

**E. The Role of the Judiciary: Improving  
the Investigation and Prosecution of  
Bribery**

## Chapter 10

# Focus Group Study of Factors That Could Help Improve the Investigation and Prevention of Corruption in Indonesia

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**T**his chapter discusses issues in relation to corruption taking into account the three pillars of action formulated as part of the Action Plan for the Asia–Pacific region.

### THEORETICAL FRAMEWORK

The theoretical framework for most forms of corruption and white-collar crimes was set by Sutherland in 1939, when he introduced the term white-collar crime (Sutherland 1983). (For the purpose of this chapter I argue that the kinds of corruption we face in this region falls within the category of white-collar crimes.) Sutherland’s theory put forward the notion that criminal behavior is learned behavior. In simple terms, Sutherland’s theory of differential association classifies all forms of criminal behavior as learned and copied. Public officials learn to be corrupt by observing their coworkers and justifying their acts as being normal behavior in their particular environments.

Box, another prominent criminologist, adds the element of skills and opportunity as being the major motivating factors behind white-collar criminals (Box 1983). Skills are developed by observing coworkers, and when the opportunity presents itself, these skills are activated to commit a crime.

In order to prevent corruption, those charged with investigating and preventing it should understand these theories, which help identify both the causes of corruption and the personalities of people who engage in it.

## **INDONESIAN STUDY OF PERSONNEL INVOLVED IN INVESTIGATING CORRUPTION AND BRIBERY**

The Indonesian study offered an opportunity to put into practice an innovative methodology to improve the investigation and prevention of corruption. It was based on sound methodology aimed at meeting a set of specific criteria.

### **Methodology**

The study was based on a methodology of critical hermeneutics (Croft 1998; Rundell 1991; Warnke 1987), which uses focus groups to ensure that individuals from different countries and/or institutions participate in the learning process leading to their own development. This methodology also provides the impetus for local participants to take ownership of issues and think through and identify their own situations as discussed and analyzed during and after the focus group meetings (Bernstein 1983; Zemke 1998). Five focus group meetings were held during a period of 18 months. Each meeting consisted of four separate groups of participants, who were mid-level and senior officers from the various agencies (police, judiciary, regulators, private sector, and others) involved in investigating corruption and bribery in Indonesia. The first group meeting was attended by 41 people who were selected based on recommendations from various government and private sector agencies. The main criteria in selecting this group were that they were mid-level or senior officers and had at least seven years' experience of investigating corruption-related activities. A decision was made to include people who had worked in the private sector after discussions with the local partners of this project, who felt that personnel employed by the private sector (mainly multinational companies) to investigate corrupt practices would contribute positively to these groups. Such people (and a small number of observers) attended subsequent group meetings. All groups had above 80 percent attendance.

Three weeks before the first meeting, all focus group participants were given materials to read about issues relating to corruption (see the reference list and bibliography for an idea of the types of materials provided to the participants). All the participants were also asked to think about how they could help improve the framework for investigating corruption and what changes, if any, they would recommend for making their respective jobs easier and more effective. They were also given a brief outline of how the project

would function and an introduction to critical hermeneutics and the logistics of the focus group meetings.

At the first focus group meeting, a series of questions was formulated by the four working groups, and their leaders generated a list of factors relevant to these questions from each group. Further focus group meetings were based on this list of factors. At the second meeting specific themes were identified and the groups were divided into four thematic clusters. Leaders from each of the clusters drew up a final list of factors that the participants had identified as ones that would help improve the investigation and prosecution of corruption-related offenses. At all stages the participants were assured of absolute confidentiality.

## **Major Findings**

The findings of this study are preliminary, as the final report has been disseminated to all the participants for their comments.

The first and second focus group meetings identified five themes as being of utmost importance for enabling the effective investigation of corruption, namely:

- Legislation
- Training
- Interagency cooperation
- Public awareness
- Effective implementation.

**LEGISLATION.** Focus group one discussed the adequacy of current legislation, the judiciary, and the process of influencing government. This group raised the following main points:

- The current legislation relating to many aspects of investigating and prosecuting corruption-related activities is adequate, with two exceptions, that is, money laundering and political interference. The group felt strongly that international efforts should concentrate on strengthening these omissions as they were beyond their control.
- The group identified the independence of the judiciary as an issue separate from the adequacy of legislation. Most of the participants agreed that the existence of good legislation and the implementation

of good legislation are quite separate issues. This group implied that in Indonesia, the legislation in relation to anti-corruption investigation and prosecution is good, but because of issues relating to the judiciary, the implementation of this legislation is the real problem. Judicial independence would also help reduce corruption (Ades and Tella 1996; Gurgur and Shah 2000).

- The group also highlighted political interference in decisionmaking about anti-corruption investigations. The participants felt that even though political interference did exist, it was not as rampant as reported in the international media. They identified political will as the issue that must be addressed and as being much more important than political interference. After much discussion, the group defined political will as the ability of the political mechanism (both governmental and private) to identify corrupt activities and be sincere about rooting out corruption at all levels.

**TRAINING.** Focus group two discussed issues relating to training officials working in both private and governmental organizations investigating and prosecuting corruption. The issues this group identified are as follows:

- A concentrated and coordinated training effort by both the Indonesian government and international agencies is lacking. The participants felt that the many ad hoc training initiatives being undertaken by the various international agencies and coordinated by the government did not meet the needs of the people concerned. All the participants had attended training programs (most had attended at least two in the past 24 months) organized by international agencies and foreign governments in areas related to anti-corruption. While they noted that many of these programs were excellent in content and presentation, most of them did not address local needs and legislation.
- The participants also identified the lack of specific programs that would be helpful in an international context. As an example, the activities of the Financial Actions Task Force had been explained to one of the participants, the only one afforded this explanation in an entire organization actively involved in investigating money laundering and asset tracing.
- The participants also identified a need for specific skills training in areas related to legislation and investigation to improve the investigation of corruption. All the participants felt that this would improve their rate of success in investigating corruption, as currently Indonesia has only a handful of highly trained corruption investigators.

**INTERAGENCY COOPERATION.** Focus group three, which concentrated on interagency cooperation, believed that despite the many initiatives—such as the Jakarta Initiative, the Corporate Governance Initiative, the Anti-Corruption Plan, and the Ombudsmen’s Office—the question of interagency cooperation has not been addressed. The main recommendations this group made include the following:

- A special task force should be established to map the types of interagency cooperation that would be workable in the Indonesian environment. This task force should take into account the work the many local and provincial government agencies are undertaking. The task force should also look into the legislative changes that would be required to make interagency cooperation function easily.
- As concerned international agencies, nongovernment organizations (NGOs), and other agencies involved in investigating corruption, the group identified many international agencies and NGOs that seemed to be working in isolation, because the current environment in Indonesia does not encourage cooperative arrangements.
- Within the Indonesian criminal justice system, the various agencies working in the area of corruption investigation and prosecution are not required to work together. The group identified many informal links, but felt that a more formal approach of mandated meetings between private and government officials would improve overall effectiveness.

**PUBLIC AWARENESS.** Focus group four discussed public awareness and identified the following major issues:

- A concentrated public awareness campaign is needed on the negative effects that corruption has on an economy. The group agreed that in most cases the participants had investigated, both the victims and the perpetrators had extensive knowledge about corruption and white-collar crime. In many instances the people they had investigated understood clearly that they had broken the law, but argued that their actions did not hurt anyone.
- The role that the public should play in preventing corruption should also be publicized. The group noted that in Indonesia many NGOs play an active role in corruption prevention. One major activity that these NGOs could undertake is spreading the word about the importance of informants and whistleblowers in corruption identification and prevention. The participants stressed that the role

of the public is important not only in preventing corruption, but also in investigating it. They cited many examples of cases where the informants were unaware of their rights and where employers victimized whistleblowers. The participants identified some public awareness campaigns that had been carried out by organizations such as the International Committee against Corruption in Hong Kong, China, and felt that these campaigns should be adapted for Indonesia.

- The group believed that education on corruption and investigation of corrupt activities, including the roles of agencies involved in investigation, should be disseminated to the employees of all government and private organizations. Again, they identified Hong Kong, China, as a good example and the most appropriate for the Indonesian context.
- The role of educating the young was another area where the participants believed that funds could be directed. They felt that it was not their role to define or identify ways that this could be done (as they were mostly senior members of investigative agencies), but stressed the importance of this activity.

Overall, all the participants agreed that the examples from Hong Kong, China, which had been provided as part of their preparation for this project (Fee-Man 1999), seemed to be the most appropriate for the Indonesian environment. If these could be expanded to the provinces and local governments, it would help in the investigation of corruption and white-collar crimes.

**IMPLEMENTATION.** All the participants agreed that the most pressing issue facing them, as either senior investigators or directors of investigative agencies, was to implement good investigative practices. As noted earlier, critical hermeneutics is a method that would create an understanding of the issues and bring about a questioning of “what is.” The implementation issue raised by this group is just another step closer to an understanding of what needs to be done. The group did not offer any solutions, even after intensive discussions, except to note the need for significant resources to improve the working conditions and training provided by the government to these investigators and their staff.

## CONCLUSION

Using the Action Plan’s three pillars as a guide and critical hermeneutics as the methodology, we can conclude that international agencies need to help

Indonesian investigative agencies (governmental, quasi-governmental, and private) implement good investigative approaches. The focus group study provides a starting point that indicates what senior investigators and their managers working in the government and in private agencies in Indonesia have identified as their needs to increase the success rate of their investigations.

One interesting point that this group raised during discussions was their perception of the West's preoccupation with processes rather than outcomes. As an example, the participants felt that in many instances, the final outcomes in selecting successful bidders for projects would have been the same, but the process became so complicated that this process itself gave rise to opportunities for engaging in corrupt behavior. Again no solution was discussed, but the participants raised this as an issue that international organizations and multinationals should consider when insisting on tendering for small projects.

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## Chapter 11

# Role of Public Prosecutors in Japan

■ Yuichiro Tachi

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In Japan attorneys, judges, and public prosecutors have the same qualifications, therefore, the status of public prosecutors is equivalent to that of judges and they receive equal salaries depending on the length of time they have held their positions. Their independence and impartiality are also protected by law. Aside from disciplinary proceedings, they cannot be dismissed from office, suspended from the performance of their duties, or be forced to accept a reduced salary.

The duties of public prosecutors include carrying out investigations, instituting prosecutions, ensuring that the courts apply the law correctly, and ensuring that judgments have been carried out. In addition, many public prosecutors are assigned to key positions in the Ministry of Justice, for example, as vice-minister of justice and director-general of the Criminal Affairs Bureau.

In identifying the overall role of prosecutors and their responsibility toward society, prosecutors are regarded as representatives of the public interest. They exercise their prosecutorial power for the purpose of maintaining law and order, based on the principle of strict fairness and impartiality, and with respect for suspects' human rights .

The police are primarily responsible for criminal investigations and carry out the initial investigations of more than 99 percent of criminal cases. Following their investigation they must refer cases to a public prosecutor together with relevant documents and evidence, even when the police believe that the evidence gathered is insufficient. The police have no power to finalize cases, except for minor offenses. Public prosecutors may also investigate cases themselves and often carry out supplementary investigations, that is, they interview victims and the main witnesses directly, and instruct the police to collect further evidence, if necessary. Moreover, public prosecutors may initiate and complete investigations without police assistance, and may do so in complicated cases, such as bribery or large-scale financial

crimes involving politicians, senior government officials, or executives of large corporations.

### **THE SPECIAL INVESTIGATION DEPARTMENT OF THE PUBLIC PROSECUTORS OFFICE**

In three major cities—Tokyo, Osaka, and Nagoya—the public prosecutors offices have special investigation departments where a considerable number of well trained and highly qualified public prosecutors and assistant officers are assigned to initiate investigations. The special investigation departments in the Tokyo and Osaka offices have a long history and have investigated many cases involving bribery, breach of trust, tax evasion, securities exchange violations, and the circumvention of laws such as those governing the prohibition of private monopolies and the maintenance of fair trade.

One of the best known cases involving a special investigation department may be the 1976 Lockheed scandal. In this case, the public prosecutors of the Special Investigation Department, Tokyo District Public Prosecutors Office, found that Lockheed Aircraft Corporation had paid millions of dollars (more than \$500 million) to Japanese government officials through a Japanese agency, Marubeni Trading Corporation, to smooth the way for the sale of Lockheed's airplanes to a Japanese airline corporation, All Nippon Airways. Besides many executives of Marubeni and All Nippon Airways, the former prime minister, the former minister of transportation, and the former parliamentary vice-minister of transportation were arrested and prosecuted for giving and receiving bribes. The former prime minister was sentenced to four years imprisonment with forced labor. The Tokyo High Court rejected his appeal. He died while the case was in the Supreme Court, and so the case against him was dismissed in 1993.

Another noted scandal was the Recruit scandal. This was another large-scale corruption case that the same department handled in 1988. In this case, executives of Recruit Cosmos Corporation, a real estate company, and its mother company, Recruit Corporation, sold the rights to buy stocks that had been scheduled to be offered for public subscription and were sure to rise in value after that, to high-ranking government officials as bribes. These officials included the chief secretary to the prime minister, the vice minister of education, the vice-minister of labor, and the president of Japan Telephone and Telegram Corporation. All were arrested and prosecuted by public

prosecutors. Some cases have been closed, while others are still being contested.

Yet another case involving the Tokyo Special Investigation Department was the Kyouwa scandal. This affair involved bribes amounting to approximately -80 million to Abe Fumio by Kyouwa, a firm that manufactures steel girders. When the scandal broke, Fumio was the secretary-general of the Liberal Democratic Party, the ruling party. Prior to that he had been head of the Hokkaido and Okinawa development agencies. In exchange for bribes he disclosed important government secrets to Kyouwa. Amid accusations of corruption, he resigned in December 1991. He was arrested in January 1992, and in May 1994 was sentenced to two years imprisonment with forced labor.

In 1994 the former minister of construction was arrested and indicted by the public prosecutor of the same department on the charge of receiving bribes in exchange for using his influence on behalf of the major construction corporation, Kajima. He was sentenced to 1 year and 6 months imprisonment with forced labor in 1997. The Tokyo High Court rejected his appeal and the case is still being contested in the Supreme Court.

## **SELF-INVESTIGATION BY SPECIAL INVESTIGATION DEPARTMENTS**

The special investigation departments in the public prosecutors offices have special units for self-investigation where well-trained assistant officers keep an eye on department officials, in particular, by analyzing their bank account activity. When the department has reason to suspect an official of corruption, members of the special unit start tracing the official's bank accounts. Given the large number of financial institutions in Japan, this is no easy task; however, one approach is through the cooperation of credit card companies, which allow investigators to review credit card applications so that investigators can determine the bank accounts noted on the application. Once investigators have identified the accounts they track transactions to check for suspicious activity.

In some cases, a corrupt official will receive bribe money in the form of a check, for example, the vice-governor of Aichi prefecture received a bribe by check in the amount of some -20 million. In most cases, however, bribes are given in the form of cash, because cash is easier to conceal. Nevertheless, persistent and painstaking investigative work can also uncover cash bribes.

Let us consider the successful investigation of a bribery case by the special unit of the Osaka Public Prosecutors Office. The unit was investigating an official suspected of receiving bribes every month. The person giving the bribes paid them by using a false name at cash dispensers. Eventually the investigators managed to match up receipts from the cash dispensers from which the person suspected of giving the bribes was withdrawing the funds and the other automated teller machine where he was remitting the funds. This eventually allowed them to find the bank account of the person suspected of paying the bribes, as once they had the account number they could check the application form he had filled out to open the account to ascertain what name he had used.

### **ANALYSIS OF MATERIAL EVIDENCE**

Japan's Code of Criminal Procedure requires that a judge must issue warrants for search and seizure and strictly restricts the extent of search and seizure. Under these regulations, material seized as evidence in relation to a particular case may lead to other cases. For example, during a tax evasion investigation, my office seized some receipts to use as evidence at trial; however, close examination of the receipts revealed that they had been doctored, and this led to the investigation being extended to a bribery offense in addition to tax evasion.

My office also investigated a case of bribery involving the mayor of the city of Wakayama—a city of some 400,000 people and a renowned tourist destination—and the former chairman of the Wakayama Municipal Assembly. The first clue was an item in a newspaper that reported that the Sennan City Agricultural Cooperative (SCAC) in Osaka had gone bankrupt. This is not usual for an agricultural cooperative. We knew that the SCAC had a bad reputation because of having too many bad loans on its books. Furthermore, Mr. X was one of the debtors, and we also knew him by reputation and had previously suspected him of giving bribes to local government officers and members of the local assembly. We therefore concluded that some breach of trust had occurred in the SCAC in relation to its loans and that Mr. X was probably involved, along with the head of the SCAC.

We started by asking for the cooperation of the Agricultural Cooperative Department in the Osaka prefectural government. This organization is responsible for supervising agricultural cooperatives in Osaka by periodically reviewing cooperatives' management and keeping track of their performance by means of reports and other documents. We received these various

documents and reports and analyzed SCAC's loans. We also interviewed some SCAC staff. Eventually we determined that we had sufficient evidence to prosecute the head of SCAC and Mr. X for a breach of trust of -500 million. We arrested the head of SCAC, another SCAC staff member who was in charge of accounting, Mr. X, and a subordinate of Mr. X. A few days later they all confessed.

During the investigation we searched Mr. X's office and seized a certificate made by the Wakayama Land Development Agency. The certificate stated that the agency guaranteed to buy Mr. X's land. At first glance it was an ordinary certificate, but careful examination revealed some irregularities. One of these was the signature. Normally the head of issuing agency signs a certificate of this kind, but in this case the signature was that of a significantly lower-ranking official. Another irregularity was that the land was not as valuable as cited on the certificate. This led us to believe that Mr. X had bribed someone at the agency.

With this information in hand we interrogated Mr. X's subordinate. After an initial denial he confessed to giving a bribe of -5 million to Mr. Y, the former chairman of the Wakayama Municipal Assembly to pressure the head of the Wakayama Land Development Agency, also the mayor of Wakayama, to issue the certificate, because Mr. X and his subordinate thought that the certificate would significantly boost the value of the land.

After confronting Mr. X with his subordinate's confession, Mr. X also eventually confessed to giving the -5 million bribe to Mr. Y. Thus we eventually also obtained a confession from Mr. Y. However, at this stage, we could not arrest the mayor of Wakayama, because he had ordered a subordinate to make the certificate and sign it, and we had insufficient evidence to prove that the mayor had committed a crime. We did, however, have sufficient grounds to search the mayor's office. We examined his daily work records and found a reference to a meeting between his subordinate, Mr. Z, early one weekend morning in his office, which was unusual. We had also learned from Mr. Y about a scheme whereby parents could get their children employed at the Wakayama Administrative Office by giving the mayor -1 million. An investigation of Mr. Z found that his daughter had gained entry to the office even though she had performed worse on the entrance examination than other candidates who had not been employed by the office.

Following further investigation we arrested the mayor, his secretary, and Mr. Z. We also interviewed Mr. Z's wife, who was familiar with the whole

story. They all confessed to the recruitment scheme and were indicted. The arrest and indictment of a mayor of a city of this size is rare and caused quite a sensation. At trial, all the defendants admitted their guilt and received appropriate sentences.

This case underscores the importance of analyzing material evidence. If we had not noticed the irregularities in the certificate or found the reference to a meeting between the mayor and Mr. Z, we would not have found the second crime, the recruitment scheme.

## **NEED FOR NEW INVESTIGATIVE TOOLS**

In the case of the mayor of Wakayama, we fortunately obtained confessions from all the suspects. Recently, however, investigations have tended to become more difficult. We should therefore consider introducing new investigative techniques, such as granting immunity in exchange for information. In terms of combating transnational organized crime, paragraph 3 of Article 23 of the United Nations Convention against Transnational Organized Crime states that each nation shall consider granting immunity from prosecution. I believe that an immunity system is necessary for the investigation of both corruption cases as well as transnational organized crime.

Japan currently does not have an immunity system, which has led to a number of problems as evidenced by the Lockheed scandal. As mentioned earlier, the former prime minister died while the case was in the Supreme Court, and the case was dismissed without any judgments being handed down. Yet the former chairman of Marubeni Trading was indicted for giving a -500 million bribe to the former prime minister. The Supreme Court dismissed the chairman's appeal and pronounced him guilty. However, this judgment came as a surprise to public prosecutors and judges, because the Supreme Court had denied the admissibility of the depositions of Archibald Kotchian, former chairman of Lockheed, and John Clatter, former director of Lockheed's office in Japan.

The scandal first became evident with testimony given by Kotchian and Clatter in the United States. A public prosecutor from the Tokyo District Public Prosecutors Office asked a Tokyo District Court judge to seek permission to obtain depositions from Kotchian and Clatter. Following the prosecutor's request to the court, the prosecutor-general issued a written declaration that he had instructed the chief prosecutor of the Tokyo District Public Prosecutors Office not to prosecute Kotchian, Clatter, and others (based

on Article 248 of the Code of Criminal Procedure) even if it turned out that their actions had contravened Japanese law.

Upon receiving the request, the U.S. District Court for the Central District of California, which had jurisdiction over the case, appointed a commissioner to preside over the taking of depositions. However, both Kotchian and Clatter refused to testify, questioning the legality of their immunity in Japan and whether it would actually hold up in court. Consequently, the U.S. judge ordered the depositions to be taken but not to be provided to the Japanese court until he had received confirmation from the Supreme Court of Japan that clearly stated that the witnesses would not be prosecuted in Japan. On receipt of such a guarantee, the depositions were provided to Japanese prosecutors.

As noted earlier, the Supreme Court of Japan consequently denied the admissibility of the depositions on the grounds that while the Constitution cannot be construed as rejecting the concept of immunity, the Code of Criminal Procedure has no such provisions. While criminal immunity serves practical purposes, it also benefits those involved in a crime and affects criminal procedure. Therefore the decision on whether or not to adopt the system should consider whether circumstances warrant the introduction of such a system, whether it is compatible with the notion of a fair trial, and whether the public will perceive it to be fair. If the system is to be adopted, provisions regarding its use would have to be drafted. As the Criminal Code does not contain such provisions, the implication is that criminal immunity cannot be used, and therefore testimony obtained in exchange for criminal immunity is inadmissible. Therefore, excluding the depositions in the Lockheed case was appropriate under the circumstances.

This judgment revealed the limitations of the interpretation of Japanese legislation. Yet despite the passage of six years since the Lockheed judgment, consensus about the introduction of immunity has not been reached. I believe that we will have an opportunity to revisit this issue when Japan enacts new laws as part of its ratification of the United Nations Convention against Transnational Organized Crime.

## **CONCLUSION**

Preventing corruption is important, yet it poses many difficulties. I hope that when the United Nations reviews this issue, as it is scheduled to do in 2002, that this will result in new guidelines or a new convention. Japan

should consider enacting new laws or revising existing laws against corruption and introducing new investigative techniques to improve the investigation and prosecution of bribery cases.

## Chapter 12

# Conditions for Effective Reform

■ Gerald A. Sumida

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**O**n 31 May 2001 the 143 countries taking part in the Second Global Forum on Fighting Corruption and Safeguarding Integrity stated in their Final Declaration that:

We are all deeply concerned about the spread of corruption, which is a virus capable of crippling government, discrediting public institutions and private corporations and having a devastating impact on the human rights of populations, and thus undermining society and its development, affecting in particular the poor.<sup>1</sup>

This succinct, but compelling, statement crystallizes the destructive impacts of corruption in general, and its corrosive and debilitating effects on the development process and on developing societies in particular.

For multilateral development financial institutions such as the ADB, an effective fight against corruption in the Asia-Pacific region is of paramount importance. The ADB and its developing member countries work in close partnership to design and implement development projects and initiatives aimed at reducing the region's widespread poverty and fostering economic growth and social development with the objectives of enhancing the quality of life and promoting human dignity. Corruption is the cancer that insinuates itself into the living fabric of society to cripple it and, if left unchecked, to destroy society's will, aspirations, and efforts to achieve sustainable economic growth and social development. Hence, fighting corruption is necessarily a part of the ADB's development agenda.<sup>2</sup>

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<sup>1</sup> The Second Global Forum was held in The Hague during 28-31 May 2001. It was cosponsored by the Netherlands and the United States and assisted by an organizing committee comprising representatives of several countries and international organizations. It cooperated closely with the International Anti-Corruption Conference, which held its 10<sup>th</sup> annual meeting in Prague in October 2001. Both conferences plan to convene in Seoul in 2003.

<sup>2</sup> This has been articulated in the ADB's official policies on Governance: Sound Development

In this conference we are focusing on specific approaches to combating corruption effectively, many of which are stated in the Action Plan that has emerged from prior conferences as a working document and could become a foundation for regional action. It is within this context that the role of the judiciary in improving the investigation and prosecution of bribery in particular is of special interest.

## **INTERNATIONAL LEGISLATION TO COMBAT BRIBERY**

Bribery has become a high priority target in the fight against corruption, largely because of the global expansion of international trade, commerce, and investment. This expansion has been led by multinational business enterprises, later supplemented by global investment funds, generally based in North America and Europe, and by increasing flows of bilateral and multilateral development assistance to the developing countries (among the vast literature on this subject see, in particular, Martin 1999; Rose-Ackerman 1999). In its purest essence, “Bribery is a breach of people’s trust” (Martin 1999, p. 12). We know that bribery diminishes, if not eliminates, competition; creates and exacerbates inefficiencies; and ultimately increases costs for countries and their consumers, especially the poor. Countries with high levels of corruption have poorer quality and amounts of public investment, which in turn is associated with lower private investment, and ultimately leads to lower economic growth rates (see Everhart and Sumlinski 2001).

The pioneering international initiative against bribery is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), which entered into force on 15 February 1999 and has been signed by all 30 OECD member countries and 5 nonmember countries. It requires that each government establish that it is a criminal offense under its law

for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

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Management (1995) and Anti-Corruption (1998) and its extensive projects and technical assistance in these areas.

Furthermore, each government must also establish as criminal offenses complicity in (including incitement and aiding and abetting) or authorization of an act of bribery of a foreign official, as well as the attempt and a conspiracy to bribe a public official of its own government. Such offenses are to be punishable by “effective, proportionate and dissuasive criminal penalties.” The OECD Convention also requires each government to take measures regarding maintaining accurate records, disclosing financial statements, providing mutual legal assistance to other signatories, cooperating in extradition and surveillance, and monitoring compliance.<sup>3</sup> In addition, certain OECD recommendations call upon OECD members to end the practice of allowing bribe payments made to foreign officials to be tax deductible.

The OECD Convention prohibits only the offering or paying of bribes, but not the soliciting or taking of bribes. In contrast, the Inter-American Convention against Corruption (the OAS Convention) requires that governments establish as criminal offenses under their laws both the solicitation or acceptance, directly or indirectly, of a bribe by a public official, as well as the offering or granting, directly or indirectly, of a bribe to a public official. The OAS Convention also provides for the adoption of standards of conduct, the criminalization of unexplained increases in wealth while in public office and of illicit enrichment, the improper use of classified or confidential information obtained during the performance of public functions, and other measures similar to those in the OECD Convention. The OAS Convention was signed by 29 countries and entered into force on 6 March 1997.

These intergovernmental efforts to combat bribery in international business transactions are supplemented by the activities of international nongovernment organizations. For example, Transparency International periodically issues its Corruption Perceptions Index, which rates countries based on perceptions of the degree of corruption as seen by business people, risk analysts, and the general public. In 1999 Transparency International published its Bribe Payers Index, which rates 19 leading exporting countries based on perceptions of each country’s willingness to pay bribes abroad.<sup>4</sup>

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<sup>3</sup> The United States had previously enacted the Foreign Corrupt Practices Act, signed into law in 1977, which prohibits paying bribes to foreign officials and imposes rigorous record keeping and accounting requirements on US companies and their overseas subsidiaries to ensure that bribes cannot be hidden. No other country had followed the lead of the United States until the OECD Convention was signed.

<sup>4</sup> See <http://www.transparency.org/documents/cip/1999/bps.html>. Among the five countries rated as having the greatest willingness to pay bribes abroad were four Asian countries (in descending order): Malaysia; Taipei, China; Republic of Korea, and PRC.

This is reinforced by actions such as the International Chamber of Commerce's adoption in 1996 of its Rules and Recommendations on Extortion and Bribery in International Business Transactions, which prohibit both demanding and accepting a bribe.<sup>5</sup>

## **NATIONAL LEGISLATION TO COMBAT BRIBERY**

A review of how we might combat bribery at the national and subnational levels in the Asia-Pacific region reveals four basic conditions that have profound implications for how we should craft and implement strategies to combat corruption in general, and bribery in particular, namely:

- In many cases, laws prohibiting corrupt acts, including bribery, are on the books; however, tightening up and updating these laws may be necessary, along with supplementing them with additional useful laws, such as freedom of information laws and similar measures aimed at achieving greater transparency and accountability.
- In most cases, what is clearly and glaringly absent is the prompt, effective, systematic, and non-discriminatory enforcement of these laws. Indeed, often there is simply no enforcement.
- In most cases, effective enforcement is lacking because the capacity to enforce these laws is extremely weak. That is, countries lack sufficient trained, professionally-oriented, adequately compensated, properly equipped, visibly and continuously supported, publicly respected men and women. Such people are needed to understand, publicize, counsel about, engender respect for, enforce, investigate, prosecute accused persons under, and vindicate these laws. In addition, they must often perform these duties in the face of ignorance of these laws; resistance to enforcement efforts; threats to their own and their families' safety; and the intangible, but powerful, force of social traditions and attitudes that condone, if not actually encourage, such practices.
- In most cases, effective enforcement faces institutional and operational obstacles, if not outright barriers, because there is no clear separation between and among the judicial system, the police administration, the investigative and prosecutorial administration, and other parts of the governmental structure involved in law enforcement and the administration of justice. Where institutional separation, especially of the judiciary from the rest of the system of justice administration, is weak or blurred, and where the judiciary and judicial administration

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<sup>5</sup> See [http://www.iccwbo.org/home/statements\\_rules/rules/1996/1996/briberydoc.asp](http://www.iccwbo.org/home/statements_rules/rules/1996/1996/briberydoc.asp).

are weak, then even the best laws will remain weakly enforced, if enforced at all.

## ROLE OF THE JUDICIARY

We must therefore recognize that improving techniques and approaches for investigating and prosecuting bribery and other forms of corruption will not work in isolation from the public institutions and attitudes that underlie an effective judiciary and judicial system and, more broadly, a system based on the rule of law. From this perspective, it is useful to review the roles and functions of the judiciary as a fundamental element of the societal order. Overall the judiciary has five dimensions and specific missions (see Dator 2001; Sugimoto and Yasutomi 1981):

- As a *branch of government* the judiciary's mission is to uphold the constitution and the government thereby created, the rights and liberties that the constitution guarantees, and the policies and principles that it embodies.
- As a *dispute resolution forum* the judiciary's mission is to ensure that the public has access to the highest standard of justice attainable under the country's system of government by assuring the equitable and expeditious resolution of all cases and controversies properly brought before the courts, and by facilitating alternative forms of dispute resolution to supplement the formal court system.
- As a *public agency* the judiciary's mission is to provide for, promote, and ensure effective, economical, and efficient use of public resources in the administration of the judicial system.
- As a *subsystem of the country's legal system* the judiciary's mission is to promote effective and expeditious administration of justice by the various other elements of the legal system.
- As an *institution of a changing society* the judiciary's mission is to anticipate and respond to society's changing judicial needs.

From this perspective, a judiciary that embodies these institutional dimensions and missions is an institution based on, and in turn an essential part of, the society's legal order, the basis of which is the rule of law. It is not only a branch of the government and a public body, but it is the central, though not exclusive, forum for the resolution of the society's legally-based disputes. As part of the society, it must not only be responsive to change as the society as a whole changes, but it must also be acutely aware of its proper role in influencing and shaping the future of the society of which it is part.

The effectiveness of the judiciary and the judicial system ultimately depends on the existence of the rule of law and the sound and efficient operation of the core legal institutions and the supporting civil society institutions and processes. Indeed, these are fundamental prerequisites for an effective economic, social, and political order essential for a modern society in our increasingly interdependent world. The institution of the judiciary—the formal court adjudicatory system—lies at the heart of a society’s legal order. Without an effective, functioning, and independent judicial system the results for society are inevitable and predictable: uncertainty will pervade society; the efficient conduct of business and economic affairs will face oppressive burdens; social integration and development will be strongly resisted; and widespread injustice and deprivation of the rights of ordinary citizens, especially the poor, women, and children, will be likely.

Finally, the effectiveness of a judiciary also depends on the concurrent development of other institutions and attitudes within the broader society that support, as well as rely upon, a strong, capable, and independent judiciary. However, the need to ensure that the judiciary itself is an effectively functioning institution is paramount.

## **JUDICIAL REFORMS**

In considering the most effective approaches and strategies for combating bribery, three interrelated areas of reform are crucial. The first targets the judiciary as the key institution in fighting corruption, the second comprises specific anti-corruption and anti-bribery measures, and the third relates to complementary institutional reforms.

When considering initiatives that will strengthen the institutional capabilities of the judiciary, reformers should keep in mind several considerations that can determine whether or not such initiatives are ultimately successful. These considerations include the following:

- Any effort at comprehensive judicial reform falls within a much broader societal context that centers on strengthening the rule of law in general, including public attitudes toward the rule of law and the legal order, and that recognizes the fundamental need to provide ordinary citizens with access to justice and the confidence that the judiciary will provide impartial, prompt, and clear results.
- Any judicial reform effort must have the government’s full commitment and must be led by the highest judicial officials, in particular, the chief

justice of the supreme court. Without this firm support and vigorous leadership the needed changes, especially in institutional attitudes and culture within the judicial institutions, will be unsustainable.

- The reform effort will be a long-term, multiyear program and must be effectively planned, staffed, funded, monitored, and supported during that entire period. Changing the attitudes and the culture of court and judiciary personnel is fundamental, as is providing them with the necessary material resources, knowledge, and skills to make the reforms work on a sustainable basis. This takes time and persistent efforts, and must be clearly anticipated. Quick fixes or one-shot reform efforts will inevitably prove to be unsustainable.
- Other public institutions and agencies also influence the fulfillment and realization of citizens' legal entitlements and must similarly be brought into the reform effort. They include the police administration, the prosecutors' and defense offices, and legal aid services. Ultimately, the success of any judicial reform efforts, including strengthening the independence of the judiciary, will be affected by how these other public institutions and agencies are reformed.
- The public must accept and support any reform effort and perceive it as credible. Sources of support from citizens include established bodies, such as bar, legal, and other professional associations; law, business, and other professional schools; chambers of commerce and other business organizations; and grassroots citizen groups and organizations.

The range of possible judicial reforms is limited only by imagination, but include the following, which must be based on the specific needs of each society:

- Improve policymaking in the judicial sector, possibly by establishing a national law commission. This commission would deal systematically with policy issues involving the judicial system, including policies related to the training of judges and court administration personnel, funding, human resource development, and standards of conduct and discipline.
- Strengthen judicial independence, including completely separating the judiciary from the executive branch of government and ensuring adequate funding and independence in staffing for the judiciary.
- Ensure the efficient and cost-effective administration of justice, including improving case management, reducing court congestion, developing bench books and trial practice manuals, establishing a judicial training academy for judges and other court personnel, setting up small causes or small claims courts, initiating court-annexed arbitration and

mediation systems, and computerizing the court system (including links to the police and prison systems).

- Improve the general public's knowledge of their legal rights to access to the courts, including publishing laws in local languages, developing public information and awareness programs, initiating law review programs, and adopting freedom of information and consumer protection laws.
- Improve judicial governance, including employing professional judiciary administration managers, establishing ombudsman positions, developing a human resources development strategy, and instituting systems to hold judges accountable.
- Improve human resource development, including developing a judiciary-wide human resources development strategy, reviewing and adopting new personnel policies and procedures as needed, developing the capacity to provide in-service training to the judiciary, and developing training and educational liaisons with academic and private sector sources.

## **ANTI-BRIBERY MEASURES**

Improving the investigation and prosecution of bribery can be pursued through several specific courses of action, a number of which are already incorporated in the Action Plan as follows (see also the annex to the Final Declaration of the Second Global Forum for compilations of measures for combating bribery and corruption; Bhargava and Bolongaita 2001 for an assessment of various anti-corruption instruments; Jayawickrama 1998):

- Ensure the adoption of well-drafted and clearly stated legislation that covers the following critical matters and provides for strong and appropriately dissuasive minimum sanctions for violations:
  - A law that criminalizes soliciting, receiving, offering, and paying bribes; money laundering; and similar crimes and that provides dissuasive sanctions. This may require a special evidentiary provision containing a rebuttable presumption that public officials who have more money or property than what they could legitimately have earned or who maintain a standard of living beyond what is commensurate with their official emoluments be deemed to have acquired such money, property, or other wealth through corruption.
  - A law that enables tracing, seizing, freezing, and forfeiture of illicit earnings from corruption, which also stipulates that any contract,

license, or approval obtained through this means will be void and unenforceable and the person convicted of corruption will be disqualified from responding to public contract tenders.

- A law that requires the regular and periodic declaration of assets, income, and liabilities by decisionmakers and public officials who hold positions where they interact with the public and are well placed to extract bribes, together with an independent monitoring and enforcement agency that regularly reviews such declarations.
  - A law that identifies and prevents or resolves conflicts of interest, especially those involving public officials' private and public interests.
  - A law that provides a strong recovery mechanism under civil law (as distinct from criminal law) to govern the recovery of illicitly acquired assets from family members, friends, acquaintances, and associates of persons convicted of corruption. Civil court judgments are usually more readily enforceable in foreign jurisdictions to which assets may have been moved.
- Ensure that no existing laws can be used to frustrate the operation of anti-bribery laws, such as criminal and civil defamation laws that could be used against those alleging corruption and those covering corruption in the media, or that any such laws are amended to preclude their use to frustrate the prosecution of corruption.
  - Ensure that laws and appropriate implementing regulations are adopted and promulgated to provide for effective, prompt, and thorough investigation and prosecution of all those accused of bribery offenses by competent authorities.
  - Strengthen the investigative and prosecutorial capacities of pertinent public agencies by providing sufficient funding, personnel, training, equipment, recruitment and retention programs, and other resources; developing and expanding communications and operational relationships with other government departments and agencies involved in judicial and law enforcement; and developing, promulgating, and enforcing standards of performance and integrity, including investigative and disciplinary mechanisms, to institutionalize professionalism and integrity.
  - Strengthen and enhance bilateral and multilateral cooperation in carrying out investigations and other legal proceedings to further information and evidence exchange, extradition, cooperative search and seizure, and prompt repatriation of forfeitable assets; training personnel and participating in exchange programs; and engaging in research and development on how to deal effectively with transnational criminal activities involving corruption, in particular bribery.

The broader institutional structure through which anti-corruption, including anti-bribery, laws are enforced and implemented is also critically important to complement the appropriate laws. The successful enforcement of anti-corruption legislation can be significantly enhanced by an institutional framework that includes the following:

- Establish an independent commission against corruption charged with implementing the anti-corruption legislation. This commission must be backed by committed political support at the highest levels of government; be politically and operationally independent and have that independence sustained by public pressure; possess adequate powers to obtain evidence and question witnesses; have leadership that is publicly perceived as being of the highest integrity and personnel of the highest professional ability; and be publicly accountable, preferably to the legislative body.
- Ensure the existence of an independent prosecuting agency, not subject to any external agency, political or otherwise, that is separate from the police and court systems, and that has the authority to decide whether or not to institute criminal proceedings.
- Ensure the existence of an independent, accountable, transparent, and professional police force free from political interference. This may include setting up public safety or police commissions to ensure civilian control and institutionalize the accountability of the police force and gender and human rights awareness within the police system and establishing liaison committees to improve relations between the police and the public.
- Create an independent authority to investigate complaints against the police.
- Create the post of auditor-general responsible for auditing government income and expenditure, including ensuring that the executive complies with the legislature as expressed through parliamentary appropriations, promoting efficiency and cost-effectiveness in government operations, and preventing corruption through the development of financial and auditing procedures designed to reduce the incidence of corruption and increase the likelihood of its detection. Ideally, this office should be constitutionally established and protected.
- Create the post of ombudsman, who will receive and investigate allegations of maladministration ranging from incompetence and delays to bribery and corruption. This should be an independent officer to whom citizens have direct access, with appropriate measures to ensure confidentiality, and whose independence and security are constitutionally protected.

Furthermore, corruption and bribery can be curbed by limiting situations in which they can occur and by reducing the benefits to both recipient and payer, that is, by rendering both more vulnerable to detection and sanctions. An anti-corruption strategy should therefore include the following:

- Define the discretionary element in decisionmaking narrowly, especially concerning procedures for government agencies charged with granting approvals, licenses, and permits and undertaking public procurement.
- Institute Internet- and electronically-based permitting and public procurement systems, which can make these otherwise often complicated and hidden processes public and accessible, and also simplify them, thereby removing their vulnerability to corruption.
- Revise, redesign, and repeal, where appropriate or desirable, the mass of rules, regulations, procedures, and formalities, leaving only those that are necessary for conducting required operations. Ensure that those rules, regulations, and procedures that remain in effect are clear, plainly understandable by ordinary citizens, and accessible.
- Ensure the adoption of legislation and appropriate regulations, as well as the ability to enforce government agency compliance, that provide for greater disclosure of information and transparency in government operations, especially public procurement and investment matters, by:
  - Publishing budgets and other routine information promptly and predictably
  - Passing a freedom of information act that provides a simple procedure allowing citizens to request and obtain government documents
  - Publishing and disseminating laws, regulations, and agency and judicial decisions promptly upon their adoption or issuance and in a manner that is accessible to the public
  - Having public agencies use the Internet to provide information about the agencies and their operations and decisions
  - Mandating annual disclosure by public officials and their families, including members of the judiciary, of their assets and requiring them to explain any unusual increases in such assets that cannot be accounted for by their public remuneration
  - Passing a whistle-blower protection act, extended to those within the government and the media, to provide protection from retribution for those who provide information about corruption.
- Undertake administrative reforms that minimize opportunities for corrupt practices.
- Demystify government by explaining government decisionmaking

processes by, for example, publishing tax collectors' and other handbooks and placing the onus on civil servants to justify why they are withholding access to documents.

- Institute a meritocratic civil service, whereby civil servants are recruited on the basis of merit, adequately remunerated, and assured of career advancement solely on the basis of merit.

In addition to these specific approaches, the business community and civil society, including professional and trade associations, nongovernment organizations, academic institutions, and the public at large, must be integrally enlisted in a continuing campaign against corruption. This involves programs of public awareness and support for the anti-corruption efforts of public authorities engaged in enforcing, investigating, and prosecuting bribery and corruption.

## CONCLUSIONS

The caveat to all these approaches and specific techniques to combat corruption is that the highest levels of government must be strongly committed to pursuing anti-bribery and anti-corruption strategies and initiatives vigorously and persistently. That commitment must be visible, forceful, and convincing. It must also enlist the legislative and judicial branches of government, the business community, and civil society as strong and equally committed parties. Without this commitment and increasingly widespread public support, any anti-corruption strategy and program will fail.

As the region's developing countries seek to continue their national programs of economic and social development, the rule of law is clearly fundamental to this process. The rule of law is not to control or to direct a society, but to provide the basic foundation and order for effective, efficient, and just operations of the many different facets of the society's governance system and to safeguard the basic rights and entitlements, and concomitant civic duties and responsibilities, of all citizens. It involves written stipulations and guarantees in constitutions, laws, and regulations. It also involves a culture infused by widespread attitudes and expectations that all citizens can confidently rely on the legal system. Fundamental to all this, and especially to the public's confidence in this legal order, is the judicial system.

Therefore our focus on the role of the judiciary in combating bribery and corruption is appropriate. Indeed, as history clearly shows, a strong, independent, professional, efficient, and respected judiciary is pivotal to the

survival of human rights and human dignity in society. As a partner in the fight against bribery and corruption and in efforts to promote good governance, the ADB will continue to support the strengthening of judicial institutions and the rule of law in the Asia-Pacific region.

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