STRENGTHENING ANTI-CORRUPTION AGENCIES

THE PERSPECTIVE OF MACAO, CHINA

Under the second pillar of the Anti-Corruption Action Plan for Asia and the Pacific, there can be no doubt that the strengthening of Anti-Bribery Actions requires adequate legislation, empowerment of the Anti-Corruption Agencies and active inter-agency co-operation.

Today I will share with you a few notes on our own experience in Macao, regarding these three areas.

For those who might not be familiar with Macao, please allow me to briefly introduce some key facts about the territory.

Macao is a Special Administrative Region of the People’s Republic of China, governed by Macao’s people under the principle “One Country, Two Systems”. This means that, while being an integral part of China, Macao enjoys a high degree of autonomy, including the power to make and enact its own Laws, independent judicial power up to final adjudication, its own currency and taxation system, independent finances, with a guarantee that the previous capitalist system shall remain unchanged at least until 2049. All these key aspects are stipulated by the Basic Law, a National Law of the People’s Republic of China, drafted and enacted pursuant to an international treaty between China and Portugal, the Joint Declaration.

The land area of Macao is just 30 Km$^2$; but this small territory houses 580,000 people, 110,000 of them being non-resident workers. Unemployment rate is lower than 2% and the main source of income is the gaming industry, with a gross revenue in excess of 38 billion US Dollars, while the GDP is 43 billion.

All these characteristics make for a unique environment. However, I believe that the problems and challenges posed by corruption in Macao are not dissimilar to those faced by many Asia and Pacific jurisdictions.
1. Adequate Legislation

I can safely state that without adequate legislation there is nothing a State can do to prevent and combat corruption. The legislative policy in this matter must be clear and ideally it should have its foundation in the Constitution.

1.1. Constitutional basis

Making the prevention and combat of corruption a core value of the State, providing for the Anti-Corruption Agency in the Constitution is most important, because it will safeguard against the changing winds of the will of the Government of the day and establish a sound basis for the long-term strategy of this fight.

1.2. Criminal Law

Criminalization of corrupt practices in all its forms is again a *sine qua non* condition of any credible efforts in this task. The UNCAC establishes an admirable standard of legislative frameworks to this effect and we can’t stress enough the importance of all jurisdictions bringing their penal laws to full compliance with the stipulations of the Convention.

1.3. Criminal Procedure Law

A third layer of legislation is required, dealing with due process of Law and enforcement, because having the crime in the books is not enough. One must have a clear and detailed set of legal instruments, laying down the procedural commands for active and successful investigation and prosecution of actual crimes of corruption.

1.4. Organic Law

And a fourth and final layer of legislation is needed, the one specifically dealing with the set-up and organization of the Anti-Corruption Agency.
In this regard, I should mention that the independent nature of the Anti-Corruption Agency – as I said earlier, ideally established in the Constitution – must translate into ordinary law into provisions for adequate budget, adequate staffing, and in general, availability of adequate resources. Its organization mustn’t depend on any Public Administration departments to operate and it must be free to resort to any external providers of expertise as deemed necessary for the success of investigation.

1.5. The situation in Macao

In Macao the Basic Law – which is of a constitutional nature – stipulates that a Commission Against Corruption shall exist, and that it shall operate independently.

The Penal Code of Macao, largely inspired by the Portuguese Penal Code, and predating the adoption of the UNCAC, criminalizes most typical acts included in the UNCAC provisions and establishes adequate punishment for the offender. A few other crimes of corruption defined in the Convention have gradually been introduced to Macao, namely the corruption in the private sector. The legislative process for enactment of a new Law criminalizing the bribery of foreign public officials is under way. There is a firm commitment of Macao to fully comply with all the legislative duties imposed by the Convention in the short term.

The Penal Procedure Code of Macao defines the due process of investigation and prosecution for all crimes. A few exceptional rules that previously applied to the investigation of crimes of corruption have been repealed by the most recent amendment to the Organic Law of the Commission Against Corruption and nowadays, the criminal procedure for these crimes is fully compliant with the general rules in force.

As to the Organic Law of CCAC, we have the benefit of accumulated experience, since the initial establishment of the ACA, in 1992. The most recent amendment, dated 2012, explicitly defines the mission and scope of activity of the CCAC, extends its jurisdiction to the crimes of corruption in the private sector, makes it mandatory for the Public Prosecutor and the Courts to inform the CCAC of the outcome of every case investigated and sent for prosecution, exempts the
Commissioner from criminal prosecution by reason of preparatory acts for recommendations or of the recommendations themselves and makes clear that the investigators and other staff are bound to protect the life, the human and civil rights of those under investigation.

Overall, I believe that the legislation of Macao is adequate and fully implements the requirements of the 2nd pillar.

2. Empowerment of the Anti-Corruption Agency

I will now introduce some aspects that have been implemented in Macao regarding the empowerment of the Anti-Corruption Agency, along with a short reasoning for each one of them.

2.1. Criminal Police Authority / Criminal Police

The Anti-Corruption Agency must be empowered to act in the capacity of Criminal Police. The ability to conduct independently any corruption-related criminal investigation is a requirement to the successful prosecution of those crimes. Moreover, the ACA must have exclusive jurisdiction over crimes of corruption, extending to fraud-related crimes committed in connection with bribery.

The head of the ACA must have the authority to conduct all necessary operations during investigation regarding gathering of evidence, and reporting directly to the judicial authority whenever such investigative operations require a court order.

2.2. Funding

I mentioned before the need for an adequate budget. This assumes that the budget is approved by the Legislature and that it is embodied in a Law.

The source of funding must also be kept free of interference from the Public Administration, and in executing the budget the ACA must be empowered with financial autonomy. This means that the Agency’s expenditure, during the financial
year, should be under the ACA’s head authority or, in exceptionally relevant cases, submitted to the authority to who the ACA is accountable, be it the Parliament or the Head of State.

2.3. Political Independence

I cannot overstate the importance of the political independence of the ACA. It is possibly in this single issue that the whole credibility of the Agency is won or lost and, without credibility, the combat against corruption cannot be won.

This is, I think, a case where self-empowerment plays the main role. When all has been said and done, it is up to the Agency’s resolve to achieve a status of political independence from the Government of the day. Not only that, but also to be perceived as such by the general public.

This can only be possible if the ACA pursues to the full extent of its powers and within the due process of law, all the corruption crimes that are brought to its attention. This is an area where only legality tests can be applied, not opportunity nor political convenience tests.

2.4. Public Awareness

It follows, of course, that the public scrutiny is not to be ignored. It also follows that the ACA must proactively engage in promoting public awareness of the evils of corruption and raising a widespread culture of zero tolerance towards it.

A merely reactive ACA will forever lag behind its own targets, and I am confident that there is no more powerful tool in bringing the initiative to the ACA than the enthusiasm of the public, either organized in civic associations, through NGOs or even individually, to assist the ACA in spotting and eradicating bribery.

Education programs, co-operation with professional associations, training of public servants and private companies’ staff, must be considered as permanent tasks of the ACA.
2.5. Synergy with the Ombudsman?

This brings me to yet another very interesting area.

Some of the goals of an ACA are shared with other institutions of the State, namely with the Ombudsman.

There is no denying that a sound Public Administration, fully compliant with the protection of Human and Civil Rights of the citizens, driven solely by the interest of the Public Good is a Public Administration with no room for bribery.

However, the problems dealt with by the Ombudsman are typically of an Administrative nature, not of a Criminal nature.

While many of the requirements that I outlined earlier are the same for the ACA and the Ombudsman, v.g. the Constitutional basis, the legal framework, the independency from the Administration, etc. it is also evident that the organization and operation of both agencies must be tailored to their specific missions and objectives.

Quite a few resources may be shared, and the promotion of public awareness to the core values of both agencies raises essentially the same issues.

And, in fact, the case for synergy has been strong enough that a few fellow Members of the Initiative have adopted a single-agency model, encompassing both the ACA and the Ombudsman within one Public Body.

Such is the case of the Ministry of Supervision of the P. R. China, the Office of the Ombudsman in the Philippines, the Anti-Corruption and Civil Rights Commission in Korea, the State Inspectorate in Vietnam, and of the Commission Against Corruption in Macao, China.

There are very different reasons for these examples.
In Macao there is a recurring debate on whether this model should be replaced or maintained. Until now it has been kept for more than 20 years, due mainly to the fact that Macao is, as I said, a very small territory where accessibility to a single agency does not create a problem to the public, that the education and public awareness policy aiming at both anti-corruption and ombudsman targets has been largely successful and that the public has a positive image of the Commission and of its ability to operate in the two capacities.

I should add one more advantage, of a practical nature.

It is often the case that a complaint addressing maladministration, accepted by the Ombudsman, reveals on the course of investigation facts of a criminal nature touching corruption.

Under the single agency model, we are able to immediately forward the case to the ACA and prevent undue delays in the criminal investigation, while ensuring that no information leaks undermine the ACA’s task.

On a previous occasion we have mentioned that, on the other hand, the publication of some of the Ombudsman recommendations and reports dealing with the operation of the Public Administration has been perceived as having a preventive effect in regard of corruption. We continue to make the same assessment.

Let me conclude this section by noting that the reasons behind the decision to adopt one or another model are not based on the theoretical superiority of one of them over the others, but rather they are rooted in the specific realities presented by each country.

**2.6. Promoting a Sound Philosophy of Public Administration**

Regardless of which model is adopted, however, I stress again that the ACA must be a driving force in the promotion of a sound philosophy of Public Administration, and continuously look at the roots of bribery and corruption.
Prevention mustn’t be confused with simple deterrent and as a significant share of corruption cases show its systemic nature, efforts must be focused on bringing good governance standards to the Public Administration, developing a high ethical standard of conduct for public officials, adopting assets and interests disclosure mechanisms for public officials and encouraging the civil society to contribute towards a constructive policy of building a clean, transparent Administration.

3. Active inter-agency co-operation

Our gathering here, if any proof was needed, shows that we all understand the importance of co-operation without frontiers in our common efforts to fight and eradicate corruption from our societies.

Either bilateral or multilateral, co-operation is the tools of choice to the increasingly global nature of bribery.

This co-operation may assume the form of extradition agreements, mutual legal assistance agreements, joint training, conferences and, obviously, common action programs.

Macao has been an active proponent of all these forms of institutional co-operation and we are committed to contribute to further strengthening the drive against corruption in the Region and globally.

As an end note I will single out one aspect of this co-operation that has shown a trend for significant increase in the last 2 or 3 years.

Macao houses nowadays the world’s largest gaming industry.

The figures that I mentioned earlier are staggering and there can be no denying that this may prove attractive to corrupt officials abroad, as a place for enjoying the fruits of their ill-gotten profits.
Accordingly, the CCAC has been actively co-operating with other ACAs, assisting in the gathering of evidence of foreign public officials’ attendance of casinos in Macao and we have reasons to believe that this trend will continue in the future.

Dili, July 2013.

Commission Against Corruption of Macao, China