cases since 2003 is more than 3,500 of which about 80% were reviewed. About 40% of received cases are found not to be in the competence of the State Commission, so these cases are either closed or sent to the other competent state bodies. The large number of complaints submitted shows the confidence that the SCPC enjoys among citizens as an independent institution.

If the SCPC finds that there is a reasonable ground for suspicions of corruption, it opens the case and instigates an investigation by requesting additional information or documents from other institutions. Institutions are obligated to submit requested documents. After compiling all requested documents, the SCPC finally delivers a decision. If the decision confirms the initial findings of corruption, then the SCPC prepares an Initiative for criminal prosecution and submits it to the General Public Prosecutor's Office, who continues with the case.

Initiatives prepared by the SCPC and submitted to the General Public Prosecution Office and their outcomes:

| Year | Filed Initiatives | Status at the Public Prosecution Office | | | | Status in Courts | |
|---|---|---|---|---|---|---|---|
| | | Indictments | Pending Requests for collection of necessary notifications | Pending Requests for conducting investigations | Rejected (closed) by PPO | Court Decisions | Pending |
| **2005** | 11 | 2 | 3 | 1 | 5 | 1 | 1 |
| **2006** | 17 | 1 | 11 | 1 | 4 | 1 | / |
| **2007** | 7 | 1 | 5 | 1 | / | / | 1 |
| **Total** | 35 | 4 | 19 | 3 | 9 | 2 | 2 |

## II. CONVENTIONS

In order to strengthen the legislative framework for the fight against corruption, as well as to ensure greater independence of the specialized bodies so as to guarantee efficient performance of all activities, free of any pressure, the Republic of Macedonia has signed and ratified many international conventions targeting organized crime and corruption. They are listed below.

(i) The Criminal Law Convention on Corruption. The Parliament of the Republic of Macedonia ratified the Convention in 1999; the Additional Protocol to the Criminal Law Convention on Corruption was ratified in 2005;

(ii) The Civil Law Convention on Corruption was ratified in 2000;

(iii) The European Convention on International Legal Aid, ratified in 1999, and its second Additional Protocol;

(iv) The European Convention on Extradition and its Additional Protocol, ratified in 1999;

(v) The European Convention on the Transfer of Sentenced Persons and its Additional Protocol, ratified in 1999;

(vi) The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990, ratified in 2000;

(vii) The Convention on Cybercrime, ratified in 2004;

(viii) The United Nations Convention against Transnational Organized Crime, ratified in 2004;

(ix) The United Nations Convention against Corruption; the UNCAC was signed in August 2006 and was ratified in March 2007.

## III. AUTHORITIES AND AGENCIES FOR INVESTIGATING, PROSECUTING AND ADJUDICATING CORRUPTION AND CORRUPTION-RELATED OFFENCES IN MACEDONIA

### A. Investigative Competence

1. Ministry of Internal Affairs
   (i) Unit for organized crime and corruption.
   (ii) Unit for internal control and professional standards.

2. Directorate for Money Laundering Prevention

3. Financial Police

4. Public Revenue Office
   (i) Unit for monitoring the assets declaration of elected and appointed officials.
   (ii) Unit for internal investigation.

5. Customs Administration – Department of Professional Accountability
   (i) Department for internal inspection.
   (ii) Department for internal investigations.

6. Independent Anti-Corruption Bodies

*(i) State Commission for Prevention of Corruption*
   (i) Unit for prevention of corruption.
   (ii) Unit for evidence and monitoring the property situation.
   (iii) Unit for prevention of conflicts of interest.

*(ii) State Audit Office*

As bodies with investigative competence, the State Commission for Prevention of Corruption and the State Audit Office also have an co-ordinative and instigative role. Their success, to a great extent, depends on their co-operation with other law enforcement agencies and institutions from the executive and judicial power.

**B. Prosecuting Competence**

1. Public Prosecutor's Office

(i) Special Unit for Organized Crime and Corruption within the General Prosecutor's Office.

**C. Adjudicative Competence**

1. Courts

Recently, several judges have been appointed in Basic Courts, and they shall be involved in the investigation and adjudication of cases of organized crime and corruption. There is an ongoing process of specialization of the judges who shall adjudicate the most complex forms of crime, such as organized crime and corruption, since practical experience has shown that without such organization, and without such specialized judges, more efficient results can hardly be expected.

**D. Status of the Judiciary and Prosecution Service**

1. Amendments to the Constitution of the Republic of Macedonia

Amendments to the Constitution were adopted in December 2005, aiming to strengthen the independence and integrity of the judiciary and prosecution service.

*(i) Judiciary*

With the amendments, the Constitution stipulates that the types of courts, their spheres of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow, are regulated by law, adopted by a two-thirds majority vote of the total number of MPs. The intention of this amendment is to ensure a consensus among political parties in the Parliament.

Also, the Judicial Council was established which should guarantee autonomy and independence of judicial power. The Judicial Council elects and dismisses judges and lay judges, determines the termination of a judge's office, elects and dismisses Presidents of Courts, monitors and assesses the work of judges, decides on the disciplinary accountability of judges, and has the right to revoke the immunity of judges, etc.

*(ii) Public Prosecution*

The Government proposes a candidate for the office of Public Prosecutor of the Republic of Macedonia, having previously obtained the opinion of the Council of Public Prosecutors. The Public Prosecutor of the Republic of Macedonia is appointed and dismissed by the Parliament of the Republic of Macedonia for a term of six years with the right to re-appointment.

The competences, establishment, termination, organization and functioning of the Public Prosecutor's Office is stipulated by law, adopted by a two-thirds majority vote of the total number of MPs. The intention of this amendment is, as above mentioned, to ensure a consensus among political parties in the Parliament.

The public prosecutors are elected by the Council of Public Prosecutors and their term of office shall have no restrictions. The Council decides on dismissal of public prosecutors. The competences, composition and structure of the Council, and the term of office of its members, as well as the basis and the procedure for termination of the mandate and for the dismissal of a member of the Council are stipulated by law. The basis and the procedure for termination of the mandate and dismissal of the Public Prosecutor of the Republic of Macedonia and of the public prosecutors are determined by law.

The Law on Public Prosecution and the Law on the Council of Public Prosecutors were adopted in December 2007. A new Basic Public Prosecutor's Office for organized crime and corruption shall be established with the competence to deal with severe cases of corruption and organized crime.

## IV. CRIMINAL JUSTICE RESPONSE

**A. Criminal Code**

The Criminal Code of the Republic of Macedonia was adopted in 1996. During its implementation there was a need for certain strengthening of punitive policy, as well as for an introduction of new forms of incrimination, especially for an effective fight against forms of organized crime and corruption. Therefore, the Criminal Code was amended four times. The new forms of crime, especially organized crime such as corruption, money laundering, illegal drug trafficking, terrorism and financing of terrorism, have imposed

the need for amendments to criminal legislation.

By amending the Criminal Code, the Republic of Macedonia has realized its determination to harmonize its punitive legislation with European legislation and with international conventions, agreements and standards. The amendments of the Criminal Code have brought significant changes not only in the General Section, but in the Special Section as well.

1. General Section of the Criminal Code
The most significant amendments to the General section are the following:

- Introducing criminal responsibility of a legal person.
- Confiscation of assets and benefit from assets, as well as confiscation of objects.

2. Special Section of the Criminal Code
The Special Section of the Criminal Code comprises amendments which refer to essential elements of certain crimes, introduction of new crimes or increase of the stipulated sanctions and measures for certain acts.

The most significant amendments refer to the crimes against public finances, payment operations and economy, crimes against professional duty, the crime of money laundering and other benefits of criminal acts, smuggling, new crimes such as customs fraud, acquiring inappropriate benefit from assets, terrorist organizations, and amendments that refer to financing of terrorism, as well as other types of criminal acts.

The amendments to the Criminal Code led to adequate amendments to the Law on Criminal Procedure, by stipulating new process norms for providing for implementation of the punitive acts.

**B. Offences Related to Corruption in the Criminal Code (Section: Crimes against Official Duty)**

1. Misuse of Official Position and Authorization – Article 353
This offence compounds the offences stipulated in Article 17 of the UNCAC (embezzlement, misappropriation or other diversion of property by a public official) and Article 19 (abuse of function).

(i) An official person who, by using his or her official position or authorization, by exceeding the limits of his or her official authorization, or by not performing his or her official duty, acquires for him or herself or for another some kind of benefit, or causes damage to another, shall be punished with imprisonment of six months to three years.

(ii) If the perpetrator of the crime from (i) above acquires a larger property gain (five average monthly salaries), or causes larger property damage, or violates the rights of another more severely, he or she shall be punished with imprisonment of six months to five years.

(iii) If the perpetrator of the crime from (i) above acquires a significant property gain (50 average monthly salaries) or causes significant damage, he shall be punished with imprisonment of one to ten years.

(iv) Responsible persons in a foreign legal entity which has a representative office in Macedonia or performs some economic activities in Macedonia or an entity who is performing activities in the public interest will be punished as determined in (i), (ii) and (iii), if the act is done via his or her special authorization or duty.

(v) If the crime stipulated in paragraph (i) is performed during the execution of public procurements or causes damage to the finances of the Budget of the Republic of Macedonia, public funds or other state owned finances, the perpetrator shall be sentenced to imprisonment of at least four years.

The intention of paragraph (v) is to protect the state capital and finances from misuse in the process of public procurements.

A case study of the misuse of an official position and authorizations is outlined in Appendix A.

2. Receiving a Bribe (Refers to Foreign Officials also) – Article 357

(i) An official person who requests or receives a present or some other benefit, or receives a promise of a present or some other benefit, in order to perform an official act within the framework of his or her own official authorization which he or she should not perform, or not to perform an official act which he or she otherwise must do, shall be punished with imprisonment of one to ten years.

(ii) An official person who requests or receives a present or some other benefit, or receives a promise for a present or some other benefit, in order to perform an official act within the framework of his or her own official authorization which he or she must perform, or not to perform an official act which he or she otherwise should not perform, shall be punished with imprisonment of six months to five years.

(iii) An official person who, after the official acts listed in items (i) and (ii) of this article are committed or not committed, requests or receives a present or some other benefit in connection with this, shall be punished with imprisonment of three months to three years.

(iv) A responsible person in a legal entity which disposes state or social property who commits a crime from items (i), (ii) and (iii), as well as a responsible person in some other legal entity, a responsible person in a foreign legal entity, or a foreign official person who commits a crime which damages the Republic of Macedonia, its citizens or legal entities, and who commits the same crime in relation to attaining, realizing or removing rights determined by law - for the crime from item (i), shall be punished with imprisonment of one to ten years; for the crime from item (ii), shall be punished with imprisonment of six months to five years; and for the crime from item (iii), shall be punished with imprisonment of three months to three years.

(v) The received present or acquired property gains shall be confiscated.

3. Giving a Bribe (Refers to Foreign Officials also) – Article 358

4. Unlawful Mediation (Trading in Influence) – Article 359

5. Covering the Origin of Disproportionately Obtained Property – Article 359a

6. Money Laundering and other Proceeds of Crime – Article 273

7. Bribery at Elections and Voting (Corruption Related)

**C. Law on Criminal Procedure**

1. Amendments and New Modern Solutions

Many amendments to the Law on Criminal Procedure have been made in the section referring to the pre-investigative procedure. The amendments stipulate new competencies of the state bodies in order to provide more efficient protection of the rights and freedoms of citizens, as well as protection of society against crime and corruption. The previous legal framework and competencies of the state bodies for detecting and pursuing crime was a limiting factor in terms of more efficient prevention and detection of crimes, as well as in terms of providing quality evidence.

Apart from the increased competencies of the bodies for internal affairs and other competent state bodies for detecting crimes and perpetrators, as well as the competencies of the Public Prosecutor, the Law on Criminal Procedure has other very important provisions. These refer to the special investigative measures, protection of witnesses, collaborators of justice and victims, provisions stipulating the procedure for confiscation of assets, protection of assets and confiscation of objects, the procedure against legal persons, and many other provisions. By including these provisions in the Law on Criminal Procedure, the objective is not only to make the criminal procedure faster and more efficient, to allow the defence to exercise its rights and guarantees, and the defendant his or her presumption of innocence, but also to prevent abuse of rights and deliberate prolonging of the procedure as well.

2. Special Investigative Measures

According to Article 146 of the Law on Criminal Procedure, special investigative measures can be undertaken for the purpose of providing data and evidence necessary for the successful flow of criminal

justice procedure, in cases in which data and evidence is impossible to collect or its collection is accompanied by serious difficulties. The special investigative measures can be undertaken only for crimes which carry a prison sentence of *at least four years*. This means that according to the Law on Criminal Procedure, the special investigative measures can be applied only to severe crimes. The law stipulates only one exception, namely, that special investigative measures can be undertaken for crimes which carry a prison sentence of up to five years, if there is reasonable suspicion that the crimes have been committed by an organized group.

The Law on Criminal Procedure stipulates the following special investigative measures:

- Interception of communications and access to private homes and other premises or transport vehicles, so as to create conditions for interception of communications under the terms and procedures stipulated by law;
- Access to and browsing of computer systems, confiscation of computer systems, part of their systems, or the database;
- Secret surveillance, interception, visual recording and wiretapping of persons and objects with technical means;
- Simulated purchase of objects, as well as apparent (simulated) bribing and apparent (simulated) acceptance of a bribe;
- Controlled delivery and transportation of persons and objects;
- Use of undercover agents for interception and collection of information or data;
- Opening of a simulated bank account in which assets originated from perpetrated criminal acts can be deposited; and
- Registration of simulated legal persons or use of currently registered legal persons for collection of data.

There are special investigative measures which are applied to a known perpetrator of a criminal act. In case the identity of the perpetrator of the criminal act is unknown, the special investigative measures can be enforced according to the subject of the criminal act. However, the use of special investigative measures, such as simulated purchase of objects; use of undercover agents for interception and collection of information or data; opening a simulated bank account in which assets originated from perpetrated criminal acts can be deposited; registration of simulated legal persons or use of currently registered legal persons for collection of data; and simulated bribing and apparent (simulated) acceptance of a bribe, must not lead to *the perpetration of a criminal act*. If the above-mentioned special investigative measures are imposed on a certain person, the person shall not be prosecuted for criminal acts such as accessory before the fact, if such criminal acts were perpetrated for the purpose of providing data and evidence for a successful flow of criminal procedure.

3. Imposing Special Investigative Measures

According to Article 148 of the Law on Criminal Procedure, special investigative measures shall be imposed during the pre-investigative procedure upon *order* of the Public Prosecutor or the investigative judge. During the investigation process, the special investigative measures shall be imposed only upon the *order* of the investigative judge. This provision clearly stipulates that special investigative measures can be imposed only through written orders. The written order can be considered valid only if the following persons have issued it:

- During the *investigation process*, special investigative measures can be imposed only by the investigative judge;
- During the *pre-investigation procedure*, special investigative measures can be imposed by the investigative judge upon an elaborated proposal by the Public Prosecutor, when the identity of the perpetrator of the criminal act is known;
- During the *pre-investigation procedure*, the written order for imposing special investigative measures can be issued by the Public Prosecutor upon an elaborated proposal by the Ministry of Interior, for

cases when the identity of the perpetrator of the criminal act is unknown; in case the investigative judge does not agree with the proposal by the Public Prosecutor regarding the imposition of special investigative measures, the Criminal Council of the court shall make the decision;

- The enforcement institutions for imposing special investigative measures are the Ministry of Interior, the Customs Administration, and the Financial Police.

**D. Law on Interception of Communications**

The Constitution of the Republic of Macedonia stipulates that the freedom and inviolability of correspondence and other forms of communication is guaranteed. Only a court decision may, under conditions and in the procedure prescribed by law, authorize non-application of the principle of inviolability of correspondence and other forms of communication, in cases where it is indispensable to prevent or reveal criminal acts, for a criminal investigation or where required in the interests of security and defence of the Republic.

The Law on Interception of Communications defines the legal framework which would limit the potential possible violation of privacy and its different aspects by the state bodies that would implement the law. Moreover, certain conditions for an efficient response to modern forms of crime shall be provided, especially referring to the fight against organized crime, corruption, illegal drugs, weapons and human trafficking, terrorism, and modern forms of espionage, as well as other types of severe crimes which endanger the safety and defence system of the state.

This law stipulates the conditions and procedures limiting the secrecy of communications, the allowable actions, and the manner of storage and use of the acquired information and data, as well as control of the legality of actions to prevent abuse of such procedures. Communications can only be intercepted on the basis of a court decision.

Remembering that this measure has serious bearing on the rights and freedoms of citizens, the Law stipulates provisions for monitoring and control of the enforcement of the measure for interception of communications. The monitoring and control of the enforcement of the measure shall be provided by the Parliament of the Republic of Macedonia, by establishing a special Committee.

1. Evidence Value of the Data, Notifications, Documents and Objects

The data, notifications, documents and objects acquired through the use of special investigative measures stipulated in Article 146 of the Law on Criminal Procedure, can be used as evidence in criminal procedure under the specific terms and manner stipulated in the law.

Persons can be interviewed as protected witnesses during the implementation of the special investigative measures. The identity of these persons shall remain a professional secret.

If the special investigative measures are imposed without the order of the investigative judge, i.e. by order of the Public Prosecutor, or are not applied in accordance with the provisions of the law, evidence acquired due to the use of such measures shall not be used as evidence in the criminal procedure.

**E. Enforced Competencies of the Public Prosecutor in the Pre-investigative Procedure**

With the amendments of the Law on Criminal Procedure, the Public Prosecutor has an active role in terms of the detection of criminal acts and their perpetrators. Despite the fact that the Law on Criminal Procedure and the Law on Public Prosecution stipulate that the Public Prosecutor has the obligation to detect and prosecute criminal acts and perpetrators of criminal acts, such obligation was not adequately confirmed by legal authorizations and measures, which authorizations must be at the disposal of the Public Prosecutor. With the amendments to the Law on Criminal Procedure, the insufficient activity and lack of responsibility can no longer be justified by the lack of authorizations.

The Public Prosecutor can ask for necessary data and notifications from state authorities; from institutions which have public competencies; from other legal persons; and from the bodies of units of local self-government, as well as from citizens. The Public Prosecutor can ask for submission of documents, minutes, cases and notifications; and he or she can consult with and ask for an opinion from experts in the relevant

field, so as to make a decision regarding criminal charges.

The Public Prosecutor has the authorization to invite the person who filed the criminal charges, the defendant and his or her defence lawyer, and other persons who might make a contribution to the assessment of the credibility of the findings in the charges. The minutes for the information acquired by citizens, which shall be written in the presence of the Public Prosecutor and shall be signed by him or her, can be used as evidence in the criminal procedure.

The Public Prosecutor can invite other persons who might make a contribution to the assessment of the credibility of the findings in the charges. The minutes for the acquired information, which shall be written in the presence of the Public Prosecutor, the defendant and the defence lawyer, and which shall be signed by the invited person, can be used as evidence in the criminal procedure. The previous provisions of the Law on Criminal Procedure did not stipulate the above mentioned details.

One of the major obstacles for delayed actions by the Public Prosecutor in relation to filed charges was the practice of not undertaking any activities for months and sometimes for years after the submission of the requests for collection of necessary information. The procedure was prolonged and there was a lack of efficiency. Stacked records of criminal charges were left unopened for years. The amendments to the Law on Criminal Procedure stipulates that the Ministry of Interior and other state authorities, institutions which have public authorizations, and other legal persons are obliged to act immediately upon request of the Public Prosecutor for review of certain allegations in the charges, within 30 days upon receipt of the request. The Ministry of Interior, other state authorities and legal persons are obliged to act within 90 days upon receipt of the request by the Public Prosecutor regarding exceptionally complex cases of severe criminal acts perpetrated by many persons from a wider area, or by organized criminal group. The Public Prosecutor can always demand that the Ministry of Interior, other state authorities, institutions which have public competencies and other legal persons notify him or her regarding the measures that they have undertaken in relation to his or her request for collection of necessary information.

A very important change in the Law on Criminal Procedure refers to the provision from Article 156, which deviates from the principle of legality, but serves for efficient prosecution of the severest form of crime. Namely, according to the above mentioned provision, the Public Prosecutor is not obliged to initiate criminal prosecution, i.e. can drop the prosecution if the defendant is a member of an organized group, gang or other criminal group, voluntarily co-operates before or during the process of perpetrating the criminal act, or during the criminal procedure, and if such co-operation and statement given by that person is of utmost significance for detecting the criminal acts or the perpetrators of the criminal acts. This is an important discretionary right of the Public Prosecutor, which can be exercised according to the precisely defined criteria, and that refers to the voluntary co-operation of the person and the essential importance of the statement that this person shall give for detecting the criminal acts or the perpetrators of the criminal acts, when such criminal acts are committed by an organized group, gang or other criminal group.

**F. Protection of Witnesses, Collaborators of Justice and Victims**

The Law on Criminal Procedure, as of 1997, did not stipulate provisions for protection of witnesses, collaborators of justice and victims. The international conventions and agreements have imposed the obligation of including such provisions in the national legislation. The latest amendments to the Law on Criminal Procedure have stipulated such provisions in a special chapter, "Protection of witnesses, collaborators of justice and victims". By including these provisions in the punitive legislation, the legislation is harmonized with the provisions of international conventions and agreements. It is clear that the modern forms of organized crime and corruption are impossible to fight without providing protection for witnesses, collaborators of justice and victims of crime.

The protection of the above mentioned persons is implemented through a special manner of investigation and participation in the procedure. The hearing of the witness is held only in the presence of the Public Prosecutor and the investigative judge or the president of the council, in premises that guarantee the protection of his or her identity. Moreover, having the witness's consent, the council can decide that the hearing be organized through the court or by using other technical means of communication, or other adequate means of communication. A copy of the minutes with the statement of the witness and without his

or her signature shall be submitted to the defendant and his or her defence lawyer, who has the opportunity to address the court in written form, by asking questions of the witness.

Protection of the above mentioned persons can be provided through inclusion of the persons in the *Program for Protection of Witnesses*. The proposal for inclusion in the Program submitted to the Council for Protection of Witnesses shall be submitted by the Public Prosecutor of the Republic of Macedonia, on the basis of a written request for inclusion in the Program, submitted by the Ministry of Internal Affairs, the competent Public Prosecutor or the judge who handles the relevant case.

If there are possibilities for inclusion in the Program, the Public Prosecutor of the Republic of Macedonia submits the proposal to the Department for Protection of Witnesses, so as to issue the decision for inclusion in the Program. The composition, the competencies of the Department for Protection of Witnesses, the measures for protection and the manner of their enforcement are stipulated in the Law on Protection of Witnesses, adopted in 2005.

**G. Confiscation of Proceeds of Crime**

The Criminal Code regulates the procedure for confiscation of the proceeds of crime. This measure, during the past, was not implemented to a great extent because the procedure for the managing of confiscated property was not adequately regulated.

Currently undergoing the procedures for adoption is the Law on Managing of Confiscated Property, Property Benefit and Items in Criminal Procedure. With the adoption of the Law, the necessary conditions for more efficient application of the criminal code regulations will be set.

## V. CONCLUSIONS

The aim of an efficient criminal justice system is to achieve two effects – special and general prevention. Special prevention is directed towards perpetrators of criminal offences through their prosecution and penalization and discouraging them from similar acts in the future. General prevention affects the public awareness of the risk and unprofitability of committing such criminal offences.

The role of NGOs and media is also of great importance in overall efforts for fighting corruption. Their position as watchdog bodies and constructive critical review of the work of the prosecution and judiciary in handling corruption cases have a positive effect in producing more efficient work of those institutions.

To further strengthen the criminal justice system, monitoring and scrutinizing the implementation of anti-corruption policy, timely reaction for the elimination of the detected weaknesses and permanent harmonization of national legislation with international standards and conventions is of vital importance.

# APPENDIX A

## CASE STUDY

The State Commission for Prevention of Corruption, upon a submitted motion regarding unlawfulness related to obtaining real estate in the denationalization procedure, expropriation of that real estate, and evasion of turnover tax on real estate and rights, in 2006 initiated a procedure for reviewing denationalization of real estate.

This is a case of exercising the right to denationalization of real estate, where the requesting parties authorized a lawyer to represent them, with complete authorization in the denationalization procedure, as well as a complete right to hold the real estate and authorization to transfer the same to a third party.

Upon adoption of a Decision from the first instance body competent for decision upon requests for denationalization, which determined an amount of 120,000 EUR, the lawyer submitted a complaint to the Commission for Administrative Issues of Second Instance in the field of denationalization. The Commission accepted the complaint and adopted a relevant decision which determines compensation at 900,000 EUR, and instead of financial compensation for the requesting parties, they shall receive state owned land in the above stated amount (agricultural land or a construction free site) with a market value five times greater than the adopted financial compensation.

At the time, the Deputy Minister of Economy was President of the Commission for Administrative Issues of Second Instance in the field of denationalization. Without notifying the owners, based on the power of attorney, the proxy (lawyer) transferred the right to hold the real estate to a third party. This property was immediately expropriated by virtual loan agreements, agreements and notary acts for mortgage and realization of the mortgage due to non-payment of the alleged loan. Immediately afterwards, the real estate was sold according to its market value.

Based on the documents, the State Commission for Prevention of Corruption established a founded suspicion of misuse of official position and authorization (Article 353 of the Criminal Code) i.e. acts of corruption and organized crime. As a consequence, the State Commission submitted an initiative to the Public Prosecutor's Office for criminal prosecution and also an initiative to the Government of the Republic of Macedonia for an annulment procedure for the denationalization decision adopted by the Commission for Administrative Issues of Second Instance in the field of denationalization.

The State Commission concluded that in this case the President of the Commission, the Director of the Cadastre, the lawyer, three notaries, and the party who had been given the right to hold the real estate were direct perpetrators and co-perpetrators of criminal acts in the field of organized crime and corruption, as determined in the Criminal Code for misuse of the official position and authorization (Article 353); tax evasion (Article 279), based on the ratio between the amount of the mortgage and the value of the property; and extortion (Article 260) – provision of a loan by private entities.

The Government, upon receipt of the initiative from the State Commission for Prevention of Corruption, within its competencies (Law on General Administrative Procedure, Article 368, paragraph 1), adopted, *ex officio*, a decision on the annulment of the denationalization decisions of the Commission for Administrative Issues of Second Instance in the field of denationalization, as well as the legal implications of the same, and due to the above mentioned, the Cadastre was obliged to enter the property in the public books in the condition as they were before the adoption of the decision from the Second Instance Commission, and the first instance body was obliged to repeat the denationalization procedure.

The Public Prosecutor's Office initiated investigation and filed indictments for the involved parties in front of the competent court. Upon conduct of the court proceedings, the Court adopted a decision, sentencing 11 persons to imprisonment for a total duration of 50 years, as follows:

- The President of the Commission for Administrative Issues of Second Instance in the field of denationalization and the Director of the Cadastre were imprisoned for three years each;
- The lawyer and the person who had been given the right to hold the property were sentenced to three years each;

- The two notaries were sentenced to imprisonment of three years, and the third notary public, for whom it was concluded within the procedure that was the organizer of the whole illicit act, was sentenced to imprisonment of 14 years.

According to the court procedure, the verdicts in favour of the State should result in seizing the proceeds of the criminal acts, in the amount of approximately 2,000,000 EUR.

At the moment, procedures remain ongoing, upon complaint from the defendants, in the Court of Appeal.

# EFFECTIVE LEGAL AND PRACTICAL MEASURES FOR COMBATING CORRUPTION: A CRIMINAL JUSTICE RESPONSE – AN INDIAN PERSPECTIVE –

*Dharam Chand Jain**

## I. INTRODUCTION

India is a large country with a population of over a billion people. It is the second most populous country in the world after China. It is one of the fastest growing economies in the world and is attracting huge investments from developed countries. In spite of the healthy growth indices, a vast population still lives in poverty and does not have access to basic sanitation, healthcare and education. The country's progress is seriously hampered by all pervasive corruption. It is preventing the benefits of development from reaching the deprived sections of society. Weeding out corruption today is a major challenge before Indian society.

The lawmakers of India have always been conscious of this problem. The British enacted the first codified law, The Indian Penal Code, in 1860. It had a chapter dealing with offences committed by public servants involving corruption and corrupt practices. Later, a special piece of legislation was enacted, i.e. The Prevention of Corruption Act 1947, to deal specifically with the problem of corruption in public life. Amendments were made from time to time to keep pace with the changing times. Later on, in 1988, it was replaced by a more comprehensive and broad piece of legislation - The Prevention of Corruption Act 1988.

Apart from this Act, India is a signatory to the United Nations Convention against Corruption (UNCAC). It has signed Extradition and Mutual Legal Assistance Treaties in Criminal Matters with a number of countries to ensure mutual co-operation in matters pertaining to investigation of corruption and other criminal cases. Co-operation is sought from other countries under these treaties through the instrument of Letters Rogatory (LRs).

This paper aims to give a brief overview of the Indian laws dealing with the problem of corruption. The main law, i.e. The Prevention of Corruption Act 1988, is discussed in brief. Provisions pertaining to confiscation of ill-gotten wealth and asset recovery have also been referred to. The established mechanisms for collecting information about corruption are also discussed. The problems and challenges faced by the country in the fight against corruption are also highlighted in brief.

## II. LAWS AND PROVISIONS TO TACKLE CORRUPTION

### A. The Prevention of Corruption Act, 1988

The Prevention of Corruption Act 1988 (hereinafter referred to as "the Corruption Act") was enacted to consolidate different anti-corruption provisions from various pieces of legislation under one umbrella and to make them more effective. The Corruption Act, *inter alia*, widened the scope of the definition of a "public servant"; enhanced penalties provided for offences in earlier laws; incorporated the provisions of freezing of suspected property during trial; mandated trial on a day-to-day basis, prohibited the grant of stay on trial; etc. Since the Corruption Act is the main law for dealing with offences pertaining to corruption in India, its salient features are discussed below.

1. Definition of "Public Servant"

The Corruption Act deals with corruption in the public sector by public servants. Though the Corruption

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Act does not cover corruption in the private sector, the definition of "public servant" in sec. 2 of this Act even covers certain categories of people who are not employed by the government. The Corruption Act does not only cover persons employed by the government or in the regular pay of the government but also *persons remunerated by fees or commission for the performance of any public duty by the Government but not employed by it*. The latter category is very important in my opinion because, by virtue of their position, such persons enjoy considerable power and can abuse the same to indulge in corrupt activities. The Corruption Act thus includes the Ministers, members of Parliament, State Legislative Assemblies, Municipal Corporations, State Cooperative Societies etc. in its fold. Even office bearers of non-governmental organizations that receive financial assistance from the government are defined as public servants.

2. Offences and Penalties under the Corruption Act

Various acts of omissions and commissions defined as offences under the Corruption Act can be broadly divided into the following categories:

*(i) Bribery of Public Servants: punishable by secs. 7, 10, 11 & 12 of the Corruption Act (Article 15 of the UNCAC)*

Sec. 7 punishes a public servant or a person expecting to be a public servant, who accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act. The important point to note is that even the sheer demand of a bribe or agreeing to accept a bribe is an offence under this law. Actual exchange of a bribe is not an essential requirement to be prosecuted under this law. A willing *bribe giver* is also punishable under sec. 12 of the Corruption Act. Further, those public servants who do not take a bribe directly, but through middlemen or touts, and those who take *valuable things* from a person with whom they have or are likely to have official dealings, are also punishable as per sec. 10 and 11 respectively. It is obvious that there is zero tolerance for corruption by public servants in the law and the Corruption Act demands exemplary conduct from them.

All these offences are punishable with a minimum imprisonment of six months, extendable up to five years, and also with a fine.

*(ii) Embezzlement, Misappropriation of Property by Public Servants: punishable by sec. 13 (1) (c) of the Corruption Act (Article 17 of the UNCAC)*

Sec. 13 (1) (c) punishes public servants who dishonestly or fraudulently misappropriate or convert to their own use any property entrusted to them as a public servant.

This offence is punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

*(iii) Trading in Influence: punishable by secs. 8 & 9 of the Corruption Act (Article 18 of the UNCAC)*

Secs. 8 & 9 punish middlemen or touts who accept or obtain or agree to accept or attempt to obtain, gratification as a motive or reward for inducing by corrupt or illegal means, (sec. 8) or by exercise of personal influence (sec. 9), any public servant, to do or forbear to do any official act.

These offences are punishable with a minimum imprisonment of six months, extendable up to five years, and also with a fine.

*(iv) Abuse of Functions by Public Servants: punishable by sec. 13 (1) (d) of the Corruption Act (Article 19 of the UNCAC)*

Sec. 13 (1) (d) punishes public servants who abuse their official position to obtain for themselves or any other person, any valuable thing or pecuniary advantage (*quid pro quo* is not an essential requirement).

This offence is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

*(v) Illicit Enrichment of Public Servants: punishable by sec. 13 (1) (e) of the Corruption Act (Article 20 of the UNCAC)*

Sec. 13 (1) (e) punishes public servants, or any person on their behalf, who are in possession, or who have been in possession, of pecuniary resources or property disproportionate to their known sources of income, at any time during the period of their office. Known sources of income have further been explained as income received from any lawful source only. It is a very important provision, particularly for booking public servants in senior positions because often there are not many complaints against them related to bribe seeking or abuse of official position.

This offence is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.

*(vi) Habitual bribe seekers are punishable under sec. 13 (1)(a)& (b) of the Corruption Act with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.*

*(vii) Persons who habitually act as middlemen or touts, or who pay bribes, are punishable with a minimum imprisonment of two years, extendable up to seven years, and also with a fine, as per sec. 14.*

*(viii) Attempt at Certain Offences by Public Servants: punishable by sec. 15 of the Corruption Act (Article 27 of the UNCAC)*

An attempt at committing offences pertaining to criminal misappropriation of property or abuse of official position by a public servant is punishable with imprisonment for up to three years and also with a fine, under sec. 15.

3. Determination of Quantum of Fine - sec. 16 of the Corruption Act

Sec. 16 mandates that while fixing the amount of a fine as part of penalty for committing an offence under this Act, the court will take into consideration the value of the properties which are proceeds of crime, and in case of disproportionate assets, pecuniary resources or property for which the accused is unable to account satisfactorily.

4. Necessity of obtaining Previous Sanction/Permission for Prosecution

Sec. 19 mandates that the investigating agency, after completing an investigation of a case for offences under secs. 7, 10, 11, 13 and 15 of this Act acquires the prior approval of the authority competent to remove the public servant from his or her present post, before launching prosecution in a court of law. No court can take cognizance of above offences unless such a sanction accompanies the report of the investigating agency filed in the court of law.

Hence, after completing investigation, the investigating agency forwards its investigation report, containing detailed findings of the investigation, to the competent authority to provide sanction for launching prosecution against the accused public servant. The investigation report is filed in a court of law along with such sanction to enable the court to initiate prosecution. This has been done with a view to save public servants from frivolous prosecution or from prosecution for acts done in good faith while discharging an official function. This is applicable only to incumbent public servants.

**B. Freezing, Seizure and Confiscation of Properties - The Criminal Law (Amendment) Ordinance, 1944 (Article 31 of UNCAC)**

This is an important law on freezing, seizure and confiscation of properties which are proceeds of crime, including offences under the Corruption Act. Such properties identified during investigation can be frozen under this law. Properties can remain frozen till disposal of the case by the court after completion of the investigation. If the alleged offence is proved in the court of law and the property is proved to be the proceeds of crime, the court will order its confiscation.

**C. Criminal Procedure Code 1973 together with Mutual Legal Assistance Treaties (MLAT) in Criminal Matters and Extradition Treaties**

Sec. 166 A and 166 B of the above code empower the crime investigation agencies of India to make requests to other countries as well as to entertain requests from other countries to render assistance in the

investigation of crime registered in the respective countries. Such letters of request are popularly known as *Letters Rogatory*. Such Letters Rogatory are executed on the basis of Mutual Legal Assistance Treaties and Extradition Treaties India has signed with other countries. To date India has Mutual Legal Assistance Treaties in Criminal Matters with 20 countries and Extradition Treaties with 25 countries. The Mutual Legal Assistance Treaties invariably have a chapter on asset recovery and sharing the same. With other countries, international co-operation is sought on the basis of guarantee of reciprocity.

In a case currently under trial in my region, we have effectively made use of these instruments in tracking proceeds of crime in a foreign country. National Fertilizer Ltd., an important public sector enterprise, placed an order for supplying 0.2 million metric tons of urea fertilizer to a Turkish firm. Advance payment of approximately 38 million US dollars was also made to the firm. With the connivance of public servants, the proprietors of this firm siphoned off the whole amount and did not supply any fertilizer. The Central Bureau of Investigation registered a criminal case in 1996. During investigation, the CBI was able to track a big part of the misappropriated amount to certain bank accounts in Switzerland and other countries. Resorting to Letters Rogatory as per the Criminal Procedure Code, it has been possible to track the money lying in such bank accounts. On conclusion of trial of this case, the proceeds of crime are expected to be returned to the firm.

**D. The Prevention of Money Laundering Act 2002 (Article 23 of the UNCAC)**

Many public servants are able to hold their ill-gotten wealth in foreign countries, which they subsequently transfer to their homeland through money laundering, disguising them as funds, apparently from a legal source. This Act empowers the Directorate of Enforcement, India, and Financial Intelligence Unit, India, both agencies of the Government of India, to investigate and prosecute such persons under the said Act.

**E. The Foreign Exchange Management Act 1999**

Middlemen or touts, who take huge commissions for brokering deals pertaining to purchases from foreign suppliers, often transfer such money in foreign currencies, claiming it to be the proceeds of some business abroad. This Act empowers the Directorate of Enforcement, India to investigate and prosecute such persons under the said act.

**F. The Right to Information Act 2005**

It is a well-known fact that too much secrecy in public administration breeds corruption. The Right to Information Act aims at ensuring efficiency, transparency and accountability in public life. This Act requires all public authorities, except the ones that handle work relating to national security, to publish all information about their functioning at regular intervals through various means of communication, including the Internet. Now any person can seek any information from the concerned public authority just by filing an application at almost at no cost. The public authority has to reply to the application compulsorily within 30 days. If the information sought is denied, the applicant has a right to agitate further before the appellate authorities under this Act. This can indeed be described as a revolutionary step towards the eradication of corruption from public life.

**G. India and the United Nations Convention against Corruption 2003 (UNCAC)**

India has welcomed the UNCAC, which provides for international co-operation and mutual legal assistance in investigating cases of corruption and recovery of assets. India signed the UNCAC in December 2005. By signing the Convention India has reiterated its resolve to strengthen international co-operation as envisaged in the Convention. It is in the process of enactment of requisite enabling legislations by the concerned Ministries or Departments before ratifiying the Convention. Once ratified, the Convention will boost India's effort and commitment to fight corruption at both domestic and international level.

## III. INVESTIGATION, PROSECUTION AND ADJUDICATION

**A. Investigation**

India is a union of States as per the Indian Constitution. Crime is a State subject under the Constitution. Investigation and prosecution of crimes, including corruption cases, which happen within the territorial jurisdiction of the State, therefore remain the basic responsibility of the State agencies. As per the federal setup of the Indian Constitution, besides States, there are certain territories, known as Union Territories, which are directly administered by the Government of India. In order to investigate and prosecute crimes in

these areas, primarily the corruption cases, the Government of India has set up the Central Bureau of Investigation. The main agencies to probe corruption cases in India are as outlined below.

1. Anti-Corruption Bureau of States

These police agencies of the States are meant mainly for investigating corruption cases within the States under the Corruption Act. They are responsible for the prevention, detection and investigation of corruption crime only and are not engaged in conducting other police duties such as handling conventional crimes and law and order. After investigating a crime, they file the investigation reports in a court of law to launch prosecution.

2. Ombudsman, known as '*Lokayuktas*'

Many Indian states have set up the office of *Ombudsman*, known as *Lokayuktas*, mainly to probe complaints against ministers and public servants pertaining to corruption.

3. Central Bureau of Investigation (CBI)

The CBI is an investigating agency set up by the Government of India to investigate crime, especially corruption cases, in Union Territories, which are directly administered by the Government of India. Over a period of time, it has become the premier corruption investigation agency in the country. It enjoys high credibility amongst the people of India. As a result even the States also refer sensitive and large-scale corruption cases to the CBI for investigation. The High Courts of various States and the Supreme Court of the country have powers under the Indian Constitution to entrust investigation of any crime to the CBI for investigation.

The CBI has a training academy of its own. It not only provides training to its own personnel but also organizes in-service training courses for the investigators and prosecutors of the State agencies. The State agencies look up to the CBI as an expert agency for guidance in matters relating to investigation and prosecution of corruption cases. The co-operation between the two sets of agencies is highly satisfactory.

4. The Directorate of Enforcement, India

Though it does not have powers to investigate and prosecute cases under the Corruption Act, the Directorate of Enforcement, India has powers to investigate and prosecute people involved in money laundering, including public servants, under the Prevention of Money Laundering Act 2002.

**B. Prosecution**

Prosecution of cases investigated by both the State Anti-Corruption Bureaus and CBI is undertaken by government-appointed prosecutors. In the CBI, there are entries at two levels for prosecutors designated as "Assistant Public Prosecutors" (APP) and "Public Prosecutors" (PP) respectively. They are recruited through a competitive examination. For appointment as an APP, the minimum qualification required is to hold a degree in law and to have a minimum of three years' experience practicing as an advocate in a court of law. For appointment as a Public Prosecutor, the requirement is to hold a degree in law and to have a minimum of seven years' experience practicing as an advocate in a court of law. After appointment, APPs and PPs are trained in the CBI academy.

Besides the above, there is another category of prosecutors, known as "Special Counsels". They are counsels who have experience of practicing as an advocate for more than ten years and are considered very skilled. They do not wish to join the public prosecution service on a permanent basis but are willing to take up individual cases on behalf of the CBI. The government prepares a panel of such senior lawyers, who conduct prosecution of individual cases assigned to them.

The system of appointment of prosecutors in the States is more or less the same as described above for the CBI.

Prosecutors are not only responsible for advocating on behalf of the State at trial, they also guide the investigating officers during investigation of the cases. Investigation officers are free to seek legal counsel on any point of law from the prosecutors at any stage of investigation. The evidence collected during investigation of a case is legally scrutinized by a prosecutor before it is filed in the court of law. The

prosecutor can suggest further investigation, if necessary.

Conducting prosecution is a joint responsibility of the police and prosecutors. Whereas the prosecutors lead the evidence in the court of law, police officers assist them in briefing the witnesses and prepare them for arguments on points raised by the other side.

**C. Adjudication**

1. Trial by Special Judges Only

As per sec. 3 of the Corruption Act, only judges designated "Special Judges", can conduct trial of cases falling under the Corruption Act. The government appoints Special Judges from serving senior judicial officers, designated as "Sessions Judge" (SJ) or "Additional Sessions Judge" (ASJ). The minimum qualification required to become an ASJ is to hold a degree in law and to have a minimum of seven years' experience as a practicing advocate in a court of law. The selection is made through a competitive examination. ASJ are promoted to the rank of Sessions Judge after serving as an ASJ for about 15 to 20 years.

The Corruption Act requires the Special Judges to hold trial on a day-to-day basis, as far as practicable.

2. Special Powers of Special Judges

*(i) Power to Grant Pardon to an Approver*

As per sec. 5, Special Judges can give a pardon to any person who has been involved in the commission of an offence under this Act with a view to obtaining his or her evidence, on the condition of him or her making a full and true disclosure of all the facts and circumstances related to commission of that offence and persons involved in the same, including him or herself.

*(ii) Freezing of Ill-gotten Properties during Trial*

Though there is a separate law, The Criminal Law (Amendment) Ordinance, 1944, which deals with freezing, seizure and confiscation of properties, which are proceeds of crime, sec. 5 of the Corruption Act empowers the Special Judge to exercise all the powers and functions under the said law during trial.

## IV. MECHANISM FOR SECURING INFORMATION OF CORRUPTION

Collecting reliable information about corruption, especially about people serving in senior positions, is an important task and challenge. In CBI, we have certain set mechanisms to obtain such information and subject the same to verification. It is described in brief as follows.

**A. Complaints received from the Public**

Due to the high credibility enjoyed by CBI, it receives a large number of complaints from the public every day. Such complaints are scrutinized and taken up for verification if found to contain verifiable allegations. Often such verifications result in registration of crime pertaining to corruption.

**B. Information developed through Sources**

Great emphasis is laid on developing information from persons who want their identities to be kept secret, otherwise known as sources. *The Whistle-Blowers (Protection in Public Interest Disclosures) Bill* meant for providing statutory protection to such persons has been passed by the Indian Parliament and is likely to become a law soon. In the CBI, the secrecy of the identity of such people is scrupulously guarded and is not compromised under any circumstance. Information thus obtained is discretely verified and registered as a crime if a criminal case is made out.

**C. Cases referred by the Central Vigilance Commission (CVC) and the Chief Vigilance Officers (CVOs) of other Government Departments**

The Central Vigilance Commission is a statutory body which monitors corruption in governmental departments. It supervises the work of Chief Vigilance Officers of all the departments of government and issues guidelines to them. The CVC also receives complaints from the general public about corruption. It refers such complaints to the CBI for verification and investigation if found to contain verifiable allegations.

The CVOs are in-house supervisors of government departments who monitor the conduct of personnel and enquire into complaints against them pertaining to corruption. If upon enquiry they conclude that a

criminal case under the Corruption Act appears to have been made out, they refer the case to the CBI for investigation.

**D. Cases referred by High Courts and the Supreme Court**

Any citizen can file a petition, known as Public Interest Litigation, in the High Courts and the Supreme Court, alleging corruption in the public sector. If the High Courts and the Supreme Court find the allegations credible, they can refer such cases to the CBI for further enquiry or investigation. Many big cases of corruption have been successfully investigated by the agency in the past on such references from these courts.

**E. Annual Programme of Vigilance Work**

In compliance with a circular issued by the government of India in 1966, an annual exercise is carried out by the CBI to identify corruption-prone departments and individual corrupt public servants at the beginning of each year. The Public Utility Departments, with whom the general public comes into frequent contact, are given a special focus in these exercises. This task is carried out with the co-operation of the Chief Vigilance Officer of the concerned Department. During this exercise, a list, known as an "Agreed List" is prepared. The list shows the names of the public servants who are perceived to be corrupt but there is no tangible information or material regarding the date to initiate legal action against them. Such officers are put under surveillance during the course of the year and their activities are kept under covert watch. Special emphasis is put on collecting discreet information about various assets acquired by such public servants. This often results in action under the law against such corrupt acts by public servants.

**F. Use of Telephonic/Electronic Surveillance**

The legal provisions relating to telephonic or electronic surveillance under the Indian Telegraph Act 1885 are effectively used by the CBI to gather accurate information about corrupt activities of the public servants. After ascertaining details about various phone numbers and email identifications used by the public servant, permission of the competent authority is taken to put the same under surveillance. Information gathered during such surveillance has been successfully used in exposing big scams.

## V. PROBLEMS AND CHALLENGES

Despite adequate laws to fight corruption in the public sector, it is still one of the biggest menaces Indian society must deal with. The Indian criminal justice system has been facing many problems and challenges in its fight against corruption, some of which are highlighted below.

**A. No Law to tackle Corruption in the Private Sector**

The Prevention of Corruption Act 1988 is the existing law in India dealing with offences relating to corruption. This law, however, was essentially enacted to take care of corruption cases in the public sector and by public servants, whereas in fact, there is widespread corruption in the private sector also which seriously hampers the overall growth and development of the country.

After the liberalization of the Indian economy in the early 1990s, the private sector has expanded greatly. The problem of corruption in the private sector is increasing with the expansion of the private sector. Today it has assumed alarming proportions. It has become the single biggest menace to Indian society. Efforts are underway to enact laws to deal with corruption in the private sector as envisaged in the UNCAC.

**B. Inherent Delays in the Criminal Justice System**

The system is painfully slow and punishments are not swift. As explained earlier, sec. 19 of the Corruption Act requires prior permission of the authority competent to remove a public servant from his or her post before launching prosecution against him or her in court. This often delays the launch of a prosecution. Upon receiving reports from the investigating agencies seeking approval for a prosecution, the concerned authorities often take considerable time to grant such permission. Also, permission is sometimes denied on political and other grounds.

The Corruption Act provides for trial of corruption cases under the act exclusively by the Special Judges. The number of Special Judges is highly insufficient compared to the number of corruption cases filed in their courts. As a result, these courts are overburdened and there is a large discrepancy in the number of cases

disposed by the investigating agencies and the number of cases disposed by the courts, adding to the backlog each year.

During trial of offences, adjournments are often taken or granted on various grounds. Further, the proceedings in the trial court are challenged at various stages by parties filing petitions in the same court as well as in higher courts. Appeals and revisions filed in higher courts against the order of the trial court often take years to be concluded.

**C. Hostile Witnesses**

In order to convict a corrupt public servant, the prosecution has to prove its case beyond doubt. This is a strict legal requirement as per the Indian Evidence Act, the general law on evidence in India. There is no exception to this requirement even for corruption cases. Prosecution has to depend heavily on the testimony of witnesses to prove its case beyond doubt. However, witnesses often do not support the prosecution case because of influence, allurement and intimidation from the other side. There is no witness protection scheme, nor are there provisions for quick and effective action against witnesses who become hostile. As a result, witnesses frequently become unco-operative and spoil the prosecution case. Punishments are, therefore, not swift and effective under the Corruption Act and don't deter corrupt public servants.

**D. Ineffective Asset Recovery**

Though there are legal provisions for confiscation and recovery of property acquired as proceeds of crime, such recovery is not easy. Corrupt public servants often acquire properties with the proceeds of crime in the names of their friends, relatives, family members and other acquaintances. Therefore, it is not easy to prove in court that such properties are the proceeds of crime. Such properties are quite often held offshore under strict privacy laws and it is not easy to trace and recover them, especially in the absence of desired international co-operation.

## VI. CONCLUSION

There are adequate laws in India to fight corruption in the public sector. The Prevention of Corruption Act 1988 is a comprehensive law which covers all possible acts pertaining to corruption and corrupt practices by public servants. There are laws relating to tracking, seizing, and confiscating proceeds of such crimes, both inside and outside the country. India has signed mutual legal assistance and extradition treaties with 20 and 25 countries respectively to facilitate international co-operation in the fight against corruption. Ratification of the UN Convention against Corruption by India will further strengthen its resolve to fight against corruption by providing and obtaining international co-operation.

Despite all these measures and laws, the country is still not free from the scourge of corruption. Corruption is still one of the biggest impediments to extending the benefits of development and progress to the poorest of the poor. The Indian criminal justice system is facing many problems and challenges in its fight against corruption. At present, there is no law to deal with corruption in the private sector, which has grown in leaps and bounds in last two decades, as envisaged in the UNCAC. Offenders take advantage of the very strict requirements of Indian courts to prove every point beyond doubt. The system suffers from inherent delays; as a result punishment is not swift. Corruption is considered a 'high profit-low risk' activity by corrupt public servants. Recoveries of assets, which are proceeds of crime, remain a big challenge. Such assets are often held offshore and getting them back is a Herculean task, especially in the absence of desired international co-operation.

The fight against corruption is, therefore, not an easy one. We need to join forces against this enemy, with all resources at our disposal to achieve better and more effective results. The United Nations Convention against Corruption can be seen as a watershed in the resolve of the international community to fight corruption. The provisions relating to asset recovery in the UNCAC are the most important, in my opinion. Effective use of the same by signatory countries will, therefore, go a long way to achieving better results in this regard. International co-operation to fight corruption as envisaged in the UNCAC is therefore inescapable and a requirement of the hour.

# WIPING AWAY THE FOOTPRINTS OF CORRUPTION IN THE PHILIPPINES

*Joselito D.R. Obejas**

## I. INTRODUCTION

For a predominantly Christian country wherein the moral fibre of the people is supposedly strengthened by basic Biblical doctrines about heavenly rewards for living upright and modest lives, the Philippines has to religiously carry a cross, so to speak, to redeem the bureaucratic flock from the sins of corruption. Indeed, even before the Philippines became a Republic, following its independence from the United States of America, graft and corruption already afflicted its system of government.

The network of corruption in the Philippines comprehends such a wide range of civic and legal necessities and requisites that Filipinos are left with little or no choice but to live with it. Observers tend to agree that corruption in our country flourishes because our socio-cultural environment causes it to thrive. While we may consider, albeit meekly, that the prevalence of corruption is more of an exception than the general rule in our public service, its magnitude is, nevertheless, a cause for serious concern. Truth to tell, it is widely perceived that corruption has footprints on the floors of every public office in the Philippines, including the Presidential Palace.

This paper, therefore, aims not only to provide a formal attestation of the prevalence or rampancy of graft and corruption in the Philippines but, likewise, to bring to fore the responsive measures and mechanisms the Philippine criminal justice authorities are adopting and applying with the objective of wiping the footprints of corruption in the government offices in this jurisdiction.

## II. THE ANATOMY OF GRAFT AND CORRUPTION

### A. Definition of Graft and Corruption

1. Practical Meaning

The Webster's New World Dictionary, College edition, defines *graft* (derived from the old French word *grafier* which means to join or unite closely), as the act of taking advantage of one's position to gain money, property, etc. dishonestly, while *corruption* is associated with dishonesty, lack of integrity and bribery. While both terms may be appear to be synonymous, some academics insist that, for analytical purposes, *graft* is committed by an individual while *corruption* involves the collusion of at least two parties.

In its Source Book 2000, Transparency International (IT), a Berlin-based, non-governmental organization (NGO) for a global coalition against corruption, describes corruption as involving "behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the power entrusted to them".

2. Legal and Judicial Definition

Unfortunately, Philippine anti-corruption laws do not provide any definition of graft and corruption. However, the Anti-Graft and Corrupt Practices Act (Republic Act 3019) enumerates certain punishable corrupt practices of public officers while the Code of Conduct for Public Officials and Employees (Republic Act 6713) lists the prohibited acts and transactions of government employees.

Our courts of law do not generally prescribe clear-cut definitions of the terms "graft" and "corruption"

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since it may be extremely difficult, if not impossible, to contain all the elements of the different types of graft and corruption in one sweeping generalization.

**B. Kinds of Corruption**

Corruption takes many hues and forms. Undeniably, it is endemic in the public service. According to the Philippine Center on Transnational Crimes, corruption in the Philippines is usually committed or exists through:

1. Tax evasion;
2. Ghost projects and payrolls;
3. Evasion of public bidding in public contracts;
4. Sub-contracting;
5. Nepotism and favoritism;
6. Extortion or giving of protection money (*tong*, in Pilipino); and
7. Bribery (*lagay*, in Pilipino).

**C. Perceived Causes of Corruption**

Since corruption is generally considered prevalent in developing countries such as the Philippines, the underlying causes attributed thereto may include the following:

1. The quest for individual survival, brought about by poverty, lack of basic needs, low salaries, etc.;
2. Wide disparity between the rich and the poor;
3. The Filipino cultural values of personalism, familism, *pakikisama* (getting along), *utang-na-loob* (debt of gratitude) and *damayan* (sympathy) for another's misery or problem;
4. Greed or the insatiable desire to amass more wealth, assets or property;
5. Comfort. As corruption provides easy money, the corrupted enjoy the easy life;
6. Convenience and expediency. These causes are particularly applicable to the corruptor who usually desires to facilitate the approval, grant and/or release of request or proposal and avoid the rigors of red tape in the bureaucracy.

**D. Prevalence of Graft in the Philippines**

Quite ominously, the Philippines rank highly in global and regional lists of the worst graft-ridden countries. On the domestic front, the national administration consistently performs dismally in public opinion surveys, mainly because of corruption issues. Thus-

1. Based on the Corruption Perception Index for 2006 of Transparency International (TI), the Philippines ranks 121$^{st}$ out of 165 countries with a rating of 2.5 on a scale of 10 (highly clean) to 0 (highly corrupt).
   Of the Southeast Asian countries, only Indonesia (2.4), Cambodia (2.1.) and Myanmar (1.9) got lower scores.
2. Just recently, TI, through its Global Corruption Barometer 2007, placed the Philippines at number 10 in the list of countries worldwide with the highest level of petty bribery, garnering a rating of 32%. TI polled more than 63,000 people in 60 countries between June and September 2007. The countries ahead of the Philippines in the poll/study are Cameroon, Cambodia, Albania, Kosovo, FYR Macedonia, Pakistan, Nigeria, Senegal and Romania (Phil. Daily Inquirer, 7 Dec. 2007, pp. 1 and 4).
3. In a survey conducted in March 2007 by the Political and Economic Risk Consultancy (PERC), an organization of about 1,476 expatriate business executives in 13 countries and territories across Asia, the Philippines is seen as the most corrupt Asian economy, getting a score of 9.4.
4. The World Bank, in a report (no. 23687-Ph) entitled "Combating Corruption in the Philippines: An Update" (30 September 2001), emphasized that corruption in the Philippines is systemic and deep-rooted, and will take many years to overcome. The WB report cited the estimates of the Office of the Ombudsman of the loss of some $48 billion to corrupt practices over the last 20 years (up to fiscal year 2001). It likewise cited the figures of the Commission on Audit that about ₱2 billion (Philippine pesos) are lost to government corruption every year.
5. The Social Weather Stations (SWS), a reputable and respected polling entity in the Philippines, disclosed in its 2007 Business Survey on Corruption that out of more than 700 Filipino managers of

business enterprises in the Philippines, 60% see a lot of corruption in the public sector within a period of 7 years; 50% said that most/almost all the firms in their line of business gives bribes to win government contracts; and 50% see corruption as part of how government works. (Transparent Accountable Governance: The 2007 SWS Business Survey on Corruption).

6. In its First Quarter 2005 Social Weather Report nationwide public opinion survey, covering February 25 to March 10, 2005, the SWS revealed that public satisfaction with the national government's effort at eradicating graft and corruption received a Net Negative Rating of -30. It is in the issue of corruption where public dissatisfaction with the national administration's performance dominates.

## III. PHILIPPINE SOLUTIONS AND THE CRIMINAL JUSTICE SYSTEM

Fully cognizant that corruption is inherent in the field of public service in any country in the world, regardless of the political regime that reigns therein, the Philippine government continuously and consistently endeavours to address this problem.

Among these measures is the incorporation of anti-corruption provisions in its fundamental law and the passage of anti-graft and corrupt practices legislation with stiffer penalties, thus amending and expanding the prohibited acts of public officers prescribed in the Revised Penal Code; streamlining the functions and strengthening the anti-graft institutions, such as the *Sandiganbayan* and the Office of the Ombudsman; and the official recognition and ratification of the United Nations Convention against Corruption (UNCAC).

### A. Survey of Anti-Graft Laws

1. The 1987 Constitution of the Philippines

The present fundamental law of the Philippines was adopted by the Constitutional Commission, created by President Corazon C. Aquino on 23 April 1986. It is the third Constitution of the Philippines after the Second World War. Among its salient provisions dealing with public officers and measures to prevent corruption are the following:

- Section 4, Article IX.B:
  "All public officers and employees shall take an oath or affirmation to defend the Constitution".

- Section 1, Article XI:
  "Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty and efficiency, act with patriotism and justice, and lead modest lives".

- Section 2, Article XI:
  "The President, the Vice-President, the members of the Supreme Court, the members of the Constitutional Commission, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the constitution, treason, bribery, graft and corruption and other high crimes, or betrayal of public trust".

- Section 15, Article XI:
  "The 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".

- Section 17, Article XI:
  "A public officer or employee shall, upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities and net worth. In the case of the President, the Vice-President, the Members of the Cabinet and Congress, the Supreme Court, the Constitutional Commissions and other constitutional offices, and officers of the armed forces with general or flag rank, the declaration shall be disclosed to the public in the manner provided by law".

- Section 4, Article XI:
  "The present anti-graft court known as the *Sandiganbayan* shall continue to function and exercise its jurisdiction as now or hereafter may be provided by law"

- Sections 5 to 14, Article XI, refer to the independent Office of the Ombudsman.

2. The Revised Penal Code

Act No. 3815, otherwise known as the Revised Penal Code, took effect on 1 January 1932. As its title connotes, it is a codification or compilation of all penal or criminal laws that were existing and in effect when the Philippines was still under the colonial rule of the United States of America and before the Second World War. Although it was enacted during the American regime, it was, nevertheless, largely copied and mainly influenced by the *Codigo Penal* of Spain, which ruled the Philippines for about 300 years.

Title Seven of the Revised Penal Code refers to crimes committed by public officers.

As defined therein, a public officer is any person who, by direct provision of the law, popular election or appointment of competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in the said government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class (Article 203).

- Corruption-related crimes
  Among the crimes therein defined which may be considered as related to corruption, directly or indirectly, are as follows:

  (i) Bribery (Article 210)
  (ii) Indirect Bribery (Article 211)
  (iii) Corruption of Public Officials (Article 212)
  (iv) Frauds against the public treasury and similar offences (Article 213)
  (v) Prohibited Transactions (Article 215)
  (vi) Possession of prohibited interest (Article 216)
  (vii) Malversation of public funds or property (Article 217)
  (viii) Failure of accountable officer to render accounts (Article 218)
  (ix) Illegal use of public funds or property (Article 220)
  (x) Failure to make delivery of public funds (Article 221)

3. Republic Act No. 3019
   The Anti-Graft and Corrupt Practices Act

This special law was passed pursuant to the policy of the Philippine government to repress certain acts of public officers and private persons alike which constitute graft and corrupt practices or which may lead thereto, in line with the principle that a public office is a public trust (Section 1). It took effect on 18 June 1955.

Section 3 thereof enumerates the corrupt practices of public officers, to wit:

a. Persuading, inducing or influencing another public officer to perform an act constituting a violation of rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced or influenced to commit such violation or offense.

b. Directly or indirectly requesting or receiving any gift, present, share, percentage, or benefit, for himself or for any other person, in connection with any contract or transaction between the Government and any other party, wherein the public officer in his official capacity has to intervene under the law.

c. Directly or indirectly requesting or receiving any gift, present or other pecuniary or material benefit, for himself or for another, from any person whom the public officer, in any manner or capacity, has secured or obtained, or will secure or obtain, any Government permit or license, in consideration for the help given or to be given, without prejudice to Section 13 of this Act.

d. Accepting or having any member of his family accept employment in a private enterprise

which has pending official business with him during the pendency thereof or within one year after its termination.

e. Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

f. Neglecting or refusing, after due demand or request, without sufficient justification to act within a reasonable time on any matter pending before him for the purpose of obtaining directly or indirectly, from any person interested in the matter some pecuniary or material benefit or advantage, of for purpose of favoring his own interest or giving undue advantage in favor of or discriminating against any other interested party.

g. Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

h. Directly or indirectly having financial or pecuniary interest in any business, contract or transaction in connection which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having interest.

i. Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or act requiring the approval of the board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel of group.

Interest for personal gain shall be presumed against those public officers responsible for the approval of manifestly unlawful, inequitable, or irregular transactions or acts by the board, panel or group to which they belong.

j. Knowingly approving or granting any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of who is not so qualified or entitled.

k. Divulging valuable information of a confidential character, acquired by his office or by him on account of his official to unauthorized persons, or releasing such information in advance of its authorized release date.

4. Republic Act No. 1379
An Act Declaring Forfeiture in Favour of the State Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Procedure Therefore

This law, which took effect on 18 June 1955, *prima facie* presumes as having been unlawfully acquired any property acquired by any public officer or employee during his or her incumbency when the amount thereof is manifestly out of proportion to his or her salary as such public officer or employee and to his or her other lawful income and the income from the legitimately acquired property.

It provides the procedure for the forfeiture of the unlawfully acquired property.

5. Presidential Decree No. 749
Granting Immunity From Prosecution to Givers of Bribes and Other Gifts and to Their Accomplices in Bribery and Other Graft Cases against Public Officers

This is one of the edicts issued by the late President Ferdinand E. Marcos during the martial law regime. It immediately took effect, upon its issuance, on 18 July 1975.

The reason given therein for the grant of immunity from prosecution to bribe givers is that it is virtually

impossible to secure the conviction and removal of dishonest public servants owing to the lack of witnesses considering that the bribe givers are always reluctant to testify against corrupt public officials and employees concerned for fear of being indicted and convicted themselves for bribery and corruption.

Section 1 thereof, provides, to wit:

> Any person who voluntarily gives information about any violation of Articles 210, 211 and 212 of the Revised Penal Code; Republic Act Numbered Three Thousand Nineteen, as amended; Section 34 of the International Revenue Code and Section 3604 of the Tariff and Customs Code and other provisions of the said codes penalizing abuse or dishonesty on the part of the public officials concerned; and other laws, rules and regulations punishing acts of graft, corruption and other forms of official abuse; and who willingly testifies against any public official or employee for such violation shall be exempt from prosecution or punishment for the offense with reference to which his information and testimony in bar of such prosecution: Provided, that this immunity may be enjoyed even in cases where the information and testimony are given against a person who is not a public official but who is a principal, or accomplice or accessory in the commission of any of the above-mentioned violations: Provided, further, that this immunity may be enjoyed by such informant or witness notwithstanding that he offered or gave the bribe or gift to the public official or is an accomplice for such gift or bribe-giving; and Provided, finally, that the following conditions concur:
>
> 1. The information must refer to consummated violations of any of the above-mentioned provisions of law, rules and regulations;
> 2. The information and testimony are necessary for the conviction of the accused public officer;
> 3. Such information and testimony are not yet in the possession of the State;
> 4. Such information and testimony can be corroborated on its material points; and
> 5. The informant or witness has not been previously convicted of a crime involving moral turpitude.

6. Presidential Decree No. 46
   Making it Punishable for Public Officials and Employees to Receive, and for Private Persons to Give, Gifts on Any Occasion, including Christmas)

Another Marcos-era decree which was issued on 10 November 1972, this significant and currently binding and valid piece of "executive legislation" was issued to put more teeth to existing laws and regulations; to wipe out all conceivable forms of graft and corruption in the public service; and to stop the practice of gift-giving to government officials. Included within the prohibition therein is the throwing of parties or entertainments in honour of the government official or employee or of his or her immediate relatives.

7. Republic Act No. 7080
   The Anti-Plunder Act

This law punishes any public officer who, by him or herself or in connivance with members of his or her family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in Section 1 (d) thereof, in the aggregate amount or total value of at least fifty million pesos (₱50,000,000.00) or more than US$1,000,000.00.

This law, which was approved on 12 July 1991, became immensely popular in the Philippines when the equally popular President, and a former movie actor, Joseph Ejercito Estrada, otherwise known as "Erap", was deposed from the Presidency, while only in his third year of a six-year term of office. After an aborted impeachment trial in 2001, he was subsequently indicted and charged before the *Sandiganbayan* with the offence of plunder, among other crimes. He was convicted of the said offence after trial but was recently given an absolute pardon by the present Philippine President Gloria Macapagal-Arroyo, who, ironically, is Estrada's main political nemesis.

8. Republic Act No. 6713
The Code of Conduct for Public Officials and Employees

Among others, this law establishes the following *norms of conduct* in the public service: (i) Commitment to public interest; (ii) Professionalism; (iii) Justness and sincerity; (iv) Political Neutrality; (v) Responsiveness to the Public; (vi) Nationalism and Patriotism; (vii) Commitment to democracy; and (viii) Simple living.

It prohibits the following acts and transactions:

(i) having a financial interest in a transaction requiring the approval of the public officer or of his or her office;

(ii) outside employment and other activities related to his or her office, such as: engaging in private practice of a profession without authority; owning or being employed in a private enterprise regulated or licensed by his or her office; and recommending a person for employment in a private enterprise with pending transaction in his or her office;

(iii) disclosure or misuse of confidential information; and

(iv) solicitation or acceptance of gifts in the course of official duties.

9. Republic Act 6770
The Ombudsman Act of 1989

This law provides, among others, for the functional and structural organization of the Office of the Ombudsman, as well as its powers, functions and duties; qualifications, term of office, removal and prohibitions and disqualifications of the Ombudsman and his or her deputies.

10. Republic Act 8249 (as amended by Republic Act 8249 and Presidential Decree No. 1486)
The law created the *Sandiganbayan* as a special court with jurisdiction over: (i) violations of R.A. 3019 (The Anti-Graft and Corrupt Practices Act), and the Forfeiture Law, R.A. 1379; (ii) crimes committed by public officers under Title VII of the Revised Penal Code; and (iii) other crimes committed by public officers or employees, including those in the government-owned or controlled corporations, in relation to their office.

11. Republic Act 9160 (as amended by Republic Act 9194) The Anti-Money Laundering Act of 2001
The law defines "money laundering" as a crime whereby the proceeds of an unlawful activity (such as plunder, robbery and extortion, *jueteng* (an illegal type of lottery) and smuggling) are transacted, thereby making them to appear as originating from legitimate sources. It is committed by any person who, knowing that any monetary instrument or property are proceeds from an unlawful activity, transacts said monetary instrument or property; or who facilitates the offence of money laundering.

12. Republic Act 6981 (1991) The Witness Protection, Security and Benefit Act
The law provides the mechanisms and procedure for the grant of protection, security and benefit to any person who has witnessed or has knowledge or information on the commission of a crime and has testified or is testifying or about to testify in any judicial or quasi-judicial body or before any investigating authority.

13. Republic Act No. 9184 (2002) The Government Procurement Act of 2002
This law penalizes a public officer for committing any of the following acts: (i) opening sealed bids prior to appointed time for public opening; (ii) delaying screening for eligibility, bid opening and evaluation; (iii) unduly influencing a Bids and Awards Committee (BAC) member to favour a bidder; (iv) splitting of contracts to avoid bidding; and (v) abusing power to reject bids to prefer a particular bidder in the case of agency heads.

14. Republic Act 9435 The Anti-Red Tape Act of 2007
This law aims to improve the efficiency in the delivery of government service to the public by reducing

bureaucratic red tape and preventing graft and corruption. It is particularly addressed to all government agencies and offices, including local government units and government-owned or controlled corporations that provide frontline services as defined therein. There are penal sanctions for the violation of its pertinent provisions.

**B. Selected Executive and Administrative Orders of the President**

1. Executive Order No. 317 (2000)

This provides for a Code of Conduct for Relatives and Close Personal Relations of the President, Vice-President and Members of the Cabinet. It enumerates the prohibited acts and transactions by a relative or a close personal relation.

2. Memorandum Circular No. 95-B

It provides the guidelines on the filing of Statements of Assets, Liabilities and net worth by all government officials and employees pursuant to/in compliance with Republic Act 6713 (The Code of Conduct for Public Officials and Employees)

3. Administrative Order No. 129 (1994)

This directs the adoption and observance of standard processing time in the bidding and award process for infrastructure and other construction works and consulting services contracts of the national government.

4. Executive Order No. 442 (1991)

This issuance creates the Presidential Complaints and Action Office (PCAO) in the Office of the President and defines its powers and functions, which include the initiation of fact-finding efforts involving immoral practices, graft and corruption and others. The PCAO is also authorized to entertain complaints of graft and corruption and violation of R.A. 1379 and R.A. 3019, as amended, and to commence fact-finding investigation thereon prior to referral to the appropriate bodies for possible prosecution.

5. Executive Order No. 12 (2001)

This order creates the Presidential Anti-Graft Commission (PAGC) and delineates its powers, duties and functions.

**C. Anti-Graft Institutions**

1. The Sandiganbayan

The time-honoured principle that the public office is a public trust must have been the persuasive inspiration for the creation of the *Sandiganbayan*, a special tribunal for trying cases involving but not limited to graft and corruption and other offences committed by a public officers in relation to their office.

It came into being on July 11, 1978 with the issuance of Presidential Decree No. 1486. The law has since been amended, the latest of which was in 1997 when Republic Act No. 8429 was enacted. Under this amendatory law, all the five divisions (consisting of three justices each) are to be housed in one principal office, located in Metro Manila. The Sandiganbayan building is now located in Commonwealth Avenue, Quezon City.

The *Sandiganbayan* has original jurisdiction over criminal cases filed against public officers classified as Salary Grade 27 and higher under the Compensation and Position Classification Act of 1989.

In case none of the principal accused are occupying positions corresponding to Salary Grade 27 or higher or PNP officers occupying the rank of superintendent or higher or their equivalent, exclusive jurisdiction over the case is vested in the proper Regional Trial Court, Metropolitan Trial Court, and Municipal Trial Court, as the case may be. The decisions of the court in these cases shall be appealable to the *Sandiganbayan* which exercises exclusive appellate jurisdiction over them.

2. The Office of the Ombudsman

As a court of justice, the *Sandiganbayan* can exercise the judicial power conferred upon it by law after a case has been filed before it for adjudication. This is where the office of the Ombudsman comes in. This office is a constitutional body created by virtue of Section 5, Article XI of the 1987 Constitution.

The fundamental law of the land gives the Office of the Ombudsman the calling and badge of "Protector of the People". This constitutional appellation summarizes the nature of its various functions. It protects the people from abuse and misuse of governmental power for personal aggrandizement. The framers of the 1987 Constitution of the Philippines defined the role of the Office of the Ombudsman as a watchdog, to monitor the "general and specific performance of government officials and employees" and to "utilize the support of non-governmental organizations (NGO's), the Youth Sector and other major sectors of society" in the campaign against graft and corruption. With the passage of Republic Act No. 6770, otherwise known as the Ombudsman Act of 1989, the Office of the Ombudsman has been clothed with the corresponding authority to implement its constitutional mandate. The powers, functions and duties of the Office of the Ombudsman are provided in Section 15 of the said law.

In sum, the Office of the Ombudsman is charged with five major functions, namely: Public Assistance, Graft Prevention, Investigation, Prosecution, and Administrative Adjudication.

3. The National Prosecution Service of the Department of Justice

The National Prosecution Service consists of the Office of the Chief State Prosecutor, the Offices of the Regional State Prosecutor, and the Offices of the Provincial or City Prosecutor throughout the Philippines. It was created under Presidential Decree No. 1275.

Although the National Prosecution Service is the principal and largest prosecution agency in the Philippines, it is, nevertheless, merely deputized by the Office of the Ombudsman in the conduct of preliminary investigation and prosecution of cases against public officers involving offences committed in relation to their office whenever the appropriate criminal complaint against a public officer has been filed with any of the prosecution offices under it (the NPS).

The NPS is tasked with prosecuting all criminal cases filed against any public officers before the Regional Trial Courts or the Metropolitan/Municipal Trial Courts. Criminal cases filed with the *Sandiganbayan* are prosecuted by the Office of the Special Prosecutor of the Office of the Ombudsman.

4. The Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts, Municipal Circuit Trial Courts

Created under Batas Pambansa Blg. 129 (The Judiciary Reorganization Act of 1980), these courts try criminal cases involving public officers which are not under the exclusive original jurisdiction of the *Sandiganbayan*.

5. The Congress of the Philippines

Although a political body, the Congress of the Philippines, consisting of The Senate (Upper House) and the House of Representatives (Lower House) is certainly a vital government agency that combats graft and corruption by virtue of its power to:

(i) pass or enact anti-corruption legislation, (Section 1, Article VI, 1987 Constitution of the Philippines); (ii) conduct inquiries in aid of legislation (Section 21, ibid); (iii) summon any heads of departments of the executive branch of the government to appear before it and be heard on any matter pertaining to their departments, (Section 22, ibid); (iv) pass or enact appropriation, revenue or tariff laws (Section 24, ibid).

Furthermore, the House of Representatives has the exclusive power to initiate all impeachment cases, and the Senate has the sole power to try and decide all impeachment cases (Sections 3 to 6, Article XI, 1987 Philippine Constitution).

**D. Adoption of the Provisions of the United Nations Convention against Corruption (UNCAC)**

The UNCAC was ratified by the Philippine Senate on 6 November 2006 by a vote of 17-0.

Quite significantly, much of its provisions on criminalization measures are already in place or in existence in many of our anti-graft laws. Among them are as follows:

| | Corrupt Acts | Found in/Punished by |
|---|---|---|
| 1. | Bribery | Revised Penal Code, Title Seven; Sec. 3 (b) and 3 (c), R.A. 3019 |
| 2. | Embezzlement of public funds (misappropriation) | Title Seven, Revised Penal Code |
| 3. | Money laundering | Section 4, Anti-Money Laundering Law (RA 9160) |
| 4. | Trading in influence | Section 3 (a), R.A. 3019 |
| 5. | Abuse of functions | Section 3 (h), R.A. 3019 |
| 6. | Illicit enrichment | R.A. 1379 |

## IV. RECOMMENDATIONS

Since graft and corruption are a menace that must be contained, several laudatory suggestions have already been generated to deal therewith.

### A. Procedural/Penal Reforms

In an article entitled "Fighting Graft and Corruption", which appeared in a fraternal publication, former Presiding Justice of the *Sandiganbayan* Manuel R. Pamaran, who is also a former public prosecutor and a trial judge, has proposed several solutions in the fight against graft and corruption. Thus-

> "First. Any case of graft and corruption or crime involving betrayal of public office must be treated as a crime against public order like rebellion, subversion or sedition, hence, the Indeterminate Sentence Law shall not apply. The penalty shall always be a straight one. No minimum and maximum period. It must always be a straight penalty of ten years or twenty years. On Probation Law, persons convicted of government-related cases should likewise be not covered like those convicted of crimes against national security or public order who are disqualified from the benefits of the probation law.
>
> Second. Revision of penalties of government-related crimes. In malversation, if the amount defalcated exceeds PHP22,000,200, the penalty is only reclusion temporal in its maximum period to reclusion perpetua. It is believed that the law should be amended in such a way that if the amount malversed exceeds PHP100,000.00, it should be punishable by a single penalty of reclusion perpetua. Also, in Republic Act No. 3019 as amended, the commission of any graft or corrupt practice as defined therein is uniformly penalized with imprisonment of not less than six years and one month nor more than 15 years regardless of the amount or value of the property involved. The uniformity of the imposable penalties is not in keeping with realities. As in malversation cases, the law should provide graduated penalties based upon the amount or damages sustained and in cases where the government is the injured party and the amount involved is PHP100,000,00 or more, the penalty should be the single penalty or reclusion perpetua.
>
> Third. In preliminary investigation of government related cases, the proceedings must be terminated and resolved within a period of 30 days from filing thereof. The present rules are too long, affording the culprit to delay the proceedings to their advantage for as they still hold office during the proceedings, they can adapt ways and means to favor them to the disadvantage of the prosecution and the public dealing with them.
>
> Also, where the graft cases involve recovery of sum of money or property, the warrant of arrest issued, should always be accompanied by a writ of attachment of property of the accused to avoid concealment or disposition to satisfy the civil liability or fine.
>
> Fourth. Government-related cases should be set for trial within a period of two months from filing to five for allowance to motion to quash, arraignment or other related matters. Trial should be finished within a period of ten months from first setting and decision rendered within a period of two months from termination thereof. We had tried this before with success when the Sandiganbayan first functioned. There can be no reason why we cannot have it now. Consequently, because of the

number of cases pending before the Sandiganbayan the number of division of the Sandiganbayan should really be increased to 15 but they should always be based in Metro Manila to insulate the proceedings from external influence.

Fifth. In order that compliance with the aforesaid periods will be observed, there should be no issuance of temporary restraining orders or injunctions except those issued by the Supreme Court. This is similar to Section 14 of the Ombudsman Act of 1989. which provides, "no writ of injunction shall be issued by any court to delay an investigation; P.D. 605, which prohibits issuance of any restraining order, preliminary injunction or preliminary mandatory injunction in any case involving or growing out of the issuance, approval of disapproval, revocation or suspension of, or any action whatsoever by the proper administrative official or body on concessions, licenses, permits, patents, or public grants of any kind or in connection with the disposition, exploitation, utilization, exploration and/or development of the natural resources of the Philippines; P.D. No. 385, which prohibits injunction against financial institution regarding collection of debts from borrower and Articles 213 and 214 of the Labor Code which prohibits any court to issue "temporary or permanent injunction, or restraining order in any case involving or growing out of labor disputes".

**B. Substantive Reforms**

1. Enactment of an additional law, with whistle blower protection provisions, to strengthen the prevention, investigation and prosecution of graft;

2. Amendments of certain provisions of existing laws that provide opportunities for graft and updating of the archaic or vintage provisions to keep up with developments in governance; and

3. Codification of the fragmented anti-graft laws and the integration of the anti-graft provisions of the widely scattered special laws.

**C. Manpower and Compensation Upgrade**

To encourage more lawyers to join the Public Prosecution in the fight against graft and corruption, it is suggested that the number of the plantilla positions of government prosecutors, both in the Office of the Ombudsman and the National Prosecution Service, and their corresponding salaries be decently increased with urgency.

## V. CONCLUSION

Undeniably, corruption co-exists with ideal governance. It is the 'dark side' of the public service. The Philippines has an impressive number of anti-graft laws imposing a wide range of administrative, civil and penal sanctions against all forms of improprieties, venalities and abuses of public officials and employees of all ranks in our government system, including some which prescribe ethical standards of conduct. Yet, despite our laws and structures that prohibit, prevent and punish engagement or involvement in corruption, it is consistently prevalent and appears to be frighteningly invincible, like the mythical hydra-headed monster.

Ironically, the strict application of the laws themselves sometimes hinders the effectiveness of the criminal justice response, as seen in the consecutive impeachment proceedings against the present President.

Hence, it is believed that aside from the battle on the legal front, a moral revolution is also imperative. This crusade adheres to only one law which is not complicated. This is quite significant and relevant especially when those involved in the fight against corruption are themselves accused of involvement in it.

The Bible says "Take heed and beware of covetousness for one's life does not consist in the abundance of the thing he possesses" (Luke 12:15).

Indeed, covetousness breeds corruption. The people who are involved in corruption may be morally bankrupt as they attempt to find security in more stuff that is temporary and fleeting.

In launching a moral revolution, of great import and significance are the sterling words of the late Philippine President Jose P. Laurel, a jurist, philosopher and patriot, to wit:

> "To be poor and honorable is a thousand times better than amassing all the riches in the world at the cost of one's good. We should strive, therefore, to keep our reputation unblemished to the end of our days and ever bear in mind that an honored name is the most precious legacy which we can leave to our children and our children's children" (From Forces that Make a Nation Great, p. 36)

# APPENDIX

## I. REPUBLIC ACT NO. 7975

An act to strengthen the functional and structural organization of the *Sandiganbayan*, amending for that purpose Presidential Decree No. 1606, as amended.

Sec. 1. Section 3 of Presidential Decree No. 1606, as amended by Executive Order No. 184, is hereby further amended to read as follows:

"Sec. 3. *Division of Court; Quorum.* – The Sandiganbayan shall sit in five (5) divisions of three justices each. The five (5) may sit at the same time.

"The first three divisions shall be stationed in the Metro Manila area, the fourth division shall be in Cebu for cases coming from the Visayas region, and the fifth division shall be in Cagayan de Oro City for cases coming from the Mindanao region.

"Three Justices shall constitute a quorum for sessions in divisions: Provided, That when the required quorum for the particular division cannot be had due to the legal disqualification or temporary disability of a Justice or of a vacancy occurring therein, the Presiding Justice may designate an Associate Justice of the Court, to be determined by the strict rotation on the basis of the reverse order of precedence, to sit as a special member of said division with all the rights and prerogatives of a regular member of the said division in the trial and determination of a case or cases assigned thereto, unless the operation of the court will be prejudiced thereby, in which case, the President shall, upon the recommendation of the Presiding Justice, designate any Justice of Justices of the Court of Appeals to sit temporarily therein."

Sec. 2. Section 4 of the same Decree is hereby further amended to read as follows:

"Sec. 4. *Jurisdiction.* The Sandiganbayan shall exercise original jurisdiction in all cases involving:

"a. Violations of Republic Act No. 3019, as amended, otherwise known as the Anti-Graft and Corrupt Practices Act, Republic Act No. 1379, and Chapter II, Section 2, Title VII of the Revised Penal Code, where one or more of the principal accused are officials occupying the following positions in the government, whether in a permanent, acting or interim capacity, at the time of the commission of the offense:

"(1) officials of the executive branch occupying the positions of regional director and higher, otherwise classified as grade 27 and higher, of the Compensation and Position Classification Act of 1989 (RA 6758), specifically including:

(a). Provincial governors, vice-governors, member of the sangguniang panlalawigan and provincial treasurers, assessors, engineers and other provincial department heads;

(b). City Mayors, vice-mayors, members of the sangguniang panlungsod, city treasurers, assessors, engineers and other city department heads;

(c). Officials of the diplomatic service occupying the position of consul and higher;

(d). Philippine Army and Air Force colonels, naval captains and all other officers of higher rank;

(e). PNP chief superintendent and PNP officers of higher rank;

(f). City and provincial prosecutors and their assistants, and officials and prosecutors in the Office of the Ombudsman and special prosecutor;

(g). Presidents, directors or trustees or managers of government-owned or controlled corporations, state universities or educational institutions of foundations.

(2) Members of Congress and officials thereof classified as Salary Grade 27 and up under the Compensation and Position Classification Act of 1989;

(3) Members of the Judiciary without prejudice to the provisions of the Constitution;

(4) Chairman and members of Constitutional Commissions without prejudice to the provisions of the Constitution;

(5) All other national and local officials classified as Salary Grade 27 and higher under the Compensation and Position Classification Act of 1989.

"b. Other offenses or felonies committed by the public officials and employees mentioned in subsection (a) of this section in relation to their office.

"c. Civil and criminal cases filed pursuant to and in connection with Executive Order Nos. 1, 2, 14 and 14-A.

"In cases where none of the principal accused are occupying positions corresponding to salary grade "27" or higher, as prescribed in the said Republic Act No. 6758, or PNP officers occupying the rank of superintendent or higher, or their equivalent, exclusive jurisdiction thereof shall be vested in the proper Regional Trial Court, Metropolitan Trial Court, Municipal Circuit Trial Court, as the case may be, pursuant to their respective jurisdictions as provided in Batas Pambansa Blg. 129.

"The Sandiganbayan shall exercise exclusive appellate jurisdiction on appeals from the final judgment, resolutions or order of regular courts where all the accused are occupying positions lower than salary grade "27", or not otherwise covered by the preceding enumeration.

"The Sandiganbayan shall have exclusive original jurisdiction over petitions for the issuance of the writs of mandamus, prohibition, certiorari, habeas corpus, injunction, and other ancillary writs and processes in aid of its appellate jurisdiction: Provided, That the jurisdiction over these petitions shall not be exclusive of the Supreme Court.

"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.

"Any provisions of law or Rules of Court to the contrary notwithstanding, the criminal action and the corresponding civil action recovery of civil liability arising from the offense 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, 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."

Sec. 3. Section 7 of the same decree is hereby amended to read as follows:

"Sec. 7. *Form, Finality and Enforcement of Decisions.* – All decisions and final orders determining the merits of a case or finally disposing of the action or proceedings of the Sandiganbayan shall contain complete findings of the facts and the law on which they are based, on all issues properly raised before it and necessary in deciding the case.

"A petition for reconsideration of any final order or decision may be filed within fifteen (15) days

from promulgation or notice of the final order or judgment, and such motion for reconsideration shall be decided within thirty (3) days from submission thereon.

"Decisions and final orders of the Sandiganbayan shall be appealable to the Supreme Court by petition for review on certiorari raising pure questions of law in accordance with Rule 45 of the Rules of Court. Whenever, in any case decided by the Sandiganbayan, the penalty of *reclusion perpetua* or higher is imposed, the decision shall be appealable to the Supreme Court in the manner prescribed in the Rules of Court. In case the penalty imposed is death, review by the Supreme Court shall be automatic, whether or not the accused filed an appeal.

"Judgments and orders of the Sandiganbayan shall be executed and enforced in the manner provided by law.

"Decisions and final orders of other courts, in cases cognizable by said courts under this Act shall be appealable to the Sandiganbayan within fifteen (15) days from promulgation or notice to the parties."

Sec. 4. Section 9 of the same Decree is hereby amended to read as follows:

"Sec. 9. *Rules of Procedure.*– The Rules of Court promulgated by the Supreme Court shall apply to all cases and proceedings filed with the Sandiganbayan. The Sandiganbayan shall have no power to promulgate its own rules of procedure, except to adopt internal rules governing the allotment of cases among the divisions, the rotation of justices among them, and other matters relating to the internal operations of the court which shall be enforced until repealed or modified by the Supreme Court."

Sec. 5. Section 10 of the same Decree is hereby repealed.

Sec. 6. Presidential Decree Nos. 1486, 1606 and 1861, Executive Orders Nos. 101 and 184 and all other laws, decrees, orders and rules of which are inconsistent therewith are hereby repealed or modified accordingly.

Sec. 7. Upon the effectivity of this Act, all criminal cases in which trial has not begun in the Sandiganbayan shall be referred to the proper courts.

Sec. This Act shall take effect fifteen (15) days following its publication in the Official Gazette or in two (2) national newspapers of general circulation.

*Approved*: 30 March 1995

## II. REPUBLIC ACT NO. 7080

[As Amended by Republic Act No. 7659 (The Death Penalty Law)

AN ACT DEFINING AND PENALIZING
THE CRIME OF PLUNDER

Section 1. Definition of terms. – As used in this Act, the term:

a. "Public Officer" means any person holding any public office in the Government of the Republic of the Philippines by virtue of an appointment, election or contract.

b. "Government" includes the National Government, and any of its subdivisions, agencies or instrumentalities, including government-owned or controlled corporations and their subsidiaries.

c. "Person" includes any natural or juridical person, unless the context indicates otherwise.

d. "Ill-gotten wealth" means any asset, property, business enterprise or material possession of any person within the purview of Section two (2) hereof, acquired by him directly or indirectly through dummies, nominees, agents, subordinates and/or business associates by any combination or series of the following means or similar schemes:

1. Through misappropriation, conversion, misuse, or malversation of public funds or raids on the public treasury;

2. By receiving, directly or indirectly, any commission, gift, share, percentage, kickbacks or any/or entity in connection with any government contract or project or by reason of the office or position of the public officer concerned;

3. By the illegal or fraudulent conveyance or disposition of assets belonging to the National government or any of its subdivisions, agencies or instrumentalities or government-owned or controlled corporations and their subsidiaries;

4. By obtaining, receiving or accepting directly or indirectly any shares of stock, equity or any other form of interest or participation including the promise of future employment in any business enterprise or undertaking;

5. By establishing agricultural, industrial or commercial monopolies or other combinations and/or implementation of decrees and orders intended to benefit particular persons or special interests; or

6. By taking undue advantage of official position, authority, relationship, connection or influence to unjustly enrich himself or themselves at the expense and to the damage and prejudice of the Filipino people and the Republic of the Philippines.

Sec. 2. Definition of the Crime of Plunder, Penalties. – Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt criminal acts as described in Section 1 (d) hereof in the aggregate amount or total value of at least Fifty million pesos (P50,000,000.00) shall be guilty or the crime of plunder and shall be punished by reclusion perpetua to death.

Any person who participated with the said public officer in the commission of an offense contributing to the crime of plunder shall likewise be punished for such offense. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances, as provided by the Revised Penal Code, shall be considered by the Court. The court shall declare any and all ill-gotten wealth and their interests and other incomes and assets including the properties and shares of stocks derived from the deposit or investment thereof forfeited in favor of the State. [As Amended by Section 12, Republic Act. No. 7659 The Death Penalty Law]

Sec. 3. Competent Court. – Until otherwise provided by law, all prosecutions under this Act shall be within the original jurisdiction of the Sandiganbayan.

Sec. 4. Rule of Evidence. – For purposes of establishing the crime of plunder, it shall not be necessary to prove each and every criminal act done by the accused in furtherance of the scheme or conspiracy to amass, accumulate or acquire ill-gotten wealth, it being sufficient to establish beyond reasonable doubt a pattern of overt or criminal acts indicative of the overall unlawful scheme or conspiracy.

Sec. 5. Suspension and Loss of Benefits. – Any public officer against whom any criminal prosecution under a valid information under this Act in whatever stage of execution and mode of participation, is pending in court, shall be suspended from office. Should he be convicted by final judgment, he shall lose all retirement or gratuity benefits under any law, but if he is acquitted he shall be entitled to reinstated and to the salaries and other benefits which he failed to receive during suspension, unless in the meantime, administrative proceedings have been filed against him.

Sec. 6. Prescription of Crime. – The crime punishable under this Act shall prescribe in twenty (20) years. However, the right of the State to recover properties unlawfully acquired by public offices from them or from their nominees or transferees shall not be barred by prescription, laches, or estoppel.

Sec. 7. Separability of Provisions. – If any provisions of this act or the application thereof to any person or circumstance are held invalid, the remaining provisions of this Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Sec. 8. Scope. – This Act shall not apply to or affect pending prosecutions or proceedings, or those which may be instituted under Executive Order no. 1 issued and promulgated on February 28, 1986.

Sec. 9. Effectivity. – This Act shall take effect after fifteen (15) days from its publication in the Official Gazette and in a newspaper of general circulation.

Approved: July 12, 1991

Old provision of Section 2, Republic Act no. 7080 prior to its amendment by Section 12, Republic Act no. 7659, otherwise known as the Death Penalty Law:

Sec. 2. Definition of the Crime of Plunder, Penalties. – Any public officer who, by himself or in connivance with members of his family, relatives by affinity or consanguinity, business associates, subordinates or other persons, amasses, accumulates or acquires ill-gotten wealth through a combination or series of overt or criminal acts as described in Section 1 (d) hereof, in the aggregate amount of total value of at least Seventy five million pesos (P75,000,000.00), shall be guilty of the crime of plunder and shall be punished by life imprisonment with perpetual absolute disqualification from holding any public office.

Any person who participated with the said public officer in the commission of plunder shall likewise be punished. In the imposition of penalties, the degree of participation and the attendance of mitigating and extenuating circumstances shall be considered by the court. The court shall declare any and all ill-gotten wealth and their interest other incomes and assets including the properties and shares of stocks derived from the deposit or investment thereof forfeited in favor of the State.

## III. PRESIDENTIAL DECREE NO. 46

MAKING IT PUNISHABLE FOR PUBLIC OFFICIALS AND EMPLOYEES TO RECEIVE, AND FOR PRIVATE PERSONS TO GIVE GIFTS ON ANY OCCASION, INCLUDING CHRISTMAS

Whereas, under existing laws the civil service rules, it is prohibited to receive, directly or indirectly, any gift, present or any other form of benefit in the course of official duties.

Whereas, it is believed necessary to put more teeth to existing laws and regulations to wipe out all conceivable forms of graft and corruption in the public service, the members of which should not only be honest but above suspicion and reproach; and

Whereas, the stoppage of the practice of gift-giving to government men is a concrete step in the administration's program of reforms for the development of new moral values in the social structure of the country, one of the main objectives of the New Society.

Now, therefore, I Ferdinand E. Marcos, President of the Philippines, by virtue of the powers vested in me by the Constitution as Commander-in-Chief of all the Armed Forces of the Philippines, and pursuant to Proclamation No. 1081, dated September 21, 1972, and General Order No. 1, dated September 22, 1972, do hereby make it punishable for any public official and employee, whether of the national or local governments, to receive, directly or indirectly, and for private persons to give, or offer to give, any gift, present or other valuable things on any occasion, including Christmas, when such gift, present or other valuable thing is given by reason of his official position, regardless of whether or not the same is for past favor or favors or the giver hopes or expects to receive a favor or treatment in the future from the public official and employees concerned in the discharge of his official functions. Included within the prohibition is the

throwing of parties or entertainments in honor of the official and employee or his immediate relatives.

For violation of this Decree, the penalty of imprisonment, for not less than one (1) year nor more than five (5) years and perpetual disqualification from public office shall be imposed. The official and employee concerned shall likewise be subject to administrative disciplinary action and, if found guilty, shall be meted out the penalty of suspension or removal, depending on the seriousness of the offense.

Any provision of law, executive order, rule or regulation or circular inconsistent with this Decree is hereby repealed or modified accordingly.

This Decree shall take effect immediately after its publication.

Done in the City of Manila, this 10th day of November, in the year of Our Lord, nineteen hundred and seventy-two.

## IV. EXECUTIVE ORDER NO. 12

CREATING THE PRESIDENTIAL ANTI-GRAFT COMMISSION AND PROVIDING FOR ITS POWERS, DUTIES AND FUNCTIONS AND FOR OTHER PURPOSES

Whereas, Article VII, Section 17 of the Constitution provides that the President shall have control of all executive departments, bureaus, and offices;

Whereas, in terms of personnel and funding, the Executive Department is the largest of the three branches of government;

Whereas, there is a need for commission under the Office of the President, to conduct the task of investigating and hearing administrative cases and complaints against personnel in the Executive Department;

Whereas, by virtue of the Executive Order No. 268 dated July 18, 2000, the Presidential Commission Against Graft and Corruption was abolished and replaced with the National Anti-Corruption Commission;

Whereas, the National Anti-Corruption Commission was never activated;

Whereas, there is a need to create a new commission to assist the President in the campaign against graft and corruption, whose jurisdiction and authority are clearly defined;

Now, therefore, I, Gloria Macapagal-Arroyo, President of the Philippines, by virtue of the powers vested in me by the Constitution and the laws, do hereby order:

Sec. 1. Creation – The Presidential Anti-Graft Commission hereinafter to as the "Commission", is hereby created under the Office of the President, pursuant to Article VII, Section 17 of the Constitution.

Sec. 2. Composition – The Commission shall be composed of a Chairman and two (2) Commissioners to be appointed by the President. All the members of the Commission shall serve on a full-time basis and a majority shall be members of the Philippine Bar. The Chairman shall have the rank, emoluments and privileges of a Presidential Assistant I. The Chairman shall preside over the meetings of the Commission and shall direct and supervise the implementation and execution of policies, standards, rules and regulations.

Sec. 3. Secretariat – The Commission shall have a Secretariat which shall provide technical and administrative support to the Commission and which shall be headed by an Executive Director. The Executive Director, under the control and supervision of the chairman, shall execute and administer the policies and decisions of the Commission and manage the day-to-day operations thereof.

The Executive Director shall be appointed by the President upon the recommendation of the Chairman. The Chairman shall have the authority to appoint, promote, and discipline the personnel of the Secretariat.

The Commission, subject to pertinent laws, rules and regulations, may create, organize and set in operation such organizational units necessary for the performance of its powers, functions, and duties and for the enforcement of this Executive Order. Such units shall be staffed duly qualified personnel appointed by the Chairman and those detailed to the Commission by other government entities

The Commission shall be exempt from the prohibition against hiring of new personnel prescribed in Administrative Order No. 100 dated December 1, 1999 with regard to its initial appointments provided that the organizational structure and staffing pattern of the Secretariat shall be prepared in coordination with the Department of Budget and Management and submitted to the President for approval.

Sec. 4. Jurisdiction, Powers and Functions.

(a) The Commission, acting as a collegial body, shall, on its own or on complaint, have the power to investigate or hear administrative cases or complainants involving the possible violation of any of the following:

    (1) Republic Act. No. 3019 as amended, otherwise known as the "Anti-Graft and Corrupt Practices Act;"

    (2) Republic Act no. 1379 on the lawful acquisition of property by a public officer or employee;

    (3) Republic Act. No. 6713, otherwise known as the "Code of Conduct and Ethical Standards for Public Officials and Employees;"

    (4) Presidential Decree No. 46, making it punishable for public officials and employees to receive gifts on any occasion, including Christmas;

    (5) Any provision under Title Seven, Book Two of the Revised Penal Code; and

    (6) Rules and regulations duly promulgated by competent authority to implement any of the foregoing laws or issuances.

(b) 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 represent the interest 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.

(c) Anonymous complaints against a presidential appointee shall not be given due course unless there appears on its faced or the supporting documents attached to the anonymous complaint a probable cause to engender a belief that the allegations may be true.

(d) The Commission shall use every and all reasonable means to ascertain the facts in each case or complaint speedily and objectively and without regard to technicalities of law or procedure, in all instances observing the due process.

(e) The investigation of hearing involving a presidential appointee with the position of Undersecretary or higher shall be conducted by the Commission sitting en banc. The investigation or hearing involving a presidential appointee occupying a lower position may be entrusted to a Commissioner or panel of hearing officers duly designated by the Chairman; Provided, however, that the report or recommendations of the Commissioner or panel of hearing officers who investigated or heard the administrative case or complaint shall be deliberated upon a reviewed by the Commission en banc

before submitting its report and recommendations to the President.

Sec. 5. Powers Incidental to Investigation. – The Commission shall have the power to administer oaths and issue subpoena ad testificandum and duces tecum. The Commission shall likewise have the power to call upon and secure the assistance of any office, committee, commission, bureau, agency, department or instrumentality in the Executive Branch, including government-owned or controlled corporations.

During the pendency of its investigation or hearing, the Commission may recommend to the President the preventive suspension of the respondent for such periods as may be allowed by law.

Sec. 6. Enforcement of Subpoena. – Upon failure to comply with a subpoena issued by the Commission or by its authority without adequate cause, the Commission en banc, on motion or motu proprio, may recommend to the President, after formal charge and hearing, the suspension or dismissal from the service of the non-complying government personnel.

Sec. 7. Resignation/Retirement of Respondent. – The resignation or retirement of the public officer under investigation shall not divest the Commission of jurisdiction to continue the investigation or hearing and submit its recommendations to the President as to the imposition of accessory penalties or such other action to be taken.

Sec. 8. Submission of Report and Recommendations. – After completing its investigation or hearing, the Commission en banc shall submit its report and recommendations to the President. The report and recommendations shall state, among others, the factual findings and legal conclusions, as well as the penalty recommend to be imposed or such other action that may be taken.

Sec. 9. Referral to Other Government Units. – Whenever the Commission deems it warranted and necessary, it may refer for appropriate action any case to the Office of the Ombudsman, or any other office, committee, commission, bureau, agency, department, instrumentality or branch of the government, including government-owned or controlled corporations.

Sec. 10. Measures to Prevent and Minimize Graft and Corruption. – The Commission may conduct studies, on its own or in cooperation with other government agencies or non-governmental organizations, on new measures to prevent and minimize the opportunities for graft and corruption at all levels of bureaucracy.

Sec. 11. Consultants and Deputies. – The Chairman may engage the services of qualified consultants and/or deputies, from the public or private sector, subject to pertinent laws, rules and regulations.

Sec. 12. Reports. - At least thirty (30) days before the opening of each session of Congress, the Commission shall submit to the President:

(a) A list of respondents whom it has investigated, together with its recommendations, and other data or information it may deem necessary to be included;

(b) A list of respondents whom it is investigating, the status of the investigation, as well as other data or information it may deem necessary to be included; and

(c) Such other report or recommendation which is germane to any provision or purpose of this Executive Order or as may be required by the President.

Sec. 13. Disclosures. – The Commission shall not disclose or make public any record or information in connection with any investigation or hearing when such disclosure would deprive the respondent of his right to a fair and impartial adjudication. All disclosure of the Commission relating to an administrative case or complaint shall be balanced, fair, and accurate.

Sec. 14. Continued Performance of PCAGC. – Until the members of the Commission have been duly appointed, the Presidential Commission Against Graft and Corruption (PCAGC) shall continue to perform its powers, duties and functions under Executive Orders Nos. 151 and 151-A, both series of 1994, with

respect only to cases already pending before it.

Sec. 15. Transfer of PCAGC Officers and Personnel. – The officers and personnel of the PCAGC may be transferred and appointed to such positions in the Commission for which they are deemed qualified.

Sec. 16. Transfer of PCAGC Funds, etc. – The funds, records, equipment, furnitures and other properties of the PCAGC shall be transferred to the Commission.

Sec. 17. Rules and Regulations. – The Commission shall promulgate or adopt its rules and regulations for the effective implementation of this Executive Order.

Sec. 18. Funding. – The Commission shall have a budget of EIGHTEEN MILLION TWO HUNDRED SIXTY THREE THOUSAND PESOS (P18,263,000.00) drawn against the budget appropriated for the National Anti-Corruption Commission. Any additional funding requirement shall be determined in coordination with the Department of Budget and Management and shall be submitted to the Office of the President for approval.

Sec. 19. Repeal. – Executive Order Nos. 151 and 151-A,dated January 11, 1994 and January 24, 1994 respectively, which created the PCAGC, are hereby repealed. Executive Order No. 268, dated July 18, 2000, which created the National Anti-Corruption Commission, is also hereby repealed. All other issuances, orders, rules and regulations, or parts thereof, inconsistent with this Executive Order are hereby repealed or modified accordingly.

Sec. 20. Effectivity. – This Executive Order shall take effect immediately upon approval.

Manila, April 16, 2001.

## V. JOINT CIRCULAR OF THE OFFICE OF THE OMBUDSMAN AND THE DEPARTMENT OF JUSTICE

OMB-DOJ JOINT CIRCULAR NO. 95-001
Series of 1995

TO : ALL GRAFT INVESTIGATION/SPECIAL PROSECUTION OFFICERS OF THE OFFICE OF THE OMBUDSMAN

ALL REGIONAL STATE PROSECUTORS AND THEIR ASSISTANTS, PROVINCIAL/CITY PROSECUTORS AND THEIR ASSISTANTS, STATE PROSECUTORS AND PROSECUTING ATTORNEYS OF THE DEPARTMENT OF JUSTICE.

SUBJECT: HANDLING COMPLAINTS FILED AGAINST PUBLIC OFFICERS AND EMPLOYEES, THE CONDUCT OF PRELIMINARY INVESTIGATION, PREPARATION OF RESOLUTIONS AND INFORMATIONS AND PROSECUTION OF CASES BY PROVINCIAL AND CITY PROSECUTORS AND THEIR ASSISTANTS.

In a recent dialogue between the OFFICE OF THE OMBUDSMAN and the DEPARTMENT OF JUSTICE, discussion centered around the latest pronouncement of the SUPREME COURT on the extent to which the OMBUDSMAN may call upon the government prosecutors for assistance in the investigation and prosecution of criminal cases cognizable by his office and the conditions under which he may do so. Also discussed was REPUBLIC ACT. NO. 7975, otherwise known as "AN ACT TO STRENGTHEN THE FUNCTIONAL AND STRUCTURAL ORGANIZATION OF THE SANDIGANBAYAN, AMENDING FOR THE PURPOSE PRESIDENTIAL DECREE NO. 1606, AS AMENDED" and its implications on the jurisdiction of the OFFICE OF THE OMBUDSMAN on criminal offenses committed by public officers and employees.

Concerns were expressed on unnecessary delays that could be caused by discussions on jurisdiction between the OFFICE OF THE OMBUDSMAN and the DEPARTMENT OF JUSTICE, and by procedural conflicts in the filing of complaints against public officers and employees, the conduct of preliminary

investigations, the preparation of resolutions and informations, and the prosecution of cases by provincial and city prosecutors and their assistants as DEPUTIZED PROSECUTORS OF THE OMBUDSMAN.

Recognizing the concerns, the OFFICE OF THE OMBUDSMAN and the DEPARTMENT OF JUSTICE, in a series of consultations, have agreed on the following guidelines to be observed in the investigation and prosecution of cases against public officers and employees:

1. Preliminary investigation and prosecution of offenses committed by public officers and employees IN RELATION TO OFFICE whether cognizable by the SANDIGANBAYAN or the REGULAR COURTS, and whether filed with the OFFICE OF THE OMBUDSMAN or with the OFFICE OF THE PROVINCIAL/ CITY PROSECUTOR shall be under the control and supervision of the OFFICE OF THE OMBUDSMAN.

2. Unless the OMBUDSMAN under its Constitutional mandate finds reason to believe otherwise, offenses NOT IN RELATION TO OFFICE and cognizable by the REGULAR COURTS shall be investigated and prosecuted by the OFFICE OF THE PROVINCIAL/CITY PROSECUTORS, which shall rule thereon with finality.

3. Preparation of criminal information shall be the responsibility of the investigating officer who conducted the preliminary investigation. Resolutions recommending prosecution together with the duly accomplished criminal informations shall be forwarded to the appropriate approving authority.

4. Considering that the OFFICE OF THE OMBUDSMAN has jurisdiction over public officers and employees and for effective monitoring of all investigations and prosecutions of cases involving public officers and employees, the OFFICE OF THE PROVINCIAL/CITY PROSECUTORS shall submit to the OFFICE OF THE OMBUDSMAN a monthly list of complaints filed with their respective offices against public officers and employees.

Manila, Philippines, October 5, 1995

(SGD) TEOFISTO T. GUINGONA, JR.
Secretary
Department of Justice

(SGD) ANIANO A. DESIERTO
Ombudsman
Office of the Ombudsman

## VI. JOINT CIRCULAR OF THE OFFICE OF THE OMBUDSMAN AND THE DEPARTMENT OF JUSTICE NO. 95-001

TO : ALL GRAFT INVESTIGATION/SPECIAL PROSECUTION OFFICERS OF THE OFFICE OF THE OMBUDSMAN

ALL PROVINCIAL/CITY PROSECUTORS AND THEIR ASSISTANTS, STATE PROSECUTORS AND PROSECUTING ATTORNEYS OF THE DEPARTMENT OF JUSTICE

SUBJECT: CLARIFICATION OF DEPARTMENT OF JUSTICE CIRCULAR NO. 10 DATED AUGUST 19, 1991 ON INVESTIGATION/PROSECUTION OF CRIMES COMMITTED BY MEMBERS OF THE PHILIPPINE NATIONAL POLICE.

In DOJ Memorandum Circular No. 10 dated August 19, 1991, the view was expressed that "crimes committed by members of the PNP fall within the exclusive jurisdiction of the regular courts" pursuant to Section 46 of RA No. 6975, and that cases falling within the exclusive original jurisdiction of the *Sandiganbayan* involving members of the PNP are no longer cognizable by the said court but are now within the exclusive jurisdiction of the regular courts.

The view thus expressed has arisen from an interpretation of the term "regular courts" as used in Section 46 of RA No. 6975 to mean courts other than the *Sandiganbayan*. This construction of the law is perceived to five rise to confusion and conflict of opinions on the real import of the law involved. For one, it is not in consonance with the statues governing the jurisdiction of the Office of the Ombudsman and the *Sandiganbayan*. Moreover, the law does not clearly nor categorically define the term "regular court" which,

considering the underlying purpose of RA No. 3775 could refer to "civilian courts", as distinguished from military courts. Needless to state, such a divergence of views would inevitably result in unnecessary discussions and unwanted delays in the prosecution of cases filed against the member of the PNP.

Recognizing the necessity of avoiding such an undesirable situation, the Department of Justice and the Office of the Ombudsman, after a series of consultations, have agreed on the following guidelines to be observed in the investigation and prosecution of cases involving the member of PNP.

1. The investigators and the prosecutors of the Department of Justice and the Office of the Ombudsman have concurrent jurisdiction to investigate any criminal complaint filed against members of the PNP, irrespective of its nature or the penalty prescribed for the offense charge.

2. If the offense involved falls within the exclusive jurisdiction of the *Sandiganbayan* pursuant to Section of PD 1606, as amended by PD 1861, the Office of the Ombudsman may take over the investigation being conducted by a DOJ prosecutor at any stage of the proceeding.

3. The filing of informations and the prosecution of cases in the *Sandiganbayan* shall be responsibility of the Office of the Ombudsman, thru its Office of the Special Prosecutor or any prosecutor designated by the Ombudsman.

The statements contained in DOJ Circular No. 10 dated August 19, 1991 to the effect that the Ombudsman may not take over the investigation of cases not cognizable by the *Sandiganbayan* shall be deemed subject to future clarification or determination by competent authorities.

DOJ Memorandum Circular No. 10, shall be deemed amended insofar as it is inconsistent herewith.

Manila, Philippines, October 14, 1991.

(SGD) SILVESTRE H. BELLO III
Acting Secretary
Department of Justice

(SGD) CONRADO M. VASQUEZ
Ombudsman
Office of the Ombudsman

**VII. MEMORANDUM CIRCULAR NO. 11 SERIES of 1995**

TO: ALL HEADS OF DEPARTMENTS, OFFICES, BUREAUS AND AGENCIES OF THE NATIONAL AND LOCAL GOVERNMENTS, INCLUDING GOVERNMENT-OWNED AND CONTROLLED CORPORATION

RE: ANONYMOUS OR FICTITIOUS COMPLAINT IN RELATION TO SECTION 12 OF RA NO. 3019, OTHERWISE KNOWN AS THE ANTI-GRAFT AND CORRUPT PRACTICES ACT.

Memorandum Circulars nos. 1,3,4,6 and 10 of this Office are modified.

As of May 22, 1995, this Office has ceased the docketing of unsigned (anonymous) or signed (fictitious) complaint as an Ombudsman case (OMB-0-00-000). It is recorded and given a complaint number (CPL-000) and the same is subject to evaluation, verification or investigation. It will be docketed as an Ombudsman Case should it be verified to be substantially true and well-founded.

A certificate issued by the Clearance Section of this Office prior to the issuance of this Memorandum Circular certifying to the pendency of a criminal or administrative case with an anonymous or fictitious accuser as the complaint shall not be made a basis for the suspension or withholding of gratuity, terminal leave pay and other benefits of retiring and resigning public officials and employees in relation to Section 12 of RA No. 3019, otherwise known as the "Anti-Graft and Corrupt Practices Act".

Relevant to this Memorandum Circular is Section 35 of RA No. 6770, otherwise known as the "Ombudsman act of 1989" which provides that "Malicious Prosecution. – Any person who, actuated by malice or gross bad faith, files a completely unwarranted or false complaint against any government official or employee shall be

subject to a penalty of One (1) month and one (1) day to six (6) months imprisonment and a fine not exceeding five thousand pesos (P5,000.00)."

Manila, May 29, 1995.

(SGD) FRANCISCO A. VILLA
Acting Ombudsman

## VIII. HIGH PROFILE CASES

In its website (www.ombudsman.gov.ph), the Office of the Ombudsman lists several high profile cases filed against high ranking officials of the government with the *Sandiganbayan*. These are:

1. The plunder cases against the former President Joseph Estrada.

2. Multiple suits against former First Lady Imelda Marcos and her kin.

3. Cases relating to the so-called "tax credit scam". In this campaign, it filed a total of 175 criminal cases for violation of Section 3 (e), R.A. 3019; and for estafa through falsification of public documents.

4. The complaint against former Vice-President Salvador "Doy' Laurel (now deceased) when he was the Chairman of the National Centennial Commission under the administration of the then President Fidel V. Ramos.

5. People of the Philippines vs. Amadeo S. Lagdameo, Jr. former Gen. Manager; Wainright Rivera, former Chairman; Arturo Trinidad, former Director; Gregorio Fider, Director; Marylou Ventura, Director; Justiniano Montano IV, former Deputy General Director; Theron Lacson, Deputy General Manager, all of Public Estate Authority; and Oscar Garcia, former Chief of the Government Corporate Counsel [for violation of RA 3019, Sec. 3 (e) in relation to Sec. 3 (g)].

   While in the performance of their respective official functions and acting with evident bad faith, conspiring and confederating, the above-named accused gave Amari Coastal Bay Development Corporation (AMARI) undue advantage, benefits and preference by entering into and confirming the Joint Venture Agreement with said corporation dated April 25, 1995 and its supplement, dated August 9, 1995, a contract which is grossly disadvantageous to the government.

6. People of the Philippines vs. Gen. Cesar P. Nazareno, Director General of the PNP; Dir. Guillermo T. Domondon of the Directorate for Comptrollership; C/Supt. Roger Deinla, Director of Recom 7; Supt. Van D. Luspo, Chief of Fiscal Division, Budget and Fiscal Service Director for Comptrollership; Supt. Corleto Lopez, Comptroller of Recom 7; C/Insp. Elpidio Ybanez, Chief Finance of Recom 7; C/Insp. Jose Beltran, Deputy ARD Comptrollership of Recom 7; C/Insp. Benhur Aguinaldo, Sr. Insp. Florante Leano, Disbursing Officers of Recom 7; and Mila G. Gabrinez, Chief Accountant of Recom 7 [for violation of Section (3) of RA 3019, as amended].

   While in the performance of official functions, the above-named accused, with bad faith, took, received and encashed 407 checks in the aggregate amount of PHP20 million issued to them as cash advances intended as payment for Combat, Clothing and Individual Equipment (CCIE) for the use of the personnel of the Philippine National Police (PNP). Said funds were misappropriated thereby, causing injury to the government.

7. People of the Philippines vs. Rodolfo C. Farinas, Provincial Governor of Ilocos Norte [for violation of Sec. 3 (e) of RA 3019].

   In December 1995, Rodolfo Farinas, in his capacity as Governor of the Province of Ilocos Norte, received the reimbursement to himself of PHP263,000.00 representing the purchase price of a speedboat acquired from the US by the Ilocano Association of Southern California. Said amount was taken from the Calamity Fund without a Sangguniang Panlalawigan Resolution authorizing said disposition.

8. People of the Philippines vs. Panfilo Domingo, VP for Philippine National Bank-International; Domingo Ingco, PNB Board Member; Constantino Bautista, Sr. VP, PNB; Leticia Teodoro, Marfina Singian, Tomas T. Teodoro, Gregorio Singian, all of Integrated Shoes, Inc. [for violation of Sec. 3 (e) of RA 3019, as amended].

   In January 1972, the above-named accused officials of PNB conspired with private individuals who are officers of the Integrated Shoes, Inc. in relation to the approval and grant of a five-year loan in favor of the latter, in the sum of PHP16,287,500.00, despite the knowledge that ISI lacked sufficient capitalization and adequate additional collaterals to serve the interest of the Government in case it failed to pay said loan, as in fact failed to pay, to the detriment of the government in the aforecited amount of more than 16 million pesos.

9. People of the Philippines vs. Ronaldo Puno, former Secretary of the DILG [for violation of Sec. 3 (e), RA 3019, as amended]

   In September 1998, Mr. Ronaldo Puno, the Undersecretary of DILG, cancelled the forfeited and already duly funded contracts between Motorola, Inc. and the Philippine National Police, covering the negotiated purchase and delivery to the PNP of the Multi-Trunked Radio System, including installation for Phase IV (NCR and Regions III and IV) and Phase V (Regions I and II). This caused lost sales for Motorola in the amount of $3,569,034.40; PHP6M for the Thesys, Inc., US$104,000.00 for the PNP; and US$55M for the government.

10. People of the Philippines vs. Benjamin "Kokoy" Romualdez, former Governor of the Province of Leyte [for violation of Sec. 3 (e) of RA 3019, as amended]

    During the period from 1976 to February 1986, accused Benjamin "Kokoy" Romualdez who was then Provincial Governor of Leyte used his influence with his brother-in-law, then President Ferdinand Marcos and had himself appointed as Ambassador to foreign countries, particularly the People's Republic of China (Peking), Kingdom of Saudi Arabia (Jeddah), and the United Stated of America (Washington, D.C.).

    Benjamin Romualdez knew fully well that such appointment is in violation of the existing laws as the Office of the Ambassador or Chief of Mission is incompatible with his position as Governor of the Province of Leyte. This enable himself to collect dual compensation from both the Department of Foreign Affairs and the Provincial Government of Leyte in the total amount of PHP5,806,709.50, to the damage and prejudice of the government.

11. People of the Philippines vs. Carmelo F.Lazatin, former Congressman; Marino P. Morales, former Mayor; Teodoro R. David, Municipal Accountant and Angelito A. Pelayo, Municipal Treasurer, all of Mabalacat, Pampanga [for Malversation of Public Funds]

    In June 1996, Treasurer Pelayo, of Mabalacat, Pampanga, conspired with former Congressman Carmelo Lazatin and Marino Morales and Teodoro David, the Mayor and Municipal Accountant of Mabalacat, Pampanga, respectively, to malverse the amount of PHP596,683.00, representing the proceeds of check no. 3102, intended for Peace and Order Campaign Expenses and Relief Assistant for Mt. Pinatubo victims, to the damage and prejudice of the government in the aforestated amount.

12. People of the Philippines vs. Manuel Lapid, Governor of Pampanga; Clayton A. Olalia, Vice-Governor; Jovito S. Sabado, Provincial Treasurer; Marino P. Morales, Mayor; Nestor D. Tadeo, Senior Police Officer IV; Conrado Pangilinan, Jr., and Rodrigo Fernandez, all of the Province of Pampanga [for violation of Sec. 3 (e), RA 3019]

    From the period 1996 to August 1998, the above-named accused conspired, imposed upon and collected from quarry operators in the province of Pampanga, padded, illegal and unauthorized quarry fees, charges, taxes and/or contributions per truckload of quarry materials, the proceeds of which, the accused failed to refund or return to the concerned quarry operators, or to account for their personal benefits, causing undue injury to quarry operators and the Province of Pampanga, an act defined and penalized under Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act.

The Office of the Ombudsman has also conducted lifestyle checks on and dismissed a number of officials in several government departments and agencies.

The following officials have been dismissed and the Ombudsman has already rendered Resolutions finding probable cause and directing the filing of cases with the *Sandiganbayan* against the following personalities for perjury, violation of Republic Act (RA) No. 3019 or the Anti-Graft and Corrupt Practices Act and the Tariff and Customs Code, and forfeiture of ill-gotten wealth under RA 1379:

From the Department of Public Works and Highways:

a. 1 Undersecretary
b. 1 Regional Director

From the Bureau of Customs:

a. Deputy Commissioner
b. Chief of Customs Operations Office
c. Chief of the Miscellaneous Division
d. Customs Operating Officer
e. Customs Collector

From the Bureau of Internal Revenue:

a. 1 Assistant Commissioner
b. 1 Regional Director
c. 1 Legal Officer (Attorney V)
d. 1 Revenue Regional Head Executive Assistant
e. 1 Assistant Regional Director

Similarly, on 28 September 2004, the Office of the Ombudsman ordered the preventive suspension of Major General Carlos Garcia of the Armed Forces of the Philippines. A petition for forfeiture of ill-gotten assets amounting to more than PHP143 million has been filed against said general. On 5 November 2004, four criminal cases involving (4) counts of perjury were filed against the same general. Further, an investigation for the possible filing of plunder charges is on-going. This is the first time that criminal charges were filed against a two-star general.

In November 2004, the Office of the Ombudsman preventively suspended Lt. Col. George A. Rabusa, Maj. Gen. Garcia's former aide, for unexplained wealth amounting to about PHP50 million. Three criminal cases for perjury and a petition for forfeiture of unexplained wealth under RA No. 1379 were filed against Lt. Col. Rabusa.

In late November 2004, the Office of the Ombudsman approved the filing of forfeiture of unexplained wealth and perjury against former AFP Chief of Staff, Gen. Lisandro C. Abadia.

On 8 February 2005, the Office of the Ombudsman preventively suspended Bureau of Customs Deputy Commissioner Reynaldo Nicolas for apparent acquisition of wealth amounting to more than PHP40 million, which is beyond his lawful means. The case is proceeding preliminary investigation and administrative adjudication for determination of his probable criminal and administrative liabilities.

# AN OVERVIEW OF THE SAUDI ARABIAN CRIMINAL JUSTICE PROCEDURES AGAINST CORRUPTION IN THE PUBLIC SECTOR

*Alharbi Ali Khalaf S.**

## I. INTRODUCTION

Nations suffer from many kinds of problems, including war, poverty, disease, backwardness, and corruption. However, corruption is considered the most damaging for all societies; most other problems are caused by intensification of corruption.

Corruption is a global phenomenon that raises concern worldwide. It is related to social, economic and political conditions, and is considered to be a most dangerous and destabilizing phenomenon.

The word "corruption" and its derivations are mentioned in the Holy Koran about 53 times. Almighty Allah said: "when he turns his back, his aim everywhere is to spread mischief through the earth and destroy crops and cattle but Allah loveth not mischief" and said: "but do thou good, as Allah has been good to thee, and seek not mischief in the land" and said: "O my people! give full measure and weight fairly, and defraud not men their things, and do not act corruptly in the land, making mischief" and said: "Shall we treat those who believe and work deeds of righteousness, the same as those who do mischief on earth? Shall we treat those who guard against evil, the same as those who turn aside from the right?"

The Prophet Mohammed (peace be upon him) said "Allah's curse is on the one who offers the bribe and on the judge who accepts it" and, peace be on him, cursed the one who offers the bribe, the one who receives it, and the one who arranges it, and peace be upon him, said "a man's foot will not be settled on ground, until he is been asked about four things; one of them is his wealth, from where he got it, and on what he spent".

Accordingly, we find Sharia law, a law set out by Allah, forbids corruption and considers it one of the most terrible sins. It is then natural for Saudi Arabia, a country ruled by Islamic law, to combat corruption as a most important mission. In this regard, Saudi Arabia is implementing Islamic law to eradicate corruption and is seeking international co-operation to develop modern techniques in order to eliminate corruption from society.

## II. THE SAUDI ARABIAN CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN THE PUBLIC SECTOR

### A. Anti-Corruption Strategies

Corruption in the public sector includes crimes such as: bribery of public officials; embezzlement; infringement of public property; evasion of public bidding in public contracts; nepotism and favouritism; trading in influence; sub-contracting; extortion or giving of protection money; illegal donation and illicit enrichment.

Saudi Arabia has adopted many strategies and procedures to fight corruption in the public sector, which may be listed as follows:

- Presence of political will to fight corruption.
- Making internal reforms in the service sector.

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- Creating direct and clear systems to fight corruption and regular review of these systems when needed.
- Creating security, control, investigation and judicial establishment to embark on the fight against corruption.
- Participating with the international community in the concern of fighting corruption through its desire to attend international conferences and seminars concerning anti-corruption efforts.
- Taking care of the edification side through working on increasing citizens' awareness of the dangers of corruption by empowering the nation's religious conscience via media and educational curricula, and by urging universities and specialized research centres to carry out research and seminars to fight corruption.

These measures and regulations are considered the most important bases for the strategy that Saudi Arabia has adopted to prevent corruption. We will concentrate on the most important proposals and measures and explain them in some detail.

1. Political Will to Fight Corruption

Saudi Arabia takes its laws and regulations from Islamic law (Sharia) which forbids everything leading to corruption, which damages the individual and society. Therefore, the political will of the leadership to fight corruption in Saudi Arabia is present in all of its anti-corruption measures. It is a number one priority to gain the support of the media and civil society. Strong leadership supported by all sectors of society would ensure the success of Saudi Arabia's anti-corruption plans and strategies.

2. Establishing Systems to Fight Corruption and Regular Reviews

There is political will to fight corruption and this requires management reforms; it was necessary to render this will to reform into clear regulations and certain agencies to fight corruption. These regulations include criminalizing all sorts of corruption:

*(i) Public-post-related Crimes*

Royal Decree No. 43 of 1957 concerns public-post-related crimes. Article 2 of this decree referred to the punishment for an individual committing any of the crimes mentioned, including abuse of authority for personal interest; accepting a bribe; asking for a bribe from other parties; management abuse such as misusing laws, orders, and instructions and profiteering for contract of tenders and bids; defalcation; squandering; neglecting public property; and maltreatment such as coercion through torture, severity, confiscating property and interfering with personal freedom.

This decree is the first rule concerning public property crimes. It lays down defalcation, squandering and neglect of public property. Pursuing the public property is laid down by Royal Decree No. M/77 of 1975. It lays down in its first article that this decree covers everyone occupying a public post that is related to trusteeship of cash or movable properties, stamps and valuables. The ninth article of this decree defines the punishments of every employee covered by this law, convicted of committing defalcation, squandering or abusing public property held by him or her. The same punishments are imposed on everyone who shared or colluded with him or her in committing any of these crimes.

*(ii) Bribery Law*

The first anti-bribery law was enacted in 1930 when the General Civil Servants' Law was issued to incriminate bribery and abuse of position. The present anti-bribery laws were issued in 1992 by Royal Decree No. M/36, through enactment of the following articles:

Article 1: Every public employee who requests for himself or others, accepts or acquires a promise or offer to do one of his duties or alleged duties, even if this duty is a mere draft, shall be considered a briber and be punished by imprisonment of no more than ten years and fined by no more than a million Saudi Riyal; or by one of either. Employee's intentions of not doing his duties shall not affect the incrimination.

Article 2**:** Every public employee who requires to himself or to others an offer to cease doing his duties or alleged duties, even if this duty is a mere draft shall be considered a briber and be punished by the

penalties mention in Article One. Employee's intention of not doing his duties shall not affect the incrimination.

Article 3: Every public employee who requires for himself or others, accepts or acquires a promise or an offer to neglect his duties or to award him of what he did even without prior agreement, shall be considered a briber and be punished by the mentioned penalties in Article One of this law.

Article 4: Every public employee who violates his duties by doing or not any of these duties as a result of request, recommendation or mediation shall be considered a briber and be punished by no more than three years of imprisonment and filled by no more than a hundred thousand Saudi Riyal or by one of either.

Article 5: Every public employee who requires for himself or others, accepts or acquires an offer to use a real or alleged authority to obtain from any public authority a labor, order, decision, commitment, authorization, import agreement, job, service or any kind of advantage shall be considered a briber and be punished by the penalties mentioned in Article One.

Article 6: Every public employee who requests for himself or for others, accepts or acquires a promise or an offer because of his job to follow up a transaction in any government department and to whom none of the terms in this law apply shall be punished by no more than two years of imprisonment and filled by no more than fifty thousand Saudi Riyal or by one of either. One who offers or suggests or promises to offer for the aforementioned purpose shall be punished by the same punishment(s). That applies to mediator(s) in any of these cases.

Article 7: Everyone who uses force, violence or threat against any public employee to obtain fulfillment of illegal transaction or to cause him not to perform his official duties shall be punished by the same penalties mentioned in Article One.

Article 8: A public employee to whom the articles of this law apply are the following:

1. Everyone who works for the government or for any institution either body or body corporate either he works permanently or temporarily.
2. The arbitrator or the expert hired by the government or any committee that has judicial authority.
3. Everyone hired by any government institution or any other administrative authority to perform a given duty.
4. Everyone who works for private companies or establishments that execute administrating or operating, maintenance or exercise of public service of any public institution or work for joint-stock companies or companies of shares held by the government and companies and establishments that exercise banking.
5. Managers and members of administrative boards mentioned in (4) of this article.

Article 9: One who offers a rejected bribe shall be punished by no longer than ten years of imprisonment and fined no more than a million Riyal or by one of either.

Article 10: The briber, the mediator and any participant in any of the crimes mentioned in this law shall be punished by penalties of the article of incrimination. Everyone who agrees, motivates or helps in committing this crime intentionally shall be considered a participant in this crime once it is committed on the basis of this agreement, motivation or help.

Article 11: Everyone hired by the bribee or briber to obtain the bribe and accepted it with knowledge of the reason behind it shall be punished by no longer than two years of imprisonment and fined by fifty thousand Saudi Riyal or by one of either.

Article 12: Every advantage or interest obtained by the bribee whichever the type, name of that advantage or interest either corporeal or incorporeal shall be considered a form of promise or offer in inflecting this law.

Article 13: Termination, deprivation of holding a public post and deprivation of holding what is considered a public post mentioned in Article Eight are consequences of incrimination of one of the crimes mentioned in this law.

Article 14: The Council of Ministers may reconsider the following punishments five years ahead of completing the punishment.

Article 15: In all cases, confiscation of money and any advantage resulting from this crime will be implemented whenever possible, in practice.

Article 16: Briber and mediator are exempted from prime and consequent punishment if they inform the authorities before discovering the crime.

Article 17: Everyone who provides information of any of the crimes mentioned in this law and leads to proving the crime and is not a briber, participant or mediator shall be given a reward no less than five thousand Riyals and no more than half of the money confiscated. The reward is identified by the authority issuing the verdict. The ministry of Interior may pay a higher reward than what is been identified in this article after the approval of the Prime Minister.

Article 18: A repeater is one who was convicted of one of the crimes mentioned in this law and was proved to have committed another crime in accordance with its articles before five years of completing the punishment. In this case he may be sentenced to higher than the maximum punishment determined but no more than twice as much.

Article 19: The authority assigned to judge in crime cases shall inflect a fine no more than ten times as much as the bribe or a deprivation of purchasing contract, executing projects and work with Ministries, government departments or body corporate or by both penalties on any company or establishment if its manager or any worker is convicted of committing any crime mentioned in this law proved to be for its interest. The Council of Ministers may reconsider the deprivation penalty, mentioned in this article, after, at least, five years of issuing the verdict.

Article 20: If any company or establishment either national or foreign is deprived according to Article Nineteen, government departments contracting with it should forward to the Council of Ministers their views of the possible action toward labor that this company or establishment is executing even if the department(s) has no relation with the crime of the verdict.

Article 21: The Ministry of Interior has to publish verdicts issued in bribe crimes and announce them.

Article 22: This law substitutes the anti-bribery law issued by Royal Decree No. 15 on 7.3.1382 and the following amendments and voids every contradiction to its articles.

Article 23: This law shall be published in the official paper and be put into effect thirty days afterwards.

This law covers all aspects of corruption including many programmes that relate to the central crime (public bribery) and the resulting effect, regardless of the variation of its degree. It is the crime of misusing public sector responsibility. Some innovations of this law include:

- A precautionary article to punish public employees who bribe a person to use his post to follow any transaction in any government body. This provision also inflicts the same punishment on a person who is offered or promised a bribe.
- A libel punishment which makes it necessary to publish sentences of all bribery crimes.
- A provision allowing for the sentencing of an offender for repeating a crime of bribery. It is a specific sentence restricted by certain conditions specified in the law. When these conditions are met it becomes possible to inflict more than the maximum punishment laid down for this crime, to a maximum of double the stipulated punishment.
- Allowing the questioning of individuals associated with the briber if that crime is committed for their interest and making the punishment a fine of no more than ten times as much the bribe or forbidding

the briber from entering any tender, bid or contract, or both together. That is because the law maker is aware that most bribery crimes are committed to further the private interest of companies or establishments. Hence the companies and establishment are removed from the control of law which the briber secures for them in spite of their individual interest. In an attempt for the company or the establishment not to escape punishment as a beneficiary of the bribe the law provides for the questioning and punishment of a legal person.

3. Establishing Security, Control, and Investigating Institutions to Fight Corruption in Saudi Arabia

All government authorities and all sectors of society within Saudi Arabia participate in measures and activities against corruption.

Fighting corruption is not limited to one institution; rather, security, control, investigation and legal institutions make collective efforts to implement criminal policy. This work is to achieve management reforms and to prevent all kinds of corruption by implementing preventive, controlling procedures and Islamic and legal punishments. These authorities are outlined below.

*(i) The Arrest Authority*

- Corruption Investigation Department (Administrative Detection)
- Criminal Investigation Department (Public Security)

These institutions are responsible for search, investigation and arrest. Their power is limited to conducting investigation of corruption, gathering evidence, planning to arrest the suspected perpetrators, and then preparing reports of inspection and conducting primary investigation. It is noticeable that every one of these institutions has a special field defined by the kind of crime it deals with.

The Corruption Investigation Department deals with anti-bribery crimes. These crimes are misuse of a post as a result of recommendation, connection or real or fake abuse of power; accepting the gains of bribery while being aware of its nature; and the crime of using force or violence or blackmail against a public post holder to make him or her commit an act or cease his or her work. The employee may be following a transaction in any government department and profiteering from his or her post.

The Criminal Investigation Department deals partially with other forgeries, defalcation tied to forgery crimes or any felony crime.

It is notable that if any institution discloses any public property defalcation it conducts the primary investigation. It takes the initial procedures to reserve documents and papers related to the crime and maintain reports required. It analyses them along with notifying the investigation institution and the General Control Council to exert their authority, by examining and reviewing relevant documents.

*(ii) Control Authority*

The Control Authorities in Saudi Arabia are listed below.

(a) Ministry of Economy and Finance

The Ministry of Economy and Finance practices its fields of authority in advanced control of budgeting, expenditure or confirming contracts such as bids.

It's been agreed to call this kind of control "continuous and preventive control", to prevent mistakes and misuse in advance. This is conducted in a regular and consistent way (by the ministry) through its financial representatives in all ministries and government departments.

(b) General Control Council

The General Control Council has the duty of controlling budget income and expenditure. It's been agreed to call this type of control "consistent exposing control", to expose violation of budgetary control. This control is conducted in a consistent and regular way through members of the council.

(c) Supervision in the Control and Investigation Board

The role of this institute differs completely from the role of both the Ministry of Economy and Finance and the General Control Council. The board neither practices continuous preventive control nor consistent exposing control. It rather practices a role which emanates from the aforementioned duties. It doesn't interfere with their duties but completes their role to make them integral. That role depends on participating in public-post holder rectification, protecting government departments from mistakes and violations or preventing them beforehand, such as acting on reports and complaints. Here the board practices a kind of advanced control that may require re-examining documents and records. Such practice is a kind of forward control of records.

*(iii) Investigation Authority*

The Investigation Department in the Investigation and Control Board represents investigative and prosecutorial power in bribery, forgery, and public property crimes.

The disciplinary systems gave investigators the power required to carry out their duties. They were then given by Royal Decree No. 51 in 1402H (1982 in the Gregorian calendar) the power to carry out their duties in bribery and other crimes with all authority necessary, such as:

- Visiting all government departments and viewing all documents required. These departments must enable investigators to do that;
- Searching all public localities and seizing whatever results from the search;
- Hearing witnesses and others who may have any connection to the case or who may have any information that leads to exposing the truth.

If investigations prove the incrimination through evidence, then the case will be submitted to the Grievance Board through the head of the prosecuting authority after preparing an indictment.

*(iv) Judicial Authority*

Two Judicial Authorities are assigned to deal with corruption matters:

(a) The Grievance Board

This is a judicial institution linked directly to the King and exercises its jurisdiction through various circuits. These circuits are to adjudicate in retribution cases against those who are accused of committing forgery and bribery.

In addition to retribution circuits, a board was established to scrutinize cases. It is assigned to scrutinize cases from all circuits of the Board. Furthermore, it scrutinizes cases in a manner defined by prosecution before the Board. It is noteworthy that prosecution rules before the board, enacted in 1989, have illustrated in detail the procedures to prosecute; contested cases; setting appointments; session regulation; sentencing and executing these sentences; and the procedures to contest. According to these rules and procedures, a scrutiny board monitors prosecuting and sentencing.

(b) The General Courts (Islamic Sharia Courts)

The Arrest Authority forwards some cases that don't fall under their jurisdiction, and cases that lack the legal basis for bribery, forgery or defalcation crimes, to these courts. It forwards the case to these courts when the incident forms another crime or is inimical to the public interest. It is noticeable that the relevant authority is the Investigation and Prosecution Board.

4. Working with the International Community in Fighting Corruption

Saudi Arabia works with other countries by attending conferences and international gatherings concerning corruption and by supporting international efforts to fight corruption.

Saudi Arabia has participated in many international forums, seminars, agreements and protocols in the field of safeguarding integrity and fighting corruption. Such events were arranged by specialized regional and international organizations such as the United Nations, the Islamic Conference Organization, the Arab League,

the Gulf States Cooperation Council, Interpol and others, all of which emphasize the effective role that Saudi Arabia plays in fighting all types of corruption. Some of the most important agreements Saudi Arabia has signed are as follows:

- The Security Agreement between the Gulf States;
- The Arab Anti-Drug Agreement, 1994;
- The Riyadh Agreement between Arabs for Judicial Co-operation;
- The Forty Recommendations regarding fighting Money Laundering approved by the Saudi Ministers Council by Decree No. 15 dated 17/1/1420H;
- The United Nations Convention against Transnational Organized Crime, signed by Saudi Arabia in December 2000;
- The United Nations Convention against Corruption, signed by Saudi Arabia in 2004.

## III. STRATEGIES TO FIGHT CORRUPTION AND TO SAFEGUARD INTEGRITY

In its effort to fight corruption and safeguard integrity Saudi Arabia conducts a national strategy of procedures and specific effective plans for this purpose at domestic and international levels.

### A. On the Local Level

1. Establishment of units and associations to fight crime in general and crimes of corruption in particular:
    - Establishment of a national association for fighting corruption. This association co-ordinates the necessary strategies such as planning and monitoring in both public and private sectors.
    - Establishment of financial investigations to prevent misuse of the banking system and follow up with the other external similar parties.
2. Insistence that the concerned party undertakes a periodic review of the anti-corruption regulations and rules.
3. Insistence on a periodic review of the regulations relating to fighting corruption by concerned departments and making use of modern methods worldwide in this field.
4. Developing internal control systems in finance and administration in all government and private sectors, especially in government purchases, collections, customs and sections issuing licenses and permits, etc.
5. Supporting the investigation, judicial and control departments by providing them with funds, manpower, experience, training, technology and modern scientific methods.
6. Quick formal actions on corruption cases confirming the principle of compensation for the victims of corruption crimes after obtaining a formal court decision.
7. Encouraging civil organizations to play their role in fighting corruption.
8. Encouraging co-operation with universities, institutes, academies, and training centres to carry out studies, research, and training sessions in the field of fighting corruption.
9. Protection through the following initiatives:
    - Strengthening religious teaching concentrating on integrity and corruption fighting, through media, debates and educational institutions;
    - Concentrating on strengthening the role of the family in building a Muslim society that will stand against corrupt acts;
    - Encouraging educational institutions to introduce in general education and university programmes an emphasis on integrity and fighting corruption;
    - Arranging an ideal cultural programme in the form of lectures, slides, video tapes, books, etc. in both government and private sectors.

**B. On the International Level**

1. Making use of the experience of international governmental and nongovernmental organizations' experience in integrity and corruption fighting.
2. Following up international findings in corruption crimes by participating in international conferences and forums.
3. Working on more co-operation and exchange of regulations, information and experience in respect of integrity and anti-corruption efforts between GCC, Arab and Islamic countries.

## IV. CONCLUSION

Corruption has become a major concern for all countries; its causes are many and are inter-related with various circumstances, mainly economical, political and social.

The Saudi Arabian government gives its full attention to fighting corruption, and to that end it has made many plans to diagnose the problem. It also works in co-ordination with all the concerned government authorities and social sectors to ensure that through co-operation with each other, they will free the country of corruption.

# REPORTS OF THE SEMINAR

## *GROUP 1*

## IDENTIFYING AND PUNISHING CORRUPT OFFENDERS

| | | |
|---|---|---|
| *Chairperson* | Ms. Claudia Alejandra Forner Ortega | (Chile) |
| *Co-Chairperson* | Mr. Shinji Iwayama | (Japan) |
| *Rapporteur* | Mr. Marco César dos Santos Sousa | (Brazil) |
| *Co-Rapporteur* | Ms. Midori Shoji | (Japan) |
| *Members* | Mr. Giorgi Phiphia | (Georgia) |
| | Mr. Madhav Prasad Ojha | (Nepal) |
| | Mr. Alharbi Ali Khalaf S. | (Saudi Arabia) |
| *Visiting Expert* | Mr. Jeremy Lo Kwok-chung | (Hong Kong) |
| *Advisers* | Prof. Takeshi Seto | (UNAFEI) |
| | Prof. Tae Sugiyama | (UNAFEI) |
| | Prof. Shinatro Naito | (UNAFEI) |
| | Prof. Haruhiko Higuchi | (UNAFEI) |

### I. INTRODUCTION

Group 1 started its discussion on 28 January 2008. The group elected by consensus Ms. Ortega as Chairperson, Mr. Iwayama as Co-chairperson, Mr. Sousa as Rapporteur and Ms. Shoji as Co-rapporteur. The group, which was assigned to discuss "Identifying and Punishing Corrupt Offenders", agreed to conduct its discussion in accordance with the following agenda:

1) Measures to encourage persons or bodies that have useful information on corruption to supply the information to, and co-operate with, investigative and prosecutorial authorities;
2) Pro-active measures to collect information and/or evidence;
3) International co-operation.

### II. SUMMARY OF THE DISCUSSIONS

#### A. Encouraging the Supply of Useful Information and Co-operation with Investigative and Prosecutorial Authorities

The discussion began with all participants sharing information about their countries' measures regarding the topic.

Mr. Alharbi stated that in Saudi Arabia there is a law that allows a reward for anyone who provides information on corruption and is willing to testify; however, despite the reward, people are afraid to co-operate due to possible negative repercussions. He also stated that there is a free phone line which the public can call with any information on corrupt activities. All participants agreed that offering cash rewards is not necessarily an effective measure to encourage the desired co-operation, since it acts as an inducement.

The group also agreed that education is a very important weapon to be used to encourage witnesses. Mr. Sousa explained that in Brazil, citizens are informed of available hotlines and are urged to complain or to report corruption related cases through advertisement campaigns, media, seminars, etc. Some participants stated that in their countries they don't have these hotlines, which becomes a problem, since the citizen is not informed of how, to whom or where he or she should report or complain.

The discussion proceeded and the visiting expert, Mr. Lo, brought to the group's attention some enlightening information regarding the Hong Kong experience in fighting corruption. According to Mr. Lo, Hong Kong has successful witness and whistle-blower protection programmes. He also stated, though, that these are very expensive tools.

Mr. Phiphia said that his country doesn't provide such programmes, because the government doesn't have enough resources, while Ms. Ortega noted that in Chile there is a witness protection programme and also that sentences can be reduced for witnesses who co-operate with the investigation. Mr. Iwayama stated

that in Japan there is no legal provision for a witness protection programme, although some witness protection measures, e.g. keeping the informant's identity confidential, can be taken in corruption cases. He also stated that the immunity of witnesses from prosecution is a good measure to be adopted. The group agreed that witness and whistle-blower measures are needed in the battle against corruption, and that each country should adapt them according to its resources and peculiarities.

All participants agreed that the media has an important role in this battle, and should be properly explored.

1. Summary of the Recommendations

(i) Determination and will of the States Parties to the UNCAC to fight corruption is needed; therefore, they need to adopt certain good practices to prevent this phenomenon, such as:

- Education programmes and campaigns, starting with school children and the community in general;
- Investment in advertisement and publicity which highlights the damage caused by corruption.

All these measures will help to encourage the reporting of offences, and therefore will allow authorities to more easily identify the corrupt offender.

(ii) Encourage the reporting of offences through:

- Implementing witnesses protection measures, in those countries where it is possible to finance them;
- Providing hotlines for reporting;
- Implementing whistle-blowing protection;
- Accepting anonymous reports;
- Offering immunity in certain cases;
- Implementing the obligation for a public servant to report offences discovered in the performance of his or her duties;
- Adopting procedures such as plea bargaining.

**B. Pro-active Measures to Collect Information and/or Evidence**

According to most of the participants, media information can be used as evidence to initiate an investigation.

Mr. Madhav stated that in Nepal, the agency responsible for the investigation of corruption cases conducts detailed surveillance based upon the information provided by the many associated organs and enterprises. Most participants stated that in their countries, although such kind of information is also provided, specific agencies are responsible for uncovering traces of illegal activities.

In Japan, Mr. Iwayama explained that in the traditional way, information gathered during an investigation can be used as a trigger to begin other corruption investigations. He asked for the opinion of the other participants, and all agreed that this was a common way to start an investigation in corruption cases.

While discussing the use of special techniques to collect evidence, Mr. Iwayama elaborated that, although there is a legal provision for the use of wiretapping, it is not applied in corruption cases. Mr. Alharbi stated that in Saudi Arabia, although wiretapping can be used during the investigation, it can't be used as evidence in trials. However, in some countries, wiretapping is commonly used and is efficient in collecting evidence regarding corruption investigations. Mr. Sousa, Mr. Phiphia and Ms. Ortega provided some practical examples of the utility of the measure in their countries. Mr. Iwayama stated that some amendments or revisions in the law would be necessary prior to the use of this tool in Japan.

Ms. Shoji added that since the use of these tools breaches the privacy of individuals, certain care should be exercised in authorizing their use. Most participants stated that in order to obtain the related warrant, credible evidence must be provided.

Some of the participants stated that other special investigation techniques are used effectively in corruption cases in their countries, such as undercover agents, informants, search and seizure, etc. These measures however are available with a warrant provided by a judge. Mr. Alharbi stated that in Saudi Arabia, these measures require the authorization of the Minister of the Interior.

Mr. Madhav added that in his country, the agency responsible for the investigation of corruption cases can not investigate directly in the private sector.

Regarding the lifting of bank secrecy and investigation of the incomes and assets of the corrupt offenders, as other measures used to collect evidence, Mr. Phiphia and Mr. Alharbi stated that although they can have free access to information regarding incomes, assets and bank account records, sometimes it is useless for the investigation, since the offenders don't deposit their money in local banks. Mr. Iwayama stated that although in Japan it was difficult to trace data concerning banking accounts, once the information was obtained, it could be significant or indispensable to prosecute corruption cases. Mr. Sousa, Mr. Alharbi and Ms. Ortega stated that their respective countries don't face such kinds of problems and that there are surveillance agencies responsible for keeping all records regarding bank transactions, which makes it easy to identify suspicious activities. This measure was specially appreciated by the other participants.

Another important tool used in the investigation of corruption cases is an expert's report, which can be used as evidence in most of the participating countries. These experts are usually public officials. It is important to quote that in Japan some police officers and public prosecutors are trained in accounting or financial matters. If any additional technical information is needed, experts can be interviewed.

In some of the participants' countries, only high-ranking officers are requested to declare their assets. In others, all public servants are requested to declare assets and financial transactions. It is important to note that in some of the represented countries, the declared information is accessible by the public, but in all of them, it can be accessed by the authorities responsible for the investigation of corruption cases. All the participants agreed that this is an important tool to achieve transparency.

1. Summary of the Recommendations

(i) Enhance traditional investigative techniques, such as:

- Obtaining information from the media;
- Obtaining information from other corruption cases;
- Obtaining information from informants;
- Search and seizure;
- Lifting of bank secrecy;
- Surveillance;
- Experts' reports.

(ii) Adopt special investigative techniques, such as:

- Undercover agents;
- Wire tapping;
- Electronic surveillance.

(iii) Promote transparency through:

- Assets and income declaration by all public servants;
- The appointment of Ombudsmen;
- Encouraging civil society's participation;
- Obliging public servants to provide requested information regarding investigations.

All these techniques should be used or considered in the investigation of corruption cases, in accordance with each country's legal regime and peculiarities.

**C. International Co-operation**

The participants decided to address only the problems regarding the obtaining of evidence and information of bank accounts in other countries.

The discussion started, with the agreement of the participants, on the importance of international co-operation in every step of the battle against corruption.

Mr. Madhav stated that legal instruments are needed in order to obtain proper international co-operation, so Nepal and neighbouring countries have to ratify the UNCAC as soon as possible. Mr. Iwayama stated that Japan seeks international co-operation through the diplomatic route. The other participants shared some information regarding difficulties faced in each respective country.

Regarding extradition, Mr. Sousa and Ms. Ortega said that their countries are open to international co-operation; both countries have signed treaties and reciprocity can also be used.

1. Summary of the Recommendations

(i) The importance of international co-operation was a common point of agreement for all the participants. The main recommendation is that every country should ratify the UNCAC, and try to adopt legal instruments, such as bilateral and/or multilateral treaties, to receive and provide international co-operation;

(ii) Although formal international co-operation is very important, the relevance of networking and informal and/or direct contact between corruption investigators cannot be ignored. This relationship must be continually encouraged in order to strengthen its effectiveness.

*GROUP 2*

## CONFISCATION OF ILLEGAL BENEFITS AND ASSET RECOVERY

| | | |
|---|---|---|
| *Chairperson* | Mr. Dharam Chand Jain | (India) |
| *Co-Chairpersons* | Mr. Younsi Noureddine | (Algeria) |
| | Ms. Anna Mphetle | (Botswana) |
| *Rapporteur* | Mr. Antonio Mendoza, Jr. | (Philippines) |
| *Co-Rapporteurs* | Mr. Muhammad Tareen | (Pakistan) |
| | Mr. Hiroshi Fukushima | (Japan) |
| *Member* | Ms. Satsuki Miyaji | (Japan) |
| *Advisers* | Prof. Kayo Ishihara | (UNAFEI) |
| | Prof. Ryuji Tatsuya | (UNAFEI) |

### I. INTRODUCTION

Group 2 began its discussions on 28 January 2008. The Group unanimously elected Mr. Jain as its Chairperson, Mr. Younsi and Ms. Mphetlhe as its Co-Chairpersons, Mr. Mendoza as its Rapporteur and Mr. Tareen and Mr. Fukushima as its Co-Rapporteurs. The subject of the group workshop was "Confiscation of Illegal Benefits of Corruption and Asset Recovery". The group agreed to proceed with the discussion with the following agenda: 1) Identifying and tracing crime proceeds (e.g. access to bank, government, financial, business and corporate records, co-operation with the FIU); 2) Seizure, freezing and confiscation; 3) International co-operation in identifying, tracing, seizing, freezing and confiscating the proceeds of corruption; and 4) Asset recovery.

### II. SUMMARY OF THE DISCUSSIONS

The Chairperson opened the discussion and noted that confiscation of the proceeds of crime and recovery of assets are key elements in effectively fighting corruption. He stated that the crime of corruption results in double loss as the offender causes loss to the public treasury and then a great amount of resources are spent on investigation.

#### A. Identifying and Tracing Crime Proceeds

The group agreed that proceeds of corruption usually end up as deposits in domestic or foreign banks or are concealed by acquiring other properties. Thus, a majority of the participants agreed that investigation agencies need to have access to the bank accounts and bank records of suspects as well as government, business and corporate records. It was noted that in the Philippines, due to bank secrecy laws, law enforcement agencies must obtain a court order prior to accessing any bank account or bank records. Similarly, income tax returns can only be accessed if there is tax fraud filed against the taxpayer. This is a serious bottleneck in the investigation of corruption cases. Against this backdrop, it was noted by the group that bank accounts, tax returns and lists of assets are useful in proving corruption cases, thus it would be beneficial if investigators are facilitated by law to acquire such information. In this regard, the group underscored the need for adequate measures for evidence gathering in corruption cases. It was further noted that investigators must foster credibility in order to achieve full co-operation from bank agents.

It was the general consensus that besides bank accounts, investigators should also request other records pertaining to bank loans and mortgaged properties of the suspect in order to trace crime proceeds. The group further agreed that investigating agencies must get some help from experts who have the special skills to decipher complex financial transactions. The group acknowledged that law enforcement agencies must maintain close contact with the financial intelligence units (FIU) in order to acquire reports of suspicious financial transactions.

It emerged during discussion that in Algeria the law empowers designated non-governmental organizations to identify and trace crime proceeds and to pass on the information to the law enforcement agencies for further action. Uncommon to most other countries, this idea could be an effective mechanism for identifying and tracing crime proceeds and may be considered by other countries. The discussion further revealed that in

Pakistan there is a central database, based upon the National Identification Card of its citizens, which stores information on citizens, including assets, and which is a vital source of data used by the National Accountability Bureau during investigation of corruption cases. Mr. Tareen stated that in Pakistan the law provides for plea bargaining and this might be an instrument for the identification of ill gotten assets.

The discussion also highlighted the importance of whistle blowers in identifying and tracing crime proceeds. Moreover, the group agreed that legal protection must be provided to whistle blowers.

**B. Seizure, Freezing and Confiscation**

The group discussed to what extent a warrant is required in search and seizure of assets and identified approaches amongst the participating countries. The group agreed that effectiveness of search and seizure should be ensured with due consideration for human rights protection. It was highlighted that in Japan both search and seizure require separate warrants from a court. Items not listed on the warrant require the issue of a separate warrant, which, in practice, can usually be obtained in the course of the search. Ms. Mphetlhe said that in Botswana there is also a restriction on the execution of search of women, wherein only female officers can carry out the search, but there is insufficient number of such officers in rural areas.

Mr. Younsi pointed out that sometimes the judiciary face difficulties in deciding whether to grant the search, seizure or freezing order when applications are not made for criminal justice purposes but with hidden political considerations.

It was noted that in Botswana, once a restraining order has been granted, the prosecution is required to register the case before the court within seven days. This creates a challenge because corruption cases are complicated and the time allowed is too short. Some investigators also lack the necessary skills to meet the above requirement.

Further, Mr. Jain and Mr. Mendoza highlighted the challenges of properties which are proceeds of crime but not registered in the name of the suspect(s). Mr. Jain said that investigators must then be able to search various premises where crime proceeds could be traced and identified.

Mr. Mendoza enquired whether the judicial authorities could confiscate some other personal properties if the corruption proceeds have already been disposed of by the convict. Ms. Mphetlhe stated that properties which do not pertain to the crime cannot be confiscated, hence there will only be imprisonment. In cases wherein there is evidence to prove that the crime proceeds are no longer in the hands of the offender, in Japan, the court can confiscate money of an equivalent amount from his/her assets. Mr. Jain said that in the case of illicit enrichment, properties can be confiscated which are found to be disproportionate to the known sources of income and in other cases the court can order recovery of the proceeds of crime by imposing an adequate fine.

The group acknowledged the difficulties in proving the link between the crime and the property beyond reasonable doubt and agreed that civil forfeiture of such properties or other civil proceedings may also be considered in addition to launching of criminal proceedings as provided by the laws of certain countries.

**C. International Co-operation in Identifying, Tracing, Seizing, Freezing and Confiscating Proceeds of Corruption**

The group agreed that the UNCAC provides an effective mechanism for international co-operation in identifying, tracing, seizing, freezing and confiscating proceeds of corruption, hence the member countries should be encouraged to ratify the UNCAC. Such convention will facilitate harmonization of criminal legislation of all the States Parties. However, the group believed that bilateral treaties still hold a special place and countries should maximize the mutual legal assistance treaties as they create a direct obligation on the consenting states. Treaties should provide for repatriation of the proceeds of crime to the requesting state and the requested state may also get some share in proportion to the amount spent by it on the recovery of proceeds. Mr. Younsi said that sometimes international co-operation is difficult to obtain because of differences in the criminal justice systems of countries and issues such as sovereignty and political policies. He stated that disputes of international co-operation may be settled through an independent international body or court.

Ms. Miyaji pointed out that there is a need to simplify procedures in the formal route, such as Mutual Legal Assistance (MLA), by allowing a direct channel between central authorities as much as possible to expedite the process. The group agreed that in MLA proceedings, it is important that a requesting state may be allowed to send investigator(s) or prosecutor(s) to the requested state so as to facilitate and assist in the execution of the request in a way tailored to their needs.

Moreover, the group acknowledged that informal contacts, including but not limited to Interpol, law enforcement co-operation and FIU-FIU information exchange, provide faster and easier channels for international co-operation. These contacts are useful to decide whether or not, and to what extent, to go with the formal route.

The group also acknowledged the difficulties and challenges in seeking international co-operation through MLA because of the provision of dual criminality. There are certain actions, such as illicit enrichment of corrupt individuals, which are still not crimes as per the laws of certain countries. Recognizing further that illicit enrichment is related to crimes such as bribery, embezzlement, tax evasion, etc., the group agreed that concerned countries may ground their request for international co-operation based on the common crimes stated above. Similarly, confiscation of assets through civil forfeiture or civil proceedings may also be difficult in the context of international co-operation because laws of certain countries may not have such provisions.

**D. Asset Recovery**

The group acknowledged the difficulties and impediments to asset recovery, especially those assets which are located in other countries. These include the absence of an appropriate legal framework, a lack of technical know-how and expertise, insufficient financial resources, etc. The group noted with concern the disparity in the systems of different countries relating to evidential requirements: this poses a further challenge in obtaining international co-operation.

The group therefore felt that countries should put in place legal frameworks which would enhance international co-operation pertaining to asset recovery. The group further gave import to maximizing mutual legal assistance. This could be supplemented by informal contacts (Interpol, FIU-FIU information exchange, etc.). In this way countries may be able to implement the spirit of the provisions of the UNCAC relating to asset recovery.

## III. CONCLUSIONS AND RECOMMENDATIONS

Based upon the foregone discussions and deliberations, the group arrived at the following conclusions and recommendations:

1. Laws of some countries do not facilitate the law enforcement agencies in collection of adequate evidence in identifying and tracing crime proceeds. The group has therefore underlined the need to have adequate legal and practical measures for evidence gathering in corruption cases;
2. Investigators need to foster credibility in order to achieve the full co-operation of banks and other agencies during investigations;
3. Wherever required, the help of experts possessing special skills to decipher complex financial transactions should be employed in identifying and tracing crime proceeds;
4. Countries may consider empowering designated non-governmental organizations (NGOs), as in Algeria, to help and assist their law enforcement agencies for the above purpose;
5. Whistleblowers play a crucial role in exposing corruption and tracing crime proceeds; therefore they need to be provided adequate legal protection;
6. Countries need to have effective legal measures for search, seizure, freezing and confiscation keeping in view the human rights of citizens;
7. Investigators should be facilitated to acquire specialized skills through continuous training in the collection of evidence linking the proceeds of corruption to the crime;
8. Wherein it is not feasible to confiscate illegal properties, countries may consider having legal

provisions to confiscate money of an equivalent amount from other assets of the convict. Countries may also consider launching civil forfeiture/civil proceedings in addition to criminal proceedings;

9. Countries should be encouraged to ratify and implement the UNCAC because it provides an effective mechanism for international co-operation in identifying, tracing, seizing, freezing, and confiscating the proceeds of corruption;
10. Countries should make an effort to maximize mutual legal assistance (MLA) in order to enhance bilateral international co-operation;
11. MLATs and laws shall have provisions regarding repatriation of proceeds of crime to the requesting state, and the requested state may also deduct expenses incurred by it on recovery;
12. The procedure provided for bilateral co-operation in MLATs needs to be simplified so as to allow a direct channel of communication between central authorities of the two countries;
13. The group also underscored the importance of informal contacts between law enforcement agencies for obtaining the desired international co-operation. In order to facilitate effective provision of assistance, countries may be allowed to send a team of investigators/prosecutors; and
14. Absence of appropriate legal framework, disparity of systems of different countries, lack of technical know-how and expertise, insufficient financial resources, etc. have been underlined as some of the impediments to obtaining international co-operation for asset recovery. Countries need to have proper legal frameworks in place to enhance international co-operation. This could be followed by maximizing mutual legal assistance supplemented by informal contacts and providing technical and financial assistance as envisaged in the UNCAC for effective asset recovery.

*GROUP 3*

## STRENGTHENING THE CAPACITY AND ABILITY OF CRIMINAL JUSTICE AUTHORITIES AND THEIR PERSONNEL

| | | |
|---|---|---|
| *Chairperson* | Mr. Yasunobu Hishita | (Japan) |
| *Co-Chairperson* | Mr. Hassan Gashemi | (Iran) |
| *Rapporteur* | Mr. Joselito D.R. Obejas | (Philippines) |
| *Co-Rapporteur* | Mr. Vladimir Georgiev | (FYR Macedonia) |
| *Members* | Mr. Mardite Harlan | (Indonesia) |
| | Ms. Clelia Fabiana Akizawa | (Argentina) |
| | Ms. Mihoko Aso | (Japan) |
| *Advisers* | Prof. Tetsuya Sugano | (UNAFEI) |
| | Prof. Jun Oshino | (UNAFEI) |
| | Prof. Koji Yamada | (UNAFEI) |

### I. INTRODUCTION

The group convened at the Director's House on 28 January 2008. The group chose, by consensus, Mr. Hishita as Chairman, Mr. Ghasemi as Co-chairman, Mr. Obejas as Rapporteur, and Mr. Georgiev as Co-rapporteur.

The group was tasked with discussing the topic of "Strengthening the capacity and ability of the criminal justice authorities and their personnel" with the following guiding points or agenda: (1) Ensuring the necessary independence of the criminal justice authorities; (2) Integrity of the personnel of the criminal justice authorities; (3) Transparency and accountability in the relevant decisions in criminal proceedings; and (4) Specialization of the criminal justice authorities.

### II. SUMMARY OF THE DISCUSSIONS

#### A. Ensuring the Necessary Independence of the Criminal Justice Authorities

The discussion of this item started and terminated on the first day the group convened. Before the commencement of the discussion, it was agreed that the criminal justice authorities in each country to which the discussion shall pertain are limited to the law enforcement agencies, the public prosecutors and the courts only.

During the discussion, it was disclosed that the independence of the criminal justice authorities in Japan is generally observed and respected.

In some of the participating countries in the group, the independence of the criminal justice authorities suffers to some extent because of the necessity of political patronage in their appointment, selection, promotion and assignment and/or due to occasional interference in their work or the exertion of influence by other government functionaries within or outside of the criminal justice system.

So that full independence of the criminal justice authorities in the affected countries can be attained, the group suggests that each of the said countries must sincerely endeavour to pass, adopt and enforce relevant legislation that shall clearly define the functional divisions of the three branches of government and stringently observe and put into force constitutional provisions on their independence from each other. The approval of the proposed budget of the criminal justice authorities must always be guaranteed or secured.

#### B. Integrity of the Personnel of the Criminal Justice Authorities

While the participants from Japan consider the personnel in their criminal justice system, in general, to possess an appreciable degree of integrity, the participants from the other countries disclosed that the integrity of the criminal justice authorities in their respective countries is most often compromised by: (1) low pay or remuneration; (2) the cultural values of family groups, cronyism, getting along, extending sympathy on another's misery, and eternally paying a 'debt of gratitude'; and (3) the need to obtain political

backing in their appointment/selection or promotion.

To address this matter, the group recommends the following;

(1) The upgrading of the remuneration of the criminal justice authorities and their personnel, making it more decent and competitive;
(2) The passage and implementation of appropriate measures that will further underscore and strengthen codes of conduct and ethical standards in the public service;
(3) The creation by law of a permanent and independent multi-sectoral body that will regularly conduct a performance evaluation or audit of the civil service personnel but whose functions will not necessarily prejudice the independence of the criminal justice authorities;
(4) The ratification of, and full compliance with, the UNCAC by each of the countries concerned, it containing measures guaranteeing the integrity of the judiciary and the prosecution service; and
(5) The adoption and observance of the pertinent UN guidelines and resolutions regarding the independence and integrity of judges and prosecutors, particularly the "Guidelines on the Role of Prosecutors" and the "Bangalore Principles of Judicial Conduct".

**C. Transparency and Accountability in the Relevant Decisions in Criminal Proceedings**

The participants gladly revealed that the relevant decisions of their judicial authorities are generally transparent for they are readily made known not only to the parties involved but to the public as well, and that their judicial authorities can always be held accountable for their decisions, either administratively, civilly or criminally. However, in some countries there is less transparency in the investigation proceedings and in the decisions of prosecutors.

The participants in the group agreed that the ratification, adoption and full implementation of the UNCAC may be a very appropriate action to broaden public access to the anti-corruption bodies, as provided in the said Convention.

Moreover, insofar as the accountability of the law-enforcement agencies and the prosecutors in their decisions is concerned, an internal audit system, like the one presently adopted and implemented by the ICAC of Hong Kong, must be considered.

**D. Specialization of the Criminal Justice Authorities**

Among the countries represented in the group, only the Philippines and Indonesia have special anti-graft courts. Nevertheless, all the countries in the group, except Iran, have special law-enforcement units and prosecution offices that are tasked with investigating and prosecuting corruption cases.

Since it is the consensus of the participants that it is more beneficial for a particular country to have specialized criminal justice authorities, it is, therefore, suggested that the creation of such special anti-graft bodies in the countries concerned be considered. Furthermore, the ratification and adoption of, and full compliance with, the UNCAC is desirable as it contains provisions on specialized authorities.

# APPENDIX

*COMMEMORATIVE PHOTOGRAPH*

- *138th International Senior Seminar*

**UNAFEI**

# The 138th International Senior Seminar

**Left to Right:**
Mr. Lo Kwok-chung, Prof. Higuchi, Prof. Naito

**4th Row:**
Mr. Ohashi (Staff), Ms. Tomita (Staff), Ms. Uenishi (Staff), Mr. Iwakami (Staff), Mr. Nakayasu (Staff), Mr. Matsumoto (Chef), Mr. Shirakawa (Staff), Ms. Hosoe (Staff), Mr. Yamagami (Staff)

**3rd Row:**
Ms. Miyaji (Japan), Mr. Sousa (Brazil), Mr. Ghasemi (Iran), Mr. Younsi (Algeria), Mr. Kitada (Staff), Mr. Takagi (Staff), Ms. Shibuki (Staff), Ms. Tsuruoka (Staff), Ms. Ota (Staff), Mr. Mori (JICA)

**2nd Row:**
Mr. Hishita (Japan), Mr. Phipia (Georgia), Mr. Iwayama (Japan), Mr. Fukushima (Japan), Mr. Mendoza (Philippines), Mr. Alharbi (Saudi Arabia), Mr. Obejas (Philippines), Ms. Akizawa (Argentina), Ms. Ortega (Chile), Ms. Mphetlhe (Botswana), Mr. Mardite (Indonesia), Mr. Madhav (Nepal), Mr. Tareen (Pakistan), Mr. Jain (India), Mr. Georgiev (FYR Macedonia), Ms. Shoji (Japan), Ms. Aso (Japan)

**1st Row:**
Mr. Nakasuga (Staff), Mr. Fujii (Staff), Prof. Tatsuya, Prof. Sugano, Prof. Oshino, Ms. Strobel-Shaw (UNODC), Dr. Cassuto (France), Director Aizawa, Mr. Gossin (Switzerland), Deputy Director Seto, Prof. Ishihara, Prof. Sugiyama, Prof. Yamada, Mr. Kawabe (Staff), Ms. Lord (L.A.)