

# Controlling Corruption in Asia and the Pacific

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of the ADB/OECD Anti-Corruption Initiative  
for Asia and the Pacific

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# Abbreviations and Acronyms

ABA	American Bar Association
ACA	Anti-Corruption Agency (Malaysia)
ADB	Asian Development Bank
APEC	Asia-Pacific Economic Co-operation
ASEAN	Association of South East Asian Nations
AUSAID	Australian Agency for International Development
BPR	Badan Pencegah Rasuah Malaysia (Anti-Corruption Agency of Malaysia)
CEO	Chief Executive Officer
CIAA	Commission for the Investigation of Abuse of Authority (Nepal)
CPIB	Corrupt Practices Investigation Bureau (Singapore)
DFID	Department for International Development (UK)
FATF	Financial Action Task Force on Money Laundering
FIDIC	International Federation of Consulting Engineers
GNP	Gross National Product
HKSAR	Hong Kong Special Administrative Region
HMG/N	His Majesty's Government of Nepal
ICAC	Independent Commission against Corruption (Hong Kong, China)
IGEC	International Group of Experts on Corruption
IMF	International Monetary Fund
INR	Indian Rupee
INTOSAI	International Organisation of Supreme Audit Institutions
KICAC	Korea Independent Commission Against Corruption
SKW	South Korean Won
MLA	Mutual Legal Assistance
MYR	Malaysian Ringgit
NAB	National Accountability Bureau (Pakistan)
NACS	National Anti-Corruption Strategy (Pakistan)
NGO	Nongovernmental Organization
NSW	New South Wales (Australia)
OECD	Organisation for Economic Co-operation and Development
PBEC	Pacific Basin Economic Council
SOE	State-Owned Enterprise

TI	Transparency International
UK	United Kingdom
UKM	National University of Malaysia
UN	United Nations Organisation
UNDP	United Nations Development Programme
UNCITRAL	United Nations Commission on International Trade Law
USAID	United States Agency for International Development
USD	US-Dollar
WTO	World Trade Organization

# Foreword

Corruption deprives countries of precious resources, hampers efforts to alleviate poverty, undermines political stability and economic growth and diminishes a country's attractiveness for investment. These negative impacts of corruption on societies and economies have been recognized by Asian and Pacific governments, which over the past few years have engaged in a number of substantial reform projects. The Asian Development Bank (ADB)/Organisation for Economic Co-operation and Development (OECD) Initiative supports these endeavors by providing forums for policy dialogue, capacity building, and strengthened understanding, through analytical tools, of the roots and consequences of corruption in Asia and the Pacific, and the potential for evaluating the effectiveness of potential remedies.

ADB and the OECD launched the Anti-Corruption Initiative for Asia and the Pacific with the aim of supporting Asian and Pacific countries in developing and implementing tangible and sustainable measures to curb corruption. The Initiative's fourth Regional Anti-Corruption Conference, held in Kuala Lumpur, Malaysia, in December 2003, provided practitioners and experts from Asian and Pacific governments, civil society, the private sector and the donor community an overview of recent developments in the countries' legal and institutional anti-corruption frameworks and insights on challenges that lie ahead. Workshops and plenary sessions discussed and evaluated tools and instruments to implement the Initiative's regional Action Plan.

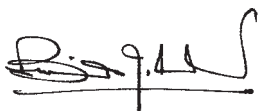
The success of the fourth Regional Anti-Corruption Conference is due above all to the commitment and hard work of the staff of the Anti-Corruption Agency of Malaysia and the progress achieved by the ADB/OECD Initiative's Steering Group. The conference on which this publication is based was directed and coordinated by Frédéric Wehrlé, Coordinator, Outreach Anti-Corruption Initiatives, Anti-Corruption Division, OECD; Jak Jabes, Director, Governance and Regional Cooperation Division, ADB; and Gretta Fenner, Manager, Anti-Corruption Initiative for Asia-Pacific, Anti-Corruption Division, OECD. Assistance in the organization of the conference and in the preparation of this publication by Joachim Pohl, Legal Advisor at the OECD's Anti-Corruption Division and by Marilyn Pizarro, consultant to ADB, are gratefully acknowledged; Marilyn Pizarro



also provided administrative assistance, together with Frances Mooney and Liliana Salazar, both of the OECD's Anti-Corruption Division.

The Initiative's work is generously supported by financial and in-kind contributions from ADB, the OECD, the Pacific Basin Economic Council, the Swiss Agency for Development and Cooperation, Transparency International, the United Kingdom Department for International Development, the United Nations Development Programme, the United States Department of State and the World Bank.

The present publication assembles the analysis and recommendations offered in the course of the conference by experts both from within the region and from outside Asia and the Pacific. It aims to inspire the further development and implementation of policies and instruments and the evaluation of the effectiveness of existing institutional structures to prevent and fight corruption. The experts' findings, interpretations and views expressed in this publication do not necessarily represent the views of ADB or those of its member governments or of the OECD and its member countries. The present publication is jointly produced by ADB's Regional and Sustainable Development Department and by the OECD's Directorate for Financial and Enterprise Affairs.



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# Controlling Corruption in Asia and the Pacific: an Overview

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Building on the principles and standards laid out in the Anti-Corruption Action Plan for Asia and the Pacific, and continuing the 23 endorsing countries' efforts to translate the Action Plan's principles into domestic policy, more than 150 senior representatives of governments, the private sector, non-governmental organizations and the international development partner community met in Kuala Lumpur, Malaysia, 3–5 December 2003 on the occasion of the ADB/OECD Initiative's fourth regional anti-corruption conference. The conference aimed to review and discuss progress made by endorsing countries in implementing the Action Plan and to enhance capacity in a number of areas that, in this context, have been identified as particular challenges to Asian and Pacific countries. The conference was organized by the Asian Development Bank (ADB) and the Organisation for Economic Cooperation and Development (OECD) and hosted by the Anti-Corruption Agency of Malaysia (ACA).

As regards preventing corruption, the discussion focused both on ways to enhance integrity in the public service through management of conflict-of-interest situations and on measures to strengthen integrity in the business sector. With the aim of assisting countries to increase their detection rate of corruption, a second set of workshops discussed the needs and tools for meaningful whistleblower protection and the necessity, in some particularly corruption-prone areas such as public procurement, to develop particular types of systems for corruption prevention and detection. The third set of workshops concentrated on some of the mechanisms required to make investigation and prosecution of corruption more effective, including the techniques of forensic accounting and functioning procedures for mutual legal assistance and asset recovery.

## Anti-corruption strategies in the region

High-level corruption scandals, persisting poverty and the Asian financial crises have pushed concerns about corruption to the top of the political agenda in many countries and highlighted the extent to which corruption undermines a country's political and economic stability and hampers the people's welfare. In an attempt to overcome the systemic weaknesses, the Initiative's twenty-three member countries have over the past few years initiated numerous reform projects and developed anti-corruption strategies tailored to the particular needs of their countries. Common to these reform endeavors is a comprehensive approach that combines preventive instruments with measures to strengthen law enforcement and is based on the understanding that anti-corruption strategies, to be effective, must involve and be supported by stakeholders from the business sector, civic organizations and the international community.

Malaysia's anti-corruption strategy, for instance, foresees a number of parallel measures to tackle both prevention and enforcement issues. In a shorter-term perspective, the promotion of good governance is Malaysia's priority in preventing corruption in its public institutions. Other preventive measures aim to instill integrity in the society at large by targeting young people through family and education programs. These and other elements of the Malaysian anti-corruption strategy have been consolidated in the newly launched National Integrity Plan. Further, the Malaysian Government, acknowledging that anti-corruption efforts should not halt at national boundaries and that countries can benefit from sharing good practices, is setting up the Anti-Corruption Academy, which aims to serve as a regional center to study and disseminate information and provide training in anti-corruption practices.

Similarly, the Australian government—acknowledging its important role in and responsibility toward the region as a whole and the Pacific region in particular—dedicates important amounts of public funds to the promotion of governance and anti-corruption reform through its overseas aid programs. At the same time, its anti-corruption strategy reflects a number of pressing domestic concerns in the areas of both prevention and prosecution, such as the integrity of public servants, the accountability and transparency of public financial management, the suppression of international bribery, and meaningful protection for whistleblowers.

The encompassing mandate of Hong Kong, China's Independent Commission Against Corruption also provides for a comprehensive approach covering prevention, prosecution, education and public awareness raising. Current priorities of Hong Kong, China's anti-corruption strategy include the strengthening of pro-active investigation and modern investigation techniques,

the minimization of corruption opportunities in particularly vulnerable areas and the training of and outreach to other public bodies and the private sector.

While these three countries' anti-corruption bodies enjoy a fairly advantageous situation in terms of resources, some of their peer organizations in the region face fundamental problems due to important shortages of staff, training and adequate financial resources. The Philippines' Office of the Ombudsman and Nepal's Commission for the Investigation of Abuse of Authority are examples, but not exceptional ones, in this respect, especially in the area of law enforcement. To extend the resources at hand, both institutions have begun seeking allies from the non-governmental sector, such as private lawyers or civil society organizations, as well as from the international community, for the purpose of training their investigators and prosecutors. By means of manuals and handbooks on investigation techniques and prosecution, they further aim to ensure a long-term and multiplied effect of their capacity-building efforts.

## **Ethics in the private sector**

Instead of being perceived as an ally in the fight against corruption, the business sector has until recently been seen rather as the cause of the problem. Today, however, larger companies and regional business associations recognize that paying bribes to win business can increasingly backfire on them. As Anne-José Fulgeras from the international consulting, accounting and auditing firm Ernst & Young has observed, international efforts to battle corruption, in particular the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, put further pressure on companies to uphold integrity by rendering corrupt business practices risky. To react to this changing environment, the business sector, with the active support of its professional associations, has developed various integrity management programs to enhance business ethics and internal control systems. To ensure the effectiveness of these mechanisms, explains Alex Duperouzel, Managing Director of Background Asia Ltd., it is important to adapt them to a company's culture and that of the country in which the company operates.

At the same time, government actions to encourage businesses in the region to enhance their ethics continue to lag behind, in particular as regards accounting and auditing standards. Consequently, many companies are still either unaware of the changes in the business environment or are reluctant to adopt appropriate policies and instruments. Greater attention should be paid to this aspect of the fight against corruption, so as to supplement initiatives taken by the private sector.

## **Integrity management in public administration**

Since many corruption schemes originate at the public-private interface, where public officials can be tempted to accept or solicit bribes from companies or individuals that they are normally meant to serve, addressing shortcomings in private-sector ethics needs to be coupled with similar measures targeting the public service. As economic development and the growing industrialization in most countries of the region over the past decades have intensified the contacts between public officials and private sector representatives, public concerns have grown over the potential abuse of these contacts. Consequently, governments from the region increasingly recognize the need to prevent and manage in an unbiased way conflicting situations that may arise between public officials' private interests and public duty.

This task is particularly difficult in smaller countries, where citizens are closely interlinked by kinship or other types of personal relations requiring particular loyalty. In such situations, conflicts of interest are, according to Marie-Noëlle Ferrieux-Patterson from Transparency International Vanuatu, particularly apt to result in unlawful practices. If such an environment is combined with a general lack of understanding of the negative impacts of corruption on the national economy and social welfare, the abuse of public or political functions for private interests is particularly rampant.

Based on country studies, the OECD has developed Guidelines for Managing Conflict of Interest in the Public Service, an international benchmark for comprehensive conflict-of-interest policies. The Guidelines strike a balance between awareness raising, disclosure, management and prohibitions of conflict-of-interest situations. Currently, the OECD develops and tests a toolkit to support the Guidelines' implementation, to allow identifying conflict of interest, and to provide examples and tested solutions to manage them.

While most countries are concerned about conflict of interest in the public service, some are already pioneering in extending such policies to the political sphere. In Hong Kong, China, for instance, conflict-of-interest policies targeting the legislature and other statutory bodies have been developed. This specific regime combines ethical commitment, a code of conduct and a public register of interests as its key pillars. It further foresees measures to sanction misconduct and has been coupled with the introduction of awareness raising and education programs to ensure its effective implementation and proper understanding by concerned persons.

## Curbing corruption in public procurement

General integrity and conflict-of-interest management in public administration serves well to govern conflicts of interest in most public services. It appears insufficient, however, to oversee particularly corruption-prone processes such as public procurement, which, because of the huge financial volumes involved, is one of the top priorities in the region's fight against corruption.

As Michael Stevens from the Asian Development Bank notes, curbing corruption in public procurement must target both the buyer's and the supplier's side. As procurement is a business process and thus follows the rules of the market, a state's regulatory means to promote competition can be used to instill a certain degree of transparency and fairness in procurement. Coupled with penal sanctions and their effective implementation, a government can promote the adoption of preventive mechanisms by the business sector itself.

As neither of the two parties involved in public procurement has a realistic interest in reporting possible fraud, the involvement of an independent third party can be another useful way to integrity in the procurement process and can act as an effective deterrent to corruption. For the execution of this task, various tools have been developed. At the Société Générale de Surveillance—a company specializing in inspection, verification, testing and certification—such practices include the evaluation and risk profiling of procurement entities to prevent any potential outbreak of corruption; primary checking of contract execution during the project implementation; and ex-post evaluations.

## Whistleblower protection mechanisms

Balancing integrity mechanisms with effective law enforcement is key to any efficient anti-corruption strategy. Today's main challenge to effective prosecution of corruption is acquiring information about committed crimes and their actors. Particularly in corruption cases, where neither of the two parties involved has an interest in revealing the act and where potential informers are particularly vulnerable to intimidation and fear of retaliation, this difficulty all too often hampers the work of investigators and prosecutors.

This situation can be improved if potential informers, also called whistleblowers, are provided with trustworthy reporting channels and meaningful legal and physical protection. Today, however, very few countries have established legislation that could serve this purpose and encourage whistleblowers to disclose information about illegal activities. Reasons for this include reluctance at the political level in some countries or the image of

disloyalty that is often still associated with whistleblowing, but above all the complexity of the task at hand. As experienced in New South Wales, Australia, dealing with the issue of confidentiality is particularly difficult, as a balance has to be maintained between the need for efficient investigation, for sufficient protection of the informer's identity, and for ensuring the rights of the accused party.

To overcome some of these difficulties, basic legal tools that provide for meaningful legal protection of whistleblowers in terms of employment and legal liability must be coupled with a number of soft factors. These include a general understanding, among employees and the public at large, that whistleblowing is not an act of disloyalty, but serves a good purpose. Potential whistleblowers must further be aware of the reporting channels that they can use, and they must believe that their report will result in appropriate action taken by the informed authority.

Korea's whistleblower and witness protection mechanism addresses these issues through a three-pillar approach: first, it guarantees the confidentiality of the whistleblower's identity and provides for employment protection to prevent discrimination or dismissal at the workplace; second, both mechanisms are enforced by means of disciplinary and penal provisions; third, the whistleblower is granted physical protection if the matter so requires. In addition to these passive incentives, the Korean Anti-Corruption Act also establishes a financial reward system for whistleblowers.

Indian law also contains regulations on whistleblower protection, consisting essentially of a guarantee of confidentiality and certain provisions for the physical protection of the witness and for awards. The field of application of these regulations is limited to tax and customs fraud, however. A recent prominent case has shown fatal weaknesses of the current mechanism and put pressure on the Government to develop a more comprehensive system. As a respective bill has been pending in parliament for several years, the government, in reaction to these pressures, enacted an interim regulation in April 2004.

## **Building expertise in forensic accounting**

If an alleged case of corruption is reported, a number of difficulties in obtaining evidence, which are inherent to corruption and other types of economic crime, further impede effective investigation and prosecution. Today, complex financial transactions and organizational structures, particularly those of companies operating internationally, can be abused to camouflage illicit activities.

In such situations, forensic accounting—the use of accounting techniques to decipher accounts and financial transactions for the sake of criminal

investigation—is a key tool in detecting fraud and securing evidence. This type of expertise is badly needed in most countries around the world, including the Asian and Pacific region, where law enforcement in many countries is struggling with an important lack of manpower and resources and where the capacity and knowledge of prosecutors in reading financial statements, understanding accounting practices and detecting financial fraud is still inadequate. To remedy these deficiencies, the Malaysian Anti-Corruption Agency and the MARA University of Technology, Malaysia, have jointly developed a forensic accounting training program, which may serve as a useful example for other countries planning to engage in similar endeavors.

## Improving procedures of mutual legal assistance

Modern means of travel and communication add to the described difficulties and obstacles to investigating and prosecuting corruption, as criminals can take advantage of these to disguise and divert financial transactions, store illicit assets and hide from prosecution in foreign jurisdictions. On the other hand, criminal prosecution remains subject to national jurisdiction and law enforcement agencies are tied by national boundaries.

The only way to collect evidence from foreign jurisdictions or to recover assets stored in foreign banks is via mutual legal assistance procedures. This is usually time-consuming and often fruitless, however, due to today's inadequate international framework and practices, lack of respective treaties and agreements, unclear regulations on responsibilities and procedures within states, and differences in legal systems, procedures and traditions. As the Chairman of Pakistan's National Accountability Bureau, Lt. Gen. Hafiez, explained, these problems are even incurred when it comes to repatriating proceeds.

Given the pace at which international agreements in general are concluded, a comprehensive solution to these problems is not in sight. Some of the hurdles may yet be overcome by modifying the day-to-day practice of investigators and prosecutors, as Martin Polaine experienced during his professional experience as a Senior Crown Prosecutor in the United Kingdom. One of his advices is to avoid or reduce the necessity to gather evidence abroad by exploiting parallel jurisdiction: if the witnesses and other evidence, as well as the defendant, are to be found in a certain country, it is usually most efficient to hold the trial there, as this avoids or reduces the necessity to request legal assistance from elsewhere. Other elements, such as the efficiency of law enforcement agencies in the involved countries, also need to be considered when taking this strategic decision. If however the recourse to a formal request for legal assistance is unavoidable, the success of such a request depends largely



on formal matters. Obstacles in this situation arise essentially from differences in the legal provisions governing the taking of evidence.

With a view to preventing such pitfalls, the exploitation of informal channels instead of or in preparation for a formal request has proven particularly useful, quick and effective. Good personal relationships with counterparts in foreign jurisdictions might help open doors when formal requests are required, as Bernard Bertossa, former Prosecutor General of Geneva, Switzerland, pointed out. The value of such personal relationships at the expert level can also not be overestimated when the political climate between states hinders swift provision of legal assistance. In this context, regional groups such as the ADB/OECD Initiative, as well as cooperation with other expert groups as the OECD Working Group on Bribery and relevant ADB programs, provide for forums where such informal contacts can begin or be strengthened.

## Outlook

Overall, the Kuala Lumpur conference showed that the fight against corruption enjoys high priority among governments and societies in Asian and Pacific countries. As highlighted in this publication, the twenty-three members of the ADB/OECD Initiative have engaged in a broad range of legal and institutional anti-corruption reforms to implement the Initiative's Action Plan. However, the battle against corruption is far from being won, and a number of major challenges yet lie ahead in the Asian and Pacific countries' efforts to fight corruption.

While the integrity of public service is a priority in most countries in the region, the effectiveness of their respective rules will depend on the rigidity with which they are implemented and enforced. Also, as the Kuala Lumpur conference recognized, problems arising from conflict-of-interest situations remain largely unsolved, and certain crucial groups, such as the judiciary or politicians, are not covered by integrity rules. Consequently, political corruption remains an issue of great relevance throughout the region. Finally, integrity, transparency and accountability in the private sector has been addressed by only a few countries and remains an area that requires more attention in the region.

With regard to law enforcement, loopholes in the countries' bribery and anti-money laundering legislation continue to exist, the interpretation of certain regulations is considered ambiguous, and some forms of corruption are not yet covered. Only a few countries' money laundering legislation provides for corruption as a predicate offence, and in many countries legal persons cannot

be held responsible for acts of corruption. The Kuala Lumpur conference also recognized that appropriate whistleblower and witness protection laws and programs are often nonexistent, and that Asian and Pacific countries continue to suffer from inadequate frameworks for mutual legal assistance and the repatriation of the proceeds of crime. At the same time, countries have undertaken important efforts to streamline investigation and prosecution by establishing anti-corruption units within law enforcement or specialized anti-corruption agencies. However, coordination between these bodies and other involved public actors, such as the police or public prosecutors, and reform in these latter institutions, has not been paid sufficient attention. The effectiveness of law enforcement further continues to be hampered by an important lack of knowledge and resources. Increased efforts by countries in this area will be necessary to enhance the capacity of law enforcement agencies, through training in modern investigation techniques such as forensic accounting.

In terms of opening the fight against corruption to the public, the region has over recent years observed a growing number of partnerships between governments and civil society organizations, business associations and the media. However, certain central preconditions, such as adequate access to information legislation, are not always available in some countries and the governments' overall policies sometimes still reflect caution about the extent of civil society involvement in the anti-corruption reform process.

To address these challenges and further advance the region's anti-corruption agenda, countries can benefit from regional forums such as the ADB/OECD Initiative, through which experts and policy makers can exchange experience, evaluate the impact of reforms and benefit from various capacity building instruments. Cooperation with non-governmental actors from the private sector and civil society must be further strengthened so as to make use of all available resources in the region. Finally, continuous involvement and active support from the international development partner community remains essential for the success of the reform in which Asian and Pacific countries have engaged.

# Keynote Speech

■ Dato' Seri Abdullah Bin Haji Ahmad Badawi  
Prime Minister of Malaysia

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**T**an Sri Samsudin Osman, Chief Secretary to the Government of Malaysia; Mr. Kiyotaka Akasaka, Deputy Secretary-General, Organisation for Economic Co-operation and Development (OECD); Mr. Gerry van der Linden, Vice President, Asian Development Bank (ADB); Dato' Zulkipli Mat Noor, Director-General, Anti-Corruption Agency (ACA) of Malaysia; Excellencies, distinguished delegates, ladies and gentlemen.

On behalf of the government and people of Malaysia, I would like to welcome all delegates and guests, especially those who have traveled from all parts of the Asia-Pacific region to be here today. As a country that has always striven to uphold the principles of democracy, justice and integrity, Malaysia is honored to host this year's regional Anti-Corruption Conference for Asia and the Pacific.

I would like to congratulate ADB, the OECD and the Anti-Corruption Agency of Malaysia for jointly organizing this important event—one that brings together politicians, officials, anti-corruption experts and leaders of civil society in order to discuss, share and deliberate on ways and means to effectively combat corruption in the Asia-Pacific region in the new millennium.

This conference is the fourth in a series of successful regional anti-corruption conferences, where many important milestones have been achieved. One such milestone is the endorsement of the regional Anti-Corruption Action Plan for Asia-Pacific by seventeen participating governments during the last conference in Tokyo in 2001. I am confident that this year's conference will continue to forge new approaches to strengthen our resolve to fight corruption and enhance integrity in all spheres of life. As an implementer, I am grateful that with such internationally endorsed strategies and action plans, we now have even more weapons in our arsenal with which to confront global and national corruption decisively.

Ladies and gentlemen, looking around this afternoon, I feel enormously encouraged that there are individuals and organizations all over the world that

are sufficiently concerned about the debilitating effects of corruption on the human condition. It is people like yourselves who are making a positive difference to the lives of citizens in your country and throughout the world. I know I am preaching to the converted when I say that corruption, both grand and petty, is mankind's most deadly social disease, which must be cured.

Efforts to combat corruption have never been and will never be easy. Indeed, it is easier to ignore it, to sweep it under the carpet, or to even benefit from it, but confront it we must, not just for the simple reason that corruption is morally wrong, but because corruption exacts a heavy toll on a nation's social, political and economic well-being.

At a fundamental level, corruption is damaging because decisions are driven by ulterior motives, with no concern for consequences to the wider community. Corrupt acts undermine good governance, fundamentally distort public policy, lead to the misallocation of resources and harm the growth of the public and private sectors.

Corruption is also the single greatest obstacle to economic and social development. It undermines development by compromising the rule of law and weakening the institutional foundations upon which economic growth depends. If there is a perception that corruption in a country is dire, and the cost of doing business has therefore escalated, that country will find its foreign and domestic investors shying away from further investing and doing business in the country. In this instance, economic expansion is stalled, competitiveness drops, incomes fall, jobs are lost and the people suffer.

Ladies and gentlemen, in order to combat corruption effectively, we can no longer afford quick, ad-hoc short-term solutions. Rather, we must fight it comprehensively on all fronts, with a myriad of tools. The fight against corruption must necessarily begin with inculcating the right attitude and values in all of society, particularly among those who wield power.

Inculcating values, attitudes and behaviors based on the principles of integrity and justice are arguably the most important elements in the fight against corruption. Values and attitudes are shaped by an individual's upbringing and his or her life experiences. In that sense, the fight against corruption is a long-term battle, and begins with the family unit. Knowingly or unknowingly, parents pass down their values to their children. It is, therefore, crucial that parents themselves lead an honest life based on principles of justice and integrity, so that they can be an example for their children to follow.

Meanwhile, the education system, which shapes and moulds our youth, can also play a vital role in instilling good values. In this case, the Malaysian government will be reintroducing civics classes in the school curriculum for all

students in the hope of instilling a lifetime of good values and ethical behavior in our children.

However, merely appealing to a person's sense of right and wrong may not be sufficient to fight corruption. I believe that to be successful, we must always consider a systems-wide approach. Our actions, especially in the area of good governance and anti-corruption, should not only be aimed at instilling the right values and attitudes, but should go beyond that to strengthening processes and institutions, as well as punitive measures.

In Malaysia, we are continuously looking at ways and means to enhance the pillars of integrity in order to work toward a corruption-free society. Personally, I have always been a strong believer in the need to promote good governance. As many of you may be aware, in the past month I have vigorously pursued efforts to improve the public service delivery system to make it more efficient, transparent and accountable.

The benefits of an improved public service delivery system are wide-ranging, with positive effects on the economy through a reduction in the cost of doing business. Through better allocation of resources, and through shorter time needed to complete a transaction, thus enhancing the delivery of services, both big business and the man on the street can benefit. But equally, if not more important, a better-functioning public service delivery system will promote integrity by reducing opportunities for corruption to occur. In short, by improving public service processes and procedures, loopholes and gaps in the system, which allow corruption to take place, can be eliminated.

Beyond this, sound institutions are critical in the fight against corruption. My experience as a politician and civil servant tells me that many of the problems associated with corruption have their origin in flawed or compromised institutions. It is out of this conviction that I recently announced that Malaysia would implement a national integrity plan, which is a comprehensive framework in which best practices, new mechanisms, committees and structures will be formalized and implemented to promote good governance, particularly within the public sector.

To ensure that institutional capacity building has a sound ethical foundation, the Malaysian government is also supporting the establishment of a national institute for public ethics, which will be the prime mover of the national integrity plan. This institute will coordinate and undertake research aimed at promoting good governance, accountability, transparency and efficiency in the public service. At the same time it will also provide training courses and opportunities for inter-agency discussions on ways to improve the quality of service and efficiency in both the public and private sectors.

What I have hitherto outlined are preventive measures in fighting corruption. If implemented effectively, I believe they can curb graft, reduce incidences of bribery and monitor potential abuses of power. Yet without the deterrence provided by enforcement, these measures will not comprehensively eradicate corruption. We need to ensure that punitive actions are as effective as preventive measures. National anti-corruption agencies must be allowed to operate without fear or favor and empowered to investigate speedily and comprehensively. For some, values and principles are insufficient. Only the fear of being caught and punished can stop them.

Ladies and gentlemen, I believe that the fight against corruption has to be a national effort. Members of the public must be educated about the evils of corruption and co-opted into the fight against this scourge. Just as we clap with both hands, we need to acknowledge that it is not only the bribe taker, but also the bribe giver, that is at fault. My government's effort to eradicate corruption will come to naught if the public compromises the integrity of government by offering financial and other such inducements.

Not only must the public not offer bribes, they must be proactive in reporting instances of corruption. Every citizen must be the eyes and ears of the government in detecting and exposing corruption. Let those who partake in graft feel unsafe and insecure knowing that they are being watched. In this regard, the Government will ensure that there are easy and convenient channels provided to the public to report cases of corruption, and that protection is given to those who come forward to report cases.

Ladies and gentlemen, with technological advancements in information and communications technology, and greater cross-border movement of ideas, people and finance, national borders are increasingly porous, and corruption too has taken on a more international flavor. For example, the evidence of corrupt acts in one country can swiftly and neatly be hidden away in secret bank accounts in another country. This is but one example that points to the serious need for greater international cooperation to contain the spread of corruption. After all, we already have international cooperation in tackling piracy, drugs, and transnational crime; it is only logical that we cooperate to stamp out corruption as well.

Recognizing the need for greater investigative expertise and skills to clamp down on the rise of corruption, my Government has recently approved a MYR17 million allocation for the creation of an anti-corruption academy under the purview of our ACA. It will be the first of its kind in the region, and we would like to offer the academy as a regional center for anti-corruption capacity-building—promoting best practices in investigations, in monitoring and enforcement, and in newer areas such as forensic accounting and forensic

engineering. It is our sincere hope that countries around the region will support this effort by sending their representatives to the academy to discuss, share, and learn from each other new methods and tools to fight corruption.

Malaysia remains committed to the cause of reducing and eradicating corruption, and we welcome any initiative that seeks to advance justice and integrity in all spheres of public life to demonstrate our strong commitment, especially at the international level. I would like to announce that the Malaysian Government will be signing the United Nations Convention against Corruption later this month in Mexico. The general areas that are covered by the convention include criminalization of bribery; prevention of corruption and promotion of integrity; and international cooperation, including in asset recovery and extradition, as well as cooperation in implementation of the convention itself.

Ladies and gentlemen, I believe expectations for this conference are fairly high. This is necessary so that much of our work will have a direct and indirect impact on the lives of so many people throughout the region. We can, and we must, do more to take on corruption in a clear and resolute manner.

I would like to wish all delegates and participants here a productive and successful conference. I hope this year's conference will result in greater understanding among all groups of the challenges that lie ahead and of the need for greater collaboration in tackling the menace of corruption. On that note, it is my honor and privilege to officially declare the 4th Regional Anti-corruption Conference for Asia and the Pacific open.

# Opening Remarks

■ Geert H. P. B. van der Linden  
Vice President  
Asian Development Bank

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**Y**our Excellency, the Honorable Dato' Seri Abdullah Haji Ahmad Badawi, Prime Minister of Malaysia, members of the diplomatic corps, ladies and gentlemen:

The Asian Development Bank (ADB) is very pleased to participate in this regional anti-corruption conference that brings together interested officials of member countries of the Asian Development Bank (ADB)/Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative, anti-corruption experts, senior government officials, representatives from the international community, and civil society and non-governmental organizations. Your presence today demonstrates the strong concerns and commitment of countries in the region to fight this great hindrance to economic and social development—corruption.

Successful anti-corruption programs depend on publicly available information, political leadership and collective action. The Government of Malaysia is an example of a country seriously advocating and implementing concrete reforms to curb corruption. The Prime Minister's interventions in this area since taking office are yet another proof of these intensified efforts.

## Corruption in the region today

Several reports suggest that corruption has worsened in most countries in Asia. One of the reasons is that people have become more conscious of and sensitive to corruption. They are more aware of the existence of corruption, of the damage it can cause, and of its negative impact on their lives. Awareness has become widespread and increasingly governments and business groups are beginning to do something about it. Fighting corruption is no longer just a moral issue. It has become a major tool in the fight against poverty.



Experience from Asia shows that corruption harms the economy, undermines the rule of law and weakens public trust in government. It is estimated that one third of public investment in many Asian and Pacific countries is squandered on corruption. Studies have shown that corruption can cost up to 17% of a country's gross domestic product, robbing the population of precious resources that could be used to reduce poverty and promote sustainable development. In Asia, it is estimated that governments pay between 20% and 100% more for goods and services due to corrupt procurement practices.

Because of their greater reliance on public services, the poor suffer the most. Corruption imposes a costly burden on businesses, with negative implications for economic growth and the creation of jobs. Because bribery and other unethical behavior undermine development efforts, governments must act against corruption to promote prosperity.

## **Countries respond to corruption**

A wave of anti-corruption sentiment has swept through Asia and the Pacific, and many governments have responded with resolve. For example, the Philippines has approved a law against money laundering. Hong Kong, China has placed anti-corruption curricula in schools to educate youth about corruption. The People's Republic of China is actively prosecuting senior officials for corruption. Korea has approved whistleblower legislation. Nepal has put in place a National Vigilance Center. These are all good examples of what can and must be done.

## **The Anti-Corruption Initiative**

Two years ago, 17 countries of this region demonstrated their commitment to combat corruption by endorsing the ADB/OECD Anti-Corruption Initiative Action Plan. The Initiative supports participating countries in developing the appropriate legislation and institutions for a sustained fight against corruption. By bringing together major stakeholders and by pooling efforts from countries of the region, the Initiative promotes international cooperation and the involvement of business, trade unions and non-governmental organizations.

The group has now grown to 21 countries—Australia; Cambodia; Hong Kong, China; and the Republic of Kazakhstan endorsed the Action Plan after the Tokyo Conference in December 2001—working together to undertake concrete reforms to fight corruption. Most of these countries have identified

and discussed their priority areas of reform and have submitted progress reports. You have heard and will hear of these accomplishments during the Conference.

## **Concrete actions taken by the Asian Development Bank**

As a multilateral agency, we at ADB work with 37 developing member countries. In all our loan and technical assistance support to our members, we stress the importance of good governance.

ADB has well-publicized governance and anti-corruption policies. We recently adopted a Policy Against Money-Laundering and Anti-Terrorism that will help us to assist developing member countries in combating money laundering.

Our anti-corruption policy is designed to reduce the burden that widespread, systemic corruption exacts upon the governments and economies of the Asian and Pacific region.

Let me give you one concrete example of ADB's work: In Nepal, we are working to strengthen institutions to improve government effectiveness and reduce corruption, while raising awareness among citizens. An amendment to the Anticorruption Bill required that an Anticorruption Unit be created in the Prime Minister's Office. As part of its implementation of this Bill, the Government has established a National Vigilance Center.

ADB also provides extensive support to improve public procurement, accounting and auditing, corporate governance and legal and judicial reform.

Today's conference aims to continue and deepen the countries' fight against corruption in the region. It provides a unique opportunity to exchange ideas, discuss valuable experiences and constraints, and learn from each other's successes and failures in implementing the Action Plan. Among the specific objectives of the Conference:

- Develop concrete tools to help countries build capacity and strengthen their knowledge of the issue;
- Strengthen partnerships among various governments;
- benchmark the legal and institutional anti-corruption framework of endorsing countries; and
- Identify and recommend training in specific areas.

ADB together with OECD is committed to ensure that these results are attained in the coming years.

## **The years ahead: strong partnership to fight corruption will continue**

The commitment demonstrated in the region gives me cause to be optimistic. The 21 member countries acting together constitute an important regional partnership working for a common cause. We at ADB attach a great importance to such an undertaking.

By forging a strong partnership with the OECD, an ally in our common fight, we at ADB are playing our role in this common endeavor. As partners in this initiative for the past four years, we have benefited from OECD's knowledge products. We shall continue to nurture our partnership with them and stand ready to assist governments in the fight against corruption. I would also like to thank all the development partners that have supported this initiative from the beginning and recognize their important contributions.

The Government of Malaysia has been an active player since the Initiative's inception four years ago. Today, it has strongly signaled to this gathering and to the world, its serious commitment to fight corruption.

On behalf of the Asian Development Bank, I thank the Government of Malaysia for hosting this important event and for the invaluable assistance and support of the Anti-Corruption Agency of Malaysia. I am confident that the fruitful discussions will spur more and better collaboration between member countries and anti-corruption experts, leading to a stronger will and a unified goal to fight corruption in the region.

# Opening Remarks

■ Kiyotaka Akasaka

Deputy Secretary-General

Organisation for Economic Co-operation and Development

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Prime Minister, your Excellencies, distinguished guests:

It is my pleasure to welcome you to Kuala Lumpur and to the fourth regional conference of the Asian Development Bank (ADB)/Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative for Asia and the Pacific. On behalf of the OECD, I would like to express my gratitude to the Government and the Anti-Corruption Agency (ACA) of Malaysia for hosting this important event. It is a great honor to have the Prime Minister of Malaysia here with us. I also wish to express my sincere gratitude to ADB and its staff. ADB has been an outstanding collaborator and partner from the very start of the Anti-Corruption Initiative four years ago.

Over the last few years, the OECD has focused its attention on corruption and bribery and on the damage these practices cause to our societies and our welfare. The Organisation considers taking action against corruption and bribery as one of its priority tasks. A prime example of how our member countries have transformed their commitment into practice is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The monitoring and peer review process attached to the Convention ensures compliance by parties.

Cooperation is a precondition for progress. The OECD attaches great importance to collaboration with countries outside the OECD region, in particular the Asian and Pacific countries. In fact, cooperation and the sharing of knowledge and experience are core values of the Organisation. I am delighted that your countries in Asia and the Pacific have adopted an approach similar to the one developed by parties to the OECD Convention. The OECD is committed to supporting this endeavor in partnership with ADB within the framework of the Anti-Corruption Initiative for Asia and the Pacific.

The Anti-Corruption Initiative provides a policy forum in which to exchange experiences and enhance regional expertise. We recognize that every country will progress differently, according to its particular situation and needs. The Initiative recognizes the value of providing for country-specific approaches.

Only two years after the Initiative's key instrument—the Action Plan—was endorsed in Tokyo, the Initiative is already bearing fruit. The adherence of a growing number of countries to the Action Plan testifies to the attractiveness of the Plan's core principles. The core principles include country ownership, regional cooperation, and the involvement of all relevant groups in society. In this context, I take pleasure in welcoming today two new members to the Anti-Corruption Action Plan, namely Australia and Hong Kong, China. I warmly congratulate the two countries for taking this important step.

The stocktaking exercise discussed this morning shows us how far the legal and institutional frameworks to stem corruption and bribery have evolved. Furthermore, it demonstrates the extent to which experience and good practices are spreading throughout the region. New institutions are inspired by and designed to emulate successful models of neighboring countries. We are also seeing a rise in bilateral and multilateral cooperation schemes. These prevent money laundering, enhance transparency in public procurement, and facilitate international legal assistance.

Finally, I would like to mention that the Initiative is assisting countries in capacity building, so that they may better meet the Action Plan's objectives. For example, a series of training seminars was started in India earlier this year on the topic of effective corruption prosecution.

Our common goal is to liberate our societies from the burden of corruption, and enormous progress has already been made in setting up appropriate institutions and providing a comprehensive legal framework. I warmly congratulate the countries for these achievements. However, the battle against corruption in our societies is not yet won. In many areas, the effective implementation of anti-corruption measures still lies ahead.

Cooperation between countries and with all social partners in the region is key if we are to sustain our present efforts and further develop effective anti-corruption measures. The ADB/OECD Initiative is an integral component of current international developments. In particular, we warmly welcome the United Nations Convention against Corruption, which is scheduled to be signed next week in Mexico. The OECD, together with ADB, is looking forward to contributing to its implementation through mechanisms such as the Asia-Pacific Initiative.

I would like to thank the OECD and ADB's partners for their support: the Pacific Basin Economic Council, the Swiss Agency for Development and Cooperation, Transparency International, the United Kingdom Department for International Development, the United Nations Development Programme, the United States State Department and the World Bank. We count on your valuable contributions and support, as we count on the determination of the countries of the region, to continue cooperating toward our common goal of eradicating corruption.

During this conference, exchanges of experience will go hand in hand with capacity building. I am convinced, ladies and gentlemen, that such an impressive assembly of experts from governments, specialized anti-corruption institutions, the business sector and civil society, will be able to derive great mutual benefit from this forum. Your personal experiences here will also be to the profit of your countries and the entire region.

I commend you all for your active participation in this conference and sincerely encourage you to continue in your efforts to take action against corruption.

# CHAPTER 1

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## *Anti-Corruption Strategies of Asian and Pacific Countries*

- A. Australia's Approach to Combating Corruption
- B. Combating Corruption in the Philippines
- C. Nepal's Efforts to Control Corruption
- D. Anti-Corruption Strategy of the Hong Kong  
Special Administrative Region of the People's  
Republic of China

# A. Australia's Approach to Combating Corruption

■ **Julie Boulton**

Australian Agency for International Development

**Felicia Johnston**

Commonwealth Attorney-General's Department, Australia

**Kate Johnston**

Australian Agency for International Development

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Corruption presents a challenge for all countries. It must be fought with a holistic approach. No single agency, and no single country, can tackle it alone. Australia is committed to fighting corruption at all levels. Continual reform in all sections of society and government strengthens Australia's defenses against domestic corruption. Australia strongly supports key regional and international anti-corruption instruments and activities. Australia is also active in assisting neighboring developing countries with their efforts to combat corruption.

Part I of this paper outlines elements and examples of Australia's domestic anti-corruption framework corresponding to the principles enshrined in the ADB/OECD Anti-Corruption Action Plan for Asia and the Pacific. Part II discusses Australia's contribution to the fight against corruption at the regional and international levels. It provides a short introduction on Australia's support for regional and international anti-corruption instruments and highlights Australia's direct efforts to assist developing countries in the Asia and Pacific region to combat corruption.



## Part 1: Australia's Domestic Anti-Corruption Framework

### PILLAR 1: DEVELOPING EFFECTIVE AND TRANSPARENT SYSTEMS FOR PUBLIC SERVICE

Australia has developed detailed systems for ensuring a transparent and effective public service. The Public Service Act 1999<sup>1</sup> and the Financial Management and Accountability Act 1997<sup>2</sup> are particularly notable.

#### Integrity in public service

In recent years, Australia has undertaken a series of reforms to the Australian Public Service (APS) to ensure that it is effective and transparent. The Public Service Act 1999 establishes the APS Values<sup>3</sup> and the Code of Conduct<sup>4</sup>. All APS employees are required to uphold the APS Values and are bound by the Code of Conduct. These constitute the central rules governing APS employee behavior. For example, the APS Values specify certain requirements for hiring employees in the APS, including the basing of employment decisions on merit; the equitability of employment; the diversity and freedom from discrimination of workplaces; and provision of a reasonable opportunity for all eligible members of the community to apply for an APS position. The Public Service Act 1999 also provides that ministers cannot direct the exercise of an agency head's employment powers.

The Code of Conduct also specifies certain requirements to prevent corruption, including the stipulation that APS employees disclose, and take reasonable steps to avoid, any conflict of interest (whether real or apparent) in connection with APS employment. Agency heads, statutory office holders and Senior Executive Service employees in the APS are also required to declare their private interests. A number of other statutes supplement the Code, including the Australian Securities and Investment Commission Act 2001<sup>5</sup> and the Commonwealth Authorities and Companies Act 1997<sup>6</sup>, which include additional requirements for disclosing conflicts of interest.

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<sup>1</sup> <http://scaleplus.law.gov.au/html/pasteact/3/3322/rtf/PublicService1999.rtf>

<sup>2</sup> <http://scaleplus.law.gov.au/html/pasteact/2/3068/rtf/FinManAcc97.rtf>

<sup>3</sup> The APS Values are available online at [www.apsc.gov.au/values](http://www.apsc.gov.au/values)

<sup>4</sup> The APS Code of Conduct are available online at [www.apsc.gov.au/conduct](http://www.apsc.gov.au/conduct)

<sup>5</sup> <http://scaleplus.law.gov.au/html/pasteact/3/3449/rtf/ASIC2001.rtf>

<sup>6</sup> <http://scaleplus.law.gov.au/html/pasteact/2/3067/rtf/CwlthAuthComp1997.rtf>

Sanctions are imposed for breaches of the Code of Conduct, including termination of employment, reduction in classification, re-assignment of duties, reduction in salary, deductions from salary (by way of fine) and reprimand. Each agency head must establish procedures to determine a breach of the Code of Conduct. The Public Service Act 1999 also protects whistleblowers (considered further below).

Discretionary decision-making powers in the APS are guided by the APS Values and Code of Conduct. In addition, some specific statutory oversight mechanisms apply to certain employees with discretionary authority. For example, the Australian Securities and Investment Commission (ASIC) Act 2001 regulates the structure, appointment and termination of ASIC staff with discretionary authority, including a limitation of their term of office to five years.

APS employee remuneration is determined through a classification structure and agency bargaining arrangements. More information on public service salaries can be found on the Department of Employment and Workplace Relations website: [www.dewr.gov.au](http://www.dewr.gov.au).

Oversight of the Public Service at the Commonwealth level is provided by a range of agencies and processes, including the Commonwealth Ombudsman, the Auditor-General, the judicial review process, and the Australian Federal Police (AFP).

## **Accountability and transparency**

The Financial Management and Accountability Act 1997 sets out requirements for agencies for the management and accountability of government funds. Australia has detailed transparency and reporting requirements for the budget, taxation and government expenditure. Australia has implemented a freedom of information scheme that ensures the highest level of public access to government decision-making processes, which is supplemented by extensive government information available on the Internet.

The Commonwealth Procurement Guidelines<sup>7</sup> detail the reporting of publicly available business opportunities and contracts, agency agreements and standing offers to the value of AUD2,000 (USD1,400) or more. The Department of Finance and Administration is reviewing the Guidelines to update and more clearly articulate the procurement framework. Implementation of any changes is subject to ministerial agreement.

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<sup>7</sup> The Guidelines are available online at [www.finance.gov.au/ctc/publications/purchasing/cpg/commonwealth\\_procurement\\_guide.html](http://www.finance.gov.au/ctc/publications/purchasing/cpg/commonwealth_procurement_guide.html).

The Corporate Law Economic Reform Program (CLERP) was initiated in 1997 by the Australian Government to provide for ongoing review and reform of Australia's corporate and business regulation. CLERP is aimed at ensuring that corporate and business regulation is modern and responsive, and promotes business activity.

## **PILLAR 2: STRENGTHENING ANTI-BRIBERY ACTIONS AND PROMOTING INTEGRITY IN BUSINESS OPERATIONS**

Australia has a wide range of anti-bribery and money-laundering initiatives in place. These initiatives are actively investigated and enforced. Australia has also undertaken a number of measures to promote corporate responsibility and accountability on the basis of international standards.

### **Effective prevention, investigation and prosecution**

All Australian jurisdictions have criminalized bribery and money laundering. The Commonwealth Criminal Code<sup>8</sup> also includes an extraterritorial offense of bribing a foreign public official, with a penalty of up to ten years' imprisonment. This offense applies where the conduct occurs wholly or partly in Australia, or wholly or partly on board an Australian aircraft or ship, or wholly outside Australia, and where the person committing the offense is an Australian citizen or resident, or a corporate body incorporated under Australian law.

In most cases, Australia's corruption offenses are supported by extradition and mutual assistance arrangements, which Australia has in place with a wide range of countries. Australia is also able to consider requests for mutual assistance from all countries.

Australia is a founding and active member of the Financial Action Task Force on Money Laundering and played a major role in drafting the 40 Recommendations (which form the basis of internationally accepted anti-money laundering standards). Australia was among the first countries to enact comprehensive anti-money laundering legislation and to put in place a robust

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<sup>8</sup> <http://scaleplus.law.gov.au/html/pasteact/1/686/rtf/CriminalCode1995.rtf>

regulatory framework (through the Financial Transactions Reports Act 1988<sup>9</sup> and the Proceeds of Crime Act 2002<sup>10</sup>).

Australia has a specialized financial intelligence unit, the Australian Transaction Reports and Analysis Centre (AUSTRAC), which provides extensive advice to regional countries, and which maintains an excellent reputation internationally. AUSTRAC has a regulatory and an intelligence role ensuring that a range of bodies complies with the reporting requirements of the Financial Transaction Reports Act 1988. It also collects and analyzes information, which may be provided by AUSTRAC to Australian law enforcement agencies and the Australian Taxation Officer.

ASIC is responsible for the enforcement and regulation of company and financial services laws. It has significant powers to investigate and obtain evidence and to compel assistance or evidence to be provided under the Australian Securities and Investment Commission Act 2001. State and Territory police services and the AFP are also closely involved in investigating corruption-related offenses. In some cases, a witness protection program may be available.

The Commonwealth Director of Public Prosecutions, which is responsible for all prosecutions at the Commonwealth level, is independent, well resourced and staffed by trained and experienced prosecutors. This is similarly the case for state and territory public prosecution bodies. A number of national and international inter-agency cooperation agreements (for example, on police-to-police cooperation) have been developed to enhance investigations and prosecutions.

## **Corporate responsibility and accountability**

A number of Australian instruments and bodies promote, govern and enforce corporate responsibility and accountability to ensure integrity in business operations. Relevant statutes include the Trade Practices Act 1974<sup>11</sup>; the Corporations Act 2001<sup>12</sup>; and the Income Tax Assessment Act 1997<sup>13</sup>.

The Trade Practices Act 1974 addresses anti-competitive and unfair market practices and is monitored and enforced by the Australian Consumer and Competition Commission and ASIC. The Corporations Act 2001 governs the operations of companies in Australia from inception to insolvency. It requires

<sup>9</sup> <http://scaleplus.law.gov.au/html/pasteact/0/59/rtf/FTR1988.rtf>

<sup>10</sup> <http://scaleplus.law.gov.au/html/pasteact/3/3552/rtf/ProceedsCrime2002.rtf>

<sup>11</sup> <http://scaleplus.law.gov.au/cgi-bin/download.pl?/scale/data/pasteact/0/115>

<sup>12</sup> <http://scaleplus.law.gov.au/cgi-bin/download.pl?/scale/data/pasteact/3/3448>

<sup>13</sup> <http://scaleplus.law.gov.au/cgi-bin/download.pl?/scale/data/pasteact/2/3036>

companies to prepare, publish and independently audit company accounts, in accordance with detailed accounting standards; disclose financial and directors' reports; and lodge annual returns. Significant penalties are imposed for failing to comply with these reporting requirements. The Income Tax Assessment Act 1997, by disallowing tax deductibility of bribes, ensures that bribery receives no indirect support.

Relevant bodies that regulate the behavior of companies include ASIC, the Australian Stock Exchange (ASX), and the Financial Reporting Council. ASIC promotes good corporate governance through monitoring, enforcing and administering compliance with the Corporations Act 2001. ASIC oversees the operations of listed companies and can investigate and prosecute companies for breaches of the Corporations Act 2001; ASIC also contributes to the reform of law on corporate governance. The ASX has issued Corporate Governance Guidelines, which are best practices to which listed companies should adhere. While the Corporate Governance Guidelines are non-binding, companies must explain to ASX any failures to comply with the Guidelines.<sup>14</sup> The Financial Reporting Council is an independent authority with responsibility for policy and direction setting for accounting standards in Australia. The Financial Reporting Council has responsibility for the Australian Accounting Standards Board and the Auditing and Assurance Standards Board.

### **PILLAR 3: SUPPORTING ACTIVE PUBLIC INVOLVEMENT IN ANTI-CORRUPTION EFFORTS**

Australia supports active public involvement in anti-corruption efforts. Non-governmental Organizations (NGOs) are involved in a range of activities addressing corruption in Australia, and independent government bodies provide further opportunities for public involvement.

#### **Public discussion and participation and access to information**

Non-government organizations and Australian companies are actively involved in parliamentary inquiries and committees in Australia. For example, one of the current inquiries of a Committee called the Parliamentary Joint Committee on Corporations and Financial Services concerns some proposed amendments to the CLERP. As of 28 April 2004, 64 people, companies and

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<sup>14</sup> The Guidelines can be found at the ASX website: [www.asx.com.au](http://www.asx.com.au).

organizations had provided submissions to the Committee on the issue. Twice each year, a consultation and discussion session is held with NGOs on the OECD Guidelines for Multinational Enterprises.

ASIC conducts consumer protection work with community and industry groups to raise awareness of the integrity of financial services in Australia. ASIC's website on financial tips and safety checks for consumers<sup>15</sup> makes information available to the community, including news for investors and consumers, warnings, resources and information about ASIC. ASIC also publishes general company information. ASIC's database contains extensive company search-type information about Australia's 1.2 million registered companies. This is publicly available, and includes company, directors' and shareholders' names, charges, annual returns, details of incorporation and the registered office of the company.

Whistleblowers in Australia are protected by the Public Service Act 1999 and regulations that require procedures to be established for investigating reports by whistleblowers. This ensures that allegations are investigated promptly and fairly, and aims to protect whistleblowers from victimization and discrimination. Whistleblowers Australia, a national NGO, also provides support and conducts campaigns on the issue of whistleblowing.

## Part 2: Australia's International and Regional Efforts

### International instruments

Australia dedicates significant resources to the international and regional anti-corruption architecture. Australia signed the United Nations (UN) Convention Against Corruption on 9 December 2003, after playing an active role in negotiations. Australia is now reviewing its compliance with the Convention, with the intention of ratifying as soon as possible.

Australia ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 18 October 1999. Australia received a positive response to its Phase I review, which took place in December 1999. The Phase II review is due to take place in 2005.

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<sup>15</sup> <http://fido.asic.gov.au/fido/fido.nsf>. ASIC also provides information to the public on its website [www.asic.gov.au](http://www.asic.gov.au).

On 31 October 2003, Australia endorsed the ADB/OECD Anti-Corruption Action Plan for Asia and the Pacific, formally announcing this at the Steering Group meeting in Kuala Lumpur, in December 2003. Australia is now formulating its first projects under the Action Plan.

### **The role of Australia's overseas aid program**

Corruption affects all countries. Developing countries are least able to bear its costs. Corruption can affect a development program by distorting the use of development aid (diverting the use of funds intended for development); placing a disproportionate burden on the poor and creating or perpetuating inequity in human, social and/or economic rights (particularly for women); impacting on growth; and/or undermining stability and security of the country and/or region.

Of these, the negative impact of corruption on sustainable economic growth and on stability and security are the most significant for a developing country. This is why helping developing countries in the Asian and Pacific region to improve governance and combat corruption is a high priority for Australia. The overseas aid program, complemented by activities undertaken by a range of other federal government departments and agencies, is a key tool Australia can use to achieve these objectives.

Supporting good governance in Australia's partner countries is one of five guiding themes for the Australian aid program established by Foreign Affairs Minister Mr. Downer in 2002<sup>16</sup>. By June 2004, Australia will have spent approximately AUD1.9 billion in overseas aid during the 2003–2004 financial year. Around 21% of this amount has been allocated to promoting improved governance. Much of this expenditure will both directly and indirectly assist Australia's partner countries to combat corruption more effectively. For example, Australia has provided funding through its overseas aid program to Transparency International to undertake a series of 12 "national integrity system" studies throughout the Pacific.<sup>17</sup> The results of these studies (completed in the first half of 2004) should strengthen the diagnostic basis for future anti-corruption efforts in Pacific island countries.

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<sup>16</sup> AusAID, 2002: Australian Aid: Investing in Growth, Stability and Prosperity ([www.ausaid.gov.au](http://www.ausaid.gov.au))

<sup>17</sup> Refer to Transparency International's website for further information about the NIS concept and to read NIS studies already completed for other countries ([www.transparency.org](http://www.transparency.org)).

## Other regional efforts

Australia is also involved in some efforts to assist regional countries facing economic challenges. At the Australia-Papua New Guinea (PNG) Ministerial Forum in Adelaide last year the Australian and PNG Governments agreed to a number of collaborative initiatives to address the core economic and development challenges facing PNG. These initiatives have been brought together under the Enhanced Cooperation Package. This package aims to strengthen PNG's ability to manage its finances, maintain law and order, tackle corruption and improve border security through the placement of a substantial number of Australian officials and police in line and advisory positions in key PNG agencies. The assistance being provided has been divided into three sectors: economic management and public sector reform, border security, and law and justice.

## Conclusion

Australia adopts a comprehensive approach to combating corruption domestically through Commonwealth, state and territory legislation and operational agencies, and through independent bodies such as ASIC and non-governmental involvement. Future domestic priorities for Australia include ratification of the UN Convention against Corruption; preparation for its Phase II review under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the development of a project under the ADB/OECD Anti-Corruption Action Plan for Asia and the Pacific. Australia will also continue to monitor and evaluate the effectiveness of its current domestic efforts to combat corruption.

Strengthening Australia's regional neighbors in their fight against corruption is a major priority for Australia's overseas aid program. Australia views transparent and accountable government as an important building block for growth, poverty reduction and security.

Australia is committed to continuing its fight against corruption in all its forms and on all levels through a comprehensive anti-corruption strategy.



## B. Combating Corruption in the Philippines

■ Simeon V. Marcelo

Ombudsman of the Republic of the Philippines

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**T**he fight against corruption begins with the humility to recognize that it is a daunting task. Alone, the Government cannot wage a successful war against it. Governments desperately need the help of other sectors of society. The fight against corruption also begins with the realization that, in this fight, one cannot be lukewarm or stand on neutral ground. One is either part of the solution, or part of the problem.

As a long-term approach to the problem of corruption, the Office of the Ombudsman of the Republic of the Philippines invests in youth and value formation programs under the Corruption Prevention Units and Junior Graftwatch Unit Programs. These programs are composed of students and community volunteers who serve as active collaborators of the Ombudsman down to the local *barangay* (administrative village) level—involving the community, as it were, in the fight against graft and corruption in the hope of creating a graft-intolerant culture in the future.

However, the results of value formation programs, information campaigns and education curriculum revisions may not be immediately forthcoming. Thus, considering that corruption is, now more than ever, also an immediate problem, posing a clear and present danger to the very fragile fabric that binds us as a civilized society, the Office also embarks on immediate, time-bound and determinable programs.

Unfortunately, the prosecution of offenders has not served as an effective deterrent. The conviction rate of the Office of the Special Prosecutor (OSP) at the Sandiganbayan (the Anti-Graft Court) is a dismal 6%. Put differently, this means that a high-ranking government official accused of graft and corruption has a 94% chance of walking away scot-free.

The reasons for this shortfall are practical ones, foremost of which is the disabling lack of personnel at the OSP. In 2002, the OSP only had 32 full-time public prosecutors, who handled about 2,500 cases. Further, no training program whatsoever existed for the prosecutors to improve their skills. We have to contend with the reality that many of the accused in the cases before the Sandiganbayan are powerful public officials who have at their disposal the services of highly paid private lawyers. Pitted against them are our prosecutors, who, though not outmatched in dedication, are probably put at a disadvantage by the simple fact that they have to handle so many cases due to lack of personnel. Against this backdrop, therefore, the Office opted to approach the problem of corruption on three fronts:

### **Building up institutional resources**

Early in 2003, lawyers at the Bureau of the Resident Ombudsmen were re-assigned to various offices in order to allow the assignment of eight additional trial prosecutors to the OSP's complement of 32.

In addition, during the Budget Hearings for 2003, the Office made no small matter of its needs before Congress. The Office likewise requested an additional allocation for its current budget from the Chief Executive. Fortunately, President Gloria Macapagal-Arroyo guaranteed and caused the release of additional funds in 2003 to create additional positions for prosecutors.

It must be emphasized that at least three years of relevant experience is required for lawyers to qualify as entry-level prosecutors or investigators. With this requirement and with low government compensation, recruitment of new personnel is all the more difficult. However, with aggressive recruitment, the OSP as of November 2003, has increased the number of its full-time prosecutors to 47. This represents a 46% increase in the Office's prosecutorial complement. In this connection, the Office has also requested the Civil Service Commission to allow, in the absence of qualified applicants, the temporary appointment as investigators or prosecutors of lawyers who lack the required period of relevant experience.

The Office of the Ombudsman's severe lack of field investigators is another problem. Its Fact-Finding Bureau, which is responsible for evidence-gathering, has only 17 investigators. The area offices in Luzon, Visayas and Mindanao have a total of only 12 field investigators and the Office of the Deputy Ombudsman for the Military has only eight. The current lifestyle probe project focuses only on 39 officials of the Bureau of Customs, the Department of Public Works and Highways and the Bureau of Internal Revenue. However, this probe already requires the full-time work of those 17 investigators, leaving

them without any available time to devote to evidence-gathering in the other numerous cases pending with our Office. Fortunately, also in November 2003, the President had also caused the creation of 56 additional positions for field investigators.

## **Strengthening individual and institutional competence**

The Office has coupled the ongoing staff augmentation with personnel training and development for our incumbent prosecutors and investigators. For this purpose, the Office enlisted the help of noted private litigators and retired justices to serve as lecturers. We also asked incumbent justices of the Sandiganbayan to serve as lecturers and also as “judges” in our practice court trials during the training programs.

Institutional reforms and restructuring have also commenced at the OSP to ensure accountability and supervision. At the time I assumed office in October 2002, we had no training program, no system of lawyer supervision and no cases or records. Five prosecution bureaus of 8 to 10 lawyers each have since been formed, each headed by a director. Each prosecution bureau corresponds to a Division of the Anti-Graft Court. The intention is to ensure that each case is handled by a team. Records management as well as routing and docketing systems have also been put in place and strengthened; an administrative office has been created to service the needs of the OSP and enhance its administrative and operational efficiency and independence.

As for our investigators, the indispensability of adequate and well-trained field investigators cannot be overly emphasized. Conviction and effective prosecution begins with fact-finding, evidence gathering and investigation. Thus, the Office of the Ombudsman intends to train its investigators in the latest skills and techniques in field investigation and evidence gathering through cooperative undertakings and seminars with international partner agencies such as Hong Kong, China’s Independent Commission Against Corruption (ICAC). In January 2003, for instance, the Office sent two representatives to a conference sponsored by ICAC and the International Criminal Police Organization (Interpol).

Based on available information, Hong Kong, China’s ICAC has 1,326 personnel for a population of about 6.8 million and maintains eight satellite offices with 18 district offices where the public can report incidents of corruption. In comparison, the Philippines’ Office of the Ombudsman has only 1,141 staff for a population of 82 million with only four satellite offices situated in three major cities. At ICAC, 838 field investigators are tasked exclusively with gathering evidence; this translates to a ratio of one investigator

to every 8,114 citizens. In comparison, the Office of the Ombudsman's 89 investigators provide a ratio of one investigator to 921,348 Filipinos. Further, ICAC's ratio of investigators to Hong Kong's 174,175 public sector employees is 1 : 207, while the Office of the Ombudsman's ratio is 1 : 16,686.

We would like, therefore, to provide training and development opportunities to help our investigators maintain the highest professional standard. The Office of the Ombudsman intends to replicate the training provided by ICAC for its own investigators. If similar facilities cannot be accessed in the short run, we will engage in workshops, training seminars and educational exchanges in the meantime. Indeed, this is a most opportune time, since the Office is in the middle of very promising negotiations with foreign funding agencies—the United Nations Development Programme, the Asian Development Bank, the United States Agency for International Development, the Australian Agency for International Development, and the Asia Foundation—as possible sources of funding for in-house training programs. On December 11–12, 2003, for example, in partnership with the American Bar Association, the Office will hold its first training seminar on financial investigation. This seminar constitutes the first major step toward building and enhancing our technical competence in field investigation.

The Office of the Ombudsman has also strengthened and enhanced its administrative adjudicatory functions. The trials of erring public officials often take so long that the public interest, concern and knowledge is lost and the cases are therefore relegated to history and become—like old news buried in the sands of time—irrelevant and inconsequential to people's everyday lives. Our current efforts intend to remedy this situation. Thus, the Office of the Ombudsman has strengthened, streamlined and rationalized its administrative adjudication procedures, powers and functions. In administrative adjudication, retribution, if warranted, is swift; the effects are immediate; and deterrence is ensured. Furthermore, retribution measures such as suspension from office (even preventive), have high visibility and are therefore immediately noticed and attentively observed by all those concerned. A suspended incumbent immediately feels and experiences the repercussions of his or her illegal act, and those around him or her become privy to the fact that corruption is a high-risk and low-reward undertaking.

Thus, the direction taken by the Office of the Ombudsman would be that all criminal complaints should also be docketed as administrative cases. Then suspension or dismissal from government service, if warranted, can immediately be imposed and implemented.

## Strategic and enhanced private and public sector involvement

Government resources are far too limited compared to the arsenals of combined public and private sector initiatives. The Office of the Ombudsman, therefore, tries as much as possible to involve other offices of the Government and the various sectors of society in its anti-corruption programs. It has become part of the Office's advocacy to make the other branches of government aware of their responsibilities to fight corruption, as well as to challenge them to strengthen the Office as the Constitutional Office primarily tasked to address the problem of corruption.

For example, in trying to generate support for additional funding to augment the number of its prosecutors and investigators, the Office lobbied before Congress and wrote to the President. The Office has also engaged in law reform initiatives and campaigned before the leaders of Congress for the passage of legislation allowing private practitioners to appear as prosecutors before the Sandiganbayan. This would help remedy the Office's severe current lack of prosecutors.

Likewise, the Office has expressed support for the passage of Senate Bill No. 2530, which seeks to upgrade the salaries of its prosecutors and graft investigators. A more competitive salary scale would enable the Office to recruit from the best law schools and hire more competent legal personnel. It is disheartening that the yearly salary of our senior prosecutors, who have about ten years of experience as lawyers, is no more than PHP500,000 (less than USD9,000). First-year lawyers at major Metro Manila law firms earn the same sum.

The Office has also taken steps toward collaborating with the Judiciary. The Office has requested the Supreme Court to consider the feasibility of designating, among the regular courts, Special Courts that will try graft and corruption cases committed by low-ranking officials. It is to be hoped that proper training would be given to the presiding judges of these special courts and the prosecutors handling graft cases. This endeavor would provide the necessary focus, emphasis and specialization and, thus, ensure more competence, expertise and efficiency in the handling of such cases.

Finally, private sector involvement is seen to be indispensable in anti-graft campaigns like the life-style probe program. Community-, school-, and church-based organizations are in the best positions to observe the conduct and indiscretions of public officials. The public will be expected to provide the network of community-based organizations that will gather data provide information, evidence and leads that will permit the identification of potentially corrupt public servants and their ill-gotten wealth and assets.

The Office has endorsed the conduct of the lifestyle probe to the Inter-Agency Anti-Graft Coordinating Council to be one of its priority projects. The said council, composed of representatives of the Civil Service Commission, the Commission on Audit, the Department of Justice, the Office of the Ombudsman, the Presidential Anti-Graft Commission and the National Bureau of Investigation, has agreed to adopt the same approach and has for this purpose coalesced with civil society organizations and other law enforcement agencies.<sup>18</sup>

Another area of strategic collaboration is assuring transparency and accountability in government procurement. The Government Procurement Reform Act requires two representatives from the non-public sector to sit in the Bids and Awards Committee. The Transparency and Accountability Network, a partner of the Office of the Ombudsman, has agreed to provide, through its member organization, Procurement Watch, the necessary training for the volunteers who would sit in these committees. In this connection, the Office is considering another strategic partnership with employers and professionals<sup>19</sup> on the issue of corporate responsibility. The first training seminar for the initial 25 volunteers has already been conducted.

In the area of fostering a deeper awareness and concern for the problem of graft and corruption and of generating a counter-corruption culture, the Office of the Ombudsman and the Philippine Province of the Society of Jesus entered into a Memorandum of Agreement on 13 October 2003 adopting the “Ehem! Aha!” program, a culture-based sensitivity and teaching module and anti-corruption manual.

Such strategic collaboration with both the public and private sectors extends and multiplies the otherwise limited resources of the Office of the Ombudsman. It further exposes, educates and emboldens those committed to dedicating more of their time and resources to the fight against corruption. After all—to quote Ashleigh Brilliant, an English writer, cartoonist and columnist—either one wants less corruption, or more chance to participate in it.

It should be noted that the costs of the aforementioned initiatives against corruption are minimal compared to the ultimate benefits that may be derived

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<sup>18</sup> The expanded group: the Catholic Bishops Conference of the Philippines-National Secretariat for Social Action, Transparency and Accountability Network, Citizens National Network Against Poverty and Corruption, United People's Against Crime, Citizens Battle Against Corruption, Philippine Government Employees Association, National Association of Corruption Prevention Units, National Youth Commission, Philippine National Police, Intelligence Service of the Armed Forces of the Philippines and the Presidential Anti-Organized Crime Commission. The expanded group executed a Memorandum of Agreement on 20 March 2003.

<sup>19</sup> Among them the Makati Business Club, the Management Association of the Philippines and the Ateneo Alumni Association.

from an effective anti-corruption campaign of deterrence and savings through reduced budget waste or leakage. Containing corruption translates directly to economic development. Containing the leakage and waste, estimated at billions of pesos, directly translates to national savings, which, in turn, translate to more viable economic opportunities and investments. Thus, government should approach expenditures for anti-corruption efforts as wise and solid investments that would yield long-term returns.

## C. Nepal's Efforts to Control Corruption

■ Surya Nath Upadhyay

Chief Commissioner

Commission for the Investigation of Abuse of Authority, Nepal

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The understanding of the term “corruption” varies between societies and over time. Corruption may for instance be regarded as any act of vice or misdeed that violates the social norms and legal provisions and results in harassment, loss, and deprivation to a person, society, or country. All immoral, unethical, and unlawful acts lead to corruption. Corruption is also defined as the sale of power for personal gain at the expense of the society's larger interests. An economist would tend to define corruption as an informal process of exchanges involving the manipulation of public resources for private gain. The World Bank defines corruption as the misuse of public services for private gain. In Nepal, corruption is considered a form of abuse of authority, which is classified into two categories: “improper conduct” and “corruption”. In this paper, corruption and abuse of authority are used synonymously.

Nepal is a developing country 147,109 square kilometers in size and with a population of 23 million. As with many poor developing countries, Nepal bears the burden of wide-ranging corruption and inefficient governance. Poor economic development, poverty and economic disparity, deprivation of opportunities, cronyism, favoritism, and corruption in all its manifestations have frustrated the Nepali society to an extent that seriously challenges the country's socio-economic fabric and security. Corruption and mismanagement of the Government are the problem's root causes. Although Nepal is not ranked in Transparency International's Corruption Perception Index, it is presumably among the worst performing in South Asia. Given the extent of the problem, an all-out war against the menace of corruption is today the only option.



## History of Nepal's anti-corruption agencies and laws

Anti-corruption activities in Nepal go back several centuries. About 230 years ago, King Prithvi Narayan Shah the Great declared that “those who take bribes and offer bribes are both enemies of the State.” Several legal and institutional provisions have been established since the very inception of the country. Already in 1851, the general code of the country, known as *Muluki Ain*, included some provisions for controlling corruption. Later, such provisions were incorporated in the sector laws that replaced the general code. It was only in 1953 that the Prevention of Corruption Act consolidated the provisions on the prevention of corruption in the government bureaucracy. The law was superseded in 1960 by a new act, which established the Special Police Department. This Department worked as an anti-corruption body and had a special cadre of officers. As time went by, however, it became evident that this institution could not work effectively, because its placement under the authority of the Ministry of Home Affairs limited its independence. Any attempt to instill ethical behavior was compromised, as political influence was coupled with corrupt bureaucracy, impunity for corruption, favoritism and mediocrity. The department turned out to be a burden rather than an effective government department.

In 1978, the Second Amendment to the constitution established the Commission for the Prevention of Abuse of Authority as a constitutional body, thereby guaranteeing its independence. The Commission had wide ranging authority and numerous tasks: it was an advisor, investigator, prosecutor, and decision maker at the same time. Eventually, it crumbled under this heavy burden, weakened by the lack of reforms in the bureaucracy. In 1990, the restoration of a multiparty democracy entailed the framing of the present Constitution of the Kingdom of Nepal and established the Commission for the Investigation of Abuse of Authority (CIAA). While also a constitutional body, the CIAA differs from its predecessor in many ways: in particular, its tasks are limited to investigation and prosecution and no longer include participation in policy decision-making processes.

## The Commission for the Investigation of Abuse of Authority

The Constitution empowers the CIAA to investigate and prosecute abuse of authority by individuals holding public office. The term “abuse of authority” includes both “improper conduct” and “corruption”. While improper conduct results in departmental or other action such as a warning, calling attention to the conduct, or admonishment for the concerned public official, cases of

corruption are brought before the Court of Law. The CIAA may also suggest the rectification of damages caused by abuse of authority. Furthermore, it may recommend amendments to relevant laws and procedures with a view to preventing abuse of authority in the future.

The CIAA is composed of a Chief Commissioner and a number of commissioners as needed. They are appointed by the Constitutional Council and may be removed only by a two-thirds majority in the House of Representatives, this provision ensuring the independence of the institution.

In addition to the constitutional provision establishing the CIAA, several laws and regulations govern the institution's operation and provide it with wide authority. In particular, they empower the CIAA with extensive access to information, including details about assets and bank accounts of public officials and associates; they also allow the CIAA to ask for bail or, with the permission of the Court, to withhold assets or to suspend or put the concerned official in custody for up to six months during the period of investigation. The CIAA may also request departmental action against the concerned official and ask for the recovery of the damages and lost revenue. The legal regime also includes the establishment of a Special Court dealing uniquely with corruption cases.

## CIAA in action

Twenty-six cases, amounting to a total claim of NPR826 million (more than USD11 million), were filed in the year 2000–2001. Ten of these cases related to the financial sector and amounted to a claim of NPR420 million (USD5.4 million), and a single case relating to aircraft leasing amounted to NPR389 million. The new legislation, in particular the amended Act of 2002, having extended its mandate, the CIAA intensified its activities in 2001 and 2002, investigating, *inter alia*, several cases in the revenue and public works sectors and in the police and other branches of the Ministry of Home Affairs. Investigations also targeted high-level officials, including former ministers.

The workload and output of the CIAA has increased dramatically over the past two years, the number of complaints received and handled has tripled and in three years' time, the number of prosecution cases has multiplied by five. During 2002–2003, 147 court cases were filed, compared to only 61 in 2001–2002; in 2002–03, CIAA's prosecution was successful in 47 out of 55 cases and reclaimed USD9.6 million in total. Forty-nine persons were warned, departmental action was recommended against 35 persons, attention was drawn in 9 cases and suggestions were made in 22 cases. The number of complaints filed with the CIAA also increased significantly, from 2,522 in 2001–2002 to 3,687 in 2002–2003. In 2002–2003, 2,206 cases were disposed of, marking a

10% increase in one year. Last year, CIAA raided the houses of 22 revenue officials and two public works officials and charge-sheeted them in the Special Court for accumulation of assets disproportionate to their incomes. It has recently conducted similar investigations against a number of politicians who previously held public positions; several former ministers were detained in police custody for investigations. The CIAA has thereby demonstrated that it investigates and prosecutes corruption and improper conduct impartially, whether committed by low ranking officials or a former Prime Minister.

The clear improvement of the Commission's performance is essentially due to a number of legal reforms. The new 2002 act has shifted the burden of proof against charges of acquisition of illegal property to the accused; amendments to the CIAA Act extend the Commission's powers of investigation and establish a special court. Other factors contributing to the CIAA's enhanced performance include the CIAA staff's high level of commitment, cooperation from the Government and various sectors of society and the CIAA's efforts to strengthen its institutional capacity

## **Institutional strengthening of the CIAA**

In order to cope with its increasing challenges, the CIAA reviewed its overall organizational capacity and in 2003 prepared a long-term strategy and a five-year action plan. This strategy focuses on preventive action through cooperation and networking with sector agencies, media and civil society, and on intensifying investigation and prosecution and enhancing corresponding capacities. In this respect, the CIAA has published manuals on prosecution procedures and investigation techniques; similar manuals for the revenue and service delivery sectors are under way.

In this effort to continuously train its staff, the CIAA takes advantage of international cooperation and of seminars and workshops held abroad. International cooperation, in fact, becomes ever more important as international trade, investments and technology transfer increase. To this end, the Commission also maintains close ties to anticorruption agencies in other countries.

As part of this strategy, the CIAA also seeks close cooperation with the Government and other agencies in its preventive work, for instance in the establishment of clear and transparent procedures for service delivery, and puts emphasis on involvement of civil society, opinion surveys, publications, and the dissemination of information. It has held several workshops and seminars to ensure stakeholder participation in the CIAA's activities, to improve anti-corruption awareness among public servants and to encourage ministries and departments to adopt internal codes or manuals for good conduct.

The Commission's institutional strengthening program aims to review and amend the CIAA's organizational structure. It has resulted in the establishment of a planning division and several sector investigation divisions, including those specialized in revenue or licensing. Furthermore, as a pilot project, the CIAA has created decentralized units in ten districts to deal with corruption complaints promptly and effectively at the district level.

## Outlook

The CIAA of Nepal is well aware of its responsibility and role in exposing and penalizing corruption, inducing good governance and stabilizing democracy that has been undermined by indiscriminate corruption. Indeed, many people in Nepal attach their only hope for improvement to the CIAA. However, many obstacles still need to be overcome and improvements made. For instance, while prosecution and conviction rates have risen phenomenally, departmental action against improper conduct and initiatives in sector agencies remains rare.

The CIAA strives for continuous improvement of existing legal provisions, policies, practices and organizational structures. For this purpose, it continues to develop corresponding recommendations and suggestions to the Government. To fulfill its demanding tasks and responsibilities effectively, the CIAA must also rely on partners: in particular, the media and civil society are crucial in boosting the CIAA's morale and in urging the Government to provide sufficient resources for the fight against corruption, reward honest officials and businessmen and alert the judiciary.

The time has come to take concrete action against this great threat that impedes social and economic advancement in our societies. Most likely, the case of Nepal is not very different from the situations in many Asian and Pacific countries. Strong regional cooperation, such as that in the framework of the Initiative taken by ADB and OECD, solidarity and joint action are therefore important to further advance our respective anti-corruption efforts.

# D. Anti-Corruption Strategy of the Hong Kong Special Administrative Region of the People's Republic of China

■ **Andrew H. Y. Wong**

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**T**he Independent Commission Against Corruption (ICAC) of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as Hong Kong, China) was set up in 1974. The ICAC, the principal agency with a statutory charter to investigate and prevent corruption in Hong Kong, China, is totally independent from the executive branch of the Government and reports directly to the Chief Executive. The principal objectives of the ICAC are to enforce anti-corruption laws vigilantly and professionally and to make corruption a high-risk crime, identify and eliminate opportunities for corruption in government departments and public bodies by reviewing their procedures and practices and promoting corruption prevention in private sector businesses, and to educate the community about the evils of corruption and enlist their support in the battle against corruption.

Since its inception, the ICAC has adopted a three-pronged approach in fighting corruption, namely investigation, prevention and education, through the Operations, Corruption Prevention and Community Relations Departments.

## Operations Department

The Operations Department is the investigative arm of the ICAC and the largest department within the Commission. The Department strives to deliver the highest standard of service by sparing no effort in the investigation of every pursuable report of corruption.

The Operations Department has developed, over recent years, a strategy to employ proactive investigation techniques to identify and prosecute instances of corruption that might otherwise go unreported. The strategy includes the use of undercover operations and broader and more effective use of intelligence and information technology (IT). The Department's investigators are given continuous professional training to keep pace with the changing commercial environment, technological advances and the latest developments in criminal investigation techniques. Such training embraces a wide range of topics, including financial investigation, IT applications, computer forensics, video interview techniques, case management and court proceedings.

Joint Operational Liaison Groups comprising senior officers of the ICAC and other local disciplined services continue to strengthen inter-departmental cooperation. These hold regular meetings with a view to stepping up operational liaison, addressing common concerns, and developing anti-corruption strategies within their respective services.

## **Corruption Prevention Department**

The main tasks of the Corruption Prevention Department are to reduce opportunities for corruption in government departments and public bodies and to advise private sector organizations on corruption prevention. The Department conducts detailed studies of practices and procedures of public sector organizations and assists them in the effective implementation of corruption prevention recommendations. The Department also provides expeditious consultation services to public sector organizations when new procedures or policies are being formulated or when quick corruption prevention advice is called for.

In addition, the Corruption Prevention Department provides free and confidential corruption prevention advice to private sector organizations on request. These include reviewing systems and procedures, drawing up codes of conduct and holding seminars on the prevention of corruption.

To help organizations develop their corruption prevention capability, the Corruption Prevention Department has produced easy-to-use best-practice packages on ways to minimize corruption opportunities in particularly vulnerable areas such as procurement, staff administration, information system security, contract letting and administration.

## **Community Relations Department**

The Community Relations Department educates the public against the evils of corruption and enlists its support in the fight against corruption. Community education is conducted through mass media programs and a network of regional offices. On a regular basis, the Department offers advice on departmental guidelines to government departments and conducts corruption prevention talks for government officers. Apart from civil servants, the Department regularly organizes training seminars for public body employees. Assistance is also provided to public bodies to encourage them to launch staff integrity promotion projects within their organizations.

The Community Relations Department also continues to maintain close liaison with various business organizations and professional bodies to promote the business ethics and corruption prevention services of the ICAC. The Hong Kong Ethics Development Centre, established in 1995 in conjunction with six major chambers of commerce, aims to promote business ethics in Hong Kong, China on a long-term basis. In November 2001, the Centre launched a website ([www.icac.org.hk/hkedc](http://www.icac.org.hk/hkedc)) to enhance the provision of its services.

## **Checks and balances**

The ICAC is subject to a stringent system of checks and balances. Its work is scrutinized by various independent committees—each chaired by a non-official member and comprising prominent members from various sectors of the community. All committee members are appointed by the Chief Executive of Hong Kong, China.

## **International cooperation**

The Government of Hong Kong, China is committed to playing a full part in international cooperation on enforcement against corruption. As an integral part of the anti-corruption strategy, the ICAC maintains regular operational liaison with other international law enforcement agencies. Since 1999, the ICAC has been a member of the Interpol Group of Experts on Corruption. Our efforts in strengthening international cooperation against corruption will continue.

## CHAPTER 2

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### *Integrity Management in the Private Sector*

- A. Designing Bribery and Fraud Prevention Programs in the Private Sector in Asia
- B. To Bribe or not to Bribe... Dealing with the OECD Anti-Bribery Convention from a Business Perspective



# A. Designing Bribery and Fraud Prevention Programs in the Private Sector in Asia

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This contribution addresses bribery and fraud prevention programs in the private sector in Asia. In considering issues relating to the private sector, transactions where the private meets the public sector are of particular interest. Private-to-private corruption goes on, but the most egregious forms of private sector corruption occur in the interaction with the public sector.

## Fraud vs. corruption

A discussion about corruption must start with some theory about fraud, as the phenomena are interlinked. However, they are not the same; rather they are like two circles that overlap in some areas but are separate in others. Fraud can occur, but without corruption; corruption can occur without fraud. Yet where fraud is, corruption often is too.

Protecting an organization in Asia against fraud involves addressing four issues: people, internal controls, enforcement and security.

People: who works for you? Who is being hired by your company? Who are your contractors or customers? Honest people do not commit fraud—but so often simple mistakes in hiring allow dishonest people to slip into an organization in the first place. The same can be said of relations with suppliers and customers. A common trick in Asia is for elements of a business that one believes to be third parties to be actually controlled by employees.

Internal controls: in Asia, they do not function as they do in Europe or in the United States, and again within Asia, what does work and what does not

can differ widely. In Asia, collusion is common, holidays are infrequently taken, and people are reluctant to question the chain of command. Moreover, lack of adequate training in many organizations may cause the failure of internal controls that look wonderful on paper. A major risk for multinationals operating in Asia is to rely on external audit in this region in much the same way as they do in their home jurisdictions. Major audit firms do not have consistent standards across their vast networks; even their training schemes are neither consistent nor sufficient.

**Enforcement:** a firm's position on enforcement of its policies vis-à-vis fraud is an important part of their fraud-prevention strategy. Those firms with a firmer stance against fraud will encounter fewer instances of fraud; those that ignore or treat a fraud only lightly send a message that fraud is accepted. Many organizations that have experienced major fraud (over USD5 million in losses) have previously experienced a similar, albeit much smaller, fraud by either the same person or a related person. Strong enforcement—not to be confused with zero tolerance, which will be discussed later—is a key tool of a company's fraud prevention arsenal.

**Security:** many firms' fraud prevention programs ignore even basic means of securing their assets. Company chops left on desks, movable assets not properly recorded or stored, intellectual property easily e-mailed away. Appropriate security is an important part of the overall fraud prevention program.

## **Finding fraud**

The earlier fraud intervention and prevention programs go in, the broader the intervention will be, but entailing higher costs. Positive background checks on all employees, for example, can be effective at countering a number of potential fraudulent practices for an organization; on the other hand, it would be an expensive endeavor to protect the operation of the petty cash tin, and the problem would be better addressed by simple internal controls over tin access and accountability.

Fraud prevention is therefore about choices. Choosing the appropriate point of intervention maximizes the return of any investment in fraud prevention. Sometimes it is better to let a little fraud go on, so that those involved can then be found and removed, rather than to intervene early.

## **Definition of corruption**

So, what is corruption? Is it bribery, fraud, extortion, nepotism, patronage, cronyism, embezzlement, graft, or is it all of these? Each of these notions

describes different manifestations of the same concept. Understanding the type of corruption that one is facing makes it possible to define the risk management strategy accordingly.

If, for example, a person runs a filthy fruit stall in a public market and the health inspector comes over, the person would need to bribe him to look the other way. Both individuals are happy with this arrangement: the shop owner can stay in business without the costs of cleaning up the stall, and the inspector is happy because he gets the bribe. Neither of them has any incentive to complain about the arrangement. The owner of a clean store would get very annoyed when being asked by an inspector to pay him off or else receive an infringement notice. The latter is, in fact, case of extortion, as it is likely to result in a complaint if there is a way. Although bribery and extortion both constitute corruption, the techniques to counter them differ.

## Causes of corruption

So what causes corruption? The following circumstances were found to be contributing factors in causing corruption on either a transactional or societal basis; some of them are indeed both a potential cause *and* a consequence:

- lack of transparency
- silence
- over-regulation
- lack of enforcement
- poverty
- lack of checks and balances
- greed
- illiteracy
- inequality
- lack of democracy
- unmet expectations
- weak judiciary
- weak press
- low public sector salaries
- lack of market competition
- transitional issues
- prohibition

Corruption is a function of motivation and opportunity, the likelihood of detection, the likelihood of punishment, and the degree of punishment.

Understanding these issues is an important part of designing an anti-corruption program for firms operating in Asia. For example, due to the strong anti-corruption agencies operating in Hong Kong, China and Singapore, firms doing business in those countries have less to worry about than those doing business in certain other countries of the region that have little or no enforcement capability.

## Addressing corruption

All firms, and indeed the public sector, make three choices when choosing tactics for addressing corruption:

- which tool should be used;
- what regulatory style fits the audience; and
- when the firm should intervene.

The choice of the tool depends on the type of corruption that a company is facing. The regulatory style is predetermined by issues of company culture and, more important, the nature of the jurisdiction in which the organization operates. Another factor in the choice of regulatory style will be the extent to which the firm is itself being regulated. The nature of its own regulatory environment may indeed leave little choice in what regulatory style to adopt: firms need to be very careful about conflicts between regulatory styles and cultural issues in a specific jurisdiction. The United States financial industry regulatory style, for instance, does not fit the way financial markets have typically operated in certain parts of Asia such as South Korea, Taiwan, Malaysia and Australia.

## Controlling corruption

In setting anti-corruption strategies and tactics, it is important to recognize some characteristics of corruption as a crime. First, it is normally a hidden crime. A victim or victims might not be obvious and the parties initially involved all have an interest in keeping the deal hidden.

Second, the enemy is conscious and evolves its techniques. What this means is that firms need to incorporate an intelligence function into corruption detection and eradication programs. Firms need to look for new ways in which the system may be abused. As one hole in the system is fixed, another one may appear. Too often the anti-corruption efforts do not evolve and—unfortunately—a company's anti-corruption unit sometimes has negative

incentives in uncovering more corruption, as it would mean showing that its corruption program is insufficient. The easiest way to report that no corruption issues have been uncovered—and therefore that the prevention programs are working perfectly—is to not do any investigation.

Managers need to think about the measurement systems and the incentive programs they use as well as organizational structure issues (particularly reporting lines) that may affect the operational effectiveness of integrity units.

## **Essential elements of an anti-corruption program**

An anti-corruption program has three essential elements: education, investigation and enforcement. A program that lacks one of these elements will ultimately fail.

Education needs to take place both at the moment when an employee joins the organization and as his or her employment continues.

Investigation needs to have reactive as well as proactive elements. In its simplest form, an anti-corruption unit needs to be able to respond to a complaint from a customer, supplier or business unit, as well as to conduct its own independent integrity testing of the business and those third parties considered to be risk areas.

Enforcement needs to be fairly conducted, easy to understand and firm in its application.

There is no such thing as a perfect way to deal with these issues. Each business will have a different way of approaching these three essential elements that fits with its operations and the type of risk issues that are most applicable to it. For instance, dealing with supplier kickbacks in the purchasing department requires different tactics than when faced with bribe paying to government officials.

## **Zero tolerance?**

A common theme among companies and governments, and indeed a common theme with some speakers at this conference, is the notion that zero tolerance should apply to corrupt activities.

The Knapp Commission, which some 30 years ago investigated the New York City Police Department, proved this concept wrong. Zero tolerance does not work. When a company adopts zero tolerance, it is presenting its employees with a stark choice: on one side are all those totally honest employees and on the other are all those who are dishonest; the guy in purchasing who has a few free beers with his suppliers is just as corrupt as the guy in the construction

department who is selling off safety equipment inside the buildings he is constructing.

In order to be effective in isolating those in a company who are the worst offenders, and thus those that are putting the organization most at risk from corrupt practices, a graduated approach to enforcement is needed. Zero tolerance has the effect of shifting the bell curve of corrupt behavior to the right. This is not to say that corrupt activity should not be punished, but enforcement action must be proportional to the issue.

## B. To Bribe or Not to Bribe... Dealing with the OECD Anti-Bribery Convention from a Business Perspective

■ Anne-José Fulgeras  
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**N**ot all athletes take performance-enhancing drugs. The recent world athletics championship provided a first glimmer of hope as regards the effectiveness of the fight against doping in sport: we may now believe in healthier competition between healthier athletes.

Bribery is to international business what doping is to high-level sports competition. Even though bribery is widely acknowledged to be harmful, it has for a long time been perceived as a necessary evil and the result of an unshakeable logic in international business. Nowadays, however, bribery, like doping, entails severe punishment if brought to light. Hence, companies are required to adapt their business practices to this new legal environment. In fact, they have a strong incentive to do so: an investigation—or even a simple allegation—in relation to the newly established offense under domestic laws can have considerable repercussions for the company image.

After performing the role of Financial Public Prosecutor in Paris for twelve years and having thus been made aware of the difficulties involved for the judiciary in combating bribery, I have spent the last three years helping companies to anticipate better the acts that may expose them to criminal proceedings. My approach is therefore no longer that of an official responsible for punishing acts of bribery, but that of one helping to prevent this type of crime in the private sector.

## **Criminalization of bribery in international business transactions**

While bribery has been tolerated by law and even encouraged by tax regulations for many years, the view on bribery in international business transactions has dramatically changed over the past two decades. When regular payments of commissions by the US aircraft manufacturer Lockheed, aimed to secure contracts in foreign countries, came to light in the 1970s, the public in the United States (US) was shocked. As a direct result, the US Foreign Corrupt Practices Act (FCPA) was passed in 1977, providing for sanctions against US businesses that intentionally bribed foreign public officials in international business transactions.

Because of this law, US exporters soon felt themselves to be at a competitive disadvantage compared to non-US competitors, and lobbied against this situation. At the same time, international awareness of the harmful effects of corruption on the world economy gradually was rising. In 1997, twenty years after the FCPA's entry into force, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed, becoming the first legally binding international anti-bribery instrument. This Convention requires its signatory states to penalize the payment of bribes to foreign public officials and to amend regulations in related fields. Today, such payments are subject to severe criminal sanctions in most of the major exporting countries. Similarly, the tax deductibility of bribes has been abandoned in all signatory states.

## **Foreign bribery as a risky business**

Whether or not companies are adapting their business practices to the new legal environment cannot be fully assessed due to the short period of time in which the Convention and implementing national legislation have been in force. It is certain, however, that the laws on foreign bribery entail serious risks for companies that continue to do their business "as usual". Moreover, while the risk of criminal charges for bribery increases, the perceived competitive advantages of bribery, due to the convergence of national legal environments, are fading. Hence, companies have a strong incentive to take seriously the risk of criminal prosecution for bribery in international business and to bring their business practices in line with the new legislation.

As the public is less and less tolerant toward obscure transactions violating business ethics, allegations of acts of bribery are more likely to be referred to the law enforcement agencies. In the recent past, reporting of offenses has been



increasingly encouraged and facilitated both in the public service and private companies, by expanded reporting obligations and secure channels to communicate allegations. In many countries today, civil servants and public officials are obliged to inform the public prosecutor of any offenses they become aware of in the course of their duties. In France, for example, statutory auditors are subject to such an obligation. These obligations have emerged in connection with parallel reporting duties in the surveillance of financial sector transactions addressing the problem of money laundering and terrorism. Similarly, a growing number of companies today have enacted codes of conduct for their staff that foresee the establishment of an in-house ombudsperson and provide for whistleblower protection regulations.

Finally, while clearly constituting an abuse of the anti-corruption laws and judicial systems, making allegations for bribery against a competitor appears to have become a strategic weapon that some companies employ to harass their economic rivals. The risk of being subject to such abuse increases as the signaling of allegations to relevant law enforcement authorities is increasingly permitted via an intermediary or anonymously. Even when the charges are unfounded or purely imaginary, the launching of proceedings for bribery usually attains wide media coverage that may damage the company concerned.

## Private sector measures to prevent foreign bribery

Companies adopt different strategies to deal with the risk of being prosecuted for bribery. These approaches may be qualified as the fatalistic, the cynical and the ideal.

Employing the fatalistic approach, certain companies (generally smaller ones) still believe they can curl up into a ball like a hedgehog and avoid being run over. This attitude is increasingly considered dangerous, as it makes companies vulnerable both to prosecution for actually committed foreign bribery and to unjustified allegations. Other companies, more cynical in their attitude, may still be tempted to opt for cosmetic measures when faced with profound changes in their business environment rather than conduct an in-depth analysis and look for lawful, innovative solutions. Such companies would try to continue paying commissions to foreign public officials using schemes that they believe can minimize the risk of criminal charges; such schemes usually include a financial platform, non-consolidated subsidiaries in a non-signatory country to the OECD Convention and the use of trusts, investment funds, intermediaries or bank accounts located in regulatory havens.

Bad habits die hard and controlling every single stage of, for instance, a tender process is difficult for any company. However, an ideal approach—in

the eyes of some the idealistic approach—takes all possible steps to prevent the risk of being subjected to criminal charges for bribery in international business. This is, after all, of vital interest to every internationally exposed company. In doing so, the following two issues are critical:

- Risks for a company arise from allegations of bribery, not only from actual conviction. In the eyes of the media and the public, despite presumed innocence, corporate officers who are subject to an investigation for bribery are liable long before the case has been tried in court. The very opening of a judicial inquiry for bribery can thus seriously harm the image of a company, whether or not the alleged act of bribery has indeed been committed.
- Second, risks for both the corporate officer and the company arise not only from actions but from omissions, as omissions may provoke suspicion of the intention to bribe. Best business practice thus implies an internal company system of prevention and control. This system not only protects the company against malpractice; in the event of an allegation of bribery, it also proves that all possible measures to avoid such incidents have been taken, and that the incident is singular.

Whereas the first risk can hardly be influenced, systems of prevention and control can be very efficient in avoiding charges for bribery. To be effective, such preventive systems must encompass at least the following elements:

- Written company codes of conduct must be circulated among staff and actively communicated. Such rules must apply not only to the company's employees but also to its agents, intermediaries, consultants and co-contractors, as such agents may divert a part of their commission back to the competent public officials in the buyer's country, in particular if their payment depends on success.
- The systems must further ensure a rigorous selection of the agents and intermediaries that are to be involved in the commercial process. A company should choose only agents and intermediaries that have the capacity of legal entities and perform a business activity that corresponds to the purpose of the agreement.
- Contractual obligations must be clearly defined and include not only an undertaking to comply strictly with the provisions of the applicable laws, but also persuasive mechanisms to be used against careless or dishonest business partners.

- Finally, a company must implement financial monitoring and internal control procedures, in particular to ensure that the margins generated on transactions are not abnormal, ensure the rigorous written substantiation of the provision of services that correspond to the commission paid, and require full transparency with respect to the method of payment.

Any shortcoming in a company's preventive mechanisms may be interpreted as a tacit incentive to commit acts of bribery and warrant the implication of their criminal liability.

Finally, an important parallel preventive measure for any company doing business abroad is to conduct in-depth studies of the foreign business environments in which it intends to invest. A company that wishes to reduce the risk of being faced with situations of corruption and eventually the possibility of being accused of or charged with bribery should take the level of bureaucratic transparency in the host country into consideration in its foreign investment strategy. Vice versa, a country wishing to attract foreign direct investment has a vital interest in increasing the transparency and accountability of its public service and enhancing the integrity of its local business community, so as to render its investment environment more attractive and less risky for foreign investors.

The signing, ratification and transposition into domestic law of the OECD Convention has several important consequences for the companies of signatory states doing business in foreign markets sensitive to corruption. The first one has been to increase within companies that do business abroad the awareness that acts that, in the past, could be performed more or less with impunity can now be investigated and prosecuted by their home country law enforcement authorities.

Second, the decision of leaders of industrialized countries to ban foreign bribery is increasingly leading to a change in the mentality of large corporate groups when deciding to invest abroad, giving rise to the development of internal corporate control mechanisms to prevent the giving of bribes to foreign public officials by managers, staff and intermediaries. Indeed, being subject to an investigation—or even a simple allegation—in relation to the newly established offense may have considerable repercussions for a company's image. For these companies, the vigilance of competitors ready to report any suspicious payment to the prosecution authorities, the adverse publicity, the institution of criminal proceedings and possible prosecution that might follow have a strong deterrent force.

Finally, the third—and not the least important—impact is on countries that have been “recipients” of bribes in the past. Although it is still premature to assess the impact of the OECD Convention on foreign investment and trade flows, it can be expected that some countries associated with a high risk of corruption by foreign companies from OECD countries might experience in the future a decrease in foreign direct investment, simply because companies will not want to take the risk of being investigated or prosecuted at home for giving bribes.

## CHAPTER 3

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### *Integrity Management in the Public Administration*

- A. Conflict of Interest – Vanuatu’s Experience
- B. Managing Conflict of Interest in the Public Sector: The Experience of the Hong Kong Special Administrative Region of the People’s Republic of China
- C. Putting Conflict-of-Interest-Policies into Practice: From Guidelines to Toolkit



## A. Conflict of Interest— Vanuatu's Experience

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A *conflict of interest* is exactly what the term implies: a conflict between a given person's interests as a public servant and his or her interests as a private person. A conflict of interest may compromise the integrity of the official and improperly influence the decisions he or she makes. Defining conflict of interest is not the problem; detecting, preventing and stopping it is.

### A culture that breeds conflicts of interest

The culture of many countries breeds so many conflicts of interest that it is difficult to imagine life without them. In Vanuatu, and the Pacific in general, people are linked by strong tribal allegiances. They take actions or decisions to pay back past favors or to store up future favors or rewards, such as jobs or contracts. These allegiances alone dramatically increase the number of conflict-of-interest situations. And, since the reason for a decision is not always apparent, conflicts of interest are difficult to detect.

Until recently, Vanuatu has had very limited international exposure. Its population has thus been little aware of the philosophical, religious and political debates that have accompanied and underpinned the evolution of society in other countries over several centuries. Although church attendance is very high throughout the country, and preaching is mostly of the “fire and brimstone” variety, no recognizable moral or ethical code has developed to define “right and wrong” in the public sphere. Put in a nutshell, no matter how outrageous or illegal a public official's actions may be, he or she does not need to fear any consequences. Significant condemnation is unlikely to come, either from his close and “wantok” group, or from the public, and only

rarely from the regulatory authorities. Even dishonesty or outright crime by public officials does not really disturb people in Vanuatu.

The same is true for the political sphere: voters have the widespread expectation that if they bother to vote for a candidate, he or she will, in return, look after them as a priority and take decisions that favor them personally. Until recently, when a new minister took office, he would exchange the entire ministry staff, thereby perpetuating the system of allocation of jobs based on political loyalty rather than merit or qualification. Such a system inevitably leads to conflicts of interest.

Under such circumstances, it is fairly easy for a dynamic person to succeed in politics, no matter whether he or she is honest. Indeed, many people in Vanuatu would even say that to be dishonest, or at least readily willing to compromise one's own honesty, is a prerequisite for being selected as a political candidate. A strong conscience and sense of honor and integrity are serious handicaps in Vanuatu's political arena.

Self-serving attitudes and decision making based on self-interest rather than national interest are commonplace and have contributed to the political instability from which Vanuatu has suffered over the last decade. Party leaders who lose votes of confidence in parliament systematically set up their own new party. This has resulted in so many political groupings represented in parliament that it is impossible for a single party to form the Government. Coalition governments tend to set the bar at the lowest common denominator to ensure political survival. This makes fundamental change for the better extremely difficult.

## **Blatant conflict of interest among civil servants and politicians**

Vanuatu has seen many instances of blatant abuse by civil servants and politicians of their public positions to further their private and political interests. To give a few examples:

- A former minister of foreign affairs used his position to sell passports for cash.
- In the days before a general election, a former prime minister removed about USD1 million from a cyclone relief fund to buy votes and pay for shipping his party's supporters around the country.
- A former minister of finance created a housing loan scheme within the workers' National Provident Fund from which he awarded non-commercial loans to political friends who could consequently purchase government



property at well below market value, another fraudulent scheme approved by the same government.

- The Vanuatu Development Bank collapsed because political leaders awarded themselves loans without repaying them, thereby depriving the very people who elected them of desperately needed low-interest finance for rural projects. After a similar fraud had occurred at the National Bank of Vanuatu, the Bank was rescued from the brink of collapse by means of reversing Vanuatu's "localization" policy, a measure that permitted the hiring of foreign professional bankers who were not poisoned by political interference to manage the institution on a commercial basis.
- In the past, a number of land ministers used to create land titles in their own name on unregistered land and afterwards sell it. Quite naturally, when seeing what their ministers were doing, many of the Land Department's staff followed this example.
- A former prime minister and finance minister used his position to forge Reserve Bank guarantees for tens of millions of United States (US) dollars in favor of a foreign swindler who fled the country, never to be seen again, when the scam was exposed and aborted.
- The chairman of the Vanuatu Maritime Authority, the country's maritime regulatory authority, is also the agent for Taiwanese fishing vessels in Vanuatu. He recently "donated" two trucks to the Department of Fisheries. On the same day that the trucks were handed over to the Department of Fisheries, the minister in charge of that department arranged for fishing licenses to be granted to two Taiwanese longliners, allowing them to fish within the six-mile zone. The same minister also granted the chairman of the Maritime Authority the right to supervise Chinese and Taiwanese fishing vessels in the country. No one questioned whether, under these circumstances, this might constitute a conflict of interest.
- Until quite recently, leading figures from the private sector's Finance Centre held positions on the board of the Vanuatu Financial Services Commission. This Commission is Vanuatu's companies registry and is responsible for regulating private companies operating within the Finance Centre. In addition to the problematic composition of its board, this authority has not been audited for the past seven years, obviously weakening the institution's integrity.
- At present, the Vanuatu Government itself is in a clear conflict-of-interest situation: while the largest employer in the country, it proposes legislation to reduce the employers' and employees' contributions to the Vanuatu National Provident Fund in order to reduce public expenditure and control the national budget.

- Conflict-of-interest situations do not always happen with a prospect of direct personal gain, but simply to reward political supporters, friends or family members. Patronage of this sort inevitably leads to the appointment of unsuitable or unqualified staff. The subsequent misconduct or mismanagement by these people often results in the corrosion of public assets. The Vanuatu Livestock Development, the Government's cattle-breeding ranch, and Natai Fishing, a government fishing project, had to be closed due to such abuses.

These are only a few examples of the types of conflict-of-interest situations that Vanuatu has seen and continues to see; many more examples could be given. Worst of all, the ministers mentioned in these examples are still members of parliament. The former prime minister referred to earlier, for instance, had been jailed for forging the Reserve Bank guarantees. Earlier this year, the President of the Republic, a political crony, pardoned him on "health grounds". The convicted felon promptly stood again for Parliament in the by-election held in December 2003, filling the very seat that was declared vacant upon his conviction. What is more, the politician in question was part of the electoral college that elects the President.

The minister of internal affairs could have released the prisoner on health grounds without pardoning him, but he did not. Still having a suspended criminal sentence hanging over his head would have prevented him from being able to stand in the by-election. And even after the President pardoned him, the Ombudsman could have reported him to the public prosecutor, asking that he be prosecuted under the Leadership Code (which entails disqualification from standing for Parliament for ten years).

## **No incentive to change, no fear of the consequences**

Such blatant abuse of office by the Head of State sends two messages: first, leaders clearly have no incentive to change, and no fear of the consequences of their misconduct other than fleeting embarrassment in the media if caught. And second, it makes the country look ridiculous to foreign investors and development partners; this is certainly not an incentive to invest in the country.

Twenty-three years of foreign aid projects and even a comprehensive reform of the entire public administration has not created an appetite for change in the general public. The population itself is involved in a conflict of interest: to promote their own personal and political interests, chiefs and community leaders put their people's votes up for sale at every provincial and national election. When I stood for Parliament as an independent candidate last year, I

was offered the “guarantee” of blocks of votes in exchange for money or jobs if I were elected. This was despite the fact that I was the only candidate to speak everyday on national radio specifically declaring that I would take no part in the usual ways of getting elected; that I would not provide food, drinks, and money; and that I would not promise jobs or influence after the election. My husband was also approached several times at his business office by community leaders, many of them church elders and chiefs. They were often bringing boxes of voters’ electoral cards to prove they had the votes they were claiming, and asked for money—sometimes ridiculously low amounts—in exchange for votes. In fact it would have been fairly easy—and cheap!—to get the couple of hundred votes I needed to get elected.

In Vanuatu, the people do not hold their leaders accountable for corrupt behavior. Some are still not aware of the connection between political corruption and the declining standard of living; they do not understand that their apathy today will lead to a lower standard of living tomorrow. Many others, even young and educated people, hide behind “custom”, excusing and justifying their timidity by claiming that it is against traditional Melanesian values to criticize “big men”. Again, others are cynical, believing that it doesn’t really matter whether the country’s institutions collapse; they expect development partner countries to come to the rescue, as happened to the neighboring Solomon Islands earlier in 2003, where an Australian force eventually stepped in to prevent the country’s collapse into chaos and criminality.

None of these views is really surprising: if the minister of foreign affairs of your country illegally sells passports for cash, if the finance minister awards himself tax exemptions, if the land minister transfers land titles into his own name—who would expect these people to tackle corruption in their departments? Who do you complain to about corruption if your boss, and his or her boss, are both corrupt themselves?

Under these circumstances, it is vital to be able to rely on independent bodies like an Ombudsman’s Office, a Public Prosecutor and an Auditor-General and their effective functioning. Unfortunately, even though Vanuatu does have powerful laws to protect the public from crooked leaders, this is where the country has completely failed to serve the public’s best interests. What the country lacks are courageous people willing to enforce the existing laws and instruments effectively. It is thus the political culture in Vanuatu that must change. Only the people themselves can stop the decline of the standard of living and of education and government services and the rise of crime and unemployment. As long as the people continue to accept this disdainful treatment by their leaders, things will not change.

## B. Managing Conflict of Interest in the Public Sector: The Experience of the Hong Kong Special Administrative Region of the People's Republic of China

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We all manage conflict of interest in our routine daily life, e.g., we want to taste good food but we also want to remain slim. Usually, we are able to manage our personal interest on our own, and people do not care how we do it. It is a completely different matter, however, when it comes to our public life. Here, people expect and demand that public officials manage their interests and discharge their duty in an open and impartial manner. They expect the official's private interests not to compromise the way the official discharges his or her public duty. The public interest must come first.

From the Government's point of view, and indeed from everyone's point of view, conflict of interest needs to be properly managed. We have seen in many cases how conflict-of-interest scandals undermined the credibility of individuals and institutions. So many promising public service careers have been destroyed because the conflict was overlooked, sometimes out of sheer ignorance or stupidity.

## The public sector

In the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter: Hong Kong, China) the public sector comprises the civil service and other principal officials appointed under the Basic Law, the Legislative Council (which is our law-making body), and the District Councils (which represent the local communities). We also have a string of advisory boards and committees that advise the Government on many areas of public administration.

Other public bodies in Hong Kong, China include statutory regulatory bodies (e.g., the Broadcasting Authority), major public service providers (e.g., the utilities companies) and other publicly funded institutions (e.g., the universities). For the purpose of this contribution, all these bodies are referred to as the public sector in Hong Kong, China.

## Managing conflict of interest

Before determining how to manage conflict of interest, we need to define what it is. In Hong Kong, China, we have a simple definition, spelled out in civil service regulations: a conflict of interest arises “when the private interests of a public official compete or conflict with the interests of the Government or the official's public duties.”

Conflict of interest is largely a “perception” issue: it does not matter whether the involved official considers that he or she acted correctly; what matters is whether the public thinks that the behavior was correct. A practical test to determine whether a conflict of interest has arisen is to ask whether the involved person is prepared to discuss it openly—the so-called “sunshine test”. In this type of analysis, the onus is on the official to prove that he or she has acted properly.

Perception is a living issue that changes over time. A certain act that may have been acceptable ten years ago may no longer be acceptable today. Public officials must thus stay vigilant about current public perception and expectations, and appropriately adjust their way of dealing with possible conflict between their public and private lives.

Conflict of interest being a perception problem, openness and transparency are the obvious answer. A robust system of declaration of interest by public officials should cover

- declaration of financial interests. This should include investments in land and property and shareholding in companies. This is particularly important

for public officers who have access to market-sensitive information, e.g., those who make fiscal policies and decisions, or regulate the financial markets.

- declaration of conflict of interest as and when it arises, e.g., when an officer involved in the award of a contract finds that his brother is one of the tenderers.
- documentation of the declarations. This is important both for protecting the public officer and for facilitating public monitoring.

Equally important is the establishment of a system to handle the declarations appropriately. When determining whether the public should have access to the declarations, one obvious consideration would be the importance of the public duty that the concerned officer is performing. For elected officials and politicians, the public generally expects their financial interests to be transparent. Managers and supervisors should carefully vet the declarations and take appropriate management actions. Where necessary, the public officer should be given appropriate advice, or instructions to divest his interest, or should be removed from the decision-making process, etc.

Within the civil service, the following “tools” are recommended:

- A code of conduct setting out the Government’s commitment to ethical practices and the management’s expectations of ethical behavior of its staff;
- Clear guidelines with examples of what constitutes conflict of interest and the procedures governing the declarations;
- Training and education to ensure that the officers understand the issues and follow the procedures;
- Designation of an ethics or compliance officer to ensure that staff follow the rules, and also to discuss gray areas and dilemma situations with staff; and
- Effective disciplinary actions in cases of non-compliance.

## Public interest versus privacy—the proportionality test

One may argue that the requirement to declare one’s personal interest violates human rights, more precisely, the right to privacy. However, such a right has to be balanced against the public’s right to know, since public duty is involved. Lawyers have advised that such requirements are consistent with the Bill of Rights, provided that the extent of the declaration is commensurate with the need, and that it serves a legitimate purpose. This is commonly known as the “proportionality test”.

## **“Sanitization” upon retirement from public office**

So far, we have examined how to manage conflict of interest while the official holds public office. Conflicts of interest may exist beyond this time, however. If a public official, upon retiring from office, immediately takes up an appointment in private business, the public is likely to perceive a potential conflict of interest. Hence in Hong Kong, China, a retired civil servant who intends to take up any employment or engage in any business activity within two years of retirement is required to obtain prior approval. The Government then assesses, with the advice of an independent committee, whether the proposed employment or business activity is likely to cause a conflict of interest. In the case of senior officers, as a matter of principle, a minimum “sanitization” period of six months must pass during which approval for post-retirement employment will not be given.

## **Role of the Hong Kong, China Independent Commission Against Corruption**

The Hong Kong, China Independent Commission Against Corruption (ICAC) plays an important role in assuring that the rules described above are widely known and thoroughly respected. Under this mission, the ICAC prosecutes offenses, raises awareness and reviews practices and procedures with a view to reducing conflict of interest situations.

## **Criminal prosecution**

In Hong Kong, any public official who accepts an advantage, which can take the form of money, a gift or a favor, in connection with his public duty is committing a corruption offense under the Prevention of Bribery Ordinance. Even if it cannot be proved that a bribe has been accepted, misconduct in public office (known as malfeasance) is a common law offense. Conflict of interest in its blatant form constitutes misconduct in public office. An important part of the ICAC’s job is to investigate, through its Operations Department, all corruption and malfeasance offenses and, if the Department of Justice decides to prosecute, to assist in the prosecution.

## Ethical awareness

The ICAC also has a Community Relations Department, which, apart from educating the public about the evils of corruption, actively assists the government to raise ethical awareness in the civil service.

## Transparent and accountable procedures

Another department of the ICAC, the Corruption Prevention Department, systematically reviews the practices and procedures of government departments to minimize the opportunities for corruption. An important strategy in the corruption prevention program is to promote transparent and accountable practices, and build in safeguards to minimize the possibility of the decision-making process's being compromised by officials' self-interest.

Through all these efforts, the ICAC launches a three-pronged attack on corruption. We have been fairly successful in containing corruption in Hong Kong, China. In the last Transparency International Corruption Perception Index (2003), Hong Kong, China was ranked the 14th least corrupt place among the 133 regions surveyed.

## Recent cases of “misconduct in public office” in Hong Kong, China

A few cases that recently happened in Hong Kong, China illustrate how the ICAC deals with the offense of misconduct in public office.

### Example 1

A directorate officer responsible for managing government buildings

- awarded government contracts amounting to USD20 million to a property management company owned by the brothers of his sister-in-law,
- failed to declare the relationship,
- awarded the contract to the company knowing that it did not fully meet the tender pre-qualification requirements, and
- was convicted and sentenced to 30 months' imprisonment.

### Example 2

A senior professional officer responsible for civil service training

- awarded government contracts amounting to USD17,000 to her husband's printing company,



- failed to declare the relationship and manipulated the quotations received to favor her husband's bid, and
- was convicted and sentenced to seven months' imprisonment.

### **Example 3**

A senior officer responsible for television and entertainment licensing

- awarded printing and production contracts amounting to USD30,000 to his wife's company,
- failed to declare the relationship and forged some quotations to favor his wife, and
- was convicted and sentenced to one year's imprisonment.

Apart from misconduct in public office concerning contract awards, the ICAC just dealt with a case involving a senior police officer prosecuted for accepting free sexual services from prostitutes and vice operators. Although the police officer at the time of the alleged offense was not directly involved in anti-prostitution duties, he was still convicted, as he was a senior police officer having an overall responsibility for law enforcement and fighting crime. In other words, had he not been the senior police officer that he was, he would not have been offered such free services—the so-called “capacity test.”

Other conflict-of-interest situations did not result in prosecutions. A case involved an ex-Commissioner of Inland Revenue who failed to declare conflict of interest when he personally dealt with tax cases handled by his wife's tax consultancy firm. Although a subsequent audit revealed no evidence suggesting that he had given favors to his wife's firm, the public perceived that there was a clear conflict of interest and protested. His service with the Hong Kong, China Government was subsequently terminated.

## **Conclusion**

The importance for public officials of handling conflict of interest properly and carefully cannot be overestimated. Public expectations are rising, and public officials are increasingly called to account for their decisions. The public needs to be reassured that the decisions are made impartially, without self-interest.

Recent developments in other parts of the world have made this need for caution more apparent. More and more businessmen or executives become senior government officials and vice versa. Business models have changed: public-private-partnerships are now common in implementing public projects. The public and private sectors interact ever more closely, making it all the

more important that public policies and decisions are made—and are seen to be made—impartially and in the public interest.

Hong Kong China manages conflict of interest in the public sector reasonably well. The success factors are

- commitment to public accountability and transparency,
- a robust administrative system of declaration and management,
- effective deterrents and sanctions, and
- a vigilant public and media.

## C. Putting Conflict-of-Interest-Policies into Practice: From Guidelines to Toolkit

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Serving the public is the fundamental mission of governments and public institutions. Citizens expect individual public officials to perform their duties with integrity, in a fair and unbiased way. Increasingly, governments are expected to ensure that public officials do not allow their private interests and affiliations to compromise official decision making and public management. In an increasingly demanding society, inadequately managed conflicts of interest on the part of public officials weaken citizens' trust in public institutions.

Conflicts of interest in both the public and private sectors have become a major matter of public concern world-wide. In government and the public sector, conflict-of-interest situations have long been the focus of specific policy; legislation and management approaches are meant to maintain integrity and disinterested decision making in government and public institutions. In the private sector, concern for integrity in business also has a long history, in particular for protecting the interests of shareholders and the public at large. Recent scandals have drawn attention to the importance of avoiding conflicts of interest that can arise when, for example, a public official leaves public office to take up a position in the business or non-governmental organization sector, or an accounting firm offers both auditing and consulting services to the same client, or a regulatory agency becomes too closely aligned to the business entities it is intended to supervise.

New forms of relationships have developed between the public sector and the business and non-profit sectors, giving rise, for example, to increasingly close forms of collaboration such as public/private partnerships, self-regulation,

interchanges of personnel, and sponsorships. New forms of employment in the public sector have also emerged, with potential for changes to traditional employment obligations and loyalties. In consequence, a potential is clearly emerging for new forms of conflict of interest involving an individual official's private interests and public duties. Growing public concern has put pressure on governments to ensure that the integrity of official decision making is not compromised.

While a conflict of interest is not *ipso facto* corruption, the recognition is increasing that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption. The proper objective of an effective conflict-of-interest policy is not the simple prohibition of all private-capacity interests on the part of public officials, even if such an approach was conceivable. The immediate objective should be to maintain the integrity of official policy and administrative decisions and of public management in general, recognizing that an unresolved conflict of interest may result in abuse of public office.

This objective can generally be achieved by ensuring that public bodies possess and implement policy standards for promoting integrity, effective procedures to identify risks and deal with emergent conflicts of interest, appropriate external and internal accountability mechanisms, and management approaches—including sanctions—that aim to ensure that public officials take personal responsibility for complying with both the letter and the spirit of such standards.

## Managing conflict of interest

In a rapidly changing public sector environment, conflicts of interest will always be an issue of concern. A too-strict approach to controlling the exercise of private interests may conflict with other rights, may be unworkable or counter-productive in practice or may deter some people from seeking public office at all. Therefore a modern conflict-of-interest policy should seek to strike a balance by identifying risks to the integrity of public organizations and public officials; prohibiting unacceptable forms of conflict; managing conflict situations appropriately; making public organizations and individual officials aware of the incidence of such conflicts and by ensuring that effective procedures are deployed for the identification, disclosure, management and promotion of the appropriate resolution of conflict-of-interest situations.

## OECD Guidelines for managing conflict of interest

Based on good practices in 30 countries, the Organisation for Economic Co-operation and Development (OECD) has developed the *OECD Guidelines for Managing Conflict of Interest in the Public Service*. While preparing these *Guidelines*, OECD identified the desirability of establishing a set of core principles, policy frameworks and institutional strategies for managing conflict-of-interest matters in the public service. The *Guidelines* were approved in the form of an OECD Recommendation to assist the efforts of OECD member countries in setting principles and benchmarks in this critical dimension of ensuring good public governance. The *Guidelines* can also provide general guidance for other branches of government, sub-national-level government, and state-owned corporations.

### Core principles for managing conflict of interest

In the interests of maintaining public confidence in public institutions, the *Guidelines* reflect the fact that public officials, in dealing with conflict-of-interest matters, are expected to observe, in particular, the following core principles to promote integrity in the performance of official duties and responsibilities:

#### Serving the public interest

- Public officials should make decisions and provide advice on the basis of the relevant law and policy, and the merits of each case, without regard for personal gain (i.e., be “disinterested”). The integrity of official decision making, in particular in the application of policy to individual cases, should not be prejudiced by the religious, professional, party-political, ethnic, family, or other personal preferences or alignments of the decision maker.
- Public officials should dispose of, or restrict the operation of, private interests that could compromise official decisions in which they participate. Where this is not feasible, a public official should abstain from involvement in official decisions that could be compromised by their private-capacity interests and affiliations.
- Public officials should avoid private-capacity action that could derive an improper advantage from “inside information” obtained in the course of official duties, where the information is not generally available to the public, and are required not to misuse their position and government resources for private gain.

- Public officials should not seek or accept any form of improper benefit in expectation of influencing the performance or non-performance of official duties or functions.
- Public officials are expected not to take improper advantage of a public office or official position which they held previously, including privileged information obtained in that position, especially when seeking employment or appointment after leaving public office.

#### Supporting transparency and scrutiny

- Public officials and public organizations are expected to act in a manner that will bear the closest public scrutiny. This obligation is not fully discharged simply by acting within the letter of the law; it also entails respecting broader public service values such as disinterestedness, impartiality and integrity.
- Public officials' private interests and affiliations that could compromise the disinterested performance of public duties should be disclosed appropriately, to enable adequate control and management of a resolution.
- Public organizations and officials should ensure consistency and an appropriate degree of openness in the process of resolving or managing a conflict of interest situation.
- Public officials and public organizations should promote scrutiny of their management of conflict of interest situations, within the applicable legal framework.

#### Promoting individual responsibility and personal example

- Public officials are expected to act at all times so that their integrity serves an example to other public officials and the public.
- Public officials should accept responsibility for arranging their private-capacity affairs, as far as reasonably possible, so as to prevent conflicts of interest arising on appointment to public office and thereafter.
- Public officials should accept responsibility for identifying and resolving conflicts in favor of the public interest when a conflict does arise.
- Public officials and public organizations are expected to demonstrate their commitment to integrity and professionalism through their application of effective conflict of Interest policy and practice.

## Engendering an organizational culture intolerant of conflicts of interest

- Public organizations should provide and implement adequate management policies, processes and practices in the working environment to encourage the effective control and management of conflict-of-interest situations.
- Organizational practices should encourage public officials to disclose and discuss conflict-of-interest matters and provide reasonable measures to protect disclosures from misuse by others.
- Public organizations should create and sustain a culture of open communication and dialogue concerning integrity and its promotion.
- Public organizations should provide guidance and training to promote understanding and dynamic evolution of the public organization's established rules and practices and their application to the working environment.

## From policy design to implementation

Defining a policy approach to dealing with conflict of interest is an essential part of the political, administrative and legal context of a country's public administration. The OECD Guidelines do not attempt to cover every possible situation in which a conflict of interest might arise, but instead are designed as a general policy and practice reference that is relevant to a rapidly changing social context. The proposed measures are intended to reinforce each other to provide a coherent and consistent approach to managing conflict-of-interest situations. The key functions of this approach are:

- Definition of the general features of conflict-of-interest situations that may jeopardize organizational and individual integrity;
- Identification of specific occurrences of unacceptable conflict-of-interest situations;
- Leadership and commitment to implementation of the conflict-of-interest policy;
- Awareness that assists compliance and anticipation of at-risk areas for prevention;
- Appropriate disclosure of adequate information and effective management of conflicts;
- Partnerships with other stakeholders, including contractors, clients, sponsors and the community;

- Assessment and evaluation of a conflict-of-interest policy in the light of experience; and
- Redevelopment and adjustment of policy and procedures as necessary to handle evolving situations.

## Sharing experience and developing a toolkit

In addition to the *Guidelines*, the OECD published a report on managing conflict of interest that highlights trends, approaches and models across 30 countries in a comparative overview and also presents examples of recent innovative solutions. Selected country case studies provide more details on the implementation of policies in national contexts and on key elements of legal and institutional frameworks. Moreover, the OECD has developed and tested conflict-of-interest management tools to provide a set of practical management strategies and processes that help managers in putting the *Guidelines* into practice. This resource package includes generic definitions, objective tests, checklists, generic provisions, model forms and training materials. Selected tools are provided below as examples.<sup>20</sup>

### TOOL #1: Objective tests for identifying a conflict of interest

This tool may be applied to

- identify conflict situations in specific detail,
- provide objective identification of relevant conduct/facts,
- provide a clear set of routines for teaching/training, and
- provide objective evidence for management of conflict situations.

The following tests provide a simple questionnaire-style framework for identifying the relevant features of conflict-of-interest situations in detail. Every public official should be trained to understand these tests, and every senior manager should be competent in applying them to real situations. Failure to do so will probably mean that conflict situations escape attention. Civil society organizations could also use these tools for the training of their members, and for conducting courses for, say journalists.

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<sup>20</sup> More information on the tools is available on the OECD's website at [http://www.oecd.org/document/53/0,2340,en\\_2649\\_34135\\_2516085\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/53/0,2340,en_2649_34135_2516085_1_1_1_37447,00.html).



Conflict of interest situation (“actual”/”real” conflict of interest):	
Question 1	What official functions or duties is person X responsible for? [Refer to relevant official policy document, functional duty statement, law, or contract, and to the functional objectives of the official’s organization, etc.].
Answer	Person X is responsible for functions 1, 2, 3 (etc.) in ministry B.
Question 2	Does person X have private interests of a relevant* kind?
Answer	Yes [the relevant facts are known].
Conclusion	Person X has a conflict of interest.
* Comment:	<p>“Relevant interest” in this context usually means the private interest is relevant to the official’s position or functional responsibilities, <i>and</i> is</p> <ul style="list-style-type: none"><li>• a private interest of such a kind that it could improperly influence person X’s performance of his or her assigned official duties (for example, family responsibilities, religious belief, professional affiliation, political alignment, personal assets or investments, debts, etc.); or</li><li>• a private interest of such a value that it could improperly influence person X’s performance of his or her assigned official duties (for example, a business interest, or an opportunity to make a financial profit or avoid a loss, etc.).</li></ul>

**TOOL #2:** Generic checklist for identifying “at-risk” areas for conflict of interest

This tool may be applied for

- management action and
- training.

The following generic checklist is intended to be used by managers to identify those areas of their responsibility where the organization is at risk if conflict-of-interest situations occur. In each case, a “Yes” answer is desirable.

For most questions, an administrative procedure is necessary, to enable the risk of conflict-of-interest situations to be identified and reduced or managed effectively. Therefore, in the case of a “Yes” answer, the user should ask him/herself the question: “*What is the relevant administrative procedure, and is it effective?*” In the case of a “No” answer, the user should go on to ask him/herself the question: “*Why is no relevant administrative procedure in place, and what could be done to identify ‘at-risk’ areas for conflict of interest potential?*”.

### 1. Additional (“ancillary”) employment

- Has the organization defined a policy and related administrative procedure for approval of additional/ancillary employment?
- Have all staff been made aware of the existence of the policy and procedure?
- Does the policy identify potential conflict of interest arising from the proposed ancillary employment as an issue for managers to assess when considering applications for approval?
- Is there a formal authorization procedure, under which staff may apply in advance for approval to engage in other employment, while retaining their official position?
- Is the policy applied consistently and responsibly, so as not to discourage staff from applying for approval?
- Are approvals reviewed from time to time to ensure that they are still appropriate?

### 2. “Inside” information

- Has the organization defined a policy and administrative procedure for ensuring that “inside information,” especially privileged information obtained in confidence from private citizens or other officials in the course of official duties, and in particular commercially sensitive business information, taxation and regulatory information, personally sensitive information, law enforcement and prosecution information, and government economic policy and financial management information, is kept secure and is not misused by organization staff?
- Have all staff been made aware of the existence of the policy and procedure?
- Have all managers been made aware of their various responsibilities to enforce the policy?

### 3. Contracts

- Does the organization ensure that the staff involved in the preparation, negotiation, management, or enforcement of a contract involving the organization has declared any private interest relevant to the contract?

- Does the organization have the power, either under the law or by contractual provision, to cancel a contract if it is proved that any significant aspect of the contract was compromised by an unidentified conflict of interest or corruption involving the contractor?
  - Where a contract has been identified as compromised by an unidentified conflict of interest or corruption involving an official or former official of the organization, does the organization retrospectively assess other significant decisions made by the official in his/her official capacity to ensure that they were not also compromised by undeclared conflicts of interest?
- 4. Gifts and other forms of benefit**
- Does the organization's current policy deal with conflicts of interest arising from both traditional and new forms of gifts or benefits?<sup>a%</sup>  
Does the organization have an established administrative process for controlling gifts, for example by defining acceptable and unacceptable gifts, for accepting specified types of gifts on behalf of the organization, and for declaring significant gifts offered to officials?
- 5. Family and community expectations**
- Does the organization recognize the potential for conflicts of interest to arise from expectations placed on individual public officials by their immediate family, or by their community (including religious or ethnic communities), especially in a multi-cultural/pluri-cultural context?
- 6. "Outside" appointments**
- Does the organization define the circumstances under which a public official may undertake a concurrent appointment on the board or controlling body of an "outside" organization or body which is involved in a contractual, regulatory, partnership or sponsorship arrangement with their employing organization? For example,
    - a community group or a non-governmental organization,
    - a professional or political organization,
    - another government organization or body, or
    - a government-owned corporation or a commercial public organization?
  - Does the organization define an administrative process for authorizing such appointments, in which potential for conflict of interest issues is considered?
- 7. Business or NGO activity after leaving public office**
- Does the organization have the power, under the law or a contract of employment, to define conditions under which a former public official may undertake an appointment with an "outside" organization or body which is involved in a contractual, regulatory, partnership or sponsorship arrangement with the official's former employing organization?

- Does the organization actively maintain authorization procedures, under which a public official who is about to leave public office may negotiate an appointment or employment or other activity with a body where there is potential for a conflict of interest to compromise the organization?
- Where an official has left the organization for employment in a non-government body or activity without undertaking the provided approval process, does the organization retrospectively assess the decisions made by the official in his/her official capacity to ensure that those decisions were not compromised by undeclared conflicts of interest?

*Comments:* Tool #2 consists of a suite of related draft clauses, which reflect the approach taken by the fundamental definition of conflict of interest. The draft clauses focus on the key elements of a modern code of ethics or anti-corruption law for the public sector. With appropriate adaptation to suit the law and drafting conventions of the country concerned, these clauses could be used to give effect to the definition of conflict of interest advocated in this package, while at the same time making the relationship between conflict of interest, corruption, integrity and ethics clear.

**TOOL # 3** Gifts and gratuities checklist  
Tool Type: Open-ended Prescriptive Checklist  
Application: Decision making, Training

Codes of conduct in the public sector often give a lot of attention to the issue of gifts. This prescriptive checklist reduces the confusion to four simple tests, arranged under the mnemonic “GIFT” to make it easier to remember. Each element of the “G-I-F-T” mnemonic recalls one of the principles of public ethics, rather than a set of complex administrative definitions and criteria or processes.

Gifts and gratuities checklist	
<b>G</b> enuine	Is this gift genuine, that is, offered in appreciation for something, which I have done well, in accordance with my functions as a public official, without any encouragement from me?
<b>I</b> ndependent	If I accept it, would a reasonable person be confident that I could be independent in doing my job in the future, especially if the donor of this gift is in some way involved or affected?
<b>F</b> ree	Could I always feel free of any obligation to do something in return for the gift from the donor, or for his/her family or affiliates?
<b>T</b> ransparent	Am I prepared to declare the gift in a completely transparent way, to my organization and its clients, to my professional colleagues, and to the media and the public in general?

## Case studies

### Case Study 1

You are a senior officer in the Corporate Services and Data Processing Division of your ministry. A contractor who has serviced the Ministry's computer equipment for the past two years offers you a computer to use at home—free of charge. Over the time, this person has become a close friend of yours. You do a lot of work for the Ministry at home, at the weekend especially, and the computer would be very useful. You cannot afford to buy a computer of your own. Your friend, the contractor, says the computer is fairly old, and so is not worth much: he says you can keep it for as long as you want to. You accept the offer. The Ministry computer equipment service contract is due for renewal in three months' time, and you will be on the committee which will decide on the winning contract. Would you accept the offer from your friend? Why?/Why not?

### Case Study 2

You are the chief Counter-Corruption Officer for the federal ministry of justice: your deputy minister has overall responsibility for the Ministry's current major review of the national Criminal Code. A consultant from the company which is advising on the review project asks you whether it would "cause difficulties" if the company were to invite your deputy minister to attend the forthcoming Soccer World Cup finals in a neighboring country. The consultant says that the company would provide the airfares and accommodation, and the deputy minister would also be a guest in the company's corporate hospitality tent at the stadium, which would give the deputy minister a good opportunity to meet other junior ministers from neighboring countries who will also be there. The deputy minister is very keen on soccer, and is a former president of your country's national soccer federation. Is a conflict-of-interest issue involved in this offer?

### Case Study 3

You overhear a conversation between two staff members from another section of your organization in the washroom, in which one employee claims, laughing, that she had recently gotten her supervisor to recommend her promotion by agreeing not to report that the supervisor has been taking bribes from citizens (to escape prosecution for traffic offenses). As a supervisor, you

**Case studies** (*continued*)

know that the new government is about to make bribe-taking a serious criminal offense. Your ministry has recently introduced a strict policy to reduce bribe-taking by employees, which includes requiring its supervisors to set an example to other staff. You are also aware that the supervisor concerned is very popular among his staff and the senior management of the organization. Is there a conflict of interest in this situation?

**Case Study 4**

You discover that, for the last two years, a close friend at work has been stealing small amounts of cash and altering official financial records to disguise the thefts, and taking office supplies from your government ministry. She has been selling the supplies at the market in the next town. Because of the ministry's extremely poor accounting systems, no one suspects that anything is wrong. Your friend has a sick husband and a young family to support and her salary as a civil servant is too low for a family to live on. Is there a conflict of interest in this case?

**Case Study 5**

As part of his official duties, an official driver is required to use the ministry's vehicle to deliver messages and to carry out official errands. His job requires him to be "on call" and away from the ministry for lengthy periods on most days, and he is trusted to carry out his duties with minimal supervision. The driver has been with the Ministry for many years, and has never been in any trouble. Because of the flexibility of the driver's work arrangements, he finds it easy to carry out personal business, such as paying bills, shopping, or taking family members to and from school, during the working day. As he still gets his official work completed, is it acceptable for the driver to carry out his private business in the ministry's vehicle? Case Study 6As manager of the section, you are asked to act as chair of the selection committee for a vacant permanent position in your section. One of the applicants is from outside the ministry, and is socially a friend of yours, as you are related by marriage to the applicant's husband. This is not known to the other members of the selection panel. You decide that you will not allow this relationship to influence your judgment. You decide to tell the panel members that you will stand aside from the final assessment of your friend, but as chair you will make the final decision in accordance with the views of the committee. Is this an appropriate solution?

## CHAPTER 4

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### *Curbing Corruption in Public Procurement*

- A. Reforming Public Procurement
- B. Analyzing the Public Procurement Process to Identify and Eliminate Risks of Corruption



# A. Reforming Public Procurement

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When the Asian Development Bank's auditors and investigators visit Asian and Pacific countries, they are often overwhelmed by accusations of fraud and corruption related to public procurement. Sometimes government officials and bureaucratic decision makers complain against contractors and consultants—the buyers against the suppliers. Other times, the reverse happens and the suppliers complain against the buyers. And sometimes, the buyers, suppliers or civil society organizations complain about a third party, often those institutions that have funded the procurement at stake.

Unfortunately, learning that public money is being siphoned off to private pockets is much easier than identifying the guilty and gathering sufficient evidence to bring the guilty to justice. Further, many legal systems are ineffective overall or make punishments trivial enough so that the expense of investigating and prosecuting corruption is not justifiable when weighed against a “greater public good”. Action should thus be taken to prevent corruption; procedures that assure transparency and foster integrity in public procurement constitute the pivotal instrument.

## Past reforms of public procurement procedures

Corruption in public procurement is not endemic only to developing countries. In fact, it is arguable that the push for greater accountability and transparency in industrialized countries has caused the concerns over public procurement in the developing world. Claims for greater government accountability in industrialized countries have brought forth continuous efforts

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<sup>21</sup> The views expressed herein are those of the author and do not necessarily reflect the views or policies of the Asian Development Bank.

to review and reform procurement systems to ensure that the taxpayer “gets his money’s worth.” The United States (US), for instance, launched a program to “reinvent government” in 1994, and one of its top priorities was to reform the procurement system. This greatly increased efficiency in public procurement; besides, the removal of bureaucratic obstacles in public procurement reduced the opportunities for corrupt practices. The United Kingdom in 1998 launched a study on Efficiency in Civil Government, which resulted in several improvements in its procurement system. France, too, undertook procurement reforms.

Such self-examination led the industrialized countries to inspect their investments in developing countries through multilateral institutions. With the aim of rendering these investments more effective, they made financing conditional on procurement and administrative reform. This was not because of some unique concern over public procurement in the borrowing countries, but rather, because of the need to ensure their own taxpayers that projects in developing countries are sound investments with positive results.

## **Procurement reform on the buyers’ side**

Public procurement is essentially a business process—with considerations of integrity; accountability and its twin, transparency; national interest; and effectiveness. This business process is also embedded in a political system; thus, without political support, it cannot be changed toward effectiveness and integrity. Simply blaming government officials on the buyer’s side for being corrupt is inadequate; lack of expertise contributes just as much to generating corruption in public procurement.

To provide such expertise, the United Nations Commission on International Trade Law developed a model law on procurement of goods and construction in 1993.<sup>22</sup> The model law essentially strives to promote competition among suppliers of goods and construction and encourages bidders to participate regardless of their nationality.

The reason why a procurement law focuses on fostering competition as its key mechanism is simple: market-based systems exert constructive pressures on suppliers to constantly adjust and improve the pricing, quality and performance of a product or service. A supplier that arranges to minimize market pressures through undue influence or bribery loses the initiative to

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<sup>22</sup> The document is available at UNCITRAL’s Website: <http://www.uncitral.org/english/texts/procurement/proc93.htm>.

make his product more competitive, and the buyer is far more likely to receive substandard products and services.

Encouraging participation “regardless of nationality” is somewhat more controversial. While it is arguable that allowing foreign competitors to bid creates additional risks of corruption, those dealing with anti-corruption issues at international organizations certainly recognize the need to work in concert and share knowledge.

Previously, the practice was to ask each country to be responsible for the conduct of its nation’s companies. However, because the economic stakes were extremely high, many countries charged one another with failure to match their own efforts in this regard, by either putting a weak statute on the books or by neglecting enforcement. The US Foreign Corrupt Practices Act is a prime example: American companies complained bitterly of not having a level playing field, even though the law was only superficially enforced until the late 1990s.

The United Nations has recognized these points in its Convention Against Corruption. The Convention acknowledges “that corruption undermines the legitimacy of public institutions and strikes at society, ethical values and justice, as well as at the sustainable development of nations, and that the globalization of the world’s economies has led to a situation where corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.”

So, while acknowledging that eradication of corruption is a responsibility of states, the Convention recognizes that nations must cooperate with one another, with the support and involvement of civil society, if their efforts in this area are to be effective. Such cooperation is necessary not only to allow states to share information globally, but to ensure equitable competition among businesses. Even the International Chamber of Commerce, which welcomed the United Nations’ moves to create this Convention, emphasized that unless properly monitored, the Convention could create an uneven playing field for businesses.

But no matter how well all of these issues can be addressed, whether through individual or collective efforts, and no matter how well we try to preempt fraud and corruption, everyone knows it will occur, somehow, somewhere, to some degree.

## **Setting incentives for change on the suppliers’ side**

Incentives for change in the suppliers’ business practices may fruitfully complement the mentioned legal and procedural reforms. Penalties for corrupt behavior serve as an essential and in fact ubiquitous deterrent; they can be

found in basically all countries' legal and judicial systems, and multilateral institutions, deprived of applying penal sanctions, make use of such administrative penalties as disqualification or ineligibility as penalties instead.

When strategically applied, administrative penalties can serve as an excellent incentive for changing business practices for the better. ADB's Anticorruption Unit's policy for dealing with contractors that violate the policy strives to exploit this potential: the company or individual is requested to explain its practices and what measures it plans to implement to avoid similar violations in the future; the proposed reforms are taken into consideration when ADB determines the penalty. This strategy has a two-fold advantage: it avoids harming the company and thus its employees, while promoting good practices and integrity. ADB has tried to balance carefully the need to punish with the better interest of reform.

## **Practical steps to resolve corruption in public procurement**

Even though resolving corruption in public procurement cannot be accomplished by one best method, some general principles can certainly be followed. The first step when reforming the procurement system is to identify deficiencies. This review must evaluate the regulatory framework, monitor compliance with laws and regulations, measure performance and advise governments and civil society of successes and deficiencies. It must further ensure appropriate competition, take advantage of potential economies of scale and demonstrate professionalism and expertise. Only after all these means have failed may appropriate penalties be imposed.

Confidence in public procurement helps to attract more investment by lowering risk. A transparent system allows the private sector to assess the risk of doing business with governments and make more rational investment decisions, in line with good commercial practice and public accountability requirements. Development partner agencies also have an interest in transparent public procurement, since control of expenditures through accountability is essential to explain to their management and boards of directors that development assistance funds have been used in an appropriate manner.

## B. Analyzing the Public Procurement Process to Identify and Eliminate Risks of Corruption

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**E**liminating risks of corruption in public procurement requires their prior identification. This again demands a precise understanding of the procurement process. With the ultimate aim of proposing a systemic approach to curbing corruption in public procurement, this document provides an overview of the key areas of concern in public procurement and how to address them.<sup>23</sup> It describes the predominant concepts and principles in public procurement, identifies the main parties intervening in this process and discusses actual instances of procurement malpractices. It also proposes three tools that are used by international financial institutions (IFIs) to detect corruption in public procurement, *inter alia* the Risk Profiling of Procurement Entities, a proactive and cost-efficient tool that the Asian Development Bank successfully employs.<sup>24</sup>

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<sup>23</sup> Full documentation on this workshop is available at <http://www1.oecd.org/daf/asiacom/KL.htm#documents>

<sup>24</sup> Office of the General Auditor, Anticorruption Unit.

## Key concepts and principles in public procurement

Public procurement is usually defined as the acquisition of goods, works and services by a public administration. Contracts are signed mostly with the private sector and are expected to meet the user's requirements with the best value for money—defined as life-cost and quality. As such, public procurement must serve citizens' and taxpayers' interests. Public procurement represents an important part of governmental expenditures. In the European Union, for example, public procurement is estimated to cover about 15% to 20% of gross domestic product; in 1998 alone, 73,000 invitations were issued for a total value of EUR1,000 billion. Given the weight of public procurement in a national economy, it is clear that good procurement practices are essential ingredients of good governance.

Procurement activities can basically be categorized as “poor” and “good” practices: Poor practices either entail waste and delays because of inefficiencies or stifle competition because of unfairness or corruption. Both such practices impede economic growth and affect public trust. Good practices achieve the forecast results in a timely fashion while ensuring cost-effectiveness. Good procurement promotes four key principles: transparency, economy, efficiency and fairness.

- *Transparency* is defined as an objective (neutral) and public (visible) mastering of the whole process from call for tender to contract award and management. An important indicator is the “public advertisement,” which must be adequate and prompt and provide identical responses to all requests for clarification.
- *Economy* can best be expressed through such criteria as
- Contract prices that are close to original estimates (although a price that is too close to the original one might indicate prior knowledge of the buyer's estimate),
- Unit rates that are comparable with similar conditions/price DB/indexes, and
- A number of bids that is sufficient to reach the best possible price.
- *Efficiency and timeliness* are achieved by comparing the planned with the actual procurement schedule, by avoiding any delay in public bid openings, and by measuring the length of time between evaluation and contract award—which normally should be reduced to the shortest possible.
- *Fairness and equity* in the procurement process are indicated by a low number of complaints received. Tender rejections for marginal reasons

and patterns of awarded contracts by the same institution are important criteria for verifying compliance with this exigency.

Failure to comply with these principles indicates corrupt or fraudulent practices, respectively defined as *the misuse of an individual's position for improper/unlawful enrichment*<sup>25</sup> or a *misrepresentation of facts*.<sup>26</sup> Such practices, including collusion, obviously diminish the benefits of free and open competition.

Six different procurement types can be distinguished: International competitive bidding, limited competitive bidding, national competitive bidding, shopping, direct contracting and force account. The following table outlines the specific features of each of these procurement types:

It is worth noting that efficient management of the procurement cycle, irrespective of the procurement method that is being used, requires several types and levels of documentation, such as guidelines and handbooks (for

**Table 4.1. Features of Procurement Types**

Procurement Type	Features
International Competitive Bidding (ICB)	<ul style="list-style-type: none"> <li>• Widest range of choices</li> <li>• Gives adequate, fair and equal opportunities to bid</li> </ul>
Limited International Bidding	<ul style="list-style-type: none"> <li>• ICB by direct invitation, no advertisement</li> <li>• Limited number of suppliers</li> </ul>
National Competitive Bidding	<ul style="list-style-type: none"> <li>• Unlikely to attract international competition.</li> </ul>
Shopping, National and International	<ul style="list-style-type: none"> <li>• At least three price quotations from known/ predetermined suppliers</li> </ul>
Direct Contracting, Single Source	<ul style="list-style-type: none"> <li>• Extension of existing contract for goods/services of similar nature</li> <li>• Standardization of Equipment</li> </ul>
Force Account	<ul style="list-style-type: none"> <li>• Borrower's own personnel and equipment</li> </ul>

<sup>25</sup> By offering, giving, receiving, or soliciting anything of value to influence a procurement process or a contract execution.

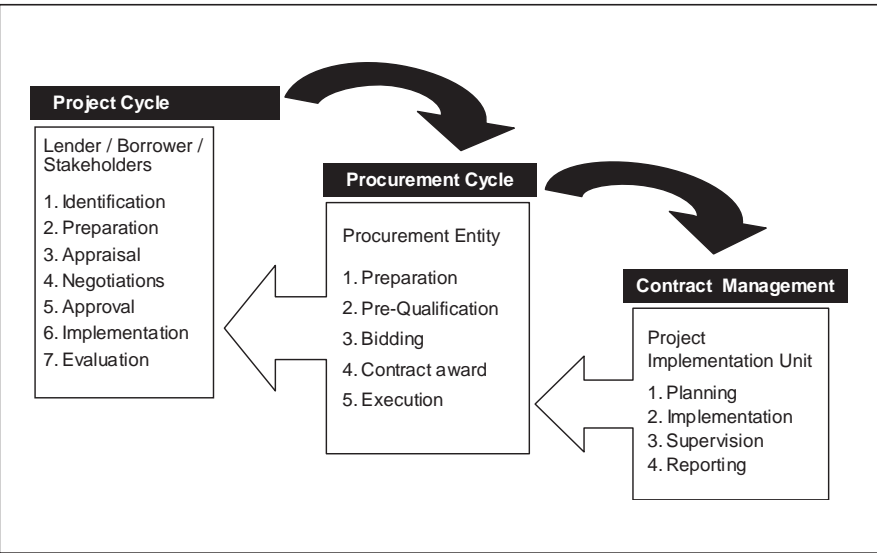
<sup>26</sup> In order to influence a procurement process or the execution of a contract.

procurement of goods and services and for the employment of consultants), standard documents and evaluation guides.<sup>27</sup> Considering this wide documentation, it is evident how complex procurement is and explains the difficulty of state administrations in coping with these difficulties efficiently.

Identifying corruption risks in public procurement

When trying to tackle corruption in public procurement, it is important to identify the stages most affected by corrupt practices. To this aim, the procurement cycle must be seen in its wider context, called “The Project Cycle” and outlined in the following diagram:

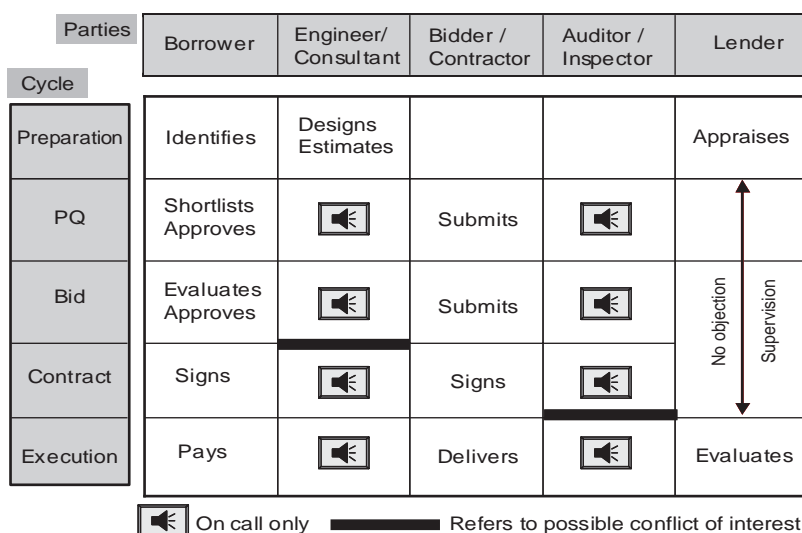
Figure 4.1. The Project Cycle



The following matrix takes in account the parties involved in each of these stages. This is important to identify actors that could prevent the risks and could take appropriate action.

<sup>27</sup> They are often complemented by more specific references such as the International Federation of Consulting Engineers Conditions of Contract, United Nations Commission on International Trade Law and World Trade Organization regulations, etc.





As the diagram outlines, only two parties are necessary to acquire goods, works, or services: the client (or “borrower” in lending operations of IFIs, in which case a lender will also have a supervisory role) and the contractor (lender). Depending on the nature and complexity of the process, an engineer/consultant might partake in the process (indicated by the “on call” symbol). An auditor, inspector or other independent third party with a supervisory role is also involved “on call” only—and such calls are too often made only when a problem has already occurred. Although experience clearly indicates that transparency and accountability are greatly enhanced with the involvement of such third parties, nothing in the bylaws or the procurement guidelines calls for any statutory auditors or inspectors.

Who among these involved parties can best address the risks of corrupt practices and take the corresponding preventive or corrective actions? The brief extract of the list of possible events that may occur in the preparation stage below allows the evaluation of how difficult effective prevention of corruption in procurement is:<sup>28</sup>

<sup>28</sup> Other examples can be found in the workshop material at <http://www1.oecd.org/daf/asiacom/KL.htm#documents>

- Absence of project procurement plan (leading to absence of risks management),
- False/inflated current/future requirements (materials, cash, replacement...),
- Decision not to publicly advertise invitation to tender,
- Setting unrealistic price of tender documents,
- No written procedure on public tendering, and
- Procurement staff lacking basic training.

These examples also highlight the importance of a systemic approach to detecting corruption in public procurement.

## Toward a systemic approach

A number of tools and instruments have been developed to address the above-mentioned risks of corruption in public procurement. The following section presents three of these tools that are used by IFIs to detect corruption in public procurement. For a better understanding of the rationale behind the three tools, the project cycle should be kept in mind, going from an *ex-post* (completed projects) situation to an on-going and finally an *ex-ante* (projects at the design stage) approach. This allows the evaluation and understanding of the potential behind each of these tools to enhance procurement effectiveness. Each tool description is followed by an assessment of its contribution toward achieving the key principles presented above, namely transparency, efficiency and effectiveness.

### Tool 1: Independent procurement reviews

Financing institutions must ensure that the proceeds of their lending operations are used for the purposes they were granted for, with due attention to considerations of economy, efficiency and transparency. This verification serves to assess and qualify various aspects of the procurement management cycle. In particular it allows IFIs to

- verify compliance against procurement guidelines and procurement and contracting procedures and processes followed for each project, including the conformity verification of final contracts against the original bidding documents;
- assess technical compliance, physical completion and price competitiveness of each contract (usually selected through a representative sample);

- review contract administration and management issues as dealt with by implementing agencies;
- evaluate the capacity of implementing agencies to handle procurement efficiently; and
- identify improvements in the procurement process in the light of deficiencies.<sup>29</sup>

This check is usually undertaken by independent third parties. It complies with the lender's fiduciary responsibility and is usually considered as a "stock-taking" exercise. However, since it is undertaken only after completion of a project, it comes too late to raise effectiveness issues for that particular project. The tool is thus most useful in a forward perspective, as it has a deterrent effect and allows for adjusting future project portfolios. Still, these advantages only become valuable if identified deficiencies are properly addressed before any new project in the same institutional setting is implemented.

#### **Tool 2:** Primary checks of procurement during project implementation

The second tool provides lending agencies with ongoing compliance checks of all documentary evidence supporting the procurement processes for goods, services and consultants undertaken by a borrower. The compliance is benchmarked against the relevant guidelines for procurement of goods and works and/or for employment of consultants.

The services assist the decision-making process of the lending agency (or procurement officers) by providing timely "primary check" reports about compliance at each and every step in the procurement processes undertaken by the borrower. These standardized reports contain a summary, an appropriateness analysis, and recommendations. The service also assures constant liaison with the lending agency for further clarification that might be requested, and provides the lending agency with regular analysis of patterns of non-conformities for any given portfolio of projects.

Such continuous identification of non-conformity, applied during project implementation, enables corrective actions to be taken before it may be too late. It also gives a broader view of a country's portfolio: it compares the performance of each borrower within the same country and thus identifies needs for support both in terms of management and capacity building.

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<sup>29</sup> Implementation of such mandates is done by verifying a detailed list of about 70 criteria (from pre-qualification down to disbursements) for each and every selected contract, including no less important items than documentation management, borrower and lender supervision, timeliness, etc.

**Tool 3: Risk profiling of procurement entities—implementing agencies**

The third tool consists of a systemic and comprehensive assessment of procurement entities and implementing agencies considered within their institutional context.<sup>30</sup> Its overall objective is to enable the assessed bodies to eventually master the identified risks attached to their mandate's undertaking as defined by the following “modules”: board of directors; institutional framework; integrity management; system and processes management; relations with stakeholders; human resources; financial processes and controls; procurement cycle management; contracts implementation; first, second and third-party audits; external and internal communication; outcomes; by-laws; regulations and voluntary accreditations.

These modules are first organized into a “cause-and-effect linkages” system. They are then defined by a series of “indicators of best practices,”<sup>31</sup> also called “objectively verifiable indicators,” and finally each of these indicators is distributed amongst each of the three dimensions shown in Table 4.2:

**Table 4.2. Cause-and-Effect Linkages for Procurement Assessment Modules**

1. Contributors' Expectations	Transparency, efficiency and effectiveness
2. Management Components	Operational systems and processes, programs and projects, human resources and finance
3. Improvement Cycle	The “plan, do, check, act” principle

<sup>30</sup> This assessment leans on some of the principles and dimensions laid down by management tools such as the Balance Scorecard, the Excellence Model, the Logical Framework and ISO Standards. However, it is important to note that ADB's approach pays due attention to the intrinsic limitations of any model that is based on private business enabling contexts, presumably transferable to the public domain of socio-economic development; for example, customer satisfaction, partnerships, road maps, etc., cannot and should not be applied as such when dealing with the provision of public goods.

<sup>31</sup> For example, the financial module contains indicators used by IFIs in their respective Country Financial Accountability Assessment, Country Procurement Assessment, Project Management Reports, Financial Accounting, Reporting and Auditing Handbooks, and Auditing Standards for non-commercial entities.

Each indicator is therefore assigned to one module, one dimension and one component. All these elements are integrated into a dedicated software whose quantification and weighting features make it possible to provide a “performance assessment tool” whose ultimate purpose is to serve as a benchmarking, monitoring and evaluation system, as per the following sequence:

- Key strengths and weaknesses are measured, enabling the provision of a detailed and actual performance dashboard ( $t_0$ );
- The identified weaknesses are reorganized in several groups of Corrective and Preventive Actions Programs ( $t_1 - t_n$ ); and finally
- They serve as a logical framework for a focused but comprehensive monitoring and evaluation system ( $t_{n, n+1}$  against  $t_0$ ).

While this tool is best used as early as possible in the project cycle, it can also be applied during project implementation. The key interest of this tool is that it provides a systemic assessment of a procurement entity (or an implementing agency) against an integrated set of dimensions within a “cause-and-effect linkages” system rather than isolated ones<sup>32</sup>.

## Who and how to implement an anti-corruption program?

A successful fight against corruption depends on many factors; the questions “*who* initiates the fight within the organization” and “*how* is it rolled out” are the most critical ones. As concerns the “*who*”, in the public sector the accountability mechanism is in the hands of the policy body and the senior management, i.e., the government and the public administration. To get started properly, commitment has to be secured from the very top.

The following case study demonstrates how an anti-corruption program could be implemented. It is based on an alleged corruption scandal that the Société Générale de Surveillance (SGS) itself had encountered, and to which both its board and top management reacted.<sup>33</sup> This case triggered the SGS Global Ethics Program, launched in 140 countries and involving more than 30,000 employees.

<sup>32</sup> As is often the case for “modules” such as finance, procurement cycle management, integrity management, etc.

<sup>33</sup> This case is documented by Jean-François Arvis and Ronald E. Berenbeim in “Fighting Corruption in East Asia: solutions from the Private Sector,” The World Bank, 2003. Part II: Case Studies: Société Générale de Surveillance, pages 194 and ff.

The scandal led to the development and implementation of the following action plan:

**Table 4.3. Société Générale de Surveillance Action Plan**

SGS Action Plan	Conceptual/Managerial Reference
1. Introduction and dissemination of the Code of Ethics	Integrity framework
2. Establishment of a compliance office Focal point	
3. Inclusion of an ethical clause in the employee's contract	Legal framework
4. Establish an ethics committee.	Leadership
5. Annual senior management reporting.	Management Accountability
6. Develop training components with employees.	Ownership
7. Maintain awareness on ethical commitment (e.g. posters).	Communication
8. Establish a direct channel to Compliance Office.	Reporting
9. Embed ethics standards in management policy and procedures.	System alignment
10. Integrated compliance in terms of reference of internal and external audit.	Control

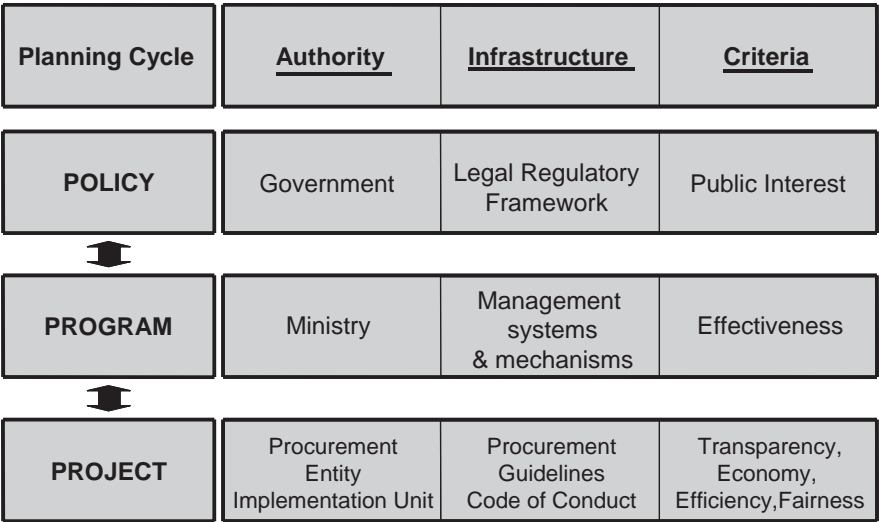
This action plan was developed for a private sector undertaking. Its ten pillars can also be applied in a public setting, however. To give just one example: if any given public sector were to consider an anti-corruption program to make procurement more transparent, a Public Ethics Infrastructure is a point to start with—just as in the private sector. Concerning public procurement more particularly, a Public Ethics Infrastructure that would meet good governance principles would have to comprise the following features:

Table 4.4. Features of Public Ethics Infrastructure

Legal/Institutional Framework	Systems and Mechanisms
Procurement Law and Regulations Code of Conduct and Anti-Corruption Act	Oversight body Training Communication Reporting Controlling Investigation
People's Commitment	Values
Government and Public Administration Declaration of Compliance Employees Statement of Compliance	Leadership Accountability Ownership

The following diagram synthesizes the major concepts and principles. It is within this framework that the tools and techniques for detecting corruption in public procurement presented above could best be applied.

Figure 2.2 Major Concepts and Principles of a Public Ethics Infrastructure



## CHAPTER 5

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### *Drafting and Implementing Whistleblower Protection Laws*

- A. The Scenario for Whistleblowers in India
- B. Korea's Whistleblower Protection and Reward System
- C. Drafting and Implementing Whistleblower Protection Laws



# A. The Scenario for Whistleblowers in India

■ S. N. P. N. Sinha  
former Secretary  
Central Vigilance Commission, India

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Corruption has for a long time been known as a low-risk, high-profit business. It has two sides—demand and supply, and four layers—systemic, individual, public, and private. Corruption occurs at the intersection of the public and private sectors, and both liberalization and excessive regulation may help it flourish. Rapid political, social or economic changes may fertilize the ground for corruption and weak institutions. Liberalization, cut-throat competition and conflict of interest may also breed corruption. When corruption becomes systemic, it changes traditional behavioral norms; political and social systems are thoroughly undermined—bribes may even be used to reduce the risk of detection and conviction. In the long run, systemic corruption inevitably leads to anger against politicians and administrations who enrich themselves illicitly and to distrust in government, and finally to a sense of disillusionment about the ability and will to reduce corruption of those who promise to do so.

For action against corruption to be successful, the involvement of the community and non-governmental actors is crucial. Education and awareness-raising programs—today known as social marketing—are very important in this context, as they contribute to citizens’ understanding about the negative impacts of corruption on a society and about available legal and institutional tools and mechanisms against it. The public at large must understand that their access to standard public services does not depend on their ability to pay a bribe. Only when people get a sense of participation will they be confident that combating corruption can make a difference. Citizens’ action against corruption is especially effective when individuals join forces in groups such as non-governmental organizations (NGOs), watch dog agencies, vigilance organizations and professional associations.

Awareness-raising and education campaigns must further instill the message that reporting corruption is a public duty. Potential informants are usually reluctant to do so, however, as they fear revenge. Eventually, the sources of information dry up if confidentiality is not assured or if an informant is required to identify himself before a complaint can be heard. Anonymity and confidentiality are therefore crucial preconditions for whistleblowing and can be achieved, for instance, by allowing the use of masking names.

Furthermore, the initial reaction of the anti-corruption body when receiving the complaint largely influences the flow of information from such sources as whistleblowers: if the agency puts aside a minor allegation, the complainant may lose confidence in the agency's work or motives and at a future time may refrain from returning with a more important matter. In the case of fraud, victims' fears of embarrassment at having to admit to being defrauded seem to deter a large proportion of them from reporting. In the case of corruption, the lack of an actual victim and fear of adverse publicity make it particularly rare for an involved individual to report to a public authority.

### **Insiders may be the best informers: internal whistleblowers**

In the case of both fraud and corruption, employees and third parties are thus particularly valuable sources of information and should consequently be encouraged to report their suspicions. Where the report is made in good faith, the employee making the report has to be protected by law. Further to legal provisions, a fraud hotline may be set up, for instance, and its existence and role in deterring or detecting fraud and corruption widely publicized. To further reassure informers of their anonymity and safety, operating this hotline through a third party could be considered.

A free press and access to information, legislation and policies may further promote disclosure and reporting of information on corrupt behavior. On the other hand, discrimination against newspapers by withdrawing government advertising and abuse of defamation laws against those who report corruption deter such action.

### **The Indian scenario**

In India, the situation regarding corruption and its exposure by individuals or group initiatives is quite specific and mainly determined by the size of the country, its population, and an effective democratic framework that has proven stable over a considerable period of time. Recently, a number of measures have been taken that over time may help to increase the reporting rate on corruption.

In January 2003, for instance, an Access to Information Act was promulgated in India. Revenue Laws contain provisions for the protection of informants in their scope of application. A piece of far-reaching legislation called the Public Interest Disclosure Act, which would grant legal protection to whistleblowers, has been recommended by the Law Commission of India.

The role of NGOs in exposing areas of corruption has also been widely acknowledged in India. A 2003 study conducted by the Center for Civil Society on corruption in the city of Delhi revealed, for instance, that the Prevention of Food Adulteration Department has only 28 inspectors to oversee 150,000 establishments, and that farmers pay 7% to 15% commissions to agents at wholesale markets that are the monopoly of the Delhi Agriculture Marketing Board. The study further revealed that INR4 million (USD88,000) has been wasted in a pension scheme: more than one third of its beneficiaries were ineligible, and in 168 cases, pension payments continued although the beneficiaries had died.

Another voluntary organization called Mazdoor Kisan Sangharsh Samity made farmer-to-farmer contacts in the State of Rajasthan and initiated a mass movement to assert the public's right to scrutinize official records. It was found that Integrated Rural Development Funds were misused and payments made for clinics, schools and public toilets that were never built. Finally, surveys conducted by the Public Affairs Centre in Bangalore (State of Karnataka) exposed fraudulent systems under the Bangalore Development Authority in areas like waste management, drainage, etc. Following the disclosure of this information, the Bangalore Development Authority reviewed its respective service delivery schemes and established a committee composed of NGOs and public agencies to oversee operations in the areas that were revealed by the survey as corrupt or corruption-prone.

Investigative journalism in India has also been widely acknowledged as an effective tool to expose corruption. The much publicized Bofors gun deal allegedly involving payment of illicit commissions is a well-known example of the effectiveness of investigative journalism in helping detect corruption. The newspaper *The Indian Express* also investigated alleged favoritism and subjective selections made in the context of the allotment of petroleum products vending licenses.

And finally, whistleblowing by individuals has led to astonishing revelations in the alleged fake stamp paper scam in the course of the last 18 months. Claimed to be the story of a mastermind, one A. Telgi purchased a stamp printing press sold by the government as an old machine and ran a printing operation, conspiring with public officials to supply stamp papers so printed to authorized vendors. The illegal action spread over a number of states and a considerable period of time and involved some INR 2 billion (USD44 million).

## B. Korea's Whistleblower Protection and Reward System

■ Nam-joo Lee

Chairman

Korea Independent Commission against Corruption

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Whistleblowing encourages members of an organization to place each other under surveillance. It is thus an effective means to control corruption. Irregular behavior always goes underground, and inexperienced eyes have a hard time detecting it. Members of the same organizational entity, however, can detect corrupt acts more easily because they work in the vicinity of the “crime scene”—the site of the corruption—and thus have easy access to compelling evidence.

In a society where whistleblowing is common, whistleblowers can work as collective deterrents to immoral or illegal activities in the entire society, thereby increasing its transparency level. Therefore, one of today's important government responsibilities is to provide an environment where anybody can reach the authorities without fear or hesitation. In this way, it can be predicted that the whistleblowing system will play a more important role as our society becomes more complex and specialized in the future.

Internationally, it was in the mid-1980s that the necessity of whistleblower protection systems was recognized and governments subsequently began efforts to set up protective legislation for whistleblowers. The importance of whistleblower and witness protection was again emphasized at the 11th International Anti-Corruption Conference held in Seoul in May 2003.

### Overview of the Korean whistleblower protection system

The Korean whistleblower protection system entered into force in January 2002 as part of the Korean Anti-Corruption Act. This Act also established the Korea Independent Commission Against Corruption (KICAC), the institution responsible for receiving and handling information.

The new protection mechanism provides official outlets and procedures for disclosing corrupt practices. Previously, those who wanted to reveal organizational wrongdoing had no legal protection and no option but to go to the media or supportive groups, risking their careers or their lives. The Whistleblower Protection and Reward System also provides for financial rewards if a whistleblower's disclosure brings about benefits to related public authorities. This means a significant change in viewing "disclosure of organizational corruption," which has long been regarded as an act of betrayal.

So far, the mechanism has proven to be quite successful: whistleblowers have increasingly approached the KICAC. In 2002, 27.7% of the reports received were submitted by whistleblowers, and in 2003 the share increased to 34.2%. In terms of credibility and intentions, internal informers' allegations have been evaluated as more useful: 5% to 10% of their cases were transferred to investigation authorities and resulted in law enforcement action. Moreover, they contributed to the reversion of 81% of the total SKW8.4 billion (USD7.1 million) that was returned to the national treasury following the KICAC's investigations.

## **Key features of the Korean whistleblower protection and reward system**

The Korean whistleblower protection and reward system consists of two basic elements: protection, encompassing protection of identity, employment, and physical security; and financial rewards.

Korean law prohibits disclosing or implying the identity of a whistleblower without his or her consent. Violators are subject to disciplinary measures or legal penal ties such as imprisonment of up to five years. When disadvantages or discrimination occur against whistleblowers at their workplace, the KICAC officially requests reinstatement or transfer. The authority is asked to take disciplinary measures against the offender or imposes a fine of up to SKW10 million (USD8,500) on a person who takes revenge against a whistleblower. Physical protection is provided when a whistleblower or his or her mate or relatives feel threatened. The KICAC, together with the competent police agency, provides physical security.

When the disclosure leads to financial gains or cost-saving to the national treasury, 2% to 10% of such benefits—up to SKW200 million (USD160,000)—go to the whistleblower as a reward.

## Review and follow-up

The performance of the whistleblower protection and reward system is being closely monitored. According to the reports as of the end of September 2003, five informants experienced reprisal such as dismissal or demotion. Our commission addressed such cases by requesting reinstatement and transfer or arranging new employment opportunities. Fines of approximately SKW8.5 million (USD7,000) for negligence were imposed on the two violators. The four informants who asked for physical protection were provided with appropriate support. In 30 cases, the commission warned against potential “witch-hunting” or mental harassment as preventive measures. Approximately SKW1.2 billion (USD1 million) were returned to the national treasury and SKW65 million (USD55,000) were awarded to two whistleblowers.

After only a short time, the protection and reward mechanism has become a basic element of the Korean whistleblower protection system and has proved its effectiveness in controlling corruption. However, cultural resistance and lack of experience at the time of the scheme’s creation have left marks in ineffective laws. Based on the past two years’ experience, the KICAC plans a number of reforms to overcome these deficiencies and to improve the mechanism’s performance:

- To prevent the exposure of a whistleblower, the KICAC is striving to improve security by allowing proxy representation and the use of pseudonyms in court.
- It has been frequently reported that whistleblowers suffered isolation in their organizations. KICAC is thus attempting to broaden the definition of “reprisal” to include the “infliction of mental distress.” Further, under current laws, an informant has to prove that reprisals occurred after the whistleblowing. To ease this burden, the KICAC is drawing up measures to hold a challenged party responsible for the documentation of the non-occurrence of organizational reprisal.
- Current instruments seem insufficient to deter reprisal practices. The KICAC is thus looking for ways to obtain power to coerce the requested party into submission and add provisions to criminalize actions constituting reprisal against a whistleblower.
- Reward payments are rare, due to the current strict preconditions that require reward money to be derived from collected penalties; payments can thus be made only after a court ruling. The KICAC is attempting to modify these conditions, to raise the ceiling and to apply a higher percentage to the calculation.

- Under current laws, a whistleblower has to present documents and records to back up his claims. This often conflicts with the duty of maintaining job-related secrecy. KICAC is thus considering a new provision that allows the exemption from such duty for a well-intentioned and reasonable disclosure.

## C. Drafting and Implementing Whistleblower Protection Laws

■ Chris Wheeler

Deputy Ombudsman of New South Wales, Australia

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For several good reasons, management should support whistleblowing and whistleblowers. Before people will blow the whistle, however, certain prerequisites must be met, to properly deal with disclosures and to protect those who come forward. These prerequisites concern management commitment and action, and effective legal protection of whistleblowers.

### **Why should management support whistleblowing and whistleblowers?**

Whistleblowers are often best placed to bring to light serious problems within the management and operations of an organization. There, problems can be broadly classified into two categories:

- unintentional problems due to misjudgments, mistakes, delays, haste and so on—primarily competence and resources issues; and
- intentional problems due to misconduct, corruption and/or illegality—primarily integrity issues.

The first category can generally be identified through alert management, effective management reporting systems, performance measures, internal or external audit and complaints from customers. The second category is much harder to identify: it is not in the interests of the parties to such conduct to draw attention to it; on the contrary, it is in their interest to take active steps to hide or disguise the problem and their involvement. Illegality, corrupt conduct and serious misconduct are usually brought to light only in one of the following four ways:



- by very astute internal or external auditing, or hands-on management and supervision, that identifies an anomaly and traces it through to a cause—a relatively rare occurrence;
- where small errors or mistakes made by one of the parties are noticed and followed up by others, thus leading to the discovery that a problem exists—again, a rare occurrence;
- where a strong moral sense is affronted by conduct that is clearly wrong—this happens occasionally; or
- through whistleblowing by a disaffected employee or former employee, or by a relative, friend or work colleague motivated by a breakdown in a physical relationship, a falling-out or on-going ill will—probably the most common way that integrity issues are likely to be brought to light.

Looked at in terms of a corporate body's defenses against the "disease" of corruption, whistleblowers can be seen as a pain that draws attention to the problem.

Not uncommonly, disclosures made by whistleblowers are branded as "malicious"; such a reaction is often used to justify taking no action. However, people motivated by malice or disaffection can still bring invaluable information to light. The fact that a whistleblower's motive may be improper or inappropriate often has little bearing in practice on whether the information provided or disclosed is of value. Certainly in the area of corrupt conduct, where both parties to a corrupt transaction are equally to blame, disclosures motivated by malice or disaffection are often the only way that such transactions are brought to light.

Another frequent claim is that whistleblowers or their disclosures are "vexatious"; again, this is used to justify taking no action. When assessing whether a whistleblower or his or her disclosures are in fact vexatious it is again important to make a clear distinction between the motive of the whistleblower and the content of the disclosure. A whistleblower may be annoying and his or her intention may even cause problems for some person, group or organization, but that is insufficient reason to ignore or take no action on their disclosure. What is crucial is the content of the disclosure.

If the content raises a valid concern or a serious issue, it needs to be dealt with appropriately. However, while it is vitally important to separate the message from the messenger, neither can be ignored. The only circumstances where a disclosure should be declined and no action taken on the basis that it is vexatious is where the motivation of the whistleblower is improper and the disclosure

does not raise any valid or serious issue. Since determining the motive of a whistleblower is a particularly difficult issue, it is generally best, at least initially, to ignore motivation and focus solely on the content of the disclosure and its accuracy.

Organizations should support whistleblowing and whistleblowers for several other good reasons as well. For example, in many jurisdictions, occupational health, safety and duty-of-care obligations impel employers to protect their staff from victimization and harassment.

Further, it can be assumed that most, if not all, organizations would prefer to have the opportunity to deal with problems in-house rather than go through the joys of an investigation by some external body such as an ombudsperson, an anti-corruption body or the police, or find out when they look at the daily newspaper. An effective internal disclosure system encourages staff to make disclosures within an organization, providing an early warning system for problems.

If a whistleblower's disclosure is not dealt with appropriately, or the whistleblower is subjected to detrimental action or victimization, this can lead to conduct both by the whistleblower and other staff that is seriously detrimental to the operations of the organization and to the morale of its staff, often over an extended period of time.

## **Treatment of whistleblowers**

Worldwide experience has clearly shown that the lot of a whistleblower is not a happy one. Such disclosures are seen as disloyalty to the employer and colleagues, if not an attack upon them. In such circumstances, the response of both employers and colleagues has generally been to take or support detrimental action against the whistleblower in reprisal. Such detrimental action can include

- blaming the whistleblower for the problem;
- “payback” complaints against the whistleblower;
- loss of opportunity for advancement;
- harassment and/or victimization;
- disciplinary action or dismissal;
- legal action against the whistleblower, for defamation, or breach of confidence or secrecy; or
- assault.

In practice, the potential for such detrimental action can arise in two different sets of circumstances:

- Where the identity of the whistleblower is *known* to the employer and concerned staff because the whistleblower has made little attempt to conceal his or her intentions or identity, because the nature of the disclosure points to the identity of the informant or because the identity of the whistleblower has been disclosed to enable the disclosure to be investigated; or
- Where the identity of the whistleblower is *unknown* to the employer or colleagues because the disclosure was made anonymously or confidentiality has been maintained, but assumptions (not necessarily correct) have been made as to the identity of the person or persons most likely to have made the disclosure.

### Prerequisites for whistleblowing and how to meet them

Leaving aside the odd obsessive or attention seeker, for the vast majority of employees to stand up and be counted when they become aware of misconduct or serious mismanagement, there are three almost universal pre-requisites:

- First and foremost, they must be confident that they will be protected if they do so—that they will have a good chance of surviving the experience in terms of their employment and legal liability;
- Second, they must believe that blowing the whistle will serve some good purpose—that appropriate action will be taken by the agency; and
- Third, they must be aware that they can make such a disclosure and how they should go about doing so—to whom, how, what information should be provided, etc.

Effective achievement of the three prerequisites for whistleblowing, properly dealing with disclosures and protecting whistleblowers requires both management commitment and an effective whistleblower protection law. The protections required in a whistleblower protection law must include both sanctions for detrimental/reprisal action and protection of whistleblowers from legal liability and prejudice in their employment.

However, a legislative scheme alone is not enough; it is also important that agencies have procedures and practices in place to protect whistleblowers on an administrative level. This is best done by having an effective internal complaints system that provides the climate in which staff feels confident that

they can complain without fear or disadvantage. For this to be effective, an organization-wide commitment is necessary to deal with any *bona fide* disclosure, including a strong commitment from senior management.

Management is far more likely to deal with whistleblowers and their disclosures appropriately if a clear legislative obligation impels them to do so. While it should make little difference to the management of an organization whether a disclosure is made under whistleblower legislation or not, experience shows us that in practice, it does make a difference.

This is not a one-sided issue: a corresponding obligation should impel staff to make their disclosures in accordance with the procedures and practices established by the law or the organization for receiving and dealing with such matters.

## Key elements of a whistleblower protection law

In drafting whistleblower protection legislation, the aim should be to encourage and facilitate the making of disclosures. Each of the provisions of such legislation should therefore be designed with one or more of the following objectives in mind:

- To protect whistleblowers;
- To ensure that disclosures are properly dealt with; and
- To facilitate the making of disclosures.

The Annex following this article sets out the key elements required to achieve these objectives, and various options for implementing each element.

Looking at the first prerequisite for disclosures (as noted above and in the Annex's Point 11), appropriate statutory protections for whistleblowers should include

- protection from exposure of identity (i.e., confidentiality and secrecy);
- protection from detrimental/reprisal action (e.g., obligations on employers/ chief executive officers (CEOs) to protect whistleblowers; a right to complain to an independent external body; criminal and disciplinary sanctions for detrimental action; injunctions; relocation of whistleblowers and/or or witness protection);
- protection from liability (e.g., from any criminal or civil liability arising out of the disclosure); and
- redress for detriment or reprisal (e.g., damages in tort or compensation).

## Managing whistleblowers

For the good of the whistleblower, the employer, the investigation of a disclosure and the public interest generally, it is vitally important that the whistleblower is dealt with appropriately. Such treatment includes

- managing their expectations to ensure from the outset that they are realistic (for example as to the process to be followed, its time frame and the likely outcomes);
- where possible and appropriate, ensuring their confidentiality (or alternatively, normally with their consent, identifying them and ensuring that they are properly protected);
- where confidentiality is to be maintained, cautioning the whistleblower about the care needed for them to avoid blowing their own cover;
- providing on-going information and support to the whistleblower (including prior warning before steps are taken that could lead to the whistleblower being identified);
- giving reasons for any decisions made in relation to the whistleblower's disclosure or how his or her disclosure is to be dealt with;
- being patient and staying calm; and
- trying to walk in their shoes.

As indicated above, statutory provisions alone do not go far enough to ensure the protection of whistleblowers; proactive management action is also required. This should include

- an explicit statement of management support for whistleblowing in general and whistleblowers in particular;
- proper and adequate investigation of allegations made by whistleblowers, as well as any allegations that may be made against them;
- preventing colleagues of whistleblowers from ostracizing them if it becomes known that they have "blown the whistle," i.e., to take active steps to prevent or stop victimization and harassment;
- providing whistleblowers with a proactive system of protection;
- providing advice and assistance, appreciating that staff who are in need of welfare assistance very often do not realize they need it, or they feel embarrassed about asking for it;
- assuring whistleblowers that they have done the right thing; and

- providing a mentoring program or arrangement whereby a senior member of the staff is given responsibility to provide advice, guidance, assistance, counseling, support, etc., to the whistleblower.

Not uncommonly, the experiences of a whistleblower that led up to their disclosure, or that followed the making of the disclosure, have a significantly detrimental affect on them. This can result in attitudes and behavior that employers, investigators and colleagues find problematic. However, the fact that a whistleblower may be “difficult” or exhibit challenging behaviors does not mean the whistleblower or his or her disclosure should be ignored. When referring earlier to whistleblowers being the pain that draws attention to problems, that term “pain” was used in more than one sense.

On the other side of the coin, whistleblower legislation should also provide that staff who make disclosures should not be given any advantage or preferential treatment because they have done so.

## Dealing with disclosures

Looking at the second pre-requisite for whistleblowing, namely that whistleblowers must believe that appropriate action will be taken, it is vital, in order for an internal reporting system to be effective, that there be mechanisms in place to ensure that disclosures are dealt with properly.

This requires that allegations be dealt with competently, impartially and promptly. Of course the nature and scale of the action warranted to address a disclosure will depend on the seriousness of the allegations, whether the matter alleged concerns mismanagement or misconduct and the potential for detrimental action to be taken against the whistleblower.

However, no matter what the substance of a disclosure, the relevant facts need to be established and documented, appropriate conclusions need to be reached based on the available evidence and a suitable response needs to be determined.

Not every disclosure requires a formal investigation. However, once a disclosure has been assessed as warranting investigation, the first step is to determine whether the allegation relates to policies, procedures and practices, or alternatively to the conduct of individuals.

At one end of the spectrum, all that may be required is to assess the disclosure and provide an explanation to the whistleblower. The options could then range through such things as an internal audit of an issue or of the general operations of a unit of the organization; a formal investigation into policies, procedures or practices; a formal investigation into alleged misconduct; or even

referral to an external body such as an ombudsperson, an anti-corruption body, or the police.

Determining the nature of the investigation at the outset has an important bearing on issues such as *powers* that will be required to investigate the complaints (and whether they are available); the *resources* that will be needed; the *authorization* necessary to undertake the investigation; and the nature of the *possible outcomes*.

It is essential that an organization-wide commitment be in place to deal with any valid disclosures. Commitment from all levels of the administration must include

- a formal statement of commitment by the CEO (endorsed by any board or council), supporting the right of staff to make complaints and asserting the CEO's and the organization's intention that they should not suffer detriment for doing so;
- a strong commitment to and acceptance by the organization's management and staff of the right of staff to make disclosures; and
- a strong commitment to investigate disclosures and to take appropriate action on those that are sustained.

## Confidentiality can be a two-edged sword

No discussion about whistleblowing can be complete without some consideration being given to the issue of confidentiality. While confidentiality can be a vital protection for a whistleblower, experience in the State of New South Wales, Australia, has shown that confidentiality can be a two-edged sword. On the one hand, it may be the best way to protect certain whistleblowers from detrimental action or victimization, but on the other hand, it can also be used as an effective defense by a defendant in any proceedings for detrimental action, victimization or in tort. A further problem is that sometimes people who are the subject of disclosure make an incorrect assumption about who made the disclosure and subject that misidentified person to detrimental action.

In a recent case involving a police officer, the defendant was able to demonstrate that the identity of the whistleblower had not been disclosed by the Police Service or its investigators. On this basis, it could not be proven that the detrimental action he took against the whistleblower was substantially in reprisal for the making of a disclosure.

The fact that an organization and its investigators have intentionally not disclosed the identity of the whistleblower often has little relevance to whether or not that information is in fact available to the person or persons that are the

subject of the disclosure. It is not uncommon that people telegraph their concerns about an issue, or even their intention to complain, before making a formal disclosure. In such circumstances, once it becomes known that a matter is being investigated, it is easy for people “in the know” to put two and two together.

Similar situations occur when a person is spotted approaching a disclosure officer. A few years ago, the office of the Ombudsman investigated a matter concerning a local council. A member of the outdoor staff had approached the nominated disclosure officer in that council to make a disclosure. The officer nominated to receive disclosures was not a person whom the outdoor staff would normally have approached, and the person in the next office to that of the nominated disclosure officer witnessed the member of the outdoor staff entering that office. The investigation revealed that this person sitting in the office next door immediately rang colleagues of the whistleblower to inform them. This was also a case where the member of the staff had indicated his concerns about a particular situation prior to making his disclosure. His colleagues put two and two together and allegedly victimized him. The point here is that even though the council had taken all reasonable steps to maintain confidentiality, the whistleblower was still identified. If this matter had ended up in disciplinary or court proceedings, it would have been very difficult for the whistleblower or the council to prove that the whistleblower’s colleagues were aware he had made a disclosure.

Sometimes the nature or subject matter of a disclosure will be sufficient for people “in the know” to be able to identify the whistleblower. Again, in these circumstances the authority and its relevant staff may not be aware that the information they have made available has been sufficient to identify the whistleblower.

In other circumstances, the sheer fact that a disclosure has been made will point to the person who made the disclosure. In such cases, a solution found by some of the larger agencies is to arrange for an internal audit of related matters or of matters of which the disclosure is only part and to indicate to the staff of the relevant area that this is merely a routine audit without disclosing the fact that any allegations have been made.

As mentioned above, the other edge of the confidentiality sword is that it may be used as a defense by anybody alleged to have committed detrimental action or victimization. Where an agency has assiduously attempted to ensure confidentiality, it will be open to a defendant in any such proceedings to argue that the detrimental action taken by them could not have been taken because of a disclosure of public interest information, as they were not aware either of the disclosure or, alternatively, of the identity of the person who made the disclosure. Of course, another defense that might be open to the defendant in



such circumstances is to claim that “I never liked the person and I have been after him for years.”

## Internal reporting systems

Looking at the third prerequisite, the nuts and bolts of making a disclosure, it is important that agencies have a detailed internal reporting policy in place that advises staff on how to disclose, what they may disclose, to whom they are to disclose it, etc.<sup>34</sup>

## The rights of people who are the subject of a disclosure

When considering the protection of whistleblowers, one must not forget that people who are the subject of a disclosure also have rights. They have the right to

- confidentiality (as long as this does not unduly interfere with the investigation);
- a quick and thorough investigation;
- the support of the organization and the senior management: if the allegations contained in a disclosure are found to be clearly wrong or unsubstantiated, the nature of that support will depend on the circumstances of the case but could include a public statement of support or a letter from the organization stating that the allegations were clearly wrong or unsubstantiated; and
- procedural fairness in the conduct and outcome of the investigation (including impartiality and the right to be heard).

## Procedural fairness

On this last point,<sup>35</sup> in common law countries it is presumed that the rules or principles of procedural fairness (natural justice) must be observed in exercising powers that could affect the rights, interests or legitimate expectations of individuals. Procedural fairness is, at law, a safeguard applying to the individual whose rights or interests are being affected. The rules of procedural

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<sup>34</sup> The Protected Disclosures Guidelines (4th edition) published by the Office of the Ombudsman of New South Wales are available at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).

<sup>35</sup> *The Complaint Handlers Tool Kit* (2nd edition), which will be published by the Office of the Ombudsman of New South Wales in 2003, deals with this issue in more detail.

fairness have been developed to ensure that decision making is fair and reasonable. Put simply, procedural fairness involves informing people of the case against them, giving them a fair hearing, not being biased and acting on the basis of logically probative evidence.

An investigator should not regard procedural fairness obligations as a burden or impediment to an investigation, to be extended grudgingly. Procedural fairness is an integral element of professional investigation, one that benefits the investigator just as much, if not more, than the person under investigation. For an investigator, procedural fairness serves a number of related functions:

- It is an important means of checking facts and of identifying major issues;
- The comments made by the subject of the investigation may expose any weaknesses in the investigation, which avoids later embarrassment; and
- It also provides advance warning of the basis on which the investigation report is likely to be attacked.

For the person whose rights, interests or legitimate expectations are likely to be affected, procedural fairness allows the person the opportunity

- to deny the allegations,
- to call evidence to rebut the allegations,
- to explain the allegations or present an innocent explanation, and
- to provide mitigating circumstances.

Depending on the circumstances that apply, procedural fairness may require an investigator or decision maker to

- ensure that investigators and subsequent decision makers act fairly and without bias,
- ensure that investigations are conducted or issues are addressed without undue delay,
- inform any person
- whose interests are or are likely to be adversely affected by a decision that a decision needs to be made and about any case the person needs to make, answer or address,
- who is the subject of an investigation about the substance of any allegations against them or the grounds of any proposed adverse comment in respect of them (at an appropriate time),

- provide any such person with a reasonable opportunity to put their case or to show cause why contemplated action should not be taken or a particular decision should or should not be made,
- consider any submissions so made,
- make reasonable inquiries or investigations before making a decision, and
- ensure that no person decides a case in which they have a direct interest or a conflict of interest.

While a person should be informed of the substance of the allegations against them and of any proposed adverse comment about them, this does not require that all information in the investigator's possession supporting those allegations be disclosed to that person. Indeed, it may damage the effectiveness of the investigation to show the investigator's hand completely by offering too much information too early to the person who is the subject of the investigation.

The obligation to inform the person of the substance of an allegation does not apply if the investigation does not directly involve proceedings which will affect the person's rights or interests, for example if an investigation is not going to lead to findings and/or recommendations that could detrimentally impact on any individuals.

## Annex: Key elements of whistleblower protection legislation

Following is a list of key elements and options to be considered for inclusion in whistleblower legislation. The list does not purport to be comprehensive. Some elements may be implemented through other legislation, for example relating to powers of investigation for watchdog bodies, witness protection, etc.

KEY ELEMENTS	OPTIONS
1. Scope of the Act	<p>Nature of conduct:</p> <ul style="list-style-type: none"> <li>• criminal/illegal activity</li> <li>• corrupt conduct</li> <li>• misconduct/improper conduct</li> <li>• maladministration</li> <li>• waste/mismanagement of public resources</li> <li>• public health and safety issues</li> <li>• environmental damage</li> </ul> <p>Responsibility for conduct:</p> <ul style="list-style-type: none"> <li>• public sector: <ul style="list-style-type: none"> <li>state/national</li> <li>local/provincial</li> <li>legislative</li> <li>judicial</li> </ul> </li> <li>• private sector: <ul style="list-style-type: none"> <li>government contractors</li> <li>corporations</li> <li>any person or body</li> </ul> </li> </ul>
2. Potential whistleblowers (i.e., persons who may make disclosures and be protected under the legislation)	<ul style="list-style-type: none"> <li>• Public officials generally</li> <li>• Employees of the public sector agency concerned</li> <li>• Government contractors</li> <li>• Private citizens</li> <li>• Legal representatives</li> <li>• Anonymous disclosures</li> <li>• Voluntary or mandatory reporting</li> </ul>
3. Reporting options	<p>Internal reporting options:</p> <ul style="list-style-type: none"> <li>• CEOs</li> <li>• nominated disclosure officers</li> </ul>

KEY ELEMENTS	OPTIONS
	<ul style="list-style-type: none"> <li>• supervisors and managers generally</li> <li>• the organization concerned</li> <li>• the employing organization (about another organization)</li> </ul> <p>External reporting options:</p> <ul style="list-style-type: none"> <li>• ombudsperson or equivalent</li> <li>• public sector standards body</li> <li>• auditor general or equivalent</li> <li>• any anti-corruption body</li> <li>• police</li> <li>• government ministers</li> <li>• members of the legislature [possibly subject to limitations or pre-conditions]</li> <li>• journalists [possibly subject to limitations or pre-conditions]<sup>a</sup> other relevant agency</li> </ul>
4. Internal reporting systems	Mandatory adoption and implementation; or Discretionary adoption and implementation
5. Threshold tests for protection	<p>Procedural:</p> <ul style="list-style-type: none"> <li>• written and/or oral disclosure</li> <li>• made to proper/specified person, position or organization</li> <li>• voluntary or mandatory reporting</li> </ul> <p>Factual:</p> <ul style="list-style-type: none"> <li>• made in good faith/with reasonable belief in truth</li> <li>• suspicion on reasonable grounds of the existence of conduct alleged; or</li> <li>• disclosure shows or tends to show the conduct alleged</li> </ul> <p>Seriousness:</p> <ul style="list-style-type: none"> <li>• misconduct/maladministration/waste generally</li> <li>• serious misconduct/maladministration/waste</li> <li>• public interest</li> <li>• warranting disciplinary action/dismissal/</li> </ul>

KEY ELEMENTS	OPTIONS
	<p>criminal charge [a high threshold if the sole test]</p> <ul style="list-style-type: none"> <li>• corrupt conduct/illegality [a high threshold if the sole test]</li> </ul>
6. Circumstances when disclosures are not protected	<p>Motivation:</p> <ul style="list-style-type: none"> <li>• disclosure known to be false/made in bad faith [Note: as a general principle, the content of the disclosure is what is important, not the motivation of the whistleblower]</li> </ul> <p>Conduct:</p> <ul style="list-style-type: none"> <li>• whistleblower fails to assist investigation</li> <li>• whistleblower makes further unauthorized disclosure</li> </ul>
7. Obligations on whistleblowers	<p>To maintain confidentialityTo assist/cooperate with investigators</p>
8. Obligations on persons/organizations that receive disclosures	<p>Adopt and implement an internal reporting system</p> <p>Confidentiality (where possible, practical, appropriate, etc) for</p> <ul style="list-style-type: none"> <li>• whistleblowers</li> <li>• subjects of disclosure</li> </ul> <p>Adopt and implement procedures for the protection of whistleblowers</p> <p>Protect whistleblowersImplement sanctions for detrimental/reprisal action, e.g.:</p> <ul style="list-style-type: none"> <li>• disciplinary action</li> <li>• dismissal</li> <li>• criminal charges</li> <li>• injunctions or orders to restrain conduct</li> </ul> <p>Deal with disclosures:</p> <ul style="list-style-type: none"> <li>• adopt and implement procedures for investigating disclosures</li> <li>• investigate disclosures</li> </ul>

KEY ELEMENTS	OPTIONS
	<ul style="list-style-type: none"> <li>• appoint or select investigators [to ensure impartial or independent investigation]</li> <li>• provide/ensure procedural fairness in the conduct of investigations</li> </ul> <p>Notify whistleblowers</p> <ul style="list-style-type: none"> <li>• of receipt of disclosure</li> <li>• of action taken or proposed</li> <li>• of progress</li> <li>• of outcome of investigations</li> </ul> <p>Notify any central monitoring/coordinating agency</p> <ul style="list-style-type: none"> <li>• of disclosures received each year</li> <li>• of outcomes of investigations</li> </ul>
9. Coordinating/monitoring body/role	<p>Establish a monitoring/coordinating body/role performed</p> <ul style="list-style-type: none"> <li>• by a separate watchdog body established for the purpose</li> <li>• by an existing watchdog body</li> <li>• by a central government agency</li> </ul> <p>Functions and powers of any coordinating/monitoring body</p> <p>Reporting on the operation of the legislation</p>
10.Determinative function as to whether a disclosure is protected under the legislation	<p>By a court/tribunal</p> <p>By an ombudsman/auditor general/public sector standards agency or equivalent</p> <p>By the receiving agency or official</p> <ul style="list-style-type: none"> <li>• generally</li> <li>• in specified circumstances</li> </ul> <p>By some other person or body</p>
11.Protections for whistleblowers	<p>Protections from exposure of identity</p> <ul style="list-style-type: none"> <li>• confidentiality obligations (with listed exceptions) implemented by...</li> <li>• discretionary guidelines</li> </ul>

KEY ELEMENTS	OPTIONS
	<ul style="list-style-type: none"> <li>• statutory obligations with or without a criminal offense for breach, and</li> <li>• provisions for disclosures to be made anonymously</li> <li>• secrecy provisions/Freedom of Information exemptions</li> <li>• suppression orders in court proceedings</li> </ul> <p>Protections from detrimental/reprisal action:</p> <ul style="list-style-type: none"> <li>• obligation on employer/management/CEO to protect whistleblowers and investigate disclosures</li> <li>• complaints to external watchdog body about detrimental/reprisal action</li> <li>• sanctions for detrimental/reprisal action:</li> <li>• disciplinary action, and</li> <li>• criminal charges [see 12 below]</li> <li>• injunctions or orders to remedy or restrain a breach</li> <li>• relocation of whistleblowers within or between organizations</li> <li>• witness protection</li> </ul> <p>Protection from liability arising out of a disclosure:</p> <ul style="list-style-type: none"> <li>• from all criminal liability or any civil action, claim or demand, including protection against actions in defamation</li> <li>• from actions for breach confidence/secrecy</li> <li>• indemnity from prosecution or disciplinary action</li> </ul> <p>Redress for detrimental/reprisal action:</p> <ul style="list-style-type: none"> <li>• damages for detrimental/reprisal action (e.g., in tort); and/or</li> <li>• compensation from employer or government</li> </ul>
12.Criminal offense for detrimental/reprisal action	<p>Onus of proof:</p> <ul style="list-style-type: none"> <li>• on prosecution, or</li> <li>• on defendant (i.e., a reversed onus of proof)</li> </ul>



KEY ELEMENTS	OPTIONS
	<p>Evidentiary tests:</p> <ul style="list-style-type: none"> <li>• “substantially in reprisal” for the making of a disclosure; or</li> <li>• “because” a disclosure was made [i.e., a “but for” test that would generally be very difficult to meet]</li> </ul> <p>Admissibility of evidence</p> <p>Time periods for commencement of proceedings/limitation periods</p> <p>Nomination of a person or a body responsible for prosecuting breaches, e.g.:</p> <ul style="list-style-type: none"> <li>• police/Director of public prosecution</li> <li>• a watchdog body</li> <li>• the employing agency or its CEO</li> <li>• the whistleblower personally</li> </ul>
13. Beneficial treatment of whistleblowers	<p>Provision of beneficial treatment for whistleblowers is either</p> <ul style="list-style-type: none"> <li>• prohibited, or</li> <li>• authorized</li> </ul> <p>Nature and scope of the benefits/rewards that may be offered/ provided where beneficial treatment is authorized (e.g., on substantiation of allegations, on conviction, etc.)</p> <p>Timing of offer/provision of beneficial treatment:</p> <ul style="list-style-type: none"> <li>• on receipt of a disclosure [NB: beneficial treatment offered as inducement for the making of a disclosure, or provided automatically on receipt, is likely to prejudice the credibility of the whistleblower and the disclosure]</li> <li>• on conclusion of any investigation where the disclosure is substantiated</li> <li>• on conviction or imposition of disciplinary penalty</li> </ul>

KEY ELEMENTS	OPTIONS
14.Referral of disclosures	<p>When:</p> <ul style="list-style-type: none"> <li>• in what circumstances</li> <li>• at what stages in the process</li> </ul> <p>Where:</p> <ul style="list-style-type: none"> <li>• between agencies</li> <li>• to an external watchdog body</li> <li>• between external watchdog bodies</li> </ul>
15.Records of disclosures (i.e., statistics)	<p>Kept by receiving agency</p> <p>Reported in receiving agency annual report</p> <p>Reported to any monitoring/coordinating body</p> <p>Reported in any monitoring/coordinating body annual report on the implementation of the Act</p> <p>Secrecy provisions/Freedom of Information exemptions</p>
16.Other	<p>Powers to investigate:</p> <ul style="list-style-type: none"> <li>• generally, or</li> <li>• for particular agencies/organizations/ persons who otherwise have insufficient powers to do so effectively</li> </ul> <p>Sanctions for false or misleading disclosures</p> <p>Timelines for action</p> <p>Any other obligations for reporting of outcomes</p> <p>Reviews of the legislation</p>

## CHAPTER 6

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### *Developing Expertise in Forensic Accounting*

#### Forensic Accounting Courses in Malaysia

# Forensic Accounting Courses in Malaysia

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The scandals that recently rocked the corporate world, namely the often cited Enron and WorldCom cases, have brought the field of forensic accounting to the forefront not only in the newspapers but also in the regulatory and investigative agencies. Although such investigations (for example involving the field of audit investigations) are not new, the “new” field of forensic accounting is seen encapsulating all the other areas in the use of accounting for investigative purposes.

The increasing sophistication of certain crimes requires that forensic accounting be added to the tools necessary to bring about the successful investigation and prosecution of those individuals involved in criminal activities such as bribery, money laundering, non-compliance with existing laws and regulations and other crimes that “leave a paper trail.” Knowledge of forensic accounting by investigators will be a powerful addition to the arsenal of investigating officers and will enhance their ability to combat those crimes.

## What is “forensic accounting”?

According to the Webster’s Dictionary, the word “forensic” is defined as “pertaining to, connected with, or used in the courts of law or public discussion and debate.” Thus, it is emphasized that forensic accounting is closely connected to the legal process and has the potential to be involved in proceedings in the civil and criminal courts. In the case of the criminal courts, forensic accounting

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is valuable in the fight against white-collar crimes such as fraud, corruption and other illegal activities.

According to W. T. Thornhill, a prominent writer on forensic accounting, “(T)he discipline is so relatively new that, up to now, there has been no formal definition accepted as the standard.”<sup>37</sup> The best definition is probably given by Bologna and Lindquist (1995):

*Forensic and investigative accounting is the application of financial skills and an investigative mentality to unresolved issues, conducted within the context of the rules of evidence. As a discipline, it encompasses financial expertise, fraud knowledge, and a sound knowledge and understanding of business reality and the working of the legal system. Its development has been primarily achieved through on-the-job training as well as experience with investigating officers and legal counsel.*<sup>38</sup>

Although the main thrust of forensic accounting is involved with the financial aspects of an investigation, it encompasses all the necessary investigative expertise and experience such as interrogative skills, knowledge of law and rules of evidence, investigative proficiency, and interpersonal skills. Thus, for the purpose of this paper, forensic accounting can be deemed as a discipline that combines expertise in accounting with other investigative skills that are used to examine instances of criminal wrongdoing; the findings from the investigation will form the basis for the prosecution of the suspects in a court of law.

## Developing forensic accounting expertise

It is not an overstatement that forensic accounting is one of the most, if not the most, important tools in the fight against corruption and other criminal wrongdoing, both in the private and public sectors. It must be borne in mind that criminals are increasingly taking advantage of new technologies such as computers, e-banking, etc., to hide their crimes. Forensic accounting, together with expertise in other investigative tools and certain other areas, will then be an important tool to detect these activities.

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<sup>37</sup> Thornhill, W. T. (1995) *Forensic Accounting: How to Investigate Financial Fraud*. New York: Irwin Professional Publishing.

<sup>38</sup> Bologna, G. Jack; Lindquist, Robert J. (1987) *Fraud Auditing and Forensic Accounting: New Tools and Techniques*. Hoboken, New Jersey: Wiley Publishers.

As stated at the outset, forensic accounting should be seen as a multi-skill or multi-disciplinary area. Expertise in accounting alone will not suffice without the complementary expertise in other investigative skills. Similarly, expertise in other investigative skills without knowledge of accounting will not assist the investigating officers in uncovering the illegal activities. Thus developing expertise in forensic accounting and training investigating and enforcement officers in the relevant agencies and departments calls for an integrated approach. Forensic accounting, although new, should not be considered an option but an important and integral part of the training of both future and experienced officers.

According to Thornhill<sup>39</sup>, the forensic accountant should be equipped with the following skills and knowledge:

- Knowledge of the relevant laws,
- Rules of evidence,
- Investigative competency,
- Knowledge of fraud,
- Interviewing and interrogation skills,
- An understanding of the psychological theories relating to criminal behavior,
- Literacy in the use of computers and information technology, and
- Communication and interpersonal skills.

Although the skills and knowledge cover a wide range, cases involving the use of forensic accounting would be best served if the investigations were to be handled by a team of officers. Individually, of course, knowledge of forensic accounting would definitely be essential in the initial phases of such investigations.

Thus, developing expertise in forensic accounting for investigating officers presupposes that the officers are trained in other investigative procedures; the training in forensic accounting involves developing a strong basic knowledge in the fundamentals of accounting and specialized training in the use of accounting knowledge and tools in the investigations.

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<sup>39</sup> Thornhill, *op.cit.*

## **The Anti-Corruption Agency of Malaysia and the MARA University of Technology model for developing expertise in forensic accounting**

The Anti-Corruption Agency of Malaysia (ACA) in its continuing efforts to upgrade and enhance the capabilities of its investigating officers, embarked on a pioneering effort in developing expertise in forensic accounting. In collaboration with MARA University of Technology, it planned, developed and implemented a three-month course in forensic accounting. This joint project constitutes an excellent example of the efforts to promote expertise in forensic accounting:

Two teams, comprising experienced investigating officers from the ACA and senior academics from the University, were formed in early 2002 to develop a training program. After preparation of a detailed schedule and background learning material, the 12-week training program was launched on 1 July 2002. The training was conducted as a full-time residential course, a fact that clearly testifies to the ACA's strong commitment to developing expertise in forensic accounting. Both institutions also invested important resources and senior and highly experienced staff to the development of this program.

### **An overview of the forensic accounting course**

A fundamental in the planning stages of this course was that, given the varying backgrounds of the participants, the purpose of the course was not to train the participants to be accountants but to develop their knowledge of accounting and accounting techniques without having to go through a formal accounting course. The main focus of the course is to enable the participants to read and understand financial statements and use the tools and techniques of forensic accounting. In order to develop this capability, the participants are exposed to the procedures and methods of preparing the financial statements and the accounting concepts and principles used in this process. The course also looks at accounting and financial information as a tool in the decision-making, planning and control process.

The understanding, analysis, interpretation and evaluation of financial statements are key features in preparing the participants for the more advanced topics of forensic accounting. The participants become familiar with corporate annual reports and similar documents, such as the accounts prepared for management. The course focuses on both the contents of company annual reports, as represented by the balance sheet, profit and loss account, cash flow statement; and on changes in equity statements.

In addition, other sections of the annual statements are discussed, such as directors' reports, corporate governance statements and notes to the accounts. This discussion exposes the participants to important accounting terms and concepts: asset, liability, equity, accounting equation, revenues and expenditures. Accounting principles such as entity, cost, materiality, periodicity, prudence and others are introduced.

Although the annual reports published by the companies are the main source of information, the participants explore other information sources, such as the Internet, company websites and specialized handbooks.

To ensure proper corporate governance and reporting, participants are also introduced to International Accounting Standards (Malaysian Accounting Standards Board), the Companies Act, and rules governing companies listed on the Kuala Lumpur Stock Exchange and the Securities Commission.

In addition to developing a strong foundation in the accounting fundamentals and understanding financial statements, the participants will become involved in specialized areas of forensic accounting such as fraud and fraud investigations. Included in the areas are tools and techniques for detecting fraudulent practices, methods of proving illicit or illegal income, money laundering methods, using financial statement analysis as a tool for uncovering fraudulent financial statements, examination of financial records to uncover "on-book" and "off-book" fraud, indicators of situations that indicate fraud (red flag situations) and other specialized areas of forensic investigative accounting.

## **Components of the forensic accounting course**

The course is divided into three components, each targeting a particular objective:

### **Part 1: Financial Statement Preparation and Analysis**

- Facilitate participants' understanding of accounting numbers in the financial statements;
- Provide an understanding of current accounting and finance concepts and fundamentals;
- Improve participants' skills in using accounting and financial data for routine organizational control activities; and
- Increase participants' ability to use accounting and financial information for planning, control and decision-making purposes.



## Part 2: Accounting Standards, Companies Act and Other Guidelines

- Increase participants' awareness and understanding of Accounting Standards;
- Increase participants' awareness and understanding of the legal requirements of the Companies Act; and
- Increase participants' awareness and understanding of other available rulings/guidelines and their Compliance.

## Part 3: Forensic Accounting & Financial Fraud

- Understand forensic accounting and how it can be used to identify potential financial fraud;
- Identify phases in forensic accounting investigation;
- Identify "on-book" accounting and financial fraud; and
- Identify "off-book" accounting and financial fraud.

So that the participants benefit fully from this course, it combines formal instruction, presentations and case studies. Prominent speakers from the professional accounting bodies, regulatory agencies and the public sector are invited to speak on several important current issues. Participants are required to work in teams to prepare and present a comprehensive case at the end of each of the training program components.

The course further includes visits to relevant agencies such as the Kuala Lumpur Stock Exchange and the Securities Commission. A one-day session is conducted in an Internet-linked computer lab to enable the participants to use Internet search tools and also to illustrate the use of a spreadsheet program used to carry out a company analysis. Throughout the training program, the participants' performance is assessed and feedback obtained in order to improve the program and maximize the benefits to the participants.

## **Implementation of the training program in forensic accounting: lessons learned from two cohorts**

Participants chosen for this program are not expected to have any formal accounting knowledge or experience, as it will be provided as part of the initial phase of the program. Many of the participants who did not have any background in accounting were initially worried (understandably) about their ability to follow this program; however, their "fear" diminished in the course

of the program. As this program was designed for adult learners and the approach was different from that of formal accounting studies, the participants were able to commit fully to the program.

The first cohort was chosen from very experienced investigating officers based in different states in Malaysia (including Sabah and Sarawak). These experienced officers provided new insights, and their discussions and opinions during the course contributed a lot to the effectiveness of the learning process. Many of the participants shared their particular experiences in the field with their colleagues.

The majority of participants, even those without a background in accounting, kept up with this intensive program in spite of initial skepticism and fear. Their commitment and hard work was proven by the fact that the participants completed all the assignments on time, were prepared for the case study sessions and managed to do well in the written assessments. The facilitators from the University were impressed by the dedication and effort put in by the officers from the first cohort.

After the first program had been accomplished successfully, a review of the program was conducted with the teams from ACA and the MARA University of Technology. Results from this assessment led to strengthening the curriculum in accounting by including a separate one-week program devoted to accounting fundamentals such as principles of accounting, the accounting process and preparation of financial statements. With this phase removed from the “proper” forensic accounting course, more time could be devoted to dealing with specific topics in forensic accounting. The modified program was first used for the training of the second cohort, which began in February 2003.

Thus, within a period of one-and-a-half years, the ACA had managed to provide about sixty officers (the number will increase in the future) serving in all the states of Malaysia with expertise in forensic accounting. In the closing address to the participants of the first cohort, the Director-General of the ACA of Malaysia, the Honorable Dato’ Zulkipli bin Mat Noor, stated that these officers will form the core of expertise in forensic accounting techniques to investigate wrongdoing in both the public and private sectors. A special unit with expertise in forensic accounting will be established at the ACA’s offices in the various states. As more officers are trained, the multiplier effects cannot be understated in the continuous fight against corruption in Malaysia.

The author is confident that the efforts made by the ACA to develop expertise in forensic accounting by conducting these training programs will result in enhancing and adding to the investigating officers’ skills in investigating and prosecuting not only the crime of bribery but also other corrupt practices

and related crimes. The ultimate aim is, of course, to eliminate corruption, which in turn will have a direct impact on the citizens of Malaysia and the country as a whole.

## **Summary and conclusions**

Recent scandals in the corporate world have brought forensic accounting to prominence. The use of forensic accounting techniques, together with knowledge and skills in other investigative methods, will enhance the investigation and enforcement officers' ability to investigate and prosecute those involved in fraud, bribery and other corrupt practices and criminal acts. Thus, the development of this expertise is an urgent initiative for those departments involved in detecting, investigating and prosecuting such crimes. Given the increasing sophistication of such illegal activities, failure to develop respective expertise would endanger such agencies' effectiveness. Developing such expertise requires the commitment of resources from these agencies.

The efforts of the Anti-Corruption Agency of Malaysia in developing expertise through a well-planned course in forensic accounting are an admirable effort that has resulted in the establishment of a core of expert officers. This expertise in forensic accounting will doubtless help empower these officers to successfully investigate and prosecute those involved in corrupt activities.

## CHAPTER 7

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### *Mutual Legal Assistance and Repatriation of Proceeds of Corruption*

- A. Mutual Legal Assistance and Repatriation of Proceeds – Pakistan's Experience
- B. Improving Procedures for Mutual Legal Assistance and the Repatriation of Proceeds of Corruption
- C. Mechanisms for Gathering Evidence Abroad

# A. Mutual Legal Assistance and Repatriation of Proceeds – Pakistan’s Experience

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**L**arge-scale criminal activities, and in particular corruption, seriously harm the sustainable social and economic development of states. Developing countries are the worst affected, as these countries face particularly severe forms of embezzlement of state funds.

Today, enhanced methods of travel and communication make it rather easy for criminals to shield themselves from justice by simply crossing national boundaries. For them, boundaries do not constitute obstacles; on the contrary, they render the criminals detection and prosecution more difficult and allow them to conceal the evidence and profits of their crimes.

Law enforcement authorities are bound by the principle of sovereignty, which precludes carrying out investigations on the territory of another state. Mutual legal assistance is thus an important mechanism through which states may help each other in the fight against international criminality. Under mechanisms of international legal assistance in criminal matters, the requested state executes on its territory an official act concerning a specific criminal case and forwards the results to the requesting state. Such assistance can take many forms: hearing witnesses; securing and transferring evidence, documents, objects and assets; search of premises and seizure of property and confrontation; and service of summonses, judgments and other court documents.

## Pakistan’s experience in fighting corruption

In Pakistan, corruption is deeply rooted in the social and political history of the region. In the 1990s, vocal and socially conscious activists clamored for

a ruthless purge of the “mafia” within the bureaucracy and for the accountability of predatory high-profile public figures. Taking power on 12 October 1999, the current Government decided to stem the rot and restore the people’s shattered faith in the country.

Prompt measures were announced to improve matters, and accountability was given high priority in the envisaged reforms. On 16 November 1999, the National Accountability Bureau (NAB) was established as the spearhead of the accountability process. Pakistan’s comprehensive National Anti-Corruption Strategy<sup>40</sup>, published in 2002, takes into account that in the Pakistani milieu, corruption can only be eradicated through a multifaceted approach that includes poverty alleviation, improved literacy, and restructuring of the administration. Thus, the strategy not only relies on enforcement of coercive laws, but also addresses root causes of corruption through awareness raising and preventive measures. The anti-corruption strategy has been approved by the federal cabinet and is currently being implemented.

Immediately after the NAB was established in 1999, it started identifying prospective targets. The list of suspects for initial interrogation included rapacious public office holders, defaulting business tycoons and mercenaries operating in all echelons of the bureaucracy. The accountability process was thus unsparing and swift, gathering momentum with the passage of time.

## **Mutual legal assistance and international cooperation in the fight against corruption**

Like other third world countries, Pakistan has particularly suffered from the embezzlement of funds by the political elite. The wealth looted by these criminals has been stashed in safe havens under cover of so-called bank secrecy norms and the abundant availability of offshore companies on the shelves of innumerable service providers. The sum of assets drained out of the economy through criminal activities by tax evaders and hardened criminals is still unknown.

Due to these circumstances, Pakistan is well aware of the importance of mutual legal assistance. On the giving side, the NAB has always extended its fullest cooperation to other states in line with the international requirements and standards for combating corruption. The country’s commitment to the global drive against corruption is recognized by the community of nations.

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<sup>40</sup> Documentation of the National Anti-Corruption Strategy can be found at: [www1.oecd.org/daf/asiacom/countries/Pakistan](http://www1.oecd.org/daf/asiacom/countries/Pakistan).

Laws and procedures on mutual legal assistance are currently under review to bring them up to the standards of internationally recognized practices. A number of laws have already been passed and financial regulatory developments have taken place so that the country's internal corresponding apparatus is commensurate with the requirements of bilateral and multilateral agreements. The following examples demonstrate Pakistan's commitment to international mutual cooperation in judicial matters:

- Pakistan is cooperating with a number of foreign jurisdictions in combating corruption, money laundering and terrorist financing, including the United States of America, Canada, the United Kingdom (UK), Australia, Switzerland, Germany, Norway, Italy, and the United Arab Emirates, to name just a few;
- At present, Pakistan has bilateral extradition treaties with 26 foreign jurisdictions;
- Pakistan has been given an observer status in the Egmont Group of Financial Intelligence Units;
- Pakistan played a leading role in the sessions of the *ad hoc* Committee for the negotiation of the United Nations Convention against Corruption. Pakistan signed the Convention in Mexico on 9 December 2003;
- A number of memoranda of understanding are in the process of finalization with other jurisdictions to arrange for the bilateral exchange of information;
- Pakistan and the UK have formed a Joint Judicial Working Group to revise the current approach to issues like mutual legal assistance, extradition, terrorism and anti-corruption legislation;
- Pakistan is an active member of the Asian Pacific Group on Money Laundering and has been participating in all major conferences and workshops on money laundering, informal value transfer and counter-terrorism financing; and
- Pakistan is compliant with United Nations Resolutions Nos. 1267, 1333, 1390 and 1455.

On the receiving end, Pakistan has had a particularly successful experience of seeking legal assistance from the UK and Switzerland. The execution of Pakistan's request for legal assistance by Switzerland in the case of Ms. Benazir Bhutto, former Prime Minister of Pakistan, and her husband, Mr. Asif Zardari, is a good example of this type of cooperation

In 1997, the Government of Pakistan requested legal assistance from the Swiss Government in various cases related to corrupt practices committed by Ms. Bhutto and Mr. Zardari. One of these requests related to allegations that

the accused had extended pre-shipment contracts with two Swiss companies with the intention of receiving illegal gratification; these extensions grossly violated applicable rules. The Swiss authorities passed immediate restraining orders on the funds identified by the Government of Pakistan in its request. It also designated an examining magistrate in the canton of Geneva to execute the request for mutual legal assistance. As of today, a substantial portion of the request has been executed and important evidence has been handed over to the Government of Pakistan. On the basis of the evidence gathered, the Attorney General of Geneva concluded that the use of off-shore companies and the holding bank accounts in Switzerland operated by the couple's Swiss attorney with the sole object of hiding their true identities were *prima facie* acts of money laundering under Swiss laws. The Swiss authorities consequently opened respective criminal prosecutions against Benazir Bhutto, Asif Zardari and their Swiss attorney.

In September 2002, the Government of Pakistan filed a request to be accepted as a "damaged Party" in the criminal proceedings for money laundering; in fact, the bribes paid by the pre-shipment inspection companies and the Swiss attorney were at the cost of the Government and people of Pakistan, and no recovery had been made. The Examining Magistrate accepted the Government of Pakistan as a damaged party and observed:

Pakistan has been directly damaged by the acts for which Benazir Bhutto [and] Asif Zardari were indicted... Had Benazir Bhutto acted loyally, she or her relatives would not have benefited from said amounts but Pakistan and there is no doubt that Benazir Bhutto's and her husband's behavior is criminally punishable in Pakistan... Pakistan was consequently directly damaged by the tort committed by Benazir Bhutto, Asif Ali Zardari and their Swiss attorney and as a consequence it was a victim of money laundering in Switzerland.

The Swiss attorney filed an appeal against the Examining Magistrate's order, but the appeal was rejected. In July 2003, both Bhutto and Asif Zardari were sentenced to six months' imprisonment (suspended). The verdict also ordered the confiscation and restitution to the Government of Pakistan of approximately USD12 million held in the name of offshore companies. All three accused filed the opposition in the Misdemeanors Court and challenged its competence to try the case. At present, the case is pending with the Attorney General of Geneva and his decision is expected shortly.

Although the Government of Pakistan is satisfied by the execution of its request for legal assistance and the cooperation with the Swiss authorities, the time it has taken for its execution must be considered as rather long; the request made in 1997 is still pending six years later.



## Need for reform of mutual legal assistance procedures

Pakistan's experience clearly demonstrates weaknesses and areas where reform of the current framework and practices of granting legal assistance is needed. Such reform must encompass the preconditions and procedures of granting legal assistance as well as the commonly applied approach to repatriation of proceeds.

Typically, three aspects hamper the execution of requests for legal assistance:

- The absence of specific regulations on the granting of international legal assistance, and failure to identify a responsible central authority,
- The absence of uniform procedures for granting legal assistance, and
- Procedural impediments, such as requirements of dual criminality, reciprocity, predicate offenses and membership in global or regional forums.

As regards repatriation of proceeds, the commonly applied “conservative”—or reluctant—approach needs to be reviewed. The limits and the generally accepted grounds for refusing legal assistance are well understood; however, it must be borne in mind that reluctance in restoring embezzled funds to the affected country diminishes that country's chances for social and economic progress. Reluctance in restoring the funds also sends an unwanted message to the corrupt. It is therefore important that

- all assets gained through corruption and stored overseas be returned to the victim state;
- the return of assets to the affected state not be tied to political motives but based on judicially decided facts;
- no distinction be made between embezzled money/diverted state funds and the money arising from kickbacks and commissions; and
- repatriation of assets not be linked to the degree of preventive measures taken by the requesting state.

In spite of the large differences between legal systems and practices, nations of the world must agree on common principles for providing each other legal with assistance. The United Nations Convention Against Corruption will be a landmark in this endeavor.

## B. Improving Procedures for Mutual Legal Assistance and the Repatriation of Proceeds of Corruption

■ **Martin Polaine**

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**I**nternational bribery and corruption are transnational crimes and, as such, require investigators and prosecutors to gather evidence across borders. Equally, in a world of financial networks that may straddle many states, the mounting of a domestic corruption case will very often demand evidence from overseas. Against that background, the frameworks and procedures within which both formal assistance (referred to as “mutual legal assistance”) and informal co-operation (referred to as “mutual assistance”) are obtained are often bewildering and very often depend on the attitude and opinions of those on the ground to whom the request is made. With that in mind, this article identifies some real and practical difficulties and offers some solutions.

### The question of jurisdiction

For a practitioner, it is artificial to look at issues of mutual legal assistance and mutual assistance without first commenting on the matter of competing jurisdictions in criminal cases that involve more than one country. To give an obvious example, if a prosecutor in London seeks to prosecute a case, elements of which took place in both the United Kingdom (UK) and in the United States (US) (and for which either country has jurisdiction) and the principal evidence is likely to come from the US, then the London prosecutor will be well advised to try to resolve the issue of jurisdiction before embarking upon what might be a long and demanding process to obtain US evidence and bring it before an English court.

Practitioners sometimes conclude that lawyers and legal academics in the field of international law are very good at describing jurisdiction and its underlying principles (e.g., so-called “protective” and “passive personality” principles). They are accomplished at establishing the extent of a state’s criminal jurisdiction, but are weak at determining the best jurisdiction (the *forum conveniens*) for the criminal process. Moreover, the traditional academic approach has stopped short of describing those factors that would form the determination process.

Very few international instruments determine jurisdiction and the appropriate venue for a particular type of case: the Cybercrime Convention, the Convention on Offenses and Certain Other Acts Committed Onboard Aircraft, two conventions relating to pollution of the sea by oil, and perhaps one or two more.

Domestic law offers sharp relief to the international uncertainty: on the whole, a state will seek to provide some clarity about the extent of its jurisdiction; it may have clearly defined laws with explicit extra-territorial effect, such as the extra-territorial jurisdiction established by signatory states to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to enable them to prosecute their nationals and companies for acts of corruption committed entirely abroad. Some states limit the assistance they will give to another state on a matter if they have a jurisdictional claim or interest of their own, while others will not, of course, extradite their own nationals. Little, indeed perhaps nothing, in the UK’s domestic law, nor indeed in many other states’ laws, addresses when and how states should “negotiate” with each other as to jurisdiction. That gap perhaps needs to be plugged. The resolution of jurisdictional problems will very often mean that issues of mutual legal assistance are also resolved.

The inherent difficulty that underlies both jurisdictional and mutual legal assistance problems is the existence of so-called “inapproximate” regimes, i.e., the lack of commonality between legal systems. Even within a small geographical area, for instance Western Europe, one is struck by the legal variance among states, from the inquisitorial to the adversarial, from the common-law to the civil code. With that legal variance go different investigative and prosecutorial systems.

When should the issue of jurisdiction be addressed? At the start of the investigation or inquiry? Before assessing the prospects of conviction? After the nature of the case has been shaped and possible admissibility issues dealt with? At a mid-point?—By whom? With whom? Police and intelligence agencies? Prosecutors? Judge/Magistrate? Government? A combination of two or more?—And how? By meetings? Joint written agreement?—What are the

difficulties? Investigators and prosecutors perhaps instinctively local? Decisions outside normal expectations? Language problems?

How can jurisdictional issues be resolved? Is there a practical set of criteria? Where are most of the witnesses? Who has the most effective laws? Who has the most effective confiscation laws? Where will there be less delay? Who can best deal with sensitive disclosure issues? What about costs? Where did the harm or result take place? Where was the offender when offending and when captured? Where is the victim?

At present, no satisfactory model exists for deciding the *forum conveniens*, even though cases where there is parallel jurisdiction are commonplace. A real potential exists for no one's initiating a prosecution, the wrong country prosecuting, or for two countries getting in each other's way.

## Mutual legal assistance/mutual assistance

Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether informal mutual assistance would, in fact, meet their needs. It is sometimes forgotten that the country receiving the request might welcome an informal request that can be dealt with efficiently and expeditiously. Prosecutors must ask themselves whether they really need a formal letter of request to obtain particular evidence. The extent to which countries are willing to assist without a formal request does, of course, vary greatly. In many cases it will depend on their own domestic laws, on the state of the relationship between that country and the requesting state and, it has to be said, the attitude and helpfulness of those on the ground to whom the request is made. The importance of excellent working relationships being built up and maintained transnationally cannot be too greatly stressed. My experience and that of my colleagues is that colleagues in other countries will usually do all they can to help.

Although no definitive list can be made of the types of inquiries that can be dealt with informally, some general observations might be useful. Variations from state to state must, however, be borne in mind.

- If the inquiry is a routine one and does not require the country of whom the request was made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
- The obtaining of public records, such as land registry documents and papers relating to registration of part companies, may very often be obtained informally.

- Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
- A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness' evidence is likely to be non-contentious.
- The obtaining of lists of previous convictions and of basic subscriber details from communications service providers that do not require a court order may also be dealt with in the same way.

In the same way, one can set out the types of instances where a formal letter will be required:

- Obtaining testimony from a non-voluntary witness;
- Seeking to interview a suspect under caution;
- Obtaining account information and documentary evidence from banks and financial institutions;
- Requests for search and seizure;
- Internet records and contents of e-mail; and
- The transfer of consenting persons into custody in order for testimony to be given.

Confusion can be avoided if prosecutors have regard for the limits of the conventions and treaties that relate to mutual legal assistance. It should be borne in mind that the regime of mutual legal assistance is for the obtaining of evidence. Thus, the obtaining of intelligence and the locating of suspects or fugitives should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.

With some lateral thinking, it should be possible to increase the areas in which evidence may be obtained informally. For example, some countries have directories of telephone account holders on the Internet (although consideration will need to be given to whether it is in a form that can be used evidentially). Sometimes it may be quicker, cheaper and easier for the requesting country's police to arrange and pay for a voluntary witness to travel to the requesting country to make a witness statement, rather than for the police officers themselves to travel to take the statement. Similarly, with the consent of the state in which the embassy is situated, witness statements may be taken by officers at the requesting country's embassy.

Taking matters one stage further, many states have no objection to an officer of the requesting state telephoning the witness, obtaining relevant information and sending it by post in an appropriately drafted statement for

signature and return. Such a method can only be used, of course, as long as the witness is willing to assist the requesting authorities and no objections arise from the authorities in the foreign state from which prior permission must be sought.

Certain prerequisites should be borne in mind when evidence is sought by informal means from abroad:

- It should be evidence that could be lawfully gathered under the requesting state's law, and there should be no reason to believe that it would be excluded in evidence by the requesting state;
- It should be evidence that may be lawfully gathered under the laws of the foreign state;
- The foreign state should have no objection; and
- The potential difficulty in failing to heed any of these elements might cause (in states with an exclusionary principle in relation to evidence) that evidence to be excluded. In addition, but of no less importance, inappropriate actions by way of informal request may well irritate the authorities of the foreign state who might therefore be less inclined to assist with future requests. The rule must be to ensure that any informal request is made and executed lawfully.

A consideration of informal assistance should not overlook the use to which informal assistance can be put in order to pave the way for a later, formal request. It may, for instance, be possible to narrow down an inquiry in a formal letter of request by first seeking informal assistance. By way of example, if a statement is to be taken from an employee of a telephone company in a foreign country, informal measures should be taken to identify the company in question, its address and any other details that will assist and expedite the request. It should not be overlooked that a global expectation exists among those working in the field of mutual legal assistance that as much preparation work as possible will be undertaken by informal means.

## **Formal requests for mutual legal assistance**

It is sometimes forgotten that the building blocks for formal requests are the conventions, schemes and treaties that states have signed and ratified. Reference should always be made within the body of the letter of request to whichever of those apply, preferably at the very outset. It hardly needs to be said, but the international obligations of a requested state to assist need to be

asserted, as indeed does the authority upon which the letter of request is written. To give a practical example, the UK made a statement of good practice in accordance with Article 1 of the Joint Action of 29 June 1998 adopted by the Council of Europe, in which it declared that the Home Office (Interior Ministry) will ensure that requests are in conformity with relevant treaties and other international obligations. Prosecutors need to take heed of any such declarations of intent made by their own state and take action accordingly. Similarly, care must be taken by the requesting authority to ensure that its own domestic law allows the request that is actually being made. For example, a piece of domestic legislation in the UK, the Criminal Justice (International Co-operation) Act 1990, disallows some requests or types of requests that many conventions, treaties or other international instruments would appear to allow. However, for the UK prosecutor, the domestic Act has primacy. To make requests otherwise than in accordance with the domestic law would be to invite arguments for exclusion of evidence.

Prosecutors and prosecuting authorities are recommended to make early contact with a counterpart in the country to which the request is to be made. Notwithstanding the existence of a convention or treaty and its broad and permissive approach, the requested state may well have entered into reservations that limit the assistance that can in fact be given. For example, some countries that signed the 1959 European Convention on Assistance in Criminal Matters have reserved the right to refuse judicial assistance when the offense is already the subject of a judicial investigation in the requested country. The key principle must be this: regard should always be given to the fact that a requested state will have to comply with its own domestic law, both as regards whether assistance can be given at all and, if so, how that assistance is given.

## **The form of the letter of request**

It is recommended that the requesting state compile a letter that is a stand-alone document. It should provide the requested state with all the information needed to decide whether assistance should be given and to undertake the requested inquiries. Of course, depending upon the nature of those inquiries and the type of case, the requested state may be quite content for officers from the requesting state to travel in and play a part in the investigation.

A problem that occurs in the UK in respect of both incoming and outgoing requests is that of time. Requests may take weeks, sometimes months and, occasionally and unfortunately, years to execute. As soon grounds emerge to make the requests abroad and the need for such requests is clear, then the letters should be issued. It is important that urgent requests be kept to a

minimum and that everyone involved in the process should appreciate that an urgent request is urgent and unavoidably so.

A fundamental difficulty is often overlooked: different states have different ways of presenting evidence. The whole purpose of the request is to obtain usable, admissible evidence. That evidence must therefore be in the form appropriate for the requesting country, or as near as possible to that form as circumstances allow. It should be made clear by the requesting state in what form, for instance, the testimony of a witness should be taken. The requested state cannot be expected to be familiar with the rules of evidence gathering and evidence adducing in the requesting state.

As an example: if a UK prosecutor simply made a request to the US for a witness to be interviewed and a statement taken, the product of that exercise might take a number of forms:

- A witness might be asked by the local authorities in the US to respond in writing to written questions, either in the form of an unsworn declaration under penalty of perjury, or an affidavit;
- The witness might be interviewed and make an informal, nonverbatim statement, which might or might not be signed; or a formal written statement or affidavit might be prepared;
- The testimony of the witness might be summarized in oral questioning, with the witness and US authority each signing the written version; and
- The witness might have been questioned after taking an oath and giving a formal statement or deposition, which would be reflected by a typed verbatim transcript.

Many states will allow the evidence to be taken in the way that the requesting state has set out in the letter of request. Treaties may contain a provision to the effect that the method of execution specified in the request shall be followed to the extent that it is compatible with the laws and practices of the requested state. If in doubt, provide examples to the requested state.

Delays are sometimes caused and problems created when a request is made for a suspect to be interviewed. It must be made clear that the suspect is regarded as, indeed, a suspect. Generally the request must state the reasons for that belief and indicate the terms under which he or she is to be interviewed. Of course, those terms will only be adhered to if allowable in the requested state. It must be remembered that different jurisdictions allow for the interviews of suspects to take place in different ways. For instance, some jurisdictions will allow or insist upon tape-recording; others will not. If extradition is contemplated as at least a possibility, the letter of request should say so—unless



there is good reason to believe the suspect will flee if he or she gets to hear about the risk of being extradited. Ideally, the questions to be asked in the interview should be set out as an annex to the letter of request. A problem sometimes arises when it is assumed that a police officer or a prosecutor in the requested country will be present to ask the questions. In some jurisdictions it might well be an examining magistrate or judge who asks the questions in a courtroom in the absence of any investigator. If the questions cannot be set out, then at least the subject matter should be.

A second common problem is a request for search and/or seizure. Essentially, as much information as possible about the location of the premises, etc., should be provided. It must be remembered that different jurisdictions set a different threshold. Search and seizure is a powerful weapon for investigators. It should always be assumed that the requested state will only be able to execute a request for search and/or seizure if it is demonstrated that reasonable grounds exist to suspect that an offense has been committed and that there is evidence on the premises or person concerned; the letter of request should consequently set out these reasonable grounds. It is generally not enough simply to ask for search and seizure without explaining why it is believed that the process might produce evidence. For requests to Europe, it is good practice to have written regard to the core principles of the European Convention on Human Rights, namely necessity, legality and proportionality. Interference with property and privacy in European countries is now frequently justified only if there are pressing social reasons such as the need to prosecute criminals for serious offenses. Search and seizure of property following a formal request are allowable in most states and should present few problems, if the above guidelines are followed. However, searching the person and taking fingerprints, DNA or other samples may have less chance of success in some jurisdictions; it can still be requested, however.

Corruption cases and cases with an international dimension may well have sensitive aspects of a commercial nature, with respect to national security, etc. It may be the case that sensitive information will have to be included in a formal request for assistance. Addresses of prospective witnesses and other information that could be exploited by criminals, organized crime or those otherwise corrupt may well need to form part of the request. Such issues must be borne in mind when the request is drafted, along with the fact that the system for obtaining mutual legal assistance, globally, is inherently insecure.

The risk of unwanted disclosure may be a greater or lesser depending on the identity of the requested state. The risks of unwanted disclosure must be weighed in the balance. Duty-of-care issues to those affected may arise. It may sometimes be that a generalized letter that leaves out the most sensitive

information may be enough to allow the request to be executed. Instances have certainly occurred in the UK where a rather vague letter has been supplemented by a senior police officer or lawyer providing an oral briefing to the judicial authorities involved. In such circumstances, it is advisable to discuss the issues in advance with a representative of the requested state. In essence, though, if contentious material is sought or coercive powers requested, chances are high that sensitive material will need to be set out in the request. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance—in other words, a request that is only to be executed if it can be executed by the requested state without requiring sensitive information to be disclosed. It should be noted that the Harare Scheme of the Commonwealth makes specific provision for confidential material to be kept confidential.

To conclude, incoming letters of request for mutual legal assistance in the UK would be examined as to the following elements:

- Assertion of authority by the sender of the letter;
- Citation of treaties and conventions;
- Assurances;
- Identification of defendant/suspect;
- Present position;
- Charges/offenses under investigation;
- Summary of facts;
- Inquiries to be made;
- Assistance required; and
- Signature.

## C. Mechanisms for Gathering Evidence Abroad<sup>41</sup>

■ **Bernard Bertossa**

Former Prosecutor General  
Geneva, Switzerland

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Corruption cases very often have a transnational character: the briber and the person receiving the bribe are from different countries, and assets are transferred via several financial centers that are located in still other countries. Therefore, in investigating and prosecuting corruption cases, international legal assistance is often the key to success. Such legal assistance covers both the taking and handing over of evidence, and the confiscation and repatriation of the illicit assets. However, a defective legal framework, numerous material conditions, and often lengthy procedures render these operations difficult. Therefore, a clear view of the legal framework, provisions, conditions, and formal procedures is crucial to the success of requests for international legal assistance, the collection of evidence abroad, and the repatriation of the proceeds of corruption. Informal contacts may also help in hurdling the difficulties that formal procedures entail.

### Legal framework of international legal assistance

In criminal matters, no universal treaty governs the gathering of proof abroad. Only model treaties of this kind exist, prepared under the auspices of the United Nations.<sup>42</sup> However, many international conventions on specific offenses contain provisions requiring signatory countries to grant each other mutual assistance at an international level, as, for instance, article 9 of the

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<sup>41</sup> Published in: Asian Development Bank/Organisation for Economic Co-operation and Development, *Effective Prosecution of Corruption*, Asian Development Bank: Manila, 2003.

<sup>42</sup> Model Treaty on Mutual Assistance in Criminal Matters (MTMA) adopted in 1991.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>43</sup> However, such provisions often remain rather general, leave room for differing interpretations or approaches, and contain little detail as to how the promised mutual assistance is to be provided.

In addition to multilateral treaties, there exist many bilateral agreements, exchanges of letters, or simple declarations of reciprocity in this field, which, however, again usually contain only undertakings in principle. Finally, several countries have adopted internal legislation regulating international mutual assistance.<sup>44</sup> Such legislation may not derogate from binding rules in treaties or international conventions and applies without reservation only if the assistance is requested by a country to which the requested country is not bound under an international treaty.

When no treaty, convention, or bilateral agreement exists between the requesting and the requested country, the provision of assistance is not mandatory but still possible. The requested country usually requires an undertaking of reciprocity on the part of the requesting country. In this respect, common law countries are usually more restrictive than civil law countries.

## Material conditions for international legal assistance

Regardless of the legal basis underlying a request for legal assistance, such assistance is granted only if the following material conditions exist. First, a general prerequisite for mutual legal assistance is the criminalization of the act in both the requesting and the requested country (dual criminality rule). The assistance must relate to criminal proceedings properly so-called, i.e., proceedings against the perpetrators of an offense under ordinary law. While the dual criminality rule seems clear and easily applicable, it entails serious obstacles to gathering evidence abroad. This is particularly true in cases of corruption, because countries have developed the necessary legislation criminalizing bribery and corruption to varying degrees. Most countries, for instance, have not criminalized private-to-private corruption, and even bribery of foreign public officials does not constitute a criminal offense in some countries. Nowadays, however, this latter loophole is covered, at least in those countries that have implemented the 1997 OECD anti-bribery convention.

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<sup>43</sup> Also relevant in this context: Convention against Torture (New York 1984), Convention against the Taking of Hostages (New York 1979), Conventions on Drugs (New York 1961 and Vienna 1988), Unidroit Convention on Stolen and Illegally Exported Cultural Objects (Rome 1995), and Convention for the Suppression of the Financing of Terrorism (New York 1999).

<sup>44</sup> Such as Switzerland, Luxembourg or Liechtenstein.

Legislation on money laundering also remains largely deficient in many countries.

Another major difficulty in this respect is the diversity of definitions of corruption in different countries. This is particularly evident in the area of public administration. Many societies consider the giving of bribes in exchange for services by public officials legitimate or at least acceptable. In fact, it is sometimes difficult to distinguish between obtaining a favor (which is punishable by law) and having a right recognized (which is not punishable).

A second prerequisite for the provision of mutual legal assistance is the guarantee of a fair trial and respect for the fundamental rights laid down in the International Covenant on Civil and Political Rights in the legal system of the requesting country.

Some countries, notably Switzerland, refuse to assist in fiscal proceedings. The request for assistance may also be rejected if the proceedings concern political or military misdemeanors or if the granting of assistance constitutes a problem for public order or the higher interests of the requested country. This type of difficulty often arises when the case concerns bribery in relation to the sale of weapons.

Contrary to what is often believed, however, bank secrecy provisions cannot be used to deny a request for mutual assistance. Diplomatic immunity is also a frequent defense in corruption probes involving diplomatic or military envoys and attachés. However, in Switzerland, for instance, diplomatic immunity provisions do not apply to private economic activities and, therefore, also cannot be used to justify denying a request for mutual assistance.

## **Procedure of acquiring evidence abroad**

If the material conditions for legal assistance are met, the request for assistance has to be issued in writing by a judicial or administrative authority with criminal jurisdiction in the requesting country. A request from a parliamentary or governmental authority is not admissible.

The request must contain a description of the facts behind the proceedings. This description must be as detailed as possible and must indicate in what way the evidence being sought is useful or necessary. In principle, the requested country does not verify the truthfulness of this description. However, common law countries are usually more demanding in this respect and often require proof of the alleged facts.

The request must also set out, in as detailed a manner as possible, the nature and object of the proof sought abroad. Requesting undefined proof ("fishing expeditions") is not admissible.

If the two countries concerned are parties to a convention or treaty authorizing direct correspondence between their judicial authorities, the request is sent directly to the competent judge or magistrate of the requested country. Otherwise, the request is made through the intermediary of central offices (if such exist) or diplomatic channels.

The request is executed by the competent judicial authority of the requested country in accordance with its own rules of procedure. If the requesting authority makes an express request, it may sometimes be allowed to apply the rules of procedure of the requesting country. In theory, the requesting judge may participate in the taking of evidence, but this is often difficult for practical reasons, such as lack of resources. After having gathered the evidence sought, the judge or magistrate from the requested country communicates it to the requesting authority through the same channel that was originally used to make the request.

In a great number of countries, the person in respect of whom the request for mutual assistance was made is allowed to appeal against the sharing of evidence with the requesting country. Such appeals may cause considerable delays in the provision of gathered evidence. For example, in several European countries—particularly in some that are considered “tax havens” such as Liechtenstein, Luxembourg and Switzerland—national legislation relating to international legal cooperation offers defendants in corruption cases many opportunities to appeal against judicial decisions that would disclose information on their financial status. Defense lawyers, of course, frequently have a vested interest in seeing judicial processes extended. Finally, banks can also readily appeal against the decision to transfer the documentation, and litigation regarding such matters can drag on indefinitely. These possible reasons for delays in the procedure may mean that, while authorization to provide requested information to a foreign authority may be granted within a relatively short period of time, the requesting party might not actually receive the requested documents for several years.

## **Confiscation and repatriation of proceeds, extradition, and proceedings against third parties**

A widely discussed issue in mutual legal assistance in corruption matters, in particular in the context of the negotiations of the United Nations Convention Against Corruption that took place in 2002–2003, is the confiscation and repatriation of the proceeds of corruption, and extradition and proceedings against third parties. At present, no internationally binding legal instrument concerns the repatriation of funds, in particular.

If ever funds are repatriated these days, the reasons are usually more political in nature than based on legal obligation. The assets are transferred only under the additional condition that the repatriated funds are not likely to end up in the pockets of other corrupt agents in the requesting country. Occasionally, funds are returned to banks or other private entities rather than claimant governments, as, for instance, the funds that had been confiscated by Swiss officials at the behest of the Nigerian Government in the Abacha case and the Philippine Government in the Marcos case. In the Abacha case, the funds were sent directly to the Bank for International Settlements, which considered them a partial payment for outstanding loans from the Nigerian Government. In the Marcos case, the Swiss authorities and the Philippine Government agreed that approximately USD500 million would be returned to Manila on the condition that an independent court would administer the equitable distribution of the funds.

As for extradition, permits to arrest and extradite suspects from other countries are usually very difficult to obtain, especially if these persons are nationals of the requested country.

Banks through which money has been laundered are increasingly being held legally culpable for what they should have known about these transactions. It has become far more difficult nowadays for banks to simply claim that it is not their responsibility to scrutinize the activities of their clients. For example, over the past few years, five Swiss bank employees have been sentenced and two banks in Switzerland have been facing serious penalties in civil cases stemming from the billions of dollars in assets secreted in that country by the Abacha family.

## **Corruption-specific obstacles to international legal assistance**

Sometimes the requested legal assistance is never provided, despite the fact that all formal and material conditions exist. This happens particularly often in investigations involving influential politicians, and the reasons are manifold.

First, as noted above, public figures and political parties, even under indictment, have special powers, particularly within the public institution under their control. They may try to use these means to prevent evidence from being found or handed over. Governments and lawmakers are sometimes the very people involved in corrupt practices, either personal or political reasons. Significant progress is therefore difficult to achieve, unless the legal authorities are granted genuine independence and effective instruments to investigate the perpetrators of these practices that the lawmakers themselves define as being criminal.

Even judges do not always have enough independence vis-à-vis the executive power, nor—at times—the necessary integrity or courage. Corrupt magistrates abound who are more interested in “carrying out orders” or advancing their careers than in concluding investigations. Judges are frequently accused of being an instrument of political parties or individual members of the government or—in the case of international mutual assistance—of the government as such in its foreign affairs strategy. Such accusations discredit the investigation, even when they are completely unfounded.

Alleged “national interests,” such as the need to safeguard the country’s economy against foreign competition, protect employment, etc., are often cited in defense of corrupt acts. The accused persons cynically justify corrupt acts as being perpetrated for the well-being of the citizens or for the economic wealth of a country.

Last but not least, the financial strategies used to camouflage a corrupt act or the profits derived from it have become increasingly sophisticated, and neither prosecutors nor judges always have the instruments needed to uncover them. Financial intermediaries have specialized in these strategies and are able to eliminate paper trails. The systematic use of offshore or other shell companies render camouflage ever more effective. Furthermore, getting legal authorities in fiscal havens to collaborate in legal investigations is often difficult. It is even more difficult when lawyers and other professionals, who can oppose the judge because of secrecy provisions, or people who enjoy immunity (heads of state, diplomats) are used as financial intermediaries. The judiciary is powerless before this type of privilege.

## **Informal networks**

Considering the legal and practical difficulties encountered when seeking legal assistance through formal procedures, informal remedies merit specific attention.

While informal contacts between prosecutors and law enforcement officials from different jurisdictions are unfortunately not very efficient, it is actually not unethical in the least to establish personal contacts with counterparts abroad. In international cases, meetings between investigating magistrates are common, as are meetings between attorneys. Obviously, informal networks and contacts cannot replace the formal procedure of requesting and obtaining legal assistance. However, informal discussions between colleagues from different jurisdictions can be very useful in determining who is best suited to perform what duties in regard to a multi-jurisdictional line of inquiry, and what could be the best investigative approach. This method also can do much to help



resolve or minimize the types of problems inherent in translation needs or protocol differences, such as how best to word formal requests for information. Experience indeed shows that prosecutors can demand and receive evidence relevant to criminal proceedings from their foreign counterparts much faster when informal networks are working well. Close informal links can even sometimes be the only truly practical way to move an investigation forward. In countries where decisions involving international assistance in prosecutions can be made at the nonfederal level, close ties with authorities in regional, provincial, or cantonal positions can also be useful, as these authorities can often act much faster than their counterparts at the national level.

## Conclusions

Nothing prevents magistrates or other authorities from entering into direct contact with a foreign jurisdiction to demand information about the best way to collect evidence (what form the request should take, to whom it should be sent, etc.). Where relevant, the central authority of the requested country is usually willing to provide this type of information.

Certain conventions provide for the possibility of spontaneous communication to the foreign judge or magistrate of any information that could be useful to the proceedings.<sup>45</sup> As a possibility, this option exists even in the absence of any specific convention. Actual evidence, however, cannot be transmitted, since this would normally contravene mutual assistance regulations. But most other types of information collected in independently established investigations could be exchanged freely.

As far as international bribery is concerned, the requested judge or magistrate, upon learning of the implication of its own country's citizens, should open his/her own proceedings. For instance, if the requested country is concerned only because its financial center was used, its authorities should open their own proceedings for money laundering (the most frequent and fatal mistake in money laundering is to launder money from different illegal activities through the same account). In both cases, it can be highly useful for the investigating authorities of the two countries to define a common strategy, notably as regards the exchange of necessary evidence.

When the person against whom proceedings are brought in a certain country lives abroad, the proceedings may be delegated to the country of residence. In

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<sup>5</sup> For example the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg 1990).

such a case, all the evidence gathered is included in the case file that is transferred to the investigating authority abroad. In the context of bribery, this allows, for example, the transfer of all the documents concerning money laundering carried out in this third country to the country in which the corrupt official lives.

If an act of a corrupt public official has caused material damage to the country concerned, the latter may ask to join as a civil party in the proceedings abroad for the crime of money laundering. In such a case, it will usually have access to the foreign acts of procedure.

The confiscation of the proceeds or instruments of corruption plays a major role in combating corruption. For this purpose, autonomous procedures may be opened in any country to which such financial proceeds have been traced.

### **A hypothetical concrete case for training**

In 1995, the Ministry for Economic Affairs of Briberyland decided to replace entirely its obsolete information technology equipment. After receiving bids from a number of foreign companies, the ministry's administrator awarded the contract to the American firm Smith Corp. for an amount of USD75 million. The new information technology environment was installed in March 1996, and the ministry paid Smith Corp. the agreed amount.

In April 1996, the public prosecutor of Briberyland received a letter from the Indian company Delhi Corp., which had also bid for the contract. Delhi Corp. informed the public prosecutor that Smith Corp. had been awarded the contract because it had paid commissions. It gave the name of "John", an employee in the ministry, as the person who had received these payments.

The public prosecutor initiated an investigation of John, which showed that he enjoyed a lifestyle above what his government salary could possibly provide. However, no suspicious funds were found in the only bank account that John held in Briberyland. But during a search of John's house, the police did discover the business card of a representative of the BSA Bank in Zurich, Switzerland.

After sending letters rogatory to the Swiss authorities, the public prosecutor learned that John did not, in fact, have an account at the bank. However, his name did appear as having signatory authority over an account opened by a registered company, Fraud Ltd., headquartered in Nassau, Bahamas, with the BSA's subsidiary in Geneva, Switzerland. The beneficial owner of this account was an individual known as "Pablo", an independent foreign exchange broker

**A hypothetical concrete case for training (continued)**

operating in Briberyland. This account had been opened in January 1996. In March of that year, it had been credited with a sum of USD7.5 million from a New York law firm. A few days later, USD4 million had been transferred to a bank in London and USD3 million to a bank in Luxembourg.

Informed of these facts, the public prosecutor of Briberyland sent letters rogatory to London and Luxembourg. The replies to these letters brought to light the following:

- The recipient account in London belonged to Oxy Inc., headquartered in the British Virgin Islands. Pablo was the beneficial owner of this account. Since the account had been opened in 1990, large cash amounts, from different origins, had been deposited and had later been transferred abroad. The account currently contained USD10 million.
- The recipient account in Luxembourg had been opened in the name of John's wife. A sum of USD3million had been the only deposit made to this account. This sum had not yet been touched.

The public prosecutor of Briberyland decided to question Pablo, who admitted that accounts had been opened in Geneva and London and said that he had made these accounts available to some of his customers in Briberyland to enable them to avoid domestic taxes. The public prosecutor then asked John and his wife to come in for questioning. However, the prosecutor then received news that the Justice Ministry had promoted him to the position of chief judge in another city, effective immediately. A colleague known to be close to those in power, and to have no interest in prosecuting bribery-related offenses, replaced the prosecutor. In fact, the new public prosecutor closed the case without further investigation.

Before leaving his post, the former public prosecutor of Briberyland had contacted his Swiss, British and Luxembourg colleagues with whom he had dealt regarding the letters rogatory connected with his investigation, in order to inform them of the situation.

In the meantime, John and Pablo had hired lawyers in Geneva, London and Luxembourg. Arguing that the case had been closed in Briberyland, the lawyers contacted the banks to request that the balance of the accounts be transferred to two separate accounts opened in two different banks in Singapore. Before making the transfers, BSA Bank in Geneva contacted the local prosecutor,

**A hypothetical concrete case for training (continued)**

who decided to initiate his own criminal proceedings for the crime of money laundering.

The prosecutor of Geneva ordered the seizure of the account of Fraud Ltd. in the BSA's Geneva branch. He then sent mutual assistance requests to authorities in London and Luxembourg, in which he asked that the accounts of Oxy Inc. and of John's wife be frozen, and that all documentation concerning these accounts be handed over to him. He also sent letters rogatory to Briberyland in order to obtain a copy of the closed investigation file.

The authorities in London and Luxembourg met these requests, but the new public prosecutor of Briberyland took no action whatsoever regarding the case.

After analyzing the bank documents received from London, the prosecutor of Geneva observed that a significant portion of the amounts transferred from the account of OXY Inc. had been transferred to an account with the FRITZ Bank in Vaduz, Liechtenstein. After sending letters rogatory, it came to light that this account had been opened in the name of a private company, BRIBY S.A., headquartered in Cyprus. The documents completed when the account was opened had been signed by a lawyer in Vaduz and by the administrator from the Ministry for Economic Affairs of Briberyland.

The prosecutor of Geneva again sent letters rogatory to Briberyland, confirming his initial request, explaining what had been discovered in Vaduz and asking to question the administrator. The new public prosecutor of Briberyland merely replied that the account of BRIBY S.A. had been opened at the request of the state and that the funds belonged to Briberyland. The prosecutor of Geneva was asked to stop investigating these funds.

Through unknown sources, the press of Briberyland had been informed of the Swiss request. Articles were published that raised questions about the decision to stop the criminal proceedings initiated in Briberyland.

***Training question:***

What further steps do you think might be taken in this hypothetical case in each of the countries concerned by the events described above?

# APPENDICES

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# Conference Agenda

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03 December 2004

10h00 – 12h30 **Anti-Corruption Reform Efforts in Asia and the Pacific:**  
Report from the Asia-Pacific Anti-Corruption Action Plan  
Steering Group to the ADB/OECD conference

**Chair:** **Jak Jabes**  
*Director, Governance & Regional Cooperation Division,  
ADB*

**Enery Quiñones**  
*Head, Anti-Corruption Division, OECD*

**Speakers:** **Gretta Fenner**  
*ADB/OECD Secretariat:*  
“Anti-corruption reform efforts in Asia and the Pacific: an  
Overview”

**Datuk Seri Zulkipli bin Mat Noor**  
*Director-General of the Anti-Corruption Agency  
of Malaysia:*  
“Overview of Malaysia’s anti-corruption strategy in the context  
of the region’s Action Plan”

**Surya Nath Upadhyay**  
*Chief Commissioner, CIAA:*  
“Nepal’s efforts to control corruption”

**Simeon Marcelo**  
*Ombudsman of the Republic of the Philippines:*  
“Combating corruption in the Philippines”

**Andrew H.Y. Wong**  
*Director of Administration, ICAC, Hong Kong, China:*  
“Anti-corruption strategy of the Hong Kong Special  
Administrative Region of the People’s Republic of China”

**Kate Rawson Johnston**  
*Australian Agency for International Development*

15h00 – 16h00 **Opening Ceremony**

Opening remarks

**Geert H.P.B. van Der Linden**

*Vice President, ADB*

**Kiyotaka Akasaka**

*Deputy Secretary-General, OECD*

Keynote address

**Right Honorable Dato' Seri Abdullah Haji**

**Ahmad Badawi**

*Prime Minister of Malaysia*

16h00 Press Conference

16h30 – 19h00 Capacity Building Workshops 1: Preventing Corruption

WORKSHOP 1A: Conflict of Interests

**Speakers: Thomas C. S. Chan**

*Director of Corruption Prevention*

*ICAC Hong Kong, China:*

“Managing conflict of interest in the public sector:  
the Hong Kong China Experience”

**Marie-Noëlle Ferrieux-Patterson**

*President, Transparency International Vanuatu*

**Janos Bertok**

*Principal Administrator, OECD:*

Governance and role of the state division:

“Putting policy into practice: From guidelines to toolkit”

**Facilitator: Marie-Noëlle Ferrieux-Patterson**

WORKSHOP 1B: The Role of Business in Improving Corporate Governance: Bribery and Fraud Prevention Programs in the Private Sector

**Speakers: Eric Teo Chu Cheow**

*Council Secretary*

*Singapore Institute of International Affairs*

**Richard Kell**

*President*

*International Federation of Consulting Engineers (FIDIC)*

**Alex Duperouzel**

*Managing Director, Background Asia Ltd.*

**Facilitator: Stephen Olson**  
*Vice President, Pacific Basin Economic Council*

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4 December 2003

09h00 – 12h00 Capacity Building Workshops 2: Detecting Corruption

WORKSHOP 2A: Drafting and Implementing of Whistleblower  
Protection Laws

**Speakers: S.N.P.N. Sinha**  
*Secretary, Central Vigilance Commission, India*

**Lee Nam-joo**  
*Chairman, KICAC, Korea*

**Chris Wheeler**  
*Deputy Ombudsman, New South Wales, Australia*

**Facilitator: Chris Wheeler**

WORKSHOP 2B: Techniques for Detecting Corruption in  
Public Procurement

**Speakers: Michael Stevens**  
*Principal Audit Specialist (Financial Investigator)  
Office of the Auditor General, ADB*

**Robert Jourdain**  
*Assistant Vice President  
Société Générale de Surveillance*

**Nadia Balgobin**  
*Business and Public Ethics Consultant  
Société Générale de Surveillance*

**Facilitator: Michael Stevens**

14h00 – 17h00 Capacity Building Workshops 3: Prosecution of  
Corruption

WORKSHOP 3A: Developing Expertise in Forensic Accounting  
to Help Investigate and Prosecute Bribery

**Speakers: Syed Noh Syed Ahmad**  
*MARA University of Technology, Malaysia*



**Anne-José Fulgeras**

*Principal Director, Ernst & Young, France, and  
former Head of Paris Financial Prosecution Department*

**Facilitator: Syed Noh Syed Ahmad, Malaysia**

WORKSHOP 3B: Improving Procedures to Obtain Mutual  
Legal Assistance and Repatriation of  
Proceeds of Corruption

**Speakers: Munir Hafiez**

*Chairman, National Accountability Bureau, Pakistan*

**Martin Polaine**

*Senior Crown Prosecutor, United Kingdom*

**Bernard Bertossa**

*Prosecutor General, Geneva, Switzerland*

**Facilitator: Munir Hafiez**

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5 December 2003

09h00 – 10h30 Future Action to Combat Corruption in Asia and the  
Pacific

**Chair: Jak Jabes and Frédéric Wehrlé**

*Secretariat, ADB/OECD-Anti-Corruption Initiative  
for Asia and the Pacific*

11h00 – 12h00 Conference Recommendations and Closing

**Enery Quiñones**

*Head, Anti-Corruption Division, OECD*

**Jak Jabes**

*Director, Governance and Regional Cooperation  
Division, ADB*

Closing Speech:

**Hon. Tan Sri Samsudin bin Osman**

*the Chief Secretary to the Government of Malaysia*

12h00 – 12h15 Press Conference

# List of Participants

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