

## Notes

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## Malaysia

### Conventions:

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (ratified September 2004)

ADB-OECD Action Plan for Asia-Pacific (endorsed November 2001)

### Legal and institutional changes

- The Central Bank introduced **two public complaints and redress forums** in 2005. The Financial Mediation Bureau (FMB), launched in January, is an integrated dispute resolution centre for financial institutions. The FMB's predecessors, the Banking Mediation Bureau and the Insurance Mediation Bureau, handled a total of 1,515 cases in 2004. The FMB provides an avenue of redress for a wider spectrum of the public since it covers the consumer areas of Islamic insurance, development finance institutions, as well as non-bank issuers of credit and charge cards. In February, the Central Bank set up a website, LINK, to facilitate a rapid response to the public, as well as small and medium enterprises, on matters related to the financial sector. LINK also has the potential to encourage internal and external whistleblowers to disclose corruption in the financial sector.
- In December 2004, the Treasury issued **new guidelines for public procurement** on infrastructure maintenance projects that outline the selection process for contractors, the use of open tenders and the participation of a broader group of public officials to ensure transparency. Though the guidelines cover one area of public procurement only, they apply to all departments of government (see below).
- The **Anti-Corruption Academy**, first announced in December 2003, is expected to become operational in September 2005. Its main role is to train officials of the domestic Anti-Corruption Agency, but it will function as a regional centre for anti-corruption capacity building, promoting best practice in investigation, monitoring and enforcement, as well as forensic accounting and engineering (see below).

- A number of civil society organisations, including TI Malaysia, formed a lobbying group in October 2004, Infokl, to press for **greater freedom of information**. Housed at the Centre for Independent Journalism, Infokl will draft a freedom of information bill, including provisions for whistleblowers, for submission to government. It will also call for a review of the Official Secrets Act, which inhibits comment on many public sector activities.

## The government's anti-corruption campaign

The fight against corruption has been the centre piece of Prime Minister Abdullah Badawi's government since it came to power in October 2003. The campaign has focused on prevention, including the formation of the National Integrity Plan (NIP), the Integrity Institute of Malaysia (IIM) and the Anti-Corruption Academy, but it has punitive aspects as well. It is too early to assess the real impact of the campaign but the signs are encouraging.

In April 2005, the government announced that the IIM would develop a National Integrity Index (NII), to assess progress in areas including corporate governance. The IIM was established in April 2004 to implement an NIP for 2004–08, aimed at reducing corruption and abuse of power, mainly through education and training. Since its inception, the IIM has conducted numerous courses on integrity for the private and public sectors, and in universities and schools.

The Anti-Corruption Academy, which is expected to open its doors in September 2005, is the first of its kind in the Asia-Pacific region. Established by the Anti-Corruption Agency (ACA) to train anti-corruption officials in Malaysia and from across the region, the academy will function as a centre for anti-corruption capacity building, promoting best practices in investigation, monitoring and enforcement, and in newer areas such as forensic accounting and engineering. Although it has yet to begin operations, it has been welcomed by the Asian Development Bank and the Organisation for Economic Co-operation and Development.

Meanwhile, the ACA stepped up enforcement of the Anti-Corruption Act

with a 47 per cent increase in corruption-related arrests in 2004, compared to 2003, and 179 new cases registered for trial.<sup>1</sup> Among those charged in 2004 were the former land and cooperative development minister, Kasitah Gadam, and Eric Chia Eng Hock, a businessman closely associated with former prime minister, Mahathir Mohamad, who retired in October 2003 after 22 years in office. The charges were remarkable since the agency had been criticised for targeting only 'small fish', with some observers blaming this on the lack of independence of the attorney general, who held the final decision to prosecute.<sup>2</sup> Other anti-corruption laws have not been enforced so effectively. The first prosecution under the Anti-Money Laundering Act of 2001 was only initiated in 2004, but a spate of prosecutions is expected in the near future.<sup>3</sup>

Despite this, there is continuing concern about the ACA's independence. It forms part of the prime minister's office and, though the king appoints the director general, he does so on the prime minister's advice. This does not necessarily translate into executive interference with its investigations, but the former prime minister did remove ACA director general Datuk Ahmad Zaki in March 2001, in spite of his diligence and record of effectiveness.

Another aspect of the government's strategy has been to limit the opportunities for corruption by improving public service delivery. To this end, an internal circular in November 2004 repealed the 1979 auditing system, setting out new objectives, functions and responsibilities. The new auditing regime will be responsible for all monetary and financial transactions, including verifying all the expenditure, profits, assets and stock managed.

In January 2004, the Public Complaints Bureau (PCB), which many had criticised for the complexity of its procedures, launched the MESRA Rakyat programme whereby it tours the country to listen to local complaints. Heads of government departments are also present at these meet-the-people sessions. At a session in Melaka state in July 2004, 278 citizens met 49 heads of department and raised over 40 issues. The officer in charge reported that of the 40 cases brought up, 37 had been settled, while three were pending. All cases relating to corruption are referred to the ACA for further investigation. The PCB plans to monitor these investigations to ensure that action has been taken.

### Procurement policies on the mend

In November 2004, a local newspaper published a front-page story on defective buildings and roads that had cost the taxpayer an estimated MYR2 billion (US \$500 million).<sup>4</sup> The response of the public works minister was that the fiasco was not the fault of his department, but of a group of contractors known as Project Management Consultants (PMC), set up in the 1990s and registered with the finance ministry.

PMC comprises several contractors who were awarded projects through direct negotiation, circumventing procurement regulations. A treasury circular in September 2000 sanctioned privileged consortia to cover five regions and exempted government departments from normal procurement procedures.<sup>5</sup> This allowed agencies to implement their own projects through limited tenders or direct negotiations. The usual procedure had been to go through the public works department and, only if the latter were unable to take on the contract, could other contractors be selected. The justification for the new procedure was speedier completion of projects,<sup>6</sup> but the cost doubled in some cases and the construction was seriously flawed. With a consultancy fee fixed at 1.5 per cent of a project's cost,

the PMC concept contributed to massive overruns and individual project failures.<sup>7</sup>

For example, the health ministry was forced to close the MYR500 million (US \$133 million) Sultan Ismail Hospital on 27 September 2004 due to structural and design flaws. Repairs to bring it up to safety standards were estimated at MYR8 million (US \$2 million).<sup>8</sup> Work on the MYR167 million (US \$44 million) Malaysian External Trade Development Corporation tower, due to have been completed in 1997, was not finished until mid-2005 and the costs rocketed to MYR400 million (US \$106 million). Defects in the building were estimated to cost MYR28.4 million (US \$7.5 million).<sup>9</sup> Even on modest projects, PMCs came in substantially over costs. According to Public Works Minister Samy Vellu, the ministry could construct a classroom for MYR55,000 (US \$15,000), but when taken over by a PMC, the bill would soar to MYR120,000 (US \$32,000).<sup>10</sup>

The public welcomed the new government's move to abolish the PMC in March 2004. Departments have been directed to comply with current procurement policies that use the tender system to ensure transparency and accountability. New guidelines may be issued to deal with specific contracts. For example, a treasury circular in December 2004 provides guidelines for the selection of contractors for public infrastructure maintenance, applicable to all government departments.<sup>11</sup> The terms detail the use of open tenders and the participation of a more balanced group of public officials, including a representative from the public works department.

These conditions comply with the 'Model Law on Procurement of Goods, Construction and Services', issued by the UN Commission on International Trade Law in 1995, but they do not divide the roles of selection and supervision, as outlined in TI's 'Minimum Standards for Public Contracting'.<sup>12</sup> Even more significant is Malaysia's failure to require companies to adopt a code of ethics against corruption, or to blacklist companies with a track record of corrupt practices.

## Police corruption under fire

The Royal Commission on Enhancing the Operations and Management of the Police (RCP), set up in February 2004 to reform the police force, submitted a report of its findings to the king on 19 April 2005. Of the 926 complaints the commission received from the public between March 2004 and March 2005, 98 concerned police corruption.

The RCP's enquiries revealed widespread corruption within the police force, including: monthly kickbacks from illegal factory owners and employers of illegal immigrants; demands for payments in exchange for providing detainees with food, or allowing them to make telephone calls; and accepting bribes to detain innocent people, or to decline from taking action against guilty parties. The report also accuses police personnel of bribing senior officers to obtain promotions or transfers.

The report cited public complaints of the lavish lifestyle some officers enjoy. One is alleged to have declared assets of MYR34 million (US \$9 million), but no investigation

was conducted to determine how he had acquired such a fortune. Influenced by the finding that corruption awareness is low among police personnel at all levels, the commission recommended that eliminating it must rank high on the reform agenda. It made 125 recommendations, of which 10 relate to corruption.

There were some indications that the government may be 'sitting on' the RCP's report, as it does with reports from the Human Rights Commission. The deputy prime minister announced that it would have to be scrutinised by all central agencies, the finance ministry and the department for public works, before any of its recommendations could be implemented.<sup>13</sup> However, in May 2005, Prime Minister Badawi announced that a task force would meet to determine an order of priority for implementation and, a few weeks later, police were reportedly investigating the corruption cases cited in the report. In late June, five sub-committees were set up to study the recommendations in greater detail. Civil society has welcomed the RCP's findings and is monitoring its implementation.

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### Further reading

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### Notes

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## Morocco

### Conventions:

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (ratified September 2002)

### Legal and institutional changes

- In April 2005, the government announced a new six-point **plan to fight corruption**. One measure will require all senior office holders to make a formal disclosure of their assets and net worth before and after holding public office. Other measures include a proposed new law on money laundering; the creation of an office responsible for keeping track of known corruption cases; and the consolidation of transparency in the process of awarding government contracts to private businesses.
- A law passed in September 2004 replaced the **Special Court of Justice (CSJ)** with five Courts of Appeal.<sup>1</sup> Offences involving corruption, extortion, the dishonest receipt of money by officials, influence peddling and the embezzlement of public funds will be handled by courts of first instance in the case of lesser offences, and the criminal divisions of the Courts of Appeal when offences are deemed more serious. The CSJ had dealt with official corruption since 1965. Under the pretext of greater efficiency, its procedures were faster but had less regard for individual liberties. The penalties were also more severe than those laid down in the Criminal Code. The CSJ was closely dependent on the justice minister, who had sole authority to initiate proceedings. This meant that the decision of whether or not to bring a case to trial was at the discretion of the executive. Non-governmental organisations, including Transparency Maroc, had called for the CSJ's abolition.
- The same law also introduced **changes to the Criminal Code** by stiffening penalties for the offences of corruption, extortion, the dishonest receipt of money by officials, influence peddling and embezzlement. It also provides for the mandatory confiscation by the state of all or part of the assets or income obtained through the offence and, in the case of bribery, the confiscation of the items supplied by the bribe payer. The law exonerates bribers that report an offence before a corrupt official has taken any action, or who are able to show that they were forced to make an illegal payment to achieve a certain outcome.
- In November 2004, a law was passed that is expected to **end the state's broadcasting monopoly** in 2005 and convert the radio and TV stations, RTM and 2M, into companies

open to private capital. However, NGOs have criticised some limitations to freedom of expression such as the requirement that media organisations granted licences must promise to 'scrupulously respect the values of the monarchy and the kingdom's achievements in Islamic matters and territorial unity'.<sup>2</sup>

## 'Rabat Spring?'

When King Mohammed VI was crowned in July 1999, there were high hopes for an all-out assault on alleged corruption by the privileged class during the 38-year reign of his father, King Hassan II. Although delayed, the new king did try to meet some of these expectations, using the partially liberalised press and an emboldened state auditor, Inspection Générale de Finances (see below), as the agents of change. The most remarkable development in 2004–05, therefore, was the media's new freedom to discuss the issue of corruption.

The press has helped to transform domestic perceptions by unravelling complex accounts of reported corruption in parastatal agencies and banks, going as far as examining the business activities of senior officers in the Royal Armed Forces (FAR), hitherto considered unmentionable.

Much of the attention focused on the Hassan II Mosque, the king's giant mausoleum in Casablanca, which was built over a period of 13 years, at a cost variously estimated at US \$500–800 million, and finally opened in 1993. That financial irregularities should only come to light more than a decade later is indicative of the restrictive measures imposed on the press during that time. Construction was financed partly by 'voluntary contributions' and partly by the compulsory deduction of employees' salaries, providing ample opportunities for racketeering and the embezzlement of funds.<sup>3</sup> Reporters also investigated irregularities involving suppliers of materials to the mosque, including the Grandes Marbreries du Sud (GMS) in Agadir, which operated a marble treatment plant and whose board was chaired by the deputy to King Hassan's former influential interior

minister, Driss Basri.<sup>4</sup> Though no arrests have been made, this example points to a lack of accountability for large sums of public money during the late king's reign.

Nor has the army been immune to revelations of alleged abuse of position, particularly with regard to the fishing industry. The army has unprecedented control over the industry, due to the security role it plays on the coast, in addition to policing the catches of Moroccan and EU trawlers. Suspicions that the fishing industry had fallen into the hands of military officers surfaced in 2001, when the press reported that a number of senior officials in the military and security agencies, and members of their families, owned companies or shares of companies that exported fish to Spain.<sup>5</sup> These allegations resurfaced in a more authoritative article in January 2005 that further detailed these connections, and which alleged the existence of conflicts of interest between the professional duties and private interests of members of the military. How could these officers, it asked, effectively oversee compliance with fishery conservation policies when their trawlers stood to lose millions of dirhams?<sup>6</sup>

The situation in the military is not helped by the fact that the defence budget is approved by the executive without debate in parliament, and that military procurement contracts are – at least in practice – not subject to the law on public contracting, limiting oversight to internal checks only. This does not allow for the transparent management of an important part of the state budget.

Despite the rare publicity afforded to all these cases, not one has come before the new Courts of Appeal, leading to the conclusion that corruption will continue to flourish in the absence of an independent judiciary

and impunity of high-ranking officials. A number of NGOs and journalists have called for an independent inquiry to find out the extent of the wealth that was amassed illegally during Hassan's long reign,<sup>7</sup> while others say this is impossible because of the sheer number of business transactions that occurred in the past 40 years. One thing appears certain. Greater freedom of speech has not been accompanied by any significant improvement in accountability. 'Greater freedom of speech is not enough', said journalist Farida Mouha. 'What is needed are effective policies against corruption.'<sup>8</sup>

### IGF publishes bold reports, but there is little follow-up

The second weapon in the government's arsenal is the Inspection Générale de Finances (IGF), a once moribund government auditing office of 160 accountants with oversight responsibility for the activities of public sector institutions and funding from donors.

While the auditing activity of the IGF was limited in the past, the IGF's work picked up steam in 2003. Its inspections have revealed evidence of gross financial fraud or embezzlement in banking, social security, agricultural credit, public housing, state contracts, public companies, municipal councils and international aid projects.

Some of the biggest names in the banking firmament – including Credit Immobilier et Hôtelier (CIH), Banque Populaire, Caisse Nationale de Sécurité Sociale and Banque Nationale pour le Développement Economique (BNDE) – have been investigated for alleged mismanagement and corruption. According to the IGF, the BNDE management dipped into its DH19 billion (US \$2.1 billion) reserves in the CDG, a fund that can only be used with the agreement of the finance ministry, the Al Maghrib Bank, the Credit Commission and the board of

directors.<sup>9</sup> Procedures normally required for withdrawals of this kind were not followed. This case is still ongoing.

A similar theme surrounds the CIH, the prestigious tourism and housing development credit fund that, according to a parliamentary inquiry in 2000, lost DH14 billion (US \$1.3 billion) over several years. Fifteen former senior CIH officials were investigated for embezzlement, including the former director general, who blamed the bank's failure on demands for unguaranteed loans from well placed businessmen close to the seat of power. Fictional businessmen using fictional companies obtained credit from the bank and were later declared bankrupt. With so many senior politicians allegedly involved, it is doubtful that full and thorough disclosures will be possible in either case.

In early 2005, the IGF's attention switched to the Office de la Formation Professionnelle et de la Promotion du Travail (OFPPT), the body responsible for providing 70 per cent of the country's professional training and construction of the infrastructure required, often with the support of donors such as Canada and the European Union. In 2004, an IGF investigation uncovered an extensive web of fictitious training schemes, with misappropriated funds estimated at DH60 million (US \$6.7 million).<sup>10</sup> This signalled a complete breakdown of the monitoring systems in place at the OFPPT, but also in other public bodies responsible for oversight. According to the IGF inquiry, between 1996 and 2001, only 45 cases out of a total of 6,247 that received subsidies for training had been monitored at all.

For all of its newfound bravado, the IGF is still critically underfunded and its reports receive little follow-up.<sup>11</sup> When cases involving senior officials are uncovered, the judicial system freezes. Only until the IGF's audits are made fully available for public scrutiny will the warnings become impossible to ignore.

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## Further reading

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## Notes

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## Nepal

### Conventions:

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (signed December 2002; not yet ratified)

ADB-OECD Action Plan for Asia-Pacific (endorsed November 2001)

### Legal and institutional developments

- King Gyanendra issued a decree in February 2005 that created a **Royal Commission for Corruption Control** (RCCC). Although the commission was initially formed through a clause in the constitution on the issuing of a state of emergency, the king extended its mandate after the state of emergency was lifted. Though the measure addresses popular grievances about corruption in the country, it has been widely criticised by politicians and civil society. There is general agreement that a measure that gives a single agency both investigative and judicial powers violates the basic principle of separation of powers. The commission has also been criticised as redundant, given the existence of the Commission for Investigation of Abuse of Authority (CIAA), an anti-graft body set up in 1991, which has been seen as increasingly effective (see below).

- In accordance with a directive on public service, 71 district committees were formed in March 2005 to **monitor public service delivery** for, among other things, abuse of authority and bribery. The local administration act was also amended by royal decree to include the appointment of five regional and 14 zonal administrators. The additional provisions were made to ensure that officials are more conscious of their duties and to put a check on bribe-taking. However, the new administrative tiers could clash with previously existing ones, due to overlap of jurisdiction and authority.
- A **draft act against money laundering** was prepared by the finance ministry in July 2004; a draft bill on **public procurement** and regulation was prepared in January 2005 by the general office of the financial comptroller; and draft regulations on the National Vigilance Centre (NVC) were prepared in March 2005 by the NVC. All were in the process of public consultation before being finalised, but have now been put in jeopardy in the absence of a functioning parliament.

## The Royal Commission's questionable role in corruption control

On 1 February 2005, King Gyanendra dissolved the four-party coalition government headed by Sher Bahadur Deuba, assumed executive control and introduced a state of emergency under article 115 of the 1990 constitution. The reasons given for this 'royal takeover' were the deterioration in security, the failure of past governments to improve law and order, and rampant corruption. The dissolution of the government was widely criticised for being undemocratic and unconstitutional.

The new government quickly announced a plan to launch a vigorous campaign against corruption and in February 2005 the Royal Commission for Corruption Control (RCCC) was established. Past measures to control corruption have not succeeded due to political instability and weak checks and balances in Nepalese institutions. This most recent initiative is similarly questionable, given the absence of parliament and local government, the non-conducive atmosphere for elections, delayed justice from the courts, continuing conflict and security problems, and the deepening economic crisis.

Many political party leaders, human rights activists and journalists have been detained while political gatherings are strongly discouraged. The promulgation of restrictive measures concerning the press, in particular,

has deprived anti-corruption bodies, the media and members of civil society of their right to freedom of speech. Anti-corruption activists have been told that 'their enquiries or watchdog activities should not lower the morale of those in civil service'.<sup>1</sup> Nonetheless, segments of the population are convinced that the king's takeover of government was in the best interests of the nation.

The six-member RCCC is headed by Bhakta Bahadur Koirala, a former government secretary, and enjoys the powers of both the Commission for the Investigation of Abuse of Authority (CIAA) and the Special Court. This goes against the basic principles of justice and the separation of powers. The CIAA was established in 1991 and its powers of investigation were extended to the prime minister and to MPs in 2002. As a prosecuting body, the CIAA investigates charges and refers its cases to the Special Court for trial. The Special Court, formed in 2002, deals specifically with corruption cases.

Since its creation, the RCCC has pursued a number of cases involving high-ranking officials and politicians. Former prime minister Sher Bahadur Deuba was convicted in July 2005 for irregularities committed in the award of a contract related to the US \$464 million Melamchi Water Supply Project, whose main financier is the Asian Development Bank. The former public works minister, Prakash Man Singh, and four others were also convicted.<sup>2</sup> Deuba and

Singh were jailed for two years and fined US \$1.3 million each. Civil society groups, lawyers and foreign governments criticised the verdicts for their extra-judicial nature.

In another case, in March 2005, the RCCC began the prosecution of six former ministers for misusing the prime minister's relief fund to distribute some NPR4 million (US \$57,000) to political supporters in the guise of relief aid to Maoist insurgency victims. The media dubbed the alleged scam the 'Dashain allowance', Dashain being an important Hindu festival. According to the RCCC, the six former ministers misused monies from the relief fund to cover 'Dashain expenses' for 21 party supporters.<sup>3</sup> Then in June 2005, the RCCC made an abrupt U-turn and cleared the former prime minister of these charges, as well as the six members of his cabinet and the 21 beneficiaries of the expenses. According to the RCCC chairman: 'The decision to distribute cash could not be established as a case of corruption under Clause 17 of the Anti-Corruption Act 2002.' Critics saw the move as evidence of the commission's excessive discretionary powers.

The RCCC's investigations invited condemnation from political parties and sectors of civil society, including the Nepal Bar Association, for what was termed an 'arbitrary, political vendetta'. In April 2005, the RCCC issued fresh orders to Nepal's banks to provide the financial records of more than 100 selected politicians and bureaucrats; according to media sources, none of the names belonged to 'loyal royals'.<sup>4</sup>

In the view of its detractors, the RCCC is in danger of becoming an instrument for political manipulation. The RCCC has been further criticised because it sidelines the CIAA, the constitutionally designated anti-corruption agency. The RCCC's life was extended under a clause in the same article in the constitution that lifted the state of emergency in April 2005. It would have been logical to discontinue the RCCC as soon as the state of emergency was lifted. Why this has not happened is a point that continues to baffle politicians, lawyers and civil society.

## CIAA gains strength but corrupt officials can still escape justice

The CIAA was established in 1991 and has withstood pressure and political attack in its drive to investigate improper conduct by politicians and officials. The professionalism of the CIAA has resulted in a remarkable 84 per cent conviction rate in the 250 or so cases it has filed at the Special Court since the latter was conceived in 2002. The CIAA has saved substantial revenues, both through the prosecution of individuals and the discovery of financial irregularities.

One recent instance when the CIAA proved its worth was in checking irregularities concerning money owed to the Civil Aviation Authority of Nepal (CAAN). In March 2005, the CIAA issued a directive to Royal Nepal Airlines (RNA) – as well as other airlines – to pay charges owed to the aviation authority following a study that found it was in arrears by NPR540 million (US \$8.1 million). The CIAA demanded that the CAAN fulfil its legal obligation to prepare monthly bills for RNA jets landing, parking and using other airport facilities for payment within 21 days. By the end of April, the authority informed the CIAA that it had started to collect arrears.

Anti-corruption activists cite this as a positive example of good practice on the part of regulatory bodies in checking financial irregularities and recovering public monies. The non-payment of dues was apparently a temporary measure undertaken by mutual consent by officials at RNA and the CAAN, but this had been neglected for five years until the CIAA alerted them.

Public confidence in the CIAA also received a boost with action against senior government officials, including the filing of corruption cases in August 2004 against three former chiefs of police. Moti Lal Bohara, Achyut Krishna Kharel and Pradip Shumsher Rana were accused of abusing their office to illegally amass several hundred thousand dollars each.<sup>5</sup> This was the first

time that the CIAA had laid charges against the police's top brass, a move that exposed institutionalised corruption in the law enforcement agencies.

For its part, the Special Court was widely acclaimed in 2004–05 for verdicts penalising three senior officials in different corruption cases filed by the CIAA. In July 2004, former public works minister and leader of the Nepali Democratic Congress Party Chiranjibi Wagle was sentenced to two and a half years in prison and a fine of NPR27.2 million (US \$411,000) for corruption.<sup>6</sup> This was considered historic in Nepal since no corruption case has ended with such a huge penalty. The CIAA claimed that Wagle had made a fortune of nearly NPR30 million (US \$450,000) by misusing his authority. In January 2005, the Special Court convicted Ramagya Chaturvedi, head of the state-owned Nepal Oil Corporation, for corruption, imprisoned him for two years and ordered the confiscation of illegal earnings of over NPR19 million (US \$287,000). The CIAA said he had misused his authority to accumulate more than NPR70 million (US \$1.1 million).<sup>7</sup> In March, the former chief of Mechi Customs Office, Keshar Jung Khadka, was given a one-year sentence and a fine of over NPR2.5 million (US \$35,000) for

corruption, and property to the value of US \$144,000 was confiscated.<sup>8</sup>

However, all three escaped the court's premises moments before the verdicts were delivered. The fact that these high-ranking officials were permitted to go free was the result of a loophole in the judicial system whereby the Special Court does not have the authority to order the arrest of corruption offenders. Instead, its verdicts must be executed through the relevant district court, which can take some days to effect due to administrative procedures. Hence judgments by the Special Court are not always implemented. Another problem is that the accused are often released on bail, enabling them to strengthen their cases by mobilising their resources. Anti-corruption activists believe that anyone held on serious corruption charges should pursue the defence from prison.

The three cases raised questions about more effective means of implementing Special Court orders. At present, the court is considering more than 150 corruption cases involving senior politicians, administrators and police officials prosecuted by the CIAA. Many are likely to escape justice unless the current shortcomings in the judicial system are fully addressed.

*Rama Krishna Regmee (Kantipur City College, Kathmandu)*

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### Notes

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## New Zealand

### Conventions:

OECD Anti-Bribery Convention (ratified June 2001)

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (ratified July 2002)

### Legal and institutional changes

- In December 2004, four existing laws aimed at promoting **integrity in the public sector** were amended. As a result, the State Services Commission, the agency responsible for overseeing all core government departments, now has explicit responsibility over a far broader range of state agencies than before (see below). Under the new legislation, the commission's annual reports on the agencies' progress in promoting ethical standards must be made available to the public. In early 2005, the commission began drawing up a set of pilot guidelines for the affected agencies.
- In January 2004, New Zealand ceased to use Britain's Privy Council as its final court of appeal. A **new Supreme Court** began hearing cases in 1 July 2004 following the passage of the Supreme Court Act of October 2003. During the transitional period, there was an unprecedented degree of tension between the government and the judiciary over funding for the new court. In May 2004, the Chief Justice made a speech in London criticising the New Zealand government for the funding process, as well as the amount available to the new Supreme Court. The independence of the judiciary is well established in New Zealand, and the controversy over the Supreme Court was seen as a litmus test of the country's standing on good governance.

## Corruption gains profile in New Zealand

Transparency International's Corruption Perceptions Index consistently finds New Zealand to be one of the least corrupt countries in the world. In the past year, however, the issue has received unprecedented attention due to a number of allegations concerning the misuse of public funds for community services.

Since reforms were launched in 1984 to reduce state intervention in the economy, successive governments have increasingly contracted out service provision. In some cases, this process of devolution occurred too

quickly and community service organisations lacked the capacity to manage funds effectively. This broadened the scope for financial misappropriation and other corrupt activities within such organisations.

One recent and highly publicised case of mismanagement of public funds involved an opposition MP, Donna Awatere Huata, who established a charitable trust in 1999 to promote reading programmes in homes that targeted Maori children. She successfully lobbied government departments to raise funds for the trust, but was then alleged to have used a large part of them for her private benefit. Huata was charged with fraud in November 2003,<sup>1</sup> but at this writing, she had

not yet been tried and has continued to deny the allegations. The protracted scandal eventually led to her dismissal from parliament in November 2004, although this was also due to a conflict within her own political party.<sup>2</sup> Allegations of financial impropriety involving MPs are virtually unknown in New Zealand and no one in living memory has hitherto been expelled.

This scandal was followed by allegations of financial mismanagement in the country's largest tertiary education institution, Te Wananga o Aotearoa. Evidence was tabled in parliament that pointed to nepotism in the award of contracts to companies owned by the organisation's senior executives or their relatives.<sup>3</sup> Several inquiries were initiated in the wake of the allegations and are still ongoing. Although media reports suggested that this could be a case of mismanagement rather than actual misappropriation, the case highlighted that such problems could have been avoided if more time and money had been invested in capacity building in the first place.

Periodic instances of misuse of funds by small, government-funded service providers, including Maori organisations, have started to attract more attention, sparking a debate about corruption at the community services level. For example, there have been reports of Maori organisations mismanaging substantial assets, many of which were acquired as compensation for breaches of the Treaty of Waitangi, signed by Maori chiefs with the British in 1840. The most notable example occurred in the late 1990s and involved the Tainui nation, and assets given by the government as compensation for breaches of the treaty dating back to the 1860s. The compensation was in both cash and land. The Tainui management body, however, invested in assets including a contentious sporting franchise.<sup>4</sup> As a result, considerable internal conflict ensued over control of the assets, generating negative publicity.

The public perception is that bad financial management, revealed in audited accounts and often accompanied by allegations of corruption and nepotism, has led to the

squandering of legitimate settlements using state assets. This is matched by the view of some of the intended beneficiaries of these organisations that their own leaders deprived them of resources. Although some of these allegations were well founded, there have been few cases where criminal charges were actually pressed.

Given growing public concern, the government has taken steps to address the issue by introducing financial management training, beginning in January 2005, for community service organisations which receive state funds to deliver services, or as compensation for treaty breaches. Since the beginning of 2005 there has also been greater emphasis on the importance of government departments assessing the organisations' management capability before funds and land are released.

## Promoting integrity in the public sector

Legislative moves to promote integrity in the broader public sector received less media attention, but brought about significant changes. The legislation amending four existing acts of parliament, passed in December 2004, widens the remit of the State Services Commission in monitoring government agencies.

In New Zealand, there are three main areas in the public sector: the core public service consisting of traditional departments such as health, education, police, foreign affairs and statistics; service and advisory agencies, funded by parliament with boards of directors appointed by the government (covering a diverse range of roles, from administering New Zealand's no-fault accident compensation legislation, to separate agencies that ensure road, air and maritime safety); and state-owned business enterprises, such as New Zealand Post, which provides postal services and operates a retail trading bank.

Previously, the heads of all these departments reported to the State Services

Commissioner, a public servant appointed in a strictly non-partisan manner. The commissioner is effectively the employer of all heads of government departments, and has personal contracts with each departmental head. These individuals are personally responsible to the commissioner on employment and performance matters, as well as setting standards for integrity, which is included in their contracts.

Under the amended legislation, the government-appointed boards of directors of other non-core state agencies (the second and third groups described above) will also have to report to the commissioner. Non-core state agencies now have clear lines of responsibility for setting standards and cultivating an ethos of integrity. The State Services Commissioner will now be able to ensure that these agencies, which are often powerful, are obliged to promote integrity. According to the new legislation, the commission also has to monitor how these agencies fulfil their obligation to promote integrity, and any reports regarding this matter will be available to the general public.

Since the economic reforms initiated in 1984, many observers felt that serving public interest and honesty, once considered the distinguishing features of New Zealand's public sector, were in danger of being lost. The reforms aimed to promote a more competitive society and a more flexible public service by doing away with government intervention in many areas of the economy. Agency heads had fixed-term contracts and their performance was evaluated by set criteria with an emphasis on efficiency, a factor highly valued by the private sector, upon which public sector management was being increasingly modelled. No comparable emphasis, however, was placed on the proactive inculcation of ethical standards.

In 1999, the newly elected government established a special body, the State Sector Standards Board (SSSB), to review the public sector; former senior public sector executives, state sector union leaders and senior private sector executives were its members. They presented two reports to the government,

which emphasised the loss of a cohesive sense of public interest service since the reforms of the 1980s. The SSSB's first report to the government in 2001 concluded that 'an over-emphasis on economic efficiency as an outcome and performance measure has distorted behaviours and undermined trust and support from the public and employees'.<sup>5</sup> Board members highlighted similar concerns in their second report. The new legislation seems to have addressed the SSSB's concerns by extending the commissioner's responsibilities for the promotion of ethical standards to the broader public sector.

## Promoting transparency abroad

New Zealand has made no substantive progress in implementing the legislation enacted in 2001, in response to the OECD Anti-Bribery Convention. Little knowledge of the foreign bribery law exists among exporters and the government has made no effort to generate awareness of the legal liabilities. Only one reference to the new law was made in a speech by the Trade Minister while out of the country.<sup>6</sup> No investigations or prosecutions have resulted from the legislation.

While there is little evidence of New Zealand companies paying bribes overseas, it is thought to occur on a minor scale and some companies lobbied against the legislation when it was first drafted. The scale of bribery is largely a reflection of the size of the country's exporters, which are overwhelmingly small businesses. Moreover, New Zealand has opted out of the WTO Government Procurement Code, due to the compliance costs that would arise, since its procurement system is currently deregulated.

Yet, together with Australia, New Zealand has stepped up joint efforts to promote better governance and transparency within the broader Pacific region. This has been achieved through a multitude of programmes, many of which are coordinated via the Pacific Islands

Forum, the core regional body representing the 14 independent island nations of the South Pacific, as well as New Zealand and Australia.

New Zealand's international aid agency, NZAID, has expressed mounting concern about standards of governance in Pacific Island countries. Support for governance reforms to combat corruption is now a top priority of NZAID and it has provided assistance to civil society actors in the region. NZAID also backs efforts by Pacific

Island governments to improve governance and financial management, and has played a major role in supporting the development of the Pacific Plan that was initiated by the members of the Pacific Forum. The Pacific Plan emphasises governance reform in the region. However, surveys by the Fiji-based Pacific Islands Forum Secretariat have found that previous regional commitments to standards of good governance have been largely ignored by the Pacific Island signatory nations.<sup>7</sup>

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## Nicaragua

### Conventions:

OAS Inter-American Convention against Corruption (ratified May 1999)  
UN Convention against Corruption (signed December 2003; not yet ratified)  
UN Convention against Transnational Organized Crime (ratified September 2002)

### Legal and institutional changes

- Article 68 of the Constitution, which exempts the media from paying import duty on supplies, was revoked in March 2005. The measure is expected to have an adverse effect on the **media's ability to report on corruption**.
- A flawed **Judicial Career Law**, which the National Assembly ratified in September 2004, was due to enter into effect in September 2005. The law establishes competitive examinations for judges, but leaves open the possibility that judges will be appointed

without competing for their positions. It also fails to separate the Supreme Court's administrative and judicial functions, and assigns responsibility for oversight of the judicial career processes to a commission formed of Supreme Court judges, rather than an independent body.

- In March 2005, the Partido Liberal Constitucionalista (PLC) tabled a bill that, if passed, would grant an **amnesty** to anyone accused of a crime against the public administration during the past 20 years. This includes the PLC leader and former president, Arnaldo Alemán, who was sentenced to 20 years under house arrest in 2003 for money laundering, embezzlement and fraud (see below).

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## Rival parties' stranglehold over government stymies anti-corruption efforts

President Enrique Bolaños' anti-corruption efforts had a promising start when he decided to press charges against his political mentor, former president Arnaldo Alemán, who is currently serving a 20-year sentence under house arrest for fraud, money laundering and embezzlement (see *Global Corruption Report 2005*). But the fight against corruption has since stagnated as the two main parties in the National Assembly collude to block prosecutions and exploit Bolaños' weaknesses by promoting legal action for alleged campaign funding abuses.

Investigations against former officials have been shelved and, with the exception of Alemán, no member of the former government has been imprisoned for corruption. Nor are they likely ever to spend time in prison, thanks to a five-year statute of limitations that applies to their crimes. The time period for prosecuting members of the former government for corruption could expire even sooner if an amnesty bill peddled by the Partido Liberal Constitucionalista is approved.

Emblematic of the failure to act decisively against corruption is the case against Byron Jerez, the former director general of income and Alemán's close associate. He was exonerated in five separate trials in 2004–05 and in the one case in which he was convicted, the sentence was overturned even though there was 'ample and convincing' evidence against him, according to attorney general Alberto Novoa. Novoa is in the process of

recovering seized assets, including the beach house allegedly built with money diverted from Hurricane Mitch relief funds.

Bolaños, who came to power at the helm of an alliance of five political parties, lost the support of his party, the PLC, in 2002 when his government prosecuted Alemán, head of the PLC, who had originally picked him as presidential candidate. Since then, the PLC and the main opposition party, the Frente Sandinista de Liberación Nacional (FSLN), which together control over 90 per cent of the National Assembly, have gradually tightened their hold over the institutions of state, making it practically impossible to act against corruption.

The two parties' leaders, Alemán and Daniel Ortega, reached an informal pact in 2000 to push through a constitutional change that enhances their control of institutions and grants Alemán an automatic seat in the National Assembly and therefore parliamentary immunity. The pact has since widened in scope and plays a critical role for their political survival since both face high rates of disapproval within their parties and externally, and are being investigated for corruption in Nicaragua and third countries.<sup>1</sup> They are both unpopular with the US government, and featured on a list of high-level party officials who have been denied entry visas to the United States on the grounds of corruption.<sup>2</sup>

Control of the legislative branch has enabled the two parties to steer through several laws that make it more difficult to tackle corruption. They have ended tax concessions for media companies who complain that the move was motivated by a desire to crack down on freedom of

expression. Another controversial move saw the passing in September 2004 of a judicial career law that allows the Supreme Court to continue to exercise responsibility for both the administration and dispensation of justice. This went directly against recommendations of several civil society organisations. The law allows judges and other court staff to be hired and promoted without participating in competitive processes.

The law also ratified existing judicial positions, which effectively amounted to the PLC's approval of the appointment of judges whom it had denounced a year before for 'working for' the FSLN.

The PLC has shifted power to the FSLN in other ways as well, most significantly by handing it the presidency of the National Assembly, marking the first time in two years that a member of that party has held a senior post in the legislature. The apparent quid pro quo for the numerous concessions made by the PLC to the FSLN is support for Alemán's release.

A rash of lawmaking in mid-November 2004 saw 14 laws adopted in four days (when none had been approved in the previous six months) many of which helped to shift the balance of power from the government to the legislature. Both the Central American Court of Justice and the Organization of American States have criticised the new laws for eroding the powers of the executive.<sup>3</sup>

Among the new legislation is a law that grants the National Assembly the power to ratify or dismiss nominees to ministerial and diplomatic posts, and reduce the number of legislators required to reject a presidential decree. The National Assembly was also granted power not only to accept or reject the budget, but also to modify it. Another law places a number of new institutions under Assembly control, including the supervisory bodies for the public services, social security and private property claims.

A strong legislature is important and a decade ago it was wide-ranging presidential powers that were cause for concern. But the worry now is whether the balance has shifted

too far, leaving insufficient counterweights granted to the executive or other institutions. This is especially worrying given Nicaragua's weak democratic tradition. Although political parties are required by law to select candidates using the most democratic method available,<sup>4</sup> this stipulation is almost universally ignored. Party grandees do not hold primaries, but rather draw up closed lists of their favoured candidates to fill the powerful National Assembly. These same favoured candidates also end up filling key positions within the judicial, electoral, audit and other institutional bodies.

The political duopoly is becoming entrenched through laws and practices that make it difficult for opponents to compete, or for state institutions to gain independence. The legal framework ushered in by the two main parties since 2000 makes it next to impossible to create new parties,<sup>5</sup> while the lack of internal party democracy means that reformists within the two main parties are consistently blocked. Though Alemán and Ortega are unpopular within their parties and amongst the electorate, at least one of them – and perhaps both – will run in 2006. In the past, with involvement from politicised state institutions, popular candidates Pedro Solórzano and José Antonio Alvarado had their electoral ambitions derailed (in 2000 and 2001, respectively). Now, the same fate threatens popular candidates Herty Lewites (FSLN) and Eduardo Montealegre (PLC) in the run-up to the 2006 general election.

The control exerted by the two main parties over the Supreme Electoral Council (CSE), the body charged with monitoring electoral activity, has prompted fears that the CSE is too disinterested to act neutrally in the 2006 elections, and that the elections will not be free or fair.<sup>6</sup>

Even if an outsider were to win the presidency, however, the increased authority granted to the National Assembly, and the firm grip Alemán and Ortega have over it, all but guarantee them enough power to continue to pose a serious obstacle to efforts to fight corruption.

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## Further reading

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## Notes

1. Accounts opened under Alemán's name have been frozen in Panama, where investigations into alleged money laundering are under way. US authorities are investigating similar charges.
2. US authorities have refused entry visas to at least 13 Nicaraguan state or party officials, including two Supreme Court judges, an electoral court judge and the state supervisor for public services 'for suspicions or investigations related to terrorism or corruption'.
3. The OAS has sent a number of missions to evaluate whether the reforms and the stalemate between the executive and the legislature represent a 'rupture of the democratic order'. Nicaraguan analysts are consistent in their criticisms of the reforms, which they argue affect the balance and independence of powers.
4. Article 63 of the electoral law.
5. See *Global Corruption Report 2004* and *2005* for an analysis of the impact of the 2000 electoral law.
6. The civil society electoral monitoring groups Grupo Cívico Etica y Transparencia and el Instituto para el Desarrollo y la Democracia (IPADE) declared a state of 'yellow alert' in March 2005, citing the high level of risk of electoral fraud and the failure of the state to tackle the problem even after the EU, the OAS and the Carter Center criticised the legal framework and the performance of the electoral authorities in the 2001 elections. Electoral monitors discovered irregularities in the 2004 municipal elections, which they argue is evidence that the problems have not been rectified ahead of the 2006 general elections: voters encountered difficulties in acquiring or renewing the ID cards mandatory for voting, or did not appear on the electoral list, despite having registered; electoral authorities overturned the result in Granada, the country's third largest city, giving victory to the FSLN in place of the APRE (Alliance for the Republic) on grounds that critics have called fictitious.

## Panama

### Conventions:

OAS Inter-American Convention against Corruption (ratified October 1998)

UN Convention against Corruption (ratified May 2005)

UN Convention against Transnational Organized Crime (ratified August 2004)

### Legal and institutional changes

- Executive Decree No. 335, issued on 1 September 2004, the day President Martín Torrijos Espino took office, derogates Executive Decree No. 124 of May 2002 which regulated the transparency law. The 2002 decree was issued under former president Mireya Moscoso and was an obstacle to **accessing information** since it restricted official information to any interested person with a 'direct relationship to the information requested'. The Supreme Court had rejected many habeas data writs by appealing to the earlier decree.

In May 2004, the Supreme Court voted that some of the most restrictive articles of the earlier decree were illegal.

- When the new government took office in September 2004, Minister of the Presidency Ubaldo Real promised to publicise how the president utilised his **discretionary budgetary allocations** and to reduce the amount from US \$25 million per year to less than US \$5 million. Both promises have been fulfilled. Information is available at both the president and ombudsman's websites.<sup>1</sup> The amount approved in the first year of the current administration was US \$3.9 million. The auditor general has prepared draft regulations for the use by future presidents of the funds, which tended in the past to be used to cover personal expenses, or to benefit family and friends. The two websites and investigations by the newspapers *La Prensa* and *El Panamá América* reveal details of numerous allegations of misuse of funds to buy jewellery, artwork, clothes, to pay for entertainment and bribe journalists during the administrations of Ernesto Pérez Balladares (1994–99) and Mireya Moscoso (1999–2004).
- In December 2004 a **code of ethics** was issued that forbids public servants from: soliciting or accepting gifts or other benefits; maintaining relationships or entering situations in which their personal, economic or financial interests could be in conflict with their ability to carry out their work properly; directing, managing, advising, endorsing, representing or providing services (paid or voluntary) to people who manage or exploit state concessions or privileges, or who have contracts with the state; and maintaining links, benefits or obligations to bodies that are directly supervised by the body employing the public servant. The code states that public servants should refrain from appointing relatives to public positions. Sanctions for violating the code range from a verbal dressing-down to dismissal. Each government body is responsible for enforcing the code, however. There are no external monitoring mechanisms as yet.
- Executive Decree No. 179 of October 2004 created the **National Council for Transparency against Corruption**, a consultative body that provides advice to the executive branch of government on matters relating to transparency and corruption prevention. In January 2005, its members were named as the Minister of the Presidency, the attorney general, the attorney for administrative matters, the auditor general, the ombudsman and one representative each from the private sector, unions, civil society, the church and the media. The council, which works on a voluntary basis, has been tasked with drawing up a working plan whose implementation will be supported by US funds (see below).
- In January 2005, the newly appointed attorney general, Ana Matilde Gómez, appointed a **new anti-corruption prosecutor**, taking the number of such prosecutors to three.
- In March, the government signed a 'State Pact for Justice' that created a special commission with six months to analyse and propose **improvements to the judicial system**. The Supreme Court has been the subject of particular scrutiny since a number of its judges have accused one another of corruption. Civil society organisations have demanded the resignation of all judges and a revision of the procedure for selecting them in order to eliminate all possibility of political interference (see below).

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## National Council for Transparency against Corruption

Corruption and the high level of impunity for people implicated in it are major concerns

in Panama, second only to unemployment, according to recent surveys.<sup>2</sup> The administration of President Martín Torrijos Espino took office with a pledge to promote greater transparency and to clamp down

on corruption. He promised to appoint a National Council for Transparency against Corruption; derogate a decree that limited the effectiveness of the transparency law; disclose the use of discretionary funds; professionalise the civil service; introduce a general salary law; introduce policies to make public contracting more transparent; and select a new attorney general. Torrijos has taken steps to fulfil most of these pledges, though their impact on corruption levels has still to be demonstrated.

Most of the legal changes have been tabled, if not adopted, and Ana Matilde Gómez was named attorney general in January. One of her first tasks was to investigate progress in some of the country's more scandalous corruption cases. On releasing her report she said she would open further investigations, including one into alleged illicit enrichment involving allies of former president Mireya Moscoso. The government has so far filed a number of complaints against illicit enrichment, but many are stalled in the Supreme Court.

The National Council for Transparency against Corruption (NCTC) was created by decree on 27 October 2004 and was intended to fill a perceived gap in anti-corruption strategy by focusing on prevention. Former public prosecutor Cristóbal Arboleda was named its first executive secretary for a period of four months. On taking up his post, he said he would only investigate allegations of corruption made in the media, and with an administrative, rather than criminal, process.

Nepotism has also been alleged in certain institutions, but the anti-corruption secretary failed to respond. One such allegation concerned the appointment to the Panamanian consulate in the Dominican Republic of Sandra Noriega, daughter of the jailed former president Manuel Antonio Noriega, in spite of the fact that she had been barred from holding public office for 10 years following a conviction for abusing public funds in 1996. The anti-corruption secretary again failed to comment, though

the government had specifically identified 'due levels of competence and integrity of appointees for the diplomatic and consular corps' as one of its priorities.

The civil society representative on the NCTC wrote to Arboleda in February 2005 asking him to request all public institutions to investigate possible cases of nepotism and to sanction any proven cases in line with the new code of ethics for public servants. The letter featured in the national television and print media. The following day Arboleda offered his resignation, which President Torrijos accepted. In March, Alma Montenegro de Fletcher took over the position. She was attorney general for administrative affairs from 1994 to 2004 when she created a public ethics network. She is now pushing for support at each of the public offices under her jurisdiction in order for the council's work to be more effective.

There is much scepticism about the value of the executive secretary and the NCTC, though the first steps have been taken to develop an anti-corruption plan with short-, medium- and long-term objectives. The council is well aware that it must show results soon.

Among its goals is a plan to reform Law 59, which regulates asset declarations, so that they can be properly audited. Another priority is to reform the administrative career law so that appointments are based more on merit (Panama was ranked bottom alongside El Salvador on this issue by the Inter-American Development Bank). Other possible activities are the development of whistleblower protections and citizens' complaints mechanisms.

Recently, the NCTC has required public bodies to provide information about their compliance with the government's 16 anti-corruption targets. Five of the 16 goals have been attained so far, according to research by TI Panama. Without any real reform of the justice system, however, the council's efforts are unlikely to improve domestic or international perceptions of corruption in Panama.

## Pact for Justice

Panama's institutions have been in a state of crisis since January 2002 when Congressman Carlos Afú announced that he and several of his colleagues had been bribed to vote in favour of a contract between the government and a private consortium to build a Multimodal Industrial and Service Centre (CEMIS) in the Colón Port area. Afú's colleague from the ruling Partido Revolucionario Democrático (PRD) party, Balbina Herrera, had earlier told the National Assembly plenary that he had received a US \$1.5 million bribe from high-level government officials to break ranks and vote for two of Mireya Moscoso's nominees to the Supreme Court (one was a minister at the time, the other a congressman: both belonged to the Partido Arnulfista, which was then in power). Since then, various organisations have been pushing for the two judges to resign and for the congressmen who took bribes to be prosecuted. This has not happened to date.

The court closed the CEMIS case on the grounds that the congressmen had immunity when the investigation was initiated. On 30 March, the Commission for Oversight of Credentials and Judicial Affairs in the National Assembly decided not to investigate a further complaint, first aired in the media and repeated at a press conference by Judge Adán Arnulfo Arjona, who alleged that one of his colleagues consistently ruled in favour of drug traffickers.

In an attempt to retrieve the Supreme Court's credibility, the government called together the heads of the legislature and judiciary, the two attorney generals, the ombudsman, the president of the national college of lawyers, and the civic society NGO Alianza Ciudadana Pro Justicia, to sign a 'Pact for Justice'. The pact creates a Commission of State for Justice, with 180 days to present recommendations for restructuring and modernising the judiciary and public prosecutions service. Civil society organisations

and the public were given the opportunity to submit their proposals.

Some of the most important areas to be revised are:

- changes to the organisational structure, and procedures and regulations to increase the independence, efficiency and competence of the judiciary and public prosecution offices;
- improved transparency in the selection process for Supreme Court judges;
- accountability mechanisms and evaluation processes for judges, magistrates, public attorneys and public prosecutors in order to ensure that the judiciary and public prosecution budgets are properly used;
- drafting of a legal reform bill that simplifies judicial processes and makes the judicial system easier to use.

The public's attitude to the pact was initially negative because what it wanted most was concrete action, not another commission of inquiry. The proposal that generated most interest involves the selection and removal of Supreme Court judges. According to the proposal, a pre-selection committee of five civil society NGOs would send a shortlist of 15 candidates to the president, who would then select the winner. The proposal was criticised for providing too many candidates. A final draft was to be presented in September 2005, along with the commission's other proposals.

Once drafted, the reforms will still need National Assembly approval if they involve legal or constitutional reform. While the commission ponders, the complaints against the two Supreme Court judges are on hold. A report that fails to propose the deep-rooted reforms that civil society hopes for, or that meets with resistance from the government or legislature, will probably result in the two cases being reactivated – and possibly wider protest.

*Angélica Maytín Justiniani (TI Panama)*

## Further reading

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Fundación para el Desarrollo de la Libertad Ciudadana, 'Propuestas para fortalecer las instituciones que investigan y previenen la corrupción en Panamá' (Proposals to Strengthen Institutions that Investigate and Prevent Corruption in Panama), 2004, [www.libertadciudadana.org](http://www.libertadciudadana.org)

TI Panama: [www.libertadciudadana.org](http://www.libertadciudadana.org)

## Notes

1. See [www.presidencia.gob.pa](http://www.presidencia.gob.pa) and [www.defensoriadelpueblo.gob.pa](http://www.defensoriadelpueblo.gob.pa)
2. TI Panama, 'Corruptómetro', [www.transparency.org/tilac/herramientas/2001/dnld/cap03/corruptometro\\_panama.pdf](http://www.transparency.org/tilac/herramientas/2001/dnld/cap03/corruptometro_panama.pdf)

## Papua New Guinea

### Conventions:

UN Convention against Corruption (signed December 2004; not yet ratified)

UN Convention against Transnational Organized Crime (not yet signed)

ADB-OECD Action Plan for Asia-Pacific (endorsed November 2001)

### Legal and institutional changes

- A private members' **bill to protect whistleblowers** has been drafted, but by mid-2005 had yet to be submitted to parliament for debate by its sponsor, the MP Kimson Kare. There is limited support in government for the bill.
- Parliament passed the **Proceeds of Crime Bill** in July 2005. The legislation provides measures against money laundering, including the confiscation of illegally gotten gains.
- Attempts to establish an **independent commission against corruption** (for which the *Global Corruption Report 2003* argued strongly) have again come to nothing. Despite statements of endorsement by all leading government politicians, a sponsor for the bill supporting the creation of the commission has yet to be found. The bill was tabled under the Bill Skate government, but lapsed after the demise of his administration in 1999.
- Amendments to the Forestry Act 1991 have been announced. The original act was introduced in response to the widespread corruption and **abuse in the country's timber sector** uncovered by the Barnett Commission of Inquiry. The Forestry Amendment Bill 2005 is ostensibly aimed at updating and eliminating inconsistencies in the earlier act, but there are concerns that it might generate increased opportunities for corruption. There are concerns that it concentrates authority for awarding logging permits in the forestry minister and makes it more difficult for the public to gain access to information about permits and licences. Transparency International Papua New Guinea (TI PNG) is currently monitoring the sector to see if these concerns are valid.
- The government agreed in July 2004 to create the National Anti-Corruption Alliance (NACA), a loose alliance of all the government agencies with responsibility for monitoring and fighting corruption.<sup>1</sup> Comprising the auditor general, the solicitor general, treasury

department financial inspectors, the ombudsman commission, the police fraud squad, the public service inspectorate and provincial affairs inspectors; the alliance is intended to bring greater efficiency to the fight against corruption in public services. The NACA had a successful beginning when it visited Western Province and uncovered massive fraud in the provincial government. Seventeen provincial officials, including the governor, were successfully prosecuted as a result.

- NGOs concerned with corruption have widened their activities to cities other than the capital, Port Moresby. Representatives of the Media Council, TI PNG and the Ombudsman Commission travelled to Lae in late 2004 with a view to establishing a branch of the Community Coalition against Corruption (CCAC) there. The CCAC is a coalition of churches, youth groups, women's groups, NGOs and citizens, and claims to represent about 2 million of the country's 5.7 million population.

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### Audit of by-elections uncovers need for strengthening elections machinery

Detailed monitoring of three by-elections held in mid-2004 by civil society groups and the Electoral Commission has shed light on weaknesses in the legislative framework and problems in the financing of political parties.<sup>2</sup> These need to be addressed ahead of the 2007 general elections.

The audit was launched in response to concerns about the capacity of the electoral authorities to manage the electoral process. Some of the key worries are the influence of private funding on the election process and the transition from a first-past-the-post system to a system of limited preferential voting.

The report followed on from the findings of a team of electoral observers from TI PNG, who noted that the by-elections were in the main conducted successfully, but that their high cost cast doubts over the financial sustainability of future elections. The costs of security including a policing bill of €3.5 million (US \$4.5 million) or 70 per cent of the total election cost, and of counting and administering the electoral roll were considered especially high.

The audit looked at the by-elections in greater detail, and questioned the integrity of various aspects of the election process. The electoral roll was found to contain a number of fictitious voters. In Chimbu,

for example, 40 per cent more votes were counted than the entire total population for that area, according to the 2000 National Census.

The introduction of the limited preferential voting system under the 2001 Organic Law on the Integrity of Political Parties and Candidates (OLIPPAC)<sup>3</sup> was deemed to have successfully reduced the ethnic polarisation of voters and ensuing violence, which had become a hallmark of elections in Papua New Guinea.<sup>4</sup>

Administrative complexity and low voter awareness remain a concern. In terms of corruption in the financing of politics, the OLIPPAC is important in that it provides for registration of political parties and public funding of registered parties, and sets limits on contributions to parties from local and foreign sources.

Enforcement of the law has been poor, however. The Office of the Registrar of Political Parties has statutory responsibility for monitoring and enforcing the OLIPPAC, including oversight of annual returns from both individuals and parties that outline their funding sources and powers to scrutinise returns for accuracy. But the office lacks the resources needed to successfully perform these tasks. To date, a large majority of candidates and parties fail to comply with these requirements.

The Electoral Commission was a core partner for the audit, and has taken on board the findings outlined in the audit report. The government has since established a task

force to reform the electoral system ahead of the 2007 elections.

## Police chiefs told to curb corruption

The Internal Security Minister has given the Commissioner of Police and his senior officers until the end of 2005 to introduce a series of reforms aimed at reducing incidences of mismanagement of funds and corruption, as well as improving leadership within the police force. Failure to adopt the suggested reforms could result in disciplinary action against the police chiefs.

The reform proposals resulted from the first-ever internal review of the Royal Papua New Guinea Constabulary (RPNGC),<sup>5</sup> which took place between February and September 2004. The report was coordinated by a review committee made up of representatives of the Ombudsman Commission, the Chamber of Commerce, the police union, the attorney general's department and a women's representative. An external opinion was provided by a former commissioner of the Australian Federal Police.

The committee took written submissions and toured the country, taking oral submissions from police as well as the general public. It toured neighbouring Pacific Island nations and Arnhemland in northern Australia to gain first-hand knowledge of policing in comparable environments. The report was tabled in parliament and a monitoring task force is to be set up to ensure that the recommendations are not ignored.

A key finding of the report was that internal disciplinary mechanisms within

the RPNGC have almost completely collapsed. Unprofessional and unethical conduct by members of the RPNGC has gone largely unpunished.<sup>6</sup> This has led to the loss of confidence and trust that once existed between the government, the wider community and the RPNGC.

The report called for the government to increase its support for the RPNGC, with funds as well as in official rhetoric. Progressive disinvestment by the government has left the RPNGC in a fragile state.<sup>7</sup> The quality of managerial leadership within the RPNGC is poor, and the report recommended setting up an Office of the Inspector General of the Constabulary to strengthen internal discipline, monitor effectiveness and audit performance across the whole of the RPNGC.

More wide-ranging recommendations addressed the need for more police officers: at present there is one police officer per 1,121 inhabitants<sup>8</sup> and consequently the police force draws heavily upon reserves and auxiliaries. Undisciplined and violent, the actions of poorly trained reserves and auxiliaries have cost the government dearly, in legal fees and loss of trust in the police.

Finally, the committee called for the implementation of an immunity process whereby police officers would be able to admit to less serious past misdemeanours, including acts of corruption, without the risk of prosecution for these offences. This, the committee argues, will allow police to perform their duty and enforce discipline without fear of being reported for a previous indiscretion.

*Transparency International Papua New Guinea*

## Further reading

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Helen Hughes and Susan Windybank, *Papua New Guinea's Choice: A Tale of Two Nations* (St Leonard's, NSW: Centre for Independent Studies, 2005), [www.cis.org.au/IssueAnalysis/ia58/IA58.pdf](http://www.cis.org.au/IssueAnalysis/ia58/IA58.pdf)  
Albert Mellam and Daniel Aloï, 'National Integrity Systems TI Country Study Report, Papua New Guinea, 2003', [www.transparency.org/activities/nat\\_integ\\_systems/dnld/pap\\_new\\_guinea\\_25.09.03.pdf](http://www.transparency.org/activities/nat_integ_systems/dnld/pap_new_guinea_25.09.03.pdf)

Mekere Morauta, 'The Papua New Guinea–Australia Relationship', *Pacific Economic Bulletin* 20(1), 2005, [peb.anu.edu.au/pdf/PEB20-1morauta.pdf](http://peb.anu.edu.au/pdf/PEB20-1morauta.pdf)

TI Papua New Guinea: [www.transparencypng.org.pg](http://www.transparencypng.org.pg)

## Notes

1. [www1.oecd.org/daf/asiacom/pdf/refpro\\_2impcyc\\_papuanewguinea1.pdf](http://www1.oecd.org/daf/asiacom/pdf/refpro_2impcyc_papuanewguinea1.pdf)
2. The audit was conducted by TI PNG, the Institute of National Affairs (PNG), the Institute of Policy Studies of New Zealand and the PNG Electoral Commission.
3. This change of voting systems was just one of a number of important changes brought in by the OLIPPAC, which was aimed primarily at reducing post-election 'horse trading' and vote-buying in the legislature.
4. [www.thenational.com.pg/0607/nation2.htm](http://www.thenational.com.pg/0607/nation2.htm)
5. *The Age* (Australia), 19 November 2004. Full report available at [www.inapng.com/Police%20Review%20Report%20final.pdf](http://www.inapng.com/Police%20Review%20Report%20final.pdf)
6. The review was not mandated to investigate individual cases of unprofessional and unethical conduct, and thus did not pursue them beyond its own terms of reference.
7. The review stated explicitly that the low salaries were an issue for police misconduct. The minister responded in early 2005 by raising police salaries by an average of about 10 per cent.
8. The UN recommended police:population ratio is 1:450. Police:population ratios for other jurisdictions are: Fiji, 1:550; Solomon Islands, 1:500; Queensland 1:475; and Northern Territory of Australia 1:280.

## Peru

### Conventions:

OAS Inter-American Convention against Corruption (ratified June 1997)

UN Convention against Corruption (ratified November 2004)

UN Convention against Transnational Organized Crime (ratified January 2002)

### Legal and institutional changes

- Reforms to the **penal code and code of criminal procedures** were approved in July 2004 and will enter into force in February 2006. They make it easier for prosecuting judges to prepare their final reports and broaden the instances in which preventative detention can be used to include complicated cases where more than 10 people are implicated (thus reducing the number of suspects implicated in the drawn-out corruption cases benefiting from house arrest or release under bail). Sanctions for public officials found guilty of corruption have been increased and a clear difference established between those who propose or extort a corrupt transaction – who will receive on average four years more than under the previous sanctions regime; and those who carry out the corrupt act – who face a sentence of two years more than before. Sentences for illicit enrichment are also increased to 8–18 years for senior public officials.
- A new law on **state contracts and acquisitions** was adopted in July 2004 and secondary regulations implementing it entered into force in December. The law contains details of an online system of state contracts (SEACE) that has been in development since 2002. It clarifies which bodies come under the law's jurisdiction; creates a national register of

providers; broadens the list of grounds for disqualification from state contracts; increases the 'cooling-off' period for former public officials who wish to enter into contracts with the state; declares void any contracting processes that are not included in the annual purchasing plans of state institutions; and clarifies which supply contracts qualify as 'urgent', and therefore can be issued without tenders, because the institution would be paralysed without them. The main flaw is that there is no need to prove what kind of situation qualifies as 'urgent'.

- The law governing the **Financial Intelligence Unit (UIF)** was modified in July 2004, and grants it new powers to request any information from any public institution (previously it could only request information about suspect transactions). The modification also increases its sphere of operations to include the prevention and detection of financing of terrorism, and increases cooperation with international organisations and other domestic public institutions. The reform was criticised for reducing the UIF's independence, however, because the head of the body will now be directly responsible to the cabinet and not the superintendent for banking and insurance (SBS), which is constitutionally independent. The body's financing has been restricted to funds provided by the treasury, funds recovered from the Fujimori regime (which are limited) and fines imposed by the UIF.
- The **Congressional Ethics Commission** was reformed in September 2004 in an attempt to bolster its poor performance. Since it was created in March 2003, it had failed to find fault with a single MP in spite of the dozens of complaints brought to its attention. It now consists of seven MPs under a new president. Since it was reformed, the commission recommended a 120-day suspension for an MP who assaulted a government official, but Congress later reduced the sanction.
- A **commission created by Justice Minister Blado Kresalja** in May 2004 to design an anti-corruption programme (see *Global Corruption Report 2005*) collapsed in July, following the minister's resignation in opposition to a new media law that allows up to 40 per cent foreign ownership of Peru's radio and television stations.
- A complaints and redress commission for corrupt acts committed by teachers, school directors or officials related to the **education sector in Lima** was created in February 2005.

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## Attempts to dismantle Fujimori's machinery foiled

After four years of legal and political struggle against the criminal mafia led by former president Alberto Fujimori and his close adviser, Vladimiro Montesinos, there have been some important achievements, albeit partial ones. By September 2004, 201 cases had been opened involving more than 1,400 suspects, and US \$175 million had been recovered. The investigation has now entered a second, crucial stage, focusing on the state's ability to sanction those responsible. Successful convictions at this stage would

go a long way towards overcoming the widespread public perception that impunity is the rule in Peru, not the exception.

The government's reluctance to tackle the roots of corruption was confirmed during the course of investigations led by Luis Vargas, who headed the Fujimori–Montesinos inquiry, when he discovered clear links between a member of President Alejandro Toledo's inner circle and a leading figure in the organisation that looted so much of Peru's wealth in the 1990s. The investigations revealed that César Almeyda, Toledo's friend, adviser and former lawyer, had had communications with former general Oscar Villanueva, also known as Montesinos'

'treasurer'. The evidence supplied was a recorded conversation in which Almeyda allegedly offered Villanueva improved prison conditions in exchange for information that could be used against Toledo's political enemies. Villanueva committed suicide when this recording was made public in September 2002. The conversation implicated those at the highest levels of power and Toledo was unable to prevent Almeyda's subsequent arrest. However, the case didn't stop there.

Vargas wanted to take charge of the new investigation to determine how far the tentacles of the Fujimori-Montesinos network had penetrated the current administration. The government expressed its trenchant opposition, arguing that the special investigator's office had been created solely to deal with events from 1990 to 2000 and that its remit should not go beyond that period. The auditor general, public prosecutor and head of the legal defence council all supported the government's position, but Justice Minister Baldo Kresalja was reportedly in favour of widening the terms of reference initially, though he later changed his mind.

Relations between the investigating team and the government deteriorated further after the media revealed in July 2004 that Perú Posible, the ruling party, had allegedly falsified hundreds of thousands of signatures in order to register as a new party in time for the 2001 general elections. This had apparently been achieved because of the party's close links to the Oficina Nacional de Procesos Electorales (ONPE), the electoral body, which was still under the control of Fujimori and Montesinos (see below).

Vargas' term of office was due to expire in October 2004, though officials had already suggested he be replaced during a smear campaign that had belittled the results of his inquiry, and his failures to secure more convictions or extradite Fujimori from Japan.<sup>1</sup> Vargas' term could easily have ended there and then were it not for a large public demonstration and several opinion polls that showed most Peruvians wanted him to stay. Public opinion won

through, but his contract was renewed for only three months, after which Antonio Maldonado was appointed the new special investigator.

A number of Vargas' team resigned in protest, citing their concern that Maldonado would not tackle in sufficient depth either the Almeyda case or the allegation of signature faking, because they involved the investigation of highly placed politicians.

The conviction that the corrupt enjoy immunity from prosecution is strong among the population, as evidenced by the annual opinion poll conducted by the anti-corruption NGO, Proética, which found that 79 per cent of respondents believe that corruption charges do not lead to any form of sanctions, and 83 per cent think corruption will be as bad or worse in five years time.

With its reputation tarnished by alleged links to the Fujimori regime, the government is caught dangerously off-balance. Torn between the desire to protect the president and his party, and a public commitment to punish corruption, it chose to emasculate its special investigation team, rather than risk opening itself up to further enquiry.

### Toledo's reaction to the case of the 'signature factory'

The Toledo government's precarious popularity with voters (his approval rating at the time of writing hovered at 10 per cent) was further damaged by news that signatures had been falsified to qualify the ruling party to fight the 2001 election.

Among the methods allegedly employed by Perú Posible was the creation of a 'signature factory', staffed by personnel hired by the party chiefs who were charged with 'manufacturing' the 500,000 signatures required by law to register a new party.

Since July 2004, a string of further revelations has come to light. A key witness appeared, then disappeared in a mysterious manner; retracted his original statement; then later accused politicians of involvement in his disappearance, implicating a number

of officials along the way. While this saga continued, other witnesses stepped forward with contradictory statements and another signature factory was discovered, linked to Congressman Rafael Rey and his Code-Renovación party. Rey was well known for his pro-Fujimori stance in the 1990s, but claims to have severed links with the regime.

This last revelation created the impression that the majority of parties engaged in falsifying signatures and other forms of corruption to compete in the election. Indeed, Fujimori and Montesinos were both reported to control the electoral commission, the ONPE and the national elections jury (JNE). This view was reinforced when Heriberto Benítez, one of five members of a parliamentary commission set up to investigate the signature factories, proposed a blanket amnesty for all parties implicated in order to avert a crisis in the political system. Housing minister Carlos Bruce accepted that Perú Posible had falsified

signatures, but defended it on the grounds that the ends – defeating the Fujimori regime – justified the means.

The commission had made little progress by the time it presented its conclusions in May 2005. The members agreed that the leaders of Perú Posible, including President Toledo, were responsible, but failed to agree on what sanctions to impose. One of the commission's aims had been to question President Toledo, but the request was denied. He eventually did agree to attend on condition that the meeting was not recorded, a decision that confirmed to many his unwillingness to collaborate with the commission. The case has now been sent to the public prosecutor's office.

The case – and Congress' failure to punish those responsible – can only contribute to the low regard in which the electorate holds political parties in Peru. A poll by Lima University in 2003 showed that 81 per cent of citizens do not trust political parties.

*Samuel Rotta Castilla and Leonardo Narvarte Olivares (Proética)*

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Instituto Prensa y Sociedad (IPYS), *Acceso a la Información de las Entidades del Sector Salud* (Access to Information in Health Sector Bodies) (Lima: IPYS, 2004)

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Proética (TI Peru): [www.proetica.org.pe](http://www.proetica.org.pe)

### Note

1. See *Global Corruption Report 2004*. At the time of writing, the Japanese authorities were examining an extradition request filed in late 2004. Analysts expected the request to be rejected since Fujimori holds Japanese citizenship and Japan does not extradite nationals. While banned under the constitution from standing in the next election, Fujimori has said that he is still considering a political role.

## Poland

### Conventions:

Council of Europe Civil Law Convention on Corruption (ratified September 2002)  
Council of Europe Criminal Law Convention on Corruption (ratified December 2002)  
OECD Anti-Bribery Convention (ratified September 2000)  
UN Convention against Corruption (signed December 2003; not yet ratified)  
UN Convention against Transnational Organized Crime (ratified November 2001)

### Legal and institutional changes

- Parliament adopted an **amendment to the law governing MPs and senators** in January 2005 that came into force in mid-May. Under new provisions, parliamentarians who have been arrested or imprisoned will automatically be deprived of their rights and obligations as representatives, including remuneration. There is a right of appeal. The amendment was introduced following a series of criminal cases and scandals involving MPs (see below).
- In a bid to eliminate **corruption in the courts**, the Sejm (lower house) approved a bill in September 2004 giving citizens the right to lodge a complaint against drawn-out proceedings in criminal, civil and administrative cases. The provision was adopted after Polish claims at the European Human Rights Tribunal in Strasbourg rose to a record 5,784 in 2004, mostly as a result of tardy court processes. Poland's old-fashioned case registration system gives poorly paid court clerks wide discretionary power to influence the order of proceedings.
- An **act on freedom of economic activity** was passed in August 2004 limiting tax officials' ability to exploit their power for bribes. Business start-ups now require fewer permits to commence trading and the law prevents tax offices from conducting more than one audit at a time, unless an official investigation is in progress.
- An amendment to the law preventing assets from illegal sources from entering the financial system, which was passed after the 9/11 terrorist attacks, entered into force in July 2004, **further tightening financial regulation**. Financial institutions, the National Deposit of Securities, the lottery, the postal system, public notaries, real estate agents and others are required to register any transaction exceeding €15,000 (US \$19,000) with the authorities and to notify the General Inspector of Financial Information on a monthly basis of any suspicious deals.
- By December 2004, all provincial police forces had established **specialised anti-corruption departments**. The first was established in Silesia in 2000. The units provide police with a set of new tools for combating corruption, including aiding whistleblowers, for example through 'controlled bribery' (when, under a court order, police provide whistleblowers with marked banknotes, a tape-recorder or camera to catch a public official extorting a bribe). The new methods may have already begun to have an impact. In the first quarter of 2005, police initiated 1,664 investigations of corruption, compared to 2,825 throughout 2003.

## Lay judges tamed, but still powerful

The judiciary has been criticised for many years for its lengthy proceedings and perceived corruption. Files went missing, cases were barred before entering the docket and verdicts were delivered on the basis of false evidence. The judges were not exclusively to blame. Public attention has recently focused on dishonest court experts who falsify evidence and corrupt lay judges who are available for hire. Lay judges are members of the panels that preside over the criminal, family and labour courts. In the three-person panel system used in Polish courts, the two lay judges exert a decisive influence. According to the 2001 law that defines their conditions, any citizen of 'impeccable character', who has lived for a year in the place where the court presides, is qualified to become a lay judge. 'Organisations', trade unions, presidents of courts or groups of 25 citizens can all put forward a candidate who must prove that he or she does not have a criminal record. *Gmina* (municipality) councils elect lay judges for a four-year term of office.

The current regulations concerning lay judges, based on those of the communist legal regime, are seriously deficient. For a start, the existing law does not adequately define the term 'organisation', with the result that political parties nominate their own candidates to administer local justice. In some *gminas*, councillors from different parties agree on the quota of judges each will appoint. They or their family members can also assume this influential post, as do people against whom penal proceedings are pending in other districts. According to the presidents of Poland's district courts, as many as 135 criminal court proceedings had been completed or were in progress against lay judges in March 2004.

Though irregularities in the election of lay judges have been commonplace since the early 1990s, the issue rarely captured the public's interest. This changed after the last election in late 2003. In June 2004, the administrative court in Łódź declared that

the appointment of lay judges by the city council of Łódź was against the law. The Administrative Court in Cracow overruled one election in July 2004 on the grounds that not all the elected lay judges had the appropriate police recommendations. In July 2004, the administrative head of Mazowieckie region overruled a resolution in Legionowo because political parties had recommended the judges for election (though the law does not actually prohibit this).

The question of lay judges' political affiliations became the focus of media attention in the same year. As a result, the government prepared a draft amendment to the law on the structure of the common courts that was submitted to parliament in March 2005. Under this bill, lay judges, like professional judges, will henceforth be apolitical. The draft amendment also limits the participation of lay judges in the administration of justice. They will not participate in cases related to social insurance and their involvement in family cases will be much reduced. Candidates for the post will have to provide a statement to the effect that no criminal proceeding is underway against them. The draft provisions also require that candidates have attained a secondary education, at the very least.

The adoption of the amendment is expected to improve the situation, as will a justice ministry instruction in August 2004 that bars councillors from standing as lay judges. Opinion varies from wanting to abolish lay judges entirely to arguments that politicians should not be responsible for the election of lay judges for fear of nepotism and cronyism.

## Tackling the log roll

In May 2005, the Sejm adopted an amendment to the acts on the civil service and on local government aimed at ending the widespread practice of 'log rolling' whereby every election is followed by a major turnover of personnel at every level of state and local hierarchies. The basis of

recruitment is often kinship, party affiliation and ties of friendship with those in power. This nepotism in the administration produces a lower quality of public service and makes the oversight of office operations difficult.

Under new regulations, information about vacancies in the civil service and local administration must be published, specifying the requirements of any given position and the relevant dates of the recruitment procedure. The list of candidates meeting the criteria must also be published, along with the name of the winner and a justification for why he or she was selected. The procedures are binding on all government institutions.

The amendment is a step in the right direction, but more decisive legislation is required if the forced rotation of experienced personnel is not to impact on the quality of administration and even the economy. The new law does not provide sufficient safeguards against the detrimental practice of awarding public tenders to companies owned by relatives of local officials. Further measures are required to restrict another harmful log rolling of reserving top managerial posts in state or municipally owned companies for members of the winning party.

Some local governments have begun to understand that good governance is also a route to political success and are introducing transparent standards of operation on their own initiative, despite the dearth of official regulations. In 2004, the head of the administration of Pabianice introduced competitive procedures to the recruitment of public officials. At the end of 2004, two competitions to fill vacancies in the administration were announced and the requirement details were published on the Internet and the local bulletin board.

In early 2005, the Pabianice administration issued six more regulations to align its policy with EU standards. In addition to the competitive recruitment process, the district now possesses formal rules for performance assessment, remuneration and career

advancement, and an ethical code for its officials. Similar changes are being introduced by a group of *gminas* in Wielkopolska, in collaboration with TI Poland.

## MPs above the law

A number of high-profile cases involving Polish politicians have come to light. Zbigniew Sobotka, former deputy minister of internal affairs and administration, Henryk Długosz and Andrzej Jagiełło, both senior officials in the regional organisation of the ruling Democratic Left Alliance (SLD), were sentenced in January 2005 to three and a half, two, and one and a half years in prison respectively for leaking information of an organised raid to a criminal ring in Starachowice which the police had targeted. Another MP and former leader of the SLD's Łódzkie chapter, Andrzej Pęczak, was arrested in 2004 on charges of corruption. Court proceedings are underway against Renata Beger, a deputy from the radical Samoobrona party, and Józef Skowyra, from the right-wing League of Polish Families. Both Beger and Skowyra were charged with forging signatures on lists supporting their candidatures for the elections. MPs' involvement in crime opened a debate on the need to limit their rights, which remain largely intact even after imprisonment. Following public pressure, parliament adopted an amendment to the law on the performance of MPs and senators in January 2005. The new provisions strip arrested or imprisoned MPs of their obligations and rights, including their salaries. However, the amendment does not apply to sentenced MPs who are still eligible for appeal. This legislation did not therefore affect the three MPs arrested in the Starachowice case, who carried on as usual. Furthermore, even after the arrest and imprisonment of an MP, they still retain their mandate and immunity. Under the constitution, fresh charges can only be brought with the approval of the Sejm.

The criminal scandals swirling around Polish MPs led to calls for a ban on anyone

with a criminal record from standing for parliament. A group of MPs from the left-wing Polish Social Democrats tried to change the constitution in March 2005 by adding a clause excluding from parliament anyone sentenced for intentional crimes and crimes prosecuted *ex officio*. The initiative failed due to the lack of the required number of signatures. The Sejm's legislative committee

took another approach to the problem. It proposed giving courts the power to deprive a sentenced person of the right to stand for parliament. This initiative also failed to win the necessary support. MPs are now discussing a third possibility in the form of a legal obligation to publish information if a candidate for parliament has been logged in the register of convicted persons.

*Julia Piłera (TI Poland)*

### Further reading

- EU Accession Monitoring Programme of the Open Society Institute, *Korupcja i polityka antykorupcyjna. Raporty krajowe. Polska* (Corruption and Anti-corruption Policy) (Warsaw: EU Accession Monitoring Programme, Open Society Institute, 2002)
- Maria Jarosz, *Władza, przywileje, korupcja* (Power, Privileges and Corruption) (Warsaw: Wydawnictwo Naukowe PWN, 2004)
- Wojciech Krupa, Marzena Rogalska and Maciej Wnuk, *Elementy korupcjogenne w wybranych przepisach prawnych regulujących funkcjonowanie samorządu gminnego* (Corruption-generating Elements in Selected Legal Provisions Regulating the Functioning of *Gmina*-level Self-government) (Warsaw: TI Poland, 2003)
- Celina Nowak, *Dostosowanie prawa polskiego do instrumentów międzynarodowych dotyczących korupcji* (Adaptation of Polish Law to the International Instruments Concerning Corruption) (Warsaw: Fundacja Batorego, 2004)

TI Poland: [www.transparency.pl](http://www.transparency.pl)

## Romania

### Conventions:

- Council of Europe Civil Law Convention on Corruption (ratified April 2002)
- Council of Europe Criminal Law Convention on Corruption (ratified July 2002; Additional Protocol ratified November 2004)
- UN Convention against Corruption (ratified November 2004)
- UN Convention against Transnational Organized Crime (ratified December 2002)

### Legal and institutional changes

- An 'urgency ordinance' in February 2005 waived the **immunity protections of members of the former government** in line with the recommendations of the Council of Europe's Group of States against Corruption (GRECO), paving the way for prosecution of past corruption crimes (see below). But there are categories of people who still benefit from immunity. Under a modification to the law on the legal profession in June 2004, lawyers cannot be prosecuted or indicted without the approval of the general prosecutor of the court of appeal where they are registered.
- A law on the **protection of whistleblowers**, passed in December 2004, improves safeguards for public employees who disclose breaches of the law inside the institutions where they

work. It guarantees whistleblowers disciplinary and administrative protection in the event of retaliation by their administrative superiors or colleagues, and introduces an inverted burden of proof whereby a whistleblower is legally presumed to be in good faith, requiring the accused to bring evidence to rebut the allegations made. Critics have pointed out that this might make the law a platform for frustrated civil servants to denounce or harass their superiors. Another strong point of the law is that whistleblowers can report to a wider array of public and private authorities than is usual in most Western whistleblower acts.<sup>1</sup> The law's effectiveness will depend on raising awareness of its existence and raising the level of trust among civil servants.

- An amendment to the law on the **prevention, disclosure and punishment of corrupt acts**, passed in November 2004, closes an important gap in the criminal law framework. Before the amendment was adopted, criminal law treated certain acts of corruption as crimes of abuse, which were often converted in court into crimes of negligence and sanctioned with fines rather than imprisonment. For example, if a civil servant took or refused a decision to grant an authorisation or a lease against the rules, incurring damage to a party, it would be treated as a crime of abuse, irrespective of the personal benefits obtained by the civil servant or a third party. The sanction for these crimes will now be 3–15 years in prison, as in bribe-taking cases.
- An amendment of the Criminal Procedure Code, passed in November 2004, widens the **plaintiff's litigation guarantees** by introducing the mandatory motivation and communication of all prosecutorial decisions in a case. This gives the plaintiff legal backing to attack any prosecution decision that runs counter to law. The modification is particularly relevant for situations in which the prosecution refuses to start, drops or suspends criminal proceedings on unjustified grounds, allowing criminals to escape prosecution.
- A law published in July 2004 provides a **new legal framework for gifts** received by dignitaries, magistrates and civil servants during the course of their duties. All goods received in 'protocol activities' must be declared to the head of the relevant department within 30 days of receipt. When their value exceeds €200 (US \$240), the beneficiary can either surrender them to a special commission or keep them, having first reimbursed their cost. Any gifts worth less than €200 may be retained. The law does not provide similar provisions for services of protocol which may include trips, bursaries, and events and so on, that may amount to important sums of money. Nor does it provide a mechanism for monitoring or sanctioning false declarations or the potential refusal to declare gifts.
- A law on the running of the Superior Council of Magistracy (CSM) was adopted in July 2004 as part of a package intended to meet the EU accession requirement of an **effective and independent judiciary**.<sup>2</sup> The amendments mainly targeted the career path and disciplinary responsibility of magistrates, which were placed definitively under the auspices of the CSM. Other responsibilities formerly held by the justice minister and now transferred to the CSM include decisions on the establishment or dissolution of courts; acts regarding the organisation of the judiciary; and the budgets of courts and prosecutors' offices. The CSM has financial autonomy<sup>3</sup> and may initiate draft laws that relate to the functioning of the judiciary (see below).
- The National Anti-Corruption Prosecution Office (PNA) continued to draw fire for its performance in 2004. A **23 per cent increase in personnel** (prosecutors, judicial police and other experts) authorised in April 2004<sup>4</sup> was offset by the decision to simultaneously broaden the PNA's mandate to include smaller acts of corruption.<sup>5</sup> This stretched the

agency's capacity to breaking point. By the end of 2004, the government intervened with another ordinance that restored the bribe threshold to €5,000 (US \$6,000), still well above its original level. Under the judicial reform package outlined above, PNA does not answer to any state authorities (see below).<sup>6</sup>

## EU membership depends on anti-corruption drive

Romania's hopes for accession to the EU in 2007 depend on it discovering remedies to its deep-seated problems of corruption and the rule of law. The judicial reform package, adopted in July 2004, alleviated some concerns over the independence of the judiciary, but qualms remain as to whether the new government of President Traian Basescu will implement its framework on time. The anti-corruption programme is on much thinner ice as debates in the European Parliament showed in December 2004. Recent strategy has been designed to secure signature of the EU Accession Treaty, which it did in April 2005, but the lack of convincing progress in the fight against grand corruption could trigger a 'delay clause' that puts back EU entry for one year.

MEPs' doubts about Romania's fitness to join the Union were encapsulated in the *Report on Romania's Progress towards Accession*, presented by parliamentary rapporteur Pierre Moscovici in December 2004. He noted the low rate of successful high-level corruption prosecutions and urged Romania to resume its campaign. More critical voices could be heard in the chamber after accession negotiations ended two days later. One MEP submitted a motion for the reopening of negotiations on the grounds that Romania was incapable of tackling its problems by the date of the treaty signature.<sup>7</sup> The motion was rejected.

The newly elected government took office later that month with a mission to resolve these concerns. President Basescu paid calls on all the authorities responsible for combating corruption – the CSM, PNA, intelligence services – to insist on their full and effective cooperation, and warned that

corruption was now a threat to national security.<sup>8</sup> He stressed his support for the independence of the magistracy and appointed a non-political figure to head the justice ministry as a sign of that support.<sup>9</sup> Basescu's get-tough approach contrasted sharply with that of his predecessor, Ion Iliescu, who was characterised as a 'passive' president surrounded by controversial associates. After this, heads began to roll in the police force and elsewhere in the administration, a move that the opposition Social Democratic Party (PSD) called 'political dismissals'. Another significant decision was to waive immunity for crimes committed by former ministers while in office (see above). Concurrently, a spate of arrests, investigations and prosecutions scooped up a number of high-level figures in the business and administrative world related to the former and present governments.<sup>10</sup>

In February 2005, the justice ministry ordered an independent audit of the first National Anti-Corruption Strategy (2001–04) as part of a pledge to the EU to provide a future basis for anti-corruption measures in the run-up to accession.<sup>11</sup> Its findings broadly reflected those reached by the EU's parliamentary rapporteur, but it reserved particular scorn for the PNA, which it called inefficient, and the previous administration, which it accused of influencing the judiciary in its fight against corruption. The report was well received by the public, the government and EU institutions alike, but officials from the institutions it targeted and the PSD criticised its 'lack of professionalism'.

In March 2005, the government approved a new anti-corruption roadmap focusing on three fronts – prevention, sanctions and institutional cooperation – with measures ranging from the strengthening of freedom of information legislation to restructuring

the CSM and PNA, to tightening anti-money laundering laws. The strategy also envisions the creation of a new agency to check asset declarations and conflicts of interest and to monitor the implementation of the law on the protection of whistleblowers. The government's plan of action was unveiled amid considerable fanfare and against a backdrop of intense public discussion about corruption and the future of Romania.

On the day the government approved the anti-corruption strategy, the Romanian president stated that he was backing reform of an 'inefficient and corrupt' judiciary.<sup>12</sup> This statement marked a new turn in the president's attitude towards public authorities, in particular the judiciary, and raised eyebrows among advocates of judicial independence.

President Basescu has indicated a change of direction, but has yet to start to turn the corner. Time is short for Romania, but the goal of a speedy EU accession should not be grounds for riding roughshod over the judiciary or the existing legal framework.

## Romania's infrastructure nightmares

There are roughly 200 km of highways in Romania which has a similar surface area to Italy, where there are 6,000 km of highways. Among its EU commitments, Bucharest must build some 1,500 km of highways under the 'Pan-European Corridor IV' that links Germany with Turkey through the Czech Republic and Hungary at a total cost of €2 billion (US \$2.4 billion). Under the programme, Romania is due to build a highway from Arad in the west to the Black Sea port of Constanta by 2015.

Despite these commitments, the previous government decided to invest in a highway running parallel to the 'Pan-European Corridor' from Oradea to Brasov, in the centre of the country. In late 2003, it announced the signature of a contract with US company Bechtel, at a cost of roughly US \$2.5 billion. However, there was no public procurement

bid for the tender,<sup>13</sup> even though it was the largest motorway project in Europe. Moreover, the contract was signed a few months before Romania was given the green light for entry into NATO in March 2004.<sup>14</sup>

After signing the Bechtel deal, the government embarked on a raft of contracts without orthodox procurement procedures. One of the most controversial was with the Franco-German-Spanish consortium European Aeronautic Defence and Space (EADS) to secure the national borders at a cost of around €1 billion (US \$1.2 billion). The contract was classified as secret and awarded without a public tender.<sup>15</sup> The EADS contract was signed in August 2004, a few months before Romania needed to close the EU accession negotiations under very difficult conditions. Smaller contracts followed, including one with French company Vinci, also signed without a public tender, to build a motorway between Bucharest and Brasov.

After the elections in November 2004, the new government rescinded all contracts signed outside normal procurement regulations by the previous administration. After the contractors complained, the government agreed to renegotiate terms with Bechtel and EADS so as to make conditions fairer for Romania.<sup>16</sup> Both companies accepted this compromise, which raised questions about the soundness of the original contracts.

The government has made an effort to bring in those responsible for the questionable contracts. In June 2005, the administration and interior minister, Vasile Blaga, announced that he had launched a criminal investigation against several heads of the police, within the ministry, for a suspected breach of the basic requirements of public procurement legislation.<sup>17</sup> Prime Minister Tariceanu in turn announced an investigation would be initiated against the former transport minister, Miron Mitrea, to probe irregularities in the Bechtel contract.<sup>18</sup> Both contracts have been criticised by EU officials for breach of procurement requirements. At this writing, the investigations were still ongoing and

no prosecutions had been made. But the lifting of former ministers' immunity in early 2005 (see above) opened the way for prosecutions.

The stakes are indeed high: the renegotiation of past contracts that flouted the rule

of open, competitive bidding, the initiation of criminal investigations against officials in charge of shady contracts and a marked improvement in the handling of future contracts will be critical if Romania is to receive a green light for EU entry.

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### Further reading

Freedom House, 'The Anti-Corruption Policy of the Romanian Government: Assessment Report', (Washington, DC: Freedom House, 2005), available at [www.gov.ro/engleza/presa/documente/200503/FH\\_Audit\\_EN\\_16\\_031.pdf](http://www.gov.ro/engleza/presa/documente/200503/FH_Audit_EN_16_031.pdf)

Government of Romania, *National Anti-Corruption Strategy* (Bucharest: Government of Romania, 2005), available at [www.just.ro/files/lupta\\_anti\\_coruptie/Lupta%20anticoruptie/National%20Anticorruption%20Strategy.htm](http://www.just.ro/files/lupta_anti_coruptie/Lupta%20anticoruptie/National%20Anticorruption%20Strategy.htm)

Transparency International Romania, *Raportul Național asupra Corupției 2005* (National Corruption Report – 2005) (Bucharest: TI Romania, 2005), [www.transparency.org/doc/rnac2005\\_ro.pdf](http://www.transparency.org/doc/rnac2005_ro.pdf)

TI Romania: [www.transparency.org.ro](http://www.transparency.org.ro)

### Notes

1. These authorities include the immediate superior, head of institution, disciplinary commissions within the institution, public prosecutions bodies, parliamentary commissions, the media, NGOs, unions, professional associations and employers' associations.
2. The other two laws in the judicial reform package were on the statute of magistrates and the organisation of the judiciary.
3. The CSM elaborates its own budget in consultation with the finance minister.
4. The institution's capacity to fight corruption was hampered from the outset because it employed fewer than 100 prosecutors for the entire country.
5. The bribe 'threshold' that mandates a PNA investigation was lowered from €10,000 (US \$13,000) to €3,000 (US \$4,000).
6. Amendments to the law on the judiciary passed in July 2005 altered this. PNA must now present an annual report to the Superior Council of the Magistracy and justice ministry, giving them more authority over the institution. The justice ministry can also forward the report to parliament for further discussion.
7. [www.euractiv.ro](http://www.euractiv.ro), 2 March 2005.
8. [www.euractiv.ro](http://www.euractiv.ro), 29 December 2004.
9. Before being appointed Minister of Justice, Monica Macovei was executive director of the Association for the Defense of Human Rights, Helsinki Committee.
10. *Ziua* (Romania), 30 March 2005.
11. The audit report was written by Freedom House (see 'Further reading').
12. See [www.gov.ro/engleza/presa/afis-doc.php?idpresa=4712&idrubricapresa=&idrubricaprimm=&idtema=&tip=&pag=1&dr=](http://www.gov.ro/engleza/presa/afis-doc.php?idpresa=4712&idrubricapresa=&idrubricaprimm=&idtema=&tip=&pag=1&dr=)
13. *The Economist* (UK), 15 April 2004.
14. *Financial Times* (UK), 2 February 2004.
15. *Financial Times* (UK), 23 February 2005.
16. Prime Minister Calin Popescu Tariceanu was quoted as saying the renegotiation with EADS saved the budget about €150 million (US \$180 million), according to ProVest TV, 26 June 2005.
17. Press release of the Romanian Ministry of Administration and Interior, 15 June 2005.
18. *Ziarul Financiar* (Romania), 27 June 2005.

## Serbia

NB: This report does not cover developments in Montenegro or Kosovo

### Conventions:

Council of Europe Civil Law Convention on Corruption (signed April 2005; not yet ratified)

Council of Europe Criminal Law Convention on Corruption (ratified December 2002)

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (ratified September 2001)

### Legal and institutional changes

- After considerable delay, parliament adopted the **law on access to information** in November 2004.<sup>1</sup> The law introduces the public right to any information held by the government, local authorities, public enterprises and all other agencies or organisations financed by the state, unless it can be legally shown there is an overriding interest in not disclosing the information. Statutory exemptions include the protection of life, health and security of persons, the judiciary, national security, public safety, economic welfare and classified information. Even in such cases, grounds for denying access must be cross-checked against a clause in the law that requires that the interest in question could not be otherwise protected in accordance with the standards of a 'democratic society'. The law also provides for fines for violations and the creation of the post of Commissioner for Information of Public Importance as a decision-making and appeals body (see below).
- The **Board for Resolving Conflict of Interest**, envisaged under legislation adopted in April 2004, was assembled in December 2004 through a combination of judicial appointments and parliamentary votes. Given that most of the April law could not be implemented without a full board, critics suspected that the delay in filling the nine-member panel was not mere negligence or poor pre-session negotiation between parliamentary groups, but rather a sign of a lack of political will to see the law implemented. Despite lacking premises and funding, the board produced its first significant output in March 2005 with new regulations for implementing the law and detailed forms for public officials' property and income disclosure (see below).

### Anti-corruption laws: lip service or business as usual?

Serbia's law on access to information largely survived its passage through parliament, though the right of appeal against decisions of the 'highest state authorities' (such as the president, government, parliament, Supreme Court, and so on) concerning access and provisions to protect whistleblowers was absent. It also fails to apply to the institutions of the Serbia and Montenegro

State Union, though they are almost entirely financed from Serbia's budget.<sup>2</sup> However, the essence of the original, drafted by an NGO, the Centre for Advanced Legal Studies, remains. In addition to guarantees of free access to any information held by the executive, legislature, judiciary, local government, public enterprises and other institutions financed by the state or local government – with the usual exemptions – the law obliges the relevant authorities – the law obliges the relevant authorities – to publish an annual directory containing the most important data on their activities,

and encourages them to publish data on the Internet.<sup>3</sup> With all its imperfections, the law represents a significant addition to the statute book and a potential blueprint for root-and-branch reform of public administration and the government–citizen relationship.

Given the international community's interest in Serbia's institutional evolution, legislation is often introduced more to comply with external pressure than to meet domestic needs. The implementation of laws adopted under these conditions is often weak. This applies equally to the information law and much of the anti-corruption legislation adopted in recent years.

Early evidence of this comes from the fact that parliamentary discussion of the draft law on information was chiefly confined to disputes between two opposition parties, the Serbian Radical Party and the Democratic Party. MPs from pro-government parties, by contrast, mainly abstained, either because they did not wish to unsettle relations in the coalition, or because they never considered the effects of the law and were thus uninterested in its details.

Since the law's entry into force in November 2004, the authorities have done little to make it function smoothly. No funds were allocated to implement it in the 2005 budget although Rodoljub Sabic, vice-president of the Social Democrat Party, one of the ruling coalition members, was elected to the post of commissioner in December 2004 (he resigned from the party after his nomination). No office was assigned to Sabic until April 2005 and he had to pay the cost of his official stamp himself. Though neither corruption nor obstruction was necessarily to blame for depriving the new law of 'teeth', its neglect certainly pointed to a lack of strategy and care.

According to research undertaken by TI Serbia during the first quarter of 2005, only 65 per cent of ministries, 33 per cent of public enterprises and 19 per cent of local governments responded to requests for information about the measures taken to implement the law by the end of March.<sup>4</sup> The percentage of those that had appointed

staff to deal with public requests for information was far lower.

## Salaries of public officials: between populist policy and need to prevent corruption

Over the past four years, political discussion has often turned to the need for an appropriate level of salary to ensure the integrity of officials entrusted with power over decision-making. The existing system is anchored in a 'basic' wage, established by the government or National Assembly, supplemented by 'coefficients' based on the responsibility of the post, level of education, working conditions and job complexity. This works out to an average public sector salary of around €190 (US \$230) per month, which is no disincentive to bribery or other forms of corruption.<sup>5</sup>

The coalition government that ruled after the overthrow of Slobodan Milošević in 2001 opted to pay its members modest, uncompetitive salaries out of deference to public sensitivity. Attitudes to salary have altered since the new coalition government assumed power in March 2004.<sup>6</sup> Ironically, the law on the prevention of conflict of interest, in force since July 2004, is partly to blame since it eliminated the legal means whereby officials boosted their salaries by barring them from working for private companies, consultancies or managing their own enterprises. In October 2004, 205 of the 250 MPs sought a salary increase through a new law, only to encounter a furious reaction from the public that led to the withdrawal of what was otherwise a necessary piece of legislation. A few months later, the government discreetly – but significantly – increased the salaries of its own officials in a manner that is legally problematic.<sup>7</sup>

In February 2005, the MPs followed suit through a legitimate parliamentary procedure.<sup>8</sup> Again there was tumult in the media. President Boris Tadić, who heads the opposition Democratic Party, distanced himself from the award, but the majority

argued that higher salaries were an 'anti-corruption preventive measure'<sup>9</sup> and dismissed the president's statement as 'populist'.<sup>10</sup> Minister of Finance Mladjan Dinkić said in March 2005 there were insufficient funds to pay the increase.

Few would claim that higher salaries will eliminate corruption or even ensure better work by MPs, but there are other reasons to take the issue seriously. Under a Constitutional Court ruling in May 2003, MPs are ultimately 'masters' of their mandate even when elected from a party's list, rather than directly. When MPs 'cross the floor' to join other parties, they remain the representatives of their constituencies. In 2003, the defection of MPs to parties defeated in the elections led Dr Vladimir Goati, a political analyst at the University of Belgrade, to refer to Serbia as an example of 'non-elective parliamentarism'. Even if they accept bribes to vote for a law or join another party, MPs are not liable for corruption since, under Serbian law, there is nothing that representatives 'should or should not do in the scope of their authorisation'.

### **Doubtful effects of conflict of interest legislation**

Conflict of interest legislation was adopted in April 2004 and dealt with duties in the public and private sector, gifts, and the declaration of assets and incomes.<sup>11</sup> Public officials, including some 1,000 people in the central government and at least 10,000 in lower levels of administration, were obliged to comply with two deadlines. The first, due in July 2004, was to cancel all consultancy arrangements, to resign from management jobs and to transfer any managerial roles in private enterprises. The second was to file property and income declarations for themselves and their immediate family after the launch of the Board for Resolving Conflict of Interest.

The board was envisaged as an independent, autonomous body, but in reality it suffered a number of hindrances.

The procedure for nominating members was long-drawn-out, the government did not provide enough resources for it to function by the deadline of May 2004, and nor did it benefit from the 2005 budget. Such oversights obstructed the law's intent since the deadline for submission of disclosures was set to coincide with the board's creation, and no other agency existed to verify and punish violations. By the first deadline, the government announced on its official website, [www.srbija.sr.gov.yu](http://www.srbija.sr.gov.yu), that all 'officials appointed by the government have complied with their prescribed duties', but there was no agency in place to check. The media quickly detected two prominent cases of non-compliance.

Bogoljub Lazić, then deputy minister of capital investment, came to his job from the Mobtel telephone company which he was also investigating as part of a commission responsible for determining the extent of the state's holding in it. When appointed, Lazić 'froze' his position in Mobtel in line with the legislation valid at the time, but failed to terminate his contract as required under the new law. The government removed him from his post in September 2005. A weightier conflict of interest issue concerned Lazić's manager, the Minister of Capital Investment, Velimir Ilić. The media pointed out that Ilić, who is president of the New Serbia party, which also has close relations with the Force of Serbia Movement (FoSM), is inevitably linked with Bogoljub Karić, who is both head of the FoSM and effective owner of Mobtel. Since Ilić's ministry is partly responsible for regulating Serbia's telecoms industry, this posed a serious conflict of interest. The second victim was Oliver Bogavac, former head of the money-laundering prevention unit in the Ministry of Finance. The media reported that Bogavac had agreed to act as a consultant for the state-owned enterprise Belgrade Airport in 2004 and had not cancelled his contract.<sup>12</sup> The government dismissed him from the post in February 2005.

Events passed more smoothly with regard to the second deadline but its overall success

was limited. Most central and provincial post holders submitted disclosures by 1 April, but officials in local governments and public enterprises largely ignored the requirement. The board's next task is to follow up the names and assets of those who failed to

respond. But members of the public, who might have more precise information about the wealth of individual officials, are denied access to the contents of the disclosure files, cutting off a huge resource of information for the board.

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### Further reading

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- Boris Begović, *Corruption in Customs: Combating Corruption at the Customs Administration* (Belgrade: Centre for Liberal-Democratic Studies, 2002)
- Vladimir Goati, Nemanja Nenadić and Predrag Jovanović: *Financing the Presidential Electoral Campaign in Serbia 2004 – A Blow to Political Corruption or Preservation of Status Quo?* (Belgrade: TI Serbia, October 2004), [www.transparentnost.org.yu/english/PUBLICATIONS/index.html#financing](http://www.transparentnost.org.yu/english/PUBLICATIONS/index.html#financing)

TI Serbia: [www.transparentnost.org.yu](http://www.transparentnost.org.yu)

### Notes

1. A nearly identical version of the bill was submitted to parliament in 2003 but was soon withdrawn by the former government (see *Global Corruption Report 2005*).
2. These include five ministries, including the Ministry of Defence and Ministry of Foreign Affairs.
3. Article 39. Among other information, the directory will include: description of powers, duties and in-house organisation; data on budget; procedures for submitting requests for access to information or complaints against decisions made; overview of requests, complaints and other measures undertaken by interested parties; data on the manner, medium and place of storing information; and type of information held.
4. See [www.transparentnost.org.yu/english/ACTIVITIES/ACCOUNTABILITY/2001-e05.html](http://www.transparentnost.org.yu/english/ACTIVITIES/ACCOUNTABILITY/2001-e05.html)
5. See [www.srbija.sr.gov.yu/vesti/vest.php?id=13926](http://www.srbija.sr.gov.yu/vesti/vest.php?id=13926)
6. The coalition, headed by Prime Minister Vojislav Kostunica, is comprised of the Democratic Party of Serbia, G17 Plus, the Serbian Renewal Movement and New Serbia, supported by the Socialist Party of Serbia.
7. The basis for calculating salaries in the executive branch was changed through a 'conclusion' of the government, which is not published in the official gazette and therefore not public, contrary to new laws on access to information and conflict of interest. Moreover, the ruling establishes a different 'basic wage' for various categories of officials, although their level of responsibility is already mirrored in the different 'coefficients' assigned to different posts.
8. [www.beta.co.yu/korupcija/default.asp?st=a&str=1&p=1&lis=1&pi=1164523](http://www.beta.co.yu/korupcija/default.asp?st=a&str=1&p=1&lis=1&pi=1164523)
9. See, for example, the statement of Zoran Andjelkovic, chair of the Socialist Party group, at [www.beta.co.yu/korupcija/default.asp?st=a&str=&p=1&lis=1&pi=1114390](http://www.beta.co.yu/korupcija/default.asp?st=a&str=&p=1&lis=1&pi=1114390)
10. [www.nspm.org.yu/PrenetiTekstovi/2005\\_evropa\\_dinkic\\_feb.htm](http://www.nspm.org.yu/PrenetiTekstovi/2005_evropa_dinkic_feb.htm)
11. See also *Global Corruption Report 2005*.
12. *Blic* (Serbia), 9 February 2005.

## Slovakia

### Conventions:

Council of Europe Civil Law Convention on Corruption (ratified May 2003)  
Council of Europe Criminal Law Convention on Corruption (ratified June 2000; Additional Protocol ratified April 2005)  
OECD Anti-Bribery Convention (ratified September 1999)  
UN Convention against Corruption (signed December 2003; not yet ratified)  
UN Convention against Transnational Organized Crime (ratified December 2003)

### Legal and institutional changes

- In February 2005, parliament approved an act regulating the **financing of political parties** and electoral campaigns. From the viewpoint of corruption, it contains several principles that improve regulation and increase transparency of party financing, but weaknesses remain, most notably the monitoring of the law's implementation (see below).
- An amendment to the act on administrative proceedings, effective since November 2004, strengthens citizens' right of **access to information** by requiring all authorities to post details of their decisions on the Internet or an accessible notice board. The amendment requires authorities to inform the public clearly and in good time about all meetings, their conduct and the decisions reached that could constitute a 'subject for public interest'.
- A law on the **property of the municipality**, effective since September 2004, amended the previous act and offers further potential to fight corruption at the local level. The first of two amendments stipulates that no municipality may transfer ownership of its property to any employee – mayor, deputy, budget directors, or any persons or companies close to them – other than by public tender under the commercial code. The second amendment allows for a reasonable exception by stating that an apartment, a plot of land or a movable asset worth less than SK50,000 (US \$1,600) may be transferred to an employee of the municipality without a public tender.
- The law on the establishment of a **special court and prosecutor to fight corruption and organised crime** entered into force in September 2004.<sup>1</sup> By December 2004, the prosecutor's office had investigated 416 cases, 12 per cent of them involving corruption. The establishment of the special court, meanwhile, was delayed. Following the failure of the Judicial Council (the body responsible for nominating judges) to elect the requisite number of special judges, its powers were temporarily delegated to the Banská Bystrica regional court. By June 2005 the special court had finally reached the number of judges required for it to begin work.

### New party law plagued by loopholes

Since 1991, Slovakia has financed political party activity partly from the national budget, due to the poor economic situation and the lack of a culture of private donations.<sup>2</sup> However, the transparency of management has remained low and the monitoring mechanisms created have been far from adequate.

The tendency to increase state support continued until 2004 and politicians, irrespective of the parties they belonged to, were the system's main advocates. In that year, civil society NGOs warned that citizens no longer felt adequately represented by their parties, and harboured suspicions that their political leaders were mired in corruption, cronyism and conflicts of interest.

The legislation regulating party finances has changed several times. Amendments in 2000 and 2001 improved monitoring by imposing obligations on parties to publish annual accounts, lists of donors and to submit statements to an independent auditor, but the act contained defects that enabled it to be circumvented. It did not limit the amount members could contribute; it emphasised transparency in only one form of income (gifts from persons and legal entities); and it placed the onus of monitoring on a parliamentary committee, thereby effectively licensing parties to monitor themselves.<sup>3</sup>

In February 2005, a new act on political parties and political movements was passed, replacing the original 1991 act. It contains anti-corruption provisions, some of which were recommended by the Council of Europe and civil society groups, including Transparency International Slovakia.

The new act has both positive and negative implications. One disadvantage is that it introduces the principle of unlimited expenditure for election campaigns and increased state funding for political activities. According to the Fair Play Alliance, an NGO that monitors party finance in Slovakia, parties can expect to receive SK617 million (US \$19.9 million) in the next election and, if their showings remain consistent, they could receive SK1.2 billion (US \$38.7 million) over the period 2006–10. An increasing amount of money will flow into political parties from public funds, but that does not necessarily mean that all party funds (including those from private donors) will be open to public scrutiny. Until now, parties could invest a maximum of SK12 million (US \$390,000) in their campaigns, a restriction cancelled under the new act. The first test of the new legislation will be the elections in autumn 2006.

The new act does introduce better transparency of financial flows. Parties will only be allowed to accept gifts of more than SK5,000 (US \$160) if they sign a contract. If the gift exceeds SK100,000 (US \$3,200), the donor's signature will require verification. Parties are also required to keep records of all member contributions exceeding SK25,000

(US \$800), which are publicly accessible. This is expected to increase transparency of campaign financing, but real change will depend on the enforcement mechanism, in particular, the checks in place to ensure that records are kept and action taken if irregularities are found.

According to Pavel Nechala of TI Slovakia, the parties have left their options open with the new legislation. They are entitled to establish companies whose operations are not monitored publicly. A party, for example, could publish a book and have all the copies 'sold' to a sponsor whose identity will remain unknown.<sup>4</sup>

Moreover, parliamentarians could not agree on SMER's (Social Alternative for Slovakia) proposal to create a special committee to scrutinise the parties' annual accounts and monitor their management. Ján Drgonec, the MP who heads the parliamentary constitutional law committee, is convinced such regulation would prove futile. 'The parties would monitor each other', he said. 'I do not see there being an honest interest in monitoring.' Róbert Madej, a SMER MP, prepared a draft amendment of the constitution that would delegate these powers to the Supreme Audit Office, but the lawmakers turned it down.<sup>5</sup>

The Fair Play Alliance argues that the monitoring of parties is still not sufficient. 'It is useless to make rules stricter if nobody will strictly monitor their observance', said Zuzana Wienk who has disclosed breaches of the act in the past. In most cases, no prosecutions followed. The group proposes instead the creation of an independent authority to monitor party financing or at the very least, monitoring by a ministry, such as the Ministry of Interior. However, none of the parties agree. 'Any approval of stricter rules for themselves is difficult for them and deputies try to avoid it', said Wienk.<sup>6</sup>

## First senior public officials tried for corruption

A spate of high-level bribery cases in early 2004 could have sparked more energetic

anti-corruption measures, but the year ended without adoption of important changes in strategy. For the first time in recent history, these cases concerned the municipality level, which had been out of the public eye for a long time. The cases were spread evenly across the country and involved the representatives of several political parties, including the Movement for Democratic Slovakia (HZDS), the Christian Democratic Movement (KDH), the Slovak Democratic and Christian Union (SDKU) and the Party of Hungarian Coalition (SMK).

In March 2004, two HZDS members, MP Gabriel Karlin and Milan Mráz, who heads the administration in Banská Bystrica, were indicted on charges of accepting a SK500,000 (US \$16,000) bribe in exchange for a favourable decision concerning a SK17 million (US \$550,000) building contract for a local school in late 2003. Karlin was stripped of his parliamentary immunity two days after police raided his office and retrieved the cash from his briefcase. In court, Karlin maintained that the secret services had framed him and Mráz in turn claimed Karlin had framed him. Karlin was found guilty in May 2005, but is appealing and has retained his post, while Mráz was found innocent and is still head of the Banská Bystrica regional office.<sup>7</sup>

In April 2004, Pavol Bielik, chairman of the regional branch of the KDH in Bratislava and mayor of Bratislava-Rača, was charged with accepting a SK5 million (US \$160,000) bribe for promising to deliver the approval of MPs to rehabilitate a building and construct two new ones in Rača. In May, Bielik was charged with the further offence of negligence in administering entrusted property. According to the weekly *Domino fórum*, police suspect that Bielik approved other improper allocations worth SK750,000 (US \$24,000) for various projects in 1999.<sup>8</sup>

In August 2004, the media reported that evidence incriminating Bielik, including the record of his tapped telephone calls, had mysteriously disappeared.<sup>9</sup> The special

prosecutor confirmed this and began an investigation into how the records were lost. Following the initial indictment against Bielik, KDH's chairman Pavol Hrušovský called for him to resign from all his party posts, which Bielik has refused to do. Though officially charged with corruption, he continues to chair the KDH regional council whose membership includes the Interior Minister Vladimír Palko.<sup>10</sup>

In March 2004 Eugen Čuňo, a member of the SDKÚ central council and deputy mayor of Košice, was detained for accepting a SK18 million (US \$581,000) bribe for a SK180 million (US \$5.8 million) contract to build 150 municipal apartments in the city. According to the Interior Minister, the bribe by construction company Kame was disguised as a loan.<sup>11</sup> The investigator also charged another SDKU member, Ladislav Lumtzer, mayor of a district in Kosice, and Maroš M, a Kame employee who had been helping the police to entrap Čuňo. Kame allegedly issued invoices for works that were never executed; Lumtzer approved them and ordered their settlement; and Maroš M, as construction supervisor, signed them off.<sup>12</sup> As a result of the scandal, construction of the housing was halted and the SDKU suspended Čuňo and asked Lumtzer to resign as mayor. Čuňo insists on his innocence and several prominent individuals from Kosice support him. At the time of writing, the case was still open.

These and other scandals appear to illustrate a 'decentralisation' of corruption in imitation of the fiscal decentralisation that has taken place in Slovakia. One proposal to stem its further spread is to give the Supreme Audit Office the right to control local government expenditure. This requires an amendment to the constitution, which was approved by the cabinet in June 2005 and at this writing was still awaiting adoption by the parliament in September 2005. But the measure is very unpopular among local government officials, some of whom are members of parliament.

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### Further reading

- E. Sičáková-Beblavá, 'Transparentnos' a korupcia' (Transparency and Corruption), in M. Kollár and G. Mesežník (eds), *Súhrnná správa o stave spoločnosti* (Global Report on the State of Society) (Bratislava: Institute for Public Affairs, 2004)
- E. Sičáková-Beblavá (ed.), *Korupcia a protikorupčná politika na Slovensku 2004, hodnotiaci správa* (Corruption and Anti-corruption Policy in Slovakia, Evaluation Report) (Bratislava: Transparency International Slovakia, 2005)

TI Slovakia: [www.transparency.sk](http://www.transparency.sk)

### Notes

1. For more details, see *Global Corruption Report 2005*.
2. In 2000, the government introduced a contribution of SK500,00 (US \$16,000) per National Council deputy, complemented by two other forms of subsidy: a contribution for votes, paid at SK60 (US \$1.90) per vote to each party which obtained over 3 per cent in the previous election); and a contribution for activities, paid at a quarter of a qualifying party's contribution for votes.
3. Z. Wienk, 'Financing of the Political Parties in 2004', in E. Sičáková-Beblava (ed.), *Corruption and Anti-corruption Policy in 2004* (Bratislava: Transparency International Slovakia, 2005).
4. *Hospodárske noviny* (Slovakia), 7 May 2005.
5. *Hospodárske noviny* (Slovakia), 7 February 2005.
6. *Sme* (Slovakia), 5 February 2005.
7. *The Slovak Spectator* (Slovakia), 16 May 2005.
8. *Domino fórum* (Slovakia), 19 May 2004.
9. *Sme* (Slovakia), 19 August 2004.
10. *Sme* (Slovakia), 13 September 2004.
11. *Sme* (Slovakia), 12 March 2004.
12. *Ibid.*, and *Sme* (Slovakia), 19 July 2004.

## South Africa

### Conventions:

AU Convention on Preventing and Combating Corruption (signed March 2004; not yet ratified)

SADC Protocol against Corruption (ratified May 2003)

UN Convention against Corruption (ratified November 2004)

UN Convention against Transnational Organized Crime (ratified February 2004)

### Legal and institutional changes

- The Division of Revenue Act came into effect in April 2005. Its objective is to promote **transparency and equity in the allocation of resources** to municipalities and provinces, and to promote accountability by ensuring that all allocations are reflected in their budgets. Corruption is rife at local government level, with serious backlogs of service delivery in many poorer areas. The act is an attempt to improve public expenditure management, although the Financial and Fiscal Commission has raised concerns over the conditionalities introduced through the act in the allocation of funds.

- The Financial Services Ombud Schemes Act 2004 was signed into law in February 2005. The act provides for the recognition of **financial services ombudsman schemes**; outlines minimum requirements for them; promotes consumer education; and empowers the Ombud for Financial Services Providers to act as a statutory ombudsman in certain cases. Though many providers have been members of voluntary complaints schemes; unscrupulous, non-member institutions have in the past sold inappropriate products, given inadequate advice or otherwise duped naive, less-literate citizens.
- The Companies Amendment Act, signed into law in October 2004, aligns company law with the Prevention and Combating of Corrupt Activities Act of April 2004. The amendment empowers the Registrar of the Court to **debar directors and other company officers** who have previously been convicted of fraud or other criminal activities in the operation of a company, and to maintain a public register of their identities. Such naming and shaming is intended as a deterrent against fraud.
- The Second National Anti-Corruption Summit in March 2005 resolved to include **ethics education** in school curricula to raise awareness among young people. The summit also asked the Law Commission to investigate the Protected Disclosures Act regarding the inadequate **protection of whistleblowers** and to report to parliament by the end of the year (see below).
- The Johannesburg Securities Exchange **Social Responsibility Index** launched in 2003 was revised in October 2004 in an attempt to implement the recommendations of the government's 2002 'King 2' report on corporate governance. The index includes a requirement that companies report on their political donations. The index is voluntary, but it sets a standard and is thought to be the first of its kind in the developing world.

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## MPs incriminated in 'Travelgate' scandal

MPs are issued with vouchers each year to defray travel expenses between their constituencies and the parliament in Cape Town. Allegations of misuse of the vouchers first surfaced in 2003, leading to an investigation in which more than 100 MPs and seven travel agencies were questioned in 2004.<sup>1</sup> The alleged frauds included the exchange of vouchers for cash; use of vouchers by family and friends; use of airfare vouchers for accommodation and vehicle hire; and MPs holding shares or receiving financial benefits from the travel agents involved. When two of the travel agents involved were closed down, 40 MPs entered plea bargains with the elite Scorpions investigation unit.<sup>2</sup> The first five MPs were convicted in March 2005, with sentences ranging from R40,000 (US \$5,800) or one year's imprisonment, to R80,000 (US

\$12,000) or three years in prison.<sup>3</sup> Under the constitution, an MP can only lose a seat if sentenced to more than 12 months' imprisonment, without the option of a fine. South Africa now finds that nearly a quarter of its legislators have been incriminated in questionable behaviour.

The confidential report of the investigation, undertaken by PricewaterhouseCoopers (PwC), recommended new investigations and legal action. Parliament appointed a special task team to consider its findings and the National Prosecuting Authority (NPA), which oversees the Scorpions, South Africa's elite crime unit, is also investigating. The report points out that the entire system for processing air tickets for MPs was overseen by a single employee, whose work was never checked by her superiors. The PwC report says there was insufficient accounting information available to determine whether MPs were party to the fraud, what the extent of the fraud was and whether MPs received undue benefits from travel agents.<sup>4</sup>

Smuts Ngonyama, spokesman for the ruling African National Congress (ANC), noted that the party will initiate 'relevant organisational disciplinary processes' against its MPs and the opposition has called for convicted MPs to 'do the honourable thing and resign'.<sup>5</sup> In June 2005, the ANC announced that five of the convicted MPs had resigned, while three more who had plea-bargained are no longer in parliament. Another 21 current or former MPs are expected to stand trial in July 2005.

The fallout from Travelgate has been varied. On the one hand, it showed that the anti-corruption bodies and judiciary have a fair degree of independence and are able to carry out their functions without hindrance, even when high-ranking members of the ANC were involved. On the other, there have since been moves to 'muzzle' the Scorpions by incorporating the unit into the regular police force. A judicial commission of inquiry has been convened to determine the Scorpions' future. That decision could signal the strength of the government's commitment to fighting corruption at the highest levels.

### Deputy president removed for alleged bribery

The US \$5 billion arms purchase of 2000 came under intense scrutiny in 2003 when former NPA head Bulelani Ngcuka announced that, although the Scorpions had found prima facie evidence of corruption against Deputy President Jacob Zuma, the state would not prosecute because the case was 'not winnable'.<sup>6</sup> Some interpreted the trial since October 2004 of Zuma's financial adviser, Schabir Shaik, as a trial of Zuma by proxy. When Justice Squires found there was a 'generally corrupt relationship' between Shaik and Zuma, President Thabo Mbeki removed Zuma from his post in June 2005. The NPA announced plans to indict Zuma, whose first court appearance was scheduled for 29 June. Zuma maintains he is innocent, retains the deputy presidency of the ANC

and enjoys wide grassroots support among trade unionists and youth, who claim that he was framed. The judge found that Shaik had solicited a bribe on Zuma's behalf from French defence company Thomson-CSF (now renamed Thales) to protect it from the investigation into the arms deal.<sup>7</sup> The trial also investigated questionable loans totalling more than R1 million (US \$146,000) from Shaik to Zuma.<sup>8</sup>

The consequences for the former deputy president and the country's oversight institutions are far-reaching. Zuma has refused to comment on whether he will enter the race to succeed President Mbeki, but his supporters maintain that the Scorpions' investigation and Shaik's trial were designed to discredit Zuma and stall his presidential ambitions. The trial highlighted weaknesses or abuse in oversight mechanisms in parliament, the director of public prosecutions, the public protector and the auditor general. The Joint Investigation Team (JIT), which first looked into the arms deal in 2001, found that although there was some corruption, it did not significantly influence the contracts.<sup>9</sup> Since the JIT included investigators from all the above oversight bodies, the court verdict calls into question the rigour of their enquiries.

There have been allegations of extensive executive interference in the auditor-general's report.

The opposition Democratic Alliance (DA) has called for the former defence secretary, Pierre Steyn, to testify before the Parliamentary Standing Committee on Accounts (SCOPA). Steyn had resigned from his post, questioning the legality of the arms deal and arguing that the procurement process was irregular.<sup>10</sup>

The fact that the JIT deliberately bypassed SCOPA prevented it from exercising its oversight role. Some commentators feel that this whole episode has weakened SCOPA, transforming it from a rigorous and non-partisan regulator into an arena for political manipulation. DA MP Eddie Trent stated: 'The challenge now is for parliament to

ensure both the executive and the Auditor-General are made to account for their conduct in the arms deal.<sup>11</sup> The Shaik trial highlighted Zuma's alleged failure to declare his loans from Shaik to parliament's Public Accounts Committee.<sup>12</sup>

The Shaik trial also shows up the responsibility of multinational corporations for the 'supply side' of international bribery. The OECD's 1999 Anti-Bribery Convention could mean increased scrutiny for Thales and other companies implicated in the arms deal.

### Whistleblower law found wanting

In March 2005, the deputy director-general in the justice department, Michael Tshishonga, brought a R2 million (US \$292,000) defamation lawsuit against former justice minister Penuell Maduna, alleging that Maduna had called him a 'dunderhead' and 'a relic from the Bantustans' in a televised statement in October 2004. Tshishonga has recently been reinstated as managing director of the Master of the High Court after Maduna suspended him on grounds of contravening the Public Service Code of Conduct.<sup>13</sup>

The office of the Master of the High Court is responsible for the appointment of liquidators of insolvent estates. Tshishonga went public in October 2003 with allegations of corruption and nepotism involving Maduna, insolvency practitioner Enver Motala, and a senior official in the Master's office.<sup>14</sup> Tshishonga accused Maduna of maintaining a corrupt relationship with Motala that had earned the latter fees of R50 million (US \$7.8 million) over a period of two years from appointments he received from Leon Lategan of the Master of the High Court's office. Tshishonga had initially reported his concerns about Motala to the then director general of justice, Vusi Pikoli. When nothing happened, he blew the whistle. Tshishonga was then hauled before an internal disciplinary hearing and Maduna suspended him.<sup>15</sup>

The internal hearing stemmed from the Public Service Code of Conduct, which states

'that an employee must use appropriate channels to air his or her grievances or to direct representations'. The hearing concluded in July 2004 that Tshishonga's statements were protected under the Protected Disclosures Act (PDA) of 2000, the legislation that protects whistleblowers.

However, the justice department refused to reinstate Tshishonga on the grounds that it 'is still studying the findings of the disciplinary hearing and will decide on the course of action to take once this process is complete'. He took the department to Labour Court, which ordered his reinstatement as of February 2005.<sup>16</sup> Detectives arrested Motala on 2 July 2004 on charges of fraud and corruption, together with eight other people. Lategan has been redeployed to 'training and evaluation' pending the outcome of the investigation. South Africans are now waiting to see if Maduna will be prosecuted or will be allowed to walk away. Will Pikoli, recently appointed national director of public prosecutions, be called upon to explain his failure to take action after Tshishonga, then his deputy, informed him of the irregularities? What message is being sent to potential whistleblowers?

Though well intended, the PDA appears to have failed whistleblowers in several instances, not only because it sets out exactly to whom disclosures are to be made, but also how the informant wishes to claim its protection. The act specifies that a whistleblower must make what is referred to as a 'protected disclosure' to a specified group of persons if he or she wishes to avoid suffering 'an occupational detriment'. The manner in which the disclosure is made is also regulated. Government employees, of whom Tshishonga was one, are free to register grievances as long as a prescribed procedure is followed. It was his apparent failure to follow procedures that resulted in disciplinary action being taken against him. The disciplinary offence – and the legal confusion – derives from the public service regulations, and what they proscribe in terms of communicating, especially outside the

public services. There is therefore a tension between the regulations and the PDA.

The jury is still out on the effectiveness of the PDA, as many potentially successful attempts to blow the whistle are likely to

go unreported; the act is up for review by parliament in late 2005. But this case highlights the difficulty of implementing the legislation and the extent to which there is resistance to sanctioning senior officials.

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### Further reading

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Hennie van Vuuren, 'National Integrity Systems: South Africa' (Johannesburg: Transparency South Africa, 2005)

TI South Africa: [www.tisa.org.za](http://www.tisa.org.za)

### Notes

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2. *Mail and Guardian* (South Africa), 28 January 2005.
3. *Mail and Guardian* (South Africa), 18 March 2005.
4. *Mail and Guardian* (South Africa), 4 March 2005.
5. *Mail and Guardian* (South Africa), 18 March 2005.
6. *Sunday Times* (South Africa), 24 August 2003.
7. *The Witness* (South Africa), 29 June 2005.
8. *Mail and Guardian* (South Africa), 26 November 2004.
9. Government of South Africa, 'Joint Investigation Report into the Strategic Defence Procurement Packages', November 2001.
10. *Pretoria News* (South Africa), 31 March 2005.
11. *Pretoria News* (South Africa), 31 March 2005.
12. *Business Day* (South Africa), 15 March 2005.
13. [www.iafrica.com/news/sa/237039.htm](http://www.iafrica.com/news/sa/237039.htm)
14. [www.armsdeal-vpo.co.za/articles07/pickle.html](http://www.armsdeal-vpo.co.za/articles07/pickle.html)
15. [www.info.gov.za/speeches//1999/9911091035a1017.htm](http://www.info.gov.za/speeches//1999/9911091035a1017.htm)
16. [www.info.gov.za.speeches/2004/04080408151007.htm](http://www.info.gov.za.speeches/2004/04080408151007.htm)

## South Korea

### Conventions:

OECD Anti-Bribery Convention (ratified January 1999)

UN Convention against Corruption (not yet signed)

UN Convention against Transnational Organized Crime (not yet signed)

ADB-OECD Action Plan for Asia-Pacific (endorsed November 2001)

### Legal and institutional changes

- The Amendment on Anti-Corruption Act, proposed by the Korean Independent Commission Against Corruption (KICAC) in November 2004, is currently under review

by the Legislation and Judiciary Committee. The act only applies to corrupt practices in the public sector. The broad thrust of the amendment is to expand its coverage to the private sector so as to root out bribe payers, as well as bribe recipients. Among the proposed changes is the **extension of existing whistleblower protection** to employees in the private sector to encourage more of them to come forward.

- In December 2004, the government submitted a draft that provides for the creation of the post of **Citizen Ombudsman** at local government level in order to increase the protection of citizens' rights. One of the main points of debate is whether to make the post mandatory. Some civil society leaders suggest it should be introduced gradually so as to minimise the resistance it is expected to encounter from members of local councils who feel the post threatens their own duties. Another point at issue is the ombudsman's degree of seniority. Since they must be independent, autonomous and neutral from government, it is important to set their credentials and authority high enough for them to be effective, but low enough to be realistic.
- In November 2004, the State Council passed a bill establishing the Corruption Investigation Office (CIO) for **investigating high-ranking public officials** suspected of corruption. The CIO will be created under the KICAC as an independent agency responsible for investigating corruption cases of high-ranking officials, members of the National Assembly, mayors, governors, judges and public prosecutors. At the time of writing the National Assembly still had to debate how the agency will operate, but one of its unspoken aims will be to provide a counterweight to the Prosecutor's Office, the only organisation with power to indict. Proponents argue that complaints to KICAC have decreased because it lacks investigative powers. Moreover, greater efforts are needed to tackle corruption amongst senior government officials who, according to KICAC's annual survey on perceived corruption, are considered most in need of reform. Many experts are sceptical as to whether the body, if established under the presidential KICAC, will be free from political intervention.
- In April 2005, the **Council for the Pact on Anti-Corruption and Transparency** was incorporated under the Korean Pact on Anti-Corruption and Transparency (K-PACT) signed a month earlier. Its mission is to raise the level of cooperation among participants and enforce agendas of inspection, evaluation, dissemination and renewal. Initiated by Transparency International Korea, the K-PACT is a national alliance of representatives from civil society and the public, private and political sectors committed to improving transparency. Encouraging citizens to sign up to a 10-point Citizen's Charter will be the Council's most important task, because the K-PACT will not have much tangible impact without widespread public support (see below).

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### **K-PACT: a people's compact against corruption**

A total of 120 leading figures attended the signing of the Korean Pact on Anti-Corruption and Transparency on 9 March 2005. The event was remarkable for the range of participants, but also because it was the culmination of six months' work to ensure that the K-PACT is a collective effort, involving the private sector,

civil society and government. The rationale behind the K-PACT is that while South Korea has many corruption prevention measures in place, cases of corruption continue to recur. The K-PACT's organisers, including TI-Korea, argue that corruption could be reduced if the population were involved in building a more transparent society, and that public pressure can be an effective deterrent against corruption.

In January 2005, the K-PACT's civil society proponents met in Ankook-Dong and asked the government to join the movement for a social agreement on transparency under the slogan, 'Together! Cleaner!' After the participants delivered the proposal to President Moo-Hyun Roh, chairman of the National Assembly Won-Ki Kim, the Federation of Korean Industries and the Korea Chamber of Commerce and Industry, a number of intersectoral steering committees were formed to discuss the K-PACT in detail, and to divide the workload between the four participating sectors.<sup>1</sup>

As a result, the public sector has effectively undertaken to: adjust the responsibilities of South Korea's anti-corruption agencies; improve local government transparency; expand public participation; reform the Information Disclosure Acts; strengthen anti-corruption awareness; and improve the transparency of public corporations. The political sector agreed to impose limits on immunity; strengthen the National Assembly Ethics Committee; introduce the blind trust system (see below); and eradicate illegal political funding and lobbying. The private sector proposes to improve corporate ethics; reduce subcontractor corruption; strengthen the function of audit committees; protect whistleblowers; enhance information disclosure; and ensure the professionalism of outside directors. Civil society committed its efforts to improving the accountability of civil society and introducing the post of Citizen Ombudsman. To prevent the recurrence of corruption, the K-PACT contains a provision to limit the power to grant amnesties to criminals convicted of corruption.

The K-PACT is only likely to be effective if it captures the imagination of South Korea's citizens. The 10-point Citizen's Charter, which includes statements of intent on aspects of corruption from tax evasion, money laundering and bribery to information on corruption and whistleblower protection, provides some guidelines for popular participation and awareness raising. The K-PACT also includes a Code of Ethics

for Citizens as a standard for implementing principles designed to overcome corruption. Citizens can participate indirectly by signing up to the charter and code, or actively as inspectors to oversee the implementation of the K-PACT. Civil society and the political, public and private sectors have pledged to organise regular inspection groups to evaluate their performance and to publicise progress in implementing the K-PACT.

Political observers and citizens' groups are doubtful that the K-PACT will make much difference to the level of corruption in South Korea, though they hope it will. The Council for the K-PACT, established in April 2005 to ensure cooperation between its participants, is reliant for financial support from the very sectors that it was set up to police, narrowing its room for manoeuvre. Much depends on a sense of popular vigilance as a campaigning tool that carries more weight in Asia than in other regions of the world. Koreans are generally aware of the K-PACT's existence and purpose, though they are perhaps less certain of how to participate. The council's primary mission in the short-term, therefore, must be to 'advertise' what Koreans can do to help.

## Preventing government officials' conflicts of interest

The problem of conflicts of interest at senior government level has been a focus of attention over the past few years, following a series of allegations that private businesses are influencing policy making, either by donating money to political parties and expecting policy favours in return, or because politicians have private interests in particular companies' fortunes. Amendments to ethics codes for elected officials and public servants, including a requirement that high-ranking appointed officials put their stocks into a blind trust during their tenure in office, have been tabled in an effort to address the problem.

There is public pressure for reform. The 2003 JoongAng-EAI poll demon-

strated that one in three people pointed to anti-corruption reform as an immediate social reform need, while on the political agenda, 'collusion between politics and business' (41.3 per cent) topped the list of concerns.

Since 2003, a code of conduct for maintaining the integrity of public officials has regulated conflicts of interest for civil servants, though not elected officials. This code, enacted by presidential decree, specifies the standards of conduct to be observed by both state and local public officials. It covers areas related to the prevention of conflict of interest, the prohibition to use public office for private purposes, and the obligations of neutrality and impartiality. It also regulates the legitimate acceptance of gifts from persons related to public duties. This is a matter of particular importance given that the presentation of gifts forms an integral part of the national culture. But compliance with the code has been weak and KICAC is only looking now at establishing a procedure for handling money, or expensive items received in violation of the code.

The Public Service Ethics Act, a separate document, focuses mainly on the asset disclosure of high-level officials and does not have any provisions regarding conflicts of interest. A draft amendment submitted to the National Assembly would incorporate conflict of interest mechanisms within the act, including a blind trust system.

The purpose of this amendment, submitted to parliament in May 2005, is to require public officials with stock holdings that exceed a certain value to either sell or place the excess stock into a blind trust, unless the relevant commission rules that the stockholding is not related to the work of the official. High-ranking public officials would be prohibited from trading stocks or

influencing stock prices with information acquired while in office, thus enabling them to concentrate on their duties as public servants.

The commission for blind trust assessment will be established under the Ministry of Government Administration and Home Affairs, to examine whether those who are required to disclose details about their property hold stocks connected to their work. The commission will be comprised of nine members, appointed by the president from a shortlist nominated by the National Assembly and Chief Justice of the Supreme Court. Once a contract with a blind trust is entered into, those required to disclose details of their property, as well as other concerned parties, will not be able purchase stocks until the contract terminates.

While the blind trust system is a positive development, it is unlikely to do much to assuage fears that some politicians use their positions of power for personal gain. Indeed, the government's messages on the need to separate political and business interests have not been entirely consistent. In May 2005, President Moo-Hyun Roh decreed an amnesty for business people incriminated in an illegal party funding scandal in the run-up to the 2002 presidential elections.<sup>2</sup> The president – who earlier promised to resign if it were demonstrated that his campaign had received more than 10 per cent of the illegal funds received by his opponent – argued that the amnesty, effective from 15 July, would protect the economy from recession. A number of civil society organisations argue that the private sector's support for the K-PACT was in order to improve the likelihood of an amnesty. Article 6 of the K-PACT states: 'Government should set up systematic mechanisms to limit the presidential power to grant amnesty.'<sup>3</sup>

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### Further reading

TI Korea (South): [www.ti.or.kr](http://www.ti.or.kr)

## Notes

1. For full text, see [www.ti.or.kr/k-pact/](http://www.ti.or.kr/k-pact/)
2. [www.koreaofocus.or.kr/chronology.asp?vol=40](http://www.koreaofocus.or.kr/chronology.asp?vol=40)
3. [www.ti.or.kr/k-pact/](http://www.ti.or.kr/k-pact/)

## Spain

### Conventions:

Council of Europe Civil Law Convention on Corruption (signed May 2005; not yet ratified)  
Council of Europe Criminal Law Convention on Corruption (signed May 2005; not yet ratified)  
OECD Anti-Bribery Convention (ratified January 2000)  
UN Convention against Corruption (not yet signed)  
UN Convention against Transnational Organized Crime (ratified March 2002)

### Legal and institutional changes

- A number of **corruption-related initiatives** have been adopted under the framework of the Plan of Economic Reactivation presented by the Economy and Finance Ministry in March 2005. The Council of Ministers has approved the plan, which includes steps to tighten laws regulating the public sector, improve public access to information, the regulation of contracts for public–private partnership schemes and the adoption of a code of conduct for public contracting.
- The Ministry of Public Administration approved a ‘programme of actions for good government’ in February 2005 which, if it passes the legislature, will regulate **conflicts of interest** by elected MPs and high-level bureaucrats (see below).
- In February, an expert group advising the government on the reform of **mass media laws** called for public television to be ‘fully independent from the government’ with mixed funding and content of public service quality. One of the purposes of the group is to limit the political incumbents’ abuse of state media in their re-election bids.

## Zapatero tries to clean up governance

Spain’s first socialist administration since Felipe González lost power amid a series of corruption scandals in 1996 came to office in April 2004. Prime Minister José Luis Rodríguez Zapatero promised to deliver clean government and to distance his Socialist Party (PSOE) from its past misdeeds. Zapatero lacks an absolute parliamentary majority and needs the support of other parties to push through the laws tabled by his government.

At the heart of Zapatero’s governance programme is a committee of experts, which has proposed measures that would, if applied, help obviate the risks of corruption. Among the most important measures are: the clarification of rules on conflicts of interest, and the monitoring of incompatibilities by an independent body; the declaration of assets and income by politicians and senior officials; reform of party financing laws, including a ban on company donations and caps on campaign spending; the creation of a national agency to evaluate public policy; a law on access to information; and greater

independence for RTVE, the state-owned broadcaster, whose programmes will be monitored for political bias.

Two draft laws approved in early 2005 went some way toward meeting the first two items on this agenda. These were the law on conflicts of interest and a code of good governance. The law on conflicts of interest amends a 1995 regulation that had little effect. The only sanction for breaching it was a note in the official gazette. The body responsible for investigating alleged misdemeanours was hampered by its structural dependency on the central government and usually failed to carry out its tasks. The PSOE had acknowledged the need to reform the law and several draft bills were presented to parliament, without success. The bill currently before parliament reflects recommendations by the OECD, the UN and the Council of Europe.

Though an important step, the draft bill could yet be modified by parliament. Its weakest point is enforcement: the body charged with sanctioning conflicts of interest is subordinate to a ministry and likely to receive low priority. The most important features of the legislation are: a ban on officials taking second jobs in the public or private sectors; a two-year moratorium on officials taking private jobs related to their work for government; the declaration of assets by ministers, secretaries of state and senior officials; and the creation of a new Office of Conflicts of Interest in the Ministry of Public Administration. Where a conflict of interest involving a state contractor is discovered, it will be investigated and published in the official gazette. Those found guilty of breaching the law will be dismissed, lose the right to compensation and be asked to repay any money lost as a result of their actions. A contracting company that hires a high-level public official during the two-year 'cooling-off' period loses the right to bid for public contracts during the same amount of time. Officials who infringe the law will be barred from competing for public posts for between 5 and 10 years.

The second piece of anti-corruption legislation, the new code of government, became effective in March 2005. Successive reports by international bodies, notably the damning report in 2001 from the Council of Europe's Group of States against Corruption (GRECO), pushed for the elaboration of codes of conduct for public officials. Laws exist to proscribe the criminal behaviour of public servants, but what was needed was a set of guidelines to orient public employees when they navigate the greyer areas of their work, such as conflicts of interest.

Under the new code, one of Zapatero's electoral pledges, senior officials will be required to: provide timely public information on the performance of their departments; keep copies of their documents for oversight by subsequent governments; refrain from accepting jobs that infringe upon their commitment to government work; refrain from improper use of power; reject any gift, favour or service that affects the performance of their duties.

The code has a number of weaknesses, however. There is no clear mechanism for legally sanctioning infringements of the code. Moreover, it does not apply to more junior public officials or other state employees, although a complementary code for public servants is at the initial drafting stages.

## Property is a corruption host

On 10 March 2005, police mounted a series of raids on a money-laundering network in the resort town of Marbella, the culmination of an 18-month investigation involving police in seven countries. At its nerve centre was the law firm of Fernando del Valle, alleged to have set up hundreds of shell companies through which multimillion-dollar investments were channelled from groups linked to organised crime. Most of the money had been funnelled into the property sector on the Mediterranean shore, which European police have long recognised as a capital of organised crime.

Police estimate that more than €600 million (US \$770 million) may have been

laundered through the del Valle firm's offices, fuelling a phenomenal boom in the construction industry. Half of all new construction projects in Spain take place on the southern coast, around Malaga, a city with one of the highest unemployment rates in the country. They suspect that many more law firms along the coast are involved in money laundering.

The so-called 'Operation White Whale' marks the first time police have established a direct link between organised crime and Spain's construction and real estate industries. Where it exists, corruption at the local government level, where decisions over land use and ownership are taken, makes the sector an ideal vehicle for laundering money.

A 2003 report by Malaga University's Andalusian Criminology Institute points to a tight relationship between construction magnates and town halls; some of the latter raise much of their municipal funds from issuing licences to the former.<sup>1</sup> Real estate deals require landowners to make payments to local governments that are often above the amount required by law, particularly if the owner wants to develop the property.

A study in 2004 found that almost every mayor in the coastal region was in favour of development agreements as a way of obtaining income.<sup>2</sup> Such agreements leave plenty of room for 'negotiation'. In Majorca alone, municipalities modified agreements on 227 separate occasions. There is little supervision of illegal construction or planning alterations, and sanctions almost never lead to demolition. A report by *La Vanguardia* newspaper suggests that there are tens of thousands of properties in Marbella that fail to comply with building regulations, including some 1,600 properties in Marbella that are illegal because they were built on parkland.<sup>3</sup>

Marbella tops the list of town halls that have suffered corruption scandals in recent

years. Two former mayors, Jesús Gil and Julián Muñoz, were banned from holding public office. Gil approved a zoning plan for Marbella that was illegal and was being investigated on 15 counts of corruption and links to Italian and Russian mafia bosses when he died in 2004. The Andalusian government announced plans in early 2005 to overhaul the Costa del Sol's urban planning process. The new plan would take away zoning and licensing powers from local authorities that consistently fail to implement the appropriate building regulations and laws.

Catalonia has also been in the headlines for corruption involving real estate. In the so-called '3 per cent case', investigators uncovered a connection between corruption in the construction sector and political party financing. In February 2005, the president of Catalonia accused the former government of charging a 3 per cent commission on public works contracted out during its period in office. The sum was allegedly used to finance the coalition that has dominated power for more than 20 years. In March 2005, Catalonia's parliament established a commission to investigate irregularities in public works between 1995 and 2005 that contributed to the collapse of houses in the Barcelona neighbourhood of Carmelo, due to errors in building a metro tunnel. The commission will also look at possible violations to political financing laws.

Suggestions of a link between corruption in the construction industry and party financing were raised in the Marbella scandal as well. No substantive changes have been made to the institutional and legal framework governing party financing in recent years, however, despite the prominent scandals of the 1990s and many electoral campaign pledges.

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Carlos Jiménez Villarejo, 'La delincuencia financiera, los paraísos fiscales y la intervención de los bancos' (Financial Crime, Tax Havens and the Intervention of Banks), mimeograph, 2004  
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## Notes

1. José Luis Díez Ripolles et al., *Prácticas ilícitas en la actividad urbanística. Un estudio en la Costa del Sol* (Illicit Practices in Urban Activity: A Study of the Costa del Sol) (Valencia: Editorial Tirant, Instituto Interuniversitario Andaluz de Criminología, 2004).
2. Antonio Vercher, 'La corrupción urbanística' (Urban Corruption), *Claves de Razón Práctica* 139, January–February 2004.
3. *La Vanguardia* (Spain), 17 March 2005.

## Sri Lanka

### Conventions:

UN Convention against Corruption (ratified March 2004)

UN Convention against Transnational Organized Crime (signed December 2000; not yet ratified)

### Legal and institutional changes

- After a three-month delay in appointing a new chairperson and two new commissioners, the **Commission to Investigate Allegations of Bribery and Corruption** became operational once again in March 2005. Its agenda includes awareness-raising programmes and training on corruption issues for 30,000 graduates recently admitted into the public services. It is also developing a curriculum to train investigative officers in financial auditing, investigations related to control systems, areas of corruption, and analysis of evidence and technique. Certain key reforms are still needed within the commission if it is to develop into a useful tool in fighting corruption. It needs to recruit more investigators with experience in the practice of law, while reducing its dependence on the police for its personnel needs. Another important step would be to allow the commission to initiate investigations on its own accord. The commission's financial status is also problematic since the Treasury may not release the funds allocated by parliament. Finally, a recruitment criterion that all three commissioners must be recruited from among retired judges, police or audit inspectors eliminates the prospects of younger, more dynamic anti-corruption campaigners leading the commission.

### Tsunami aid and transparency

The tsunami that struck 13 of Sri Lanka's 25 provinces on 26 December 2004 affected 1,000 km of the island's coastline. By early February, it was calculated that 30,974 people had died, 4,698 were still missing

and 558,287 displaced. Nearly 100,000 private houses were destroyed and 45,000 partially damaged.<sup>1</sup>

As in other affected countries, it was an unforeseen catastrophe requiring the immediate attention of a large number of international and local actors with no

precedent to fall back on for guidance. A flood of donor aid overwhelmed the country's financial and institutional structures, leading to administrative lapses that paved the way for corruption. On the one hand, the weakness of the accountability framework highlighted the need for intensive public participation to ensure transparency in the use of post-tsunami reconstruction funds. On the other, the lack of a freedom of information law, weak parliamentary oversight and an attenuated anti-corruption body left Sri Lanka in particularly poor shape to monitor funds correctly.

A multitude of allegations concerning unethical behaviour or misappropriation of relief funds has emerged. In April 2005, a local newspaper revealed how World Food Programme volunteers recruited for disaster relief activities were the spouses or relatives of existing staff members with no relevant expertise, but who were accommodated in five-star hotels.<sup>2</sup> Another case highlighted how supplies allocated to the inhabitants of Batticaloa allegedly ended up in Polonnaruwa district through the relief arm of the ruling coalition partner, People's Liberation Front (JVP). Once in Pollanaruwa, the local JVP MP stored the supplies privately and distributed them to party supporters in Giritale, which had been unaffected by the tsunami.<sup>3</sup> In Rambukkana, police seized goods from houses belonging to employees of the social services department that were reportedly stolen from supplies intended for refugees in the Kalmunai area. They included clothing, toys, plastic mats and 5,000 kg of lentils.<sup>4</sup>

Other criticisms focused on the 'task forces' set up to handle the distribution of relief. President Chandrika Kumaratunga appointed several in the immediate wake of the tsunami, but the main coordinating role was given to the Task Force for Rebuilding the Nation (TAFREN). Given the urgency of the disaster, TAFREN members were appointed outside normal parliamentary procedures. A civil society group, the Alliance for Protection of National Resources and Human Rights, expressed concerns that they lacked disaster relief expertise and alleged that private sector

delegates on the task force were politically aligned. At the same time, the government announced it would establish a statutory body to handle all operations in relation to post-disaster activities, sparking criticism that it would be riddled with nepotism and become another 'white elephant', unless a strong legal framework were introduced. To date, the government has given no indication that it will present the proposed law to the public before sending it to parliament. A special Parliamentary Select Committee for Natural Disasters was also formed, although its mandate is restricted to investigating the island's lack of preparedness and recommending steps to minimise damage in the event of a recurrence.

Instead of opening one central account to handle the inflow of funds, the government set up several, raising fears over accountability, lack of coordination between departments and possible duplication of effort. Sri Lanka's limited freedom of information provision played an important role in stimulating these concerns. A draft freedom of information law was due to go to parliament in 2004, but no steps have been taken to proceed.<sup>5</sup> The current disempowerment of citizens and communities affected by the tsunami is not helped by the absence of legislation on disclosure and whistleblower protection that would have gone some way towards rolling back corrupt practices during the earliest phase of disaster relief. Nor did the government consult tsunami victims when the first damage and needs assessments were made. As a result, the reconstruction programme gives the impression of being a top-down, one-size-fits-all affair. Civil society made suggestions for more appropriate reconstruction interventions, but has received little response to date.<sup>6</sup>

The state-controlled media painted a far rosier picture of the success of the reconstruction process than researchers on the ground. A case in point is the allegedly uneven distribution of aid to districts inhabited by Sinhalese and Tamils, particularly in the north-east which is controlled by the rebel Liberation Tigers of Tamil Eelam (LTTE). A

ceasefire three years ago ended the civil war between the LTTE and government, but the post-tsunami relief effort surfaced new tensions. The LTTE asked to receive relief funds directly, citing the government's poor record on corruption as justification, but was refused. Political parties in the south raised the issue that LTTE might use the money to fuel the separatist war. To defuse the situation, the two sides agreed on the formation of a joint mechanism, known as the Post-Tsunami Operational Management Structure (PTOMS), to ensure the equitable allocation of funds to all affected areas. The move was the subject of great controversy in parliament where it met resistance from the Party of Buddhist Clergy, the Muslim parties and the JVP, which claimed the PTOMS 'legitimised' the LTTE (the JVP later quit the coalition over the issue).<sup>7</sup> Under the agreement, all communities are expected to share the nearly US \$3 billion in aid pledged, and will divide responsibility for reconstruction in the Tamil-dominated north and east.<sup>8</sup> The funds are to be channelled through the government, with the World Bank to serve as custodian. The PTOMS ran into further trouble in July 2005 when its constitutionality was challenged in the Supreme Court.<sup>9</sup> The court issued an interim order freezing the process until the conclusion of the case.

Although earlier independent and government reports tended to confirm the swifter pace of reconstruction in the south compared to the north, those most affected by the nightmare wave are generally excluded from the debate on aid relief, due to the lack of investigative capacity in the print and electronic media.<sup>10</sup>

## Slow road to parliamentary fiscal oversight

Corruption was certainly not introduced to Sri Lanka by the tsunami. The lack of accountability and transparency is pervasive, starting with the scrutiny of public funds. Two standing parliamentary committees are responsible for carrying out the legislature's

oversight duties. The Committee on Public Accounts (COPA) reviews the accounts of ministries, departments and local authorities, while the Committee on Public Enterprises (COPE) deals with state-owned corporations and the government's other ventures. Contrary to practice in most Commonwealth countries, Sri Lanka does not have a budget or estimates committee to deliberate the national budget.

Legislative scrutiny of public funds is poor because the committees meet in camera, to the exclusion of the media, general public and even fellow MPs. 'The government is not required to respond to the recommendations of these committees within any stipulated period of time', according to one civil society observer. 'This leaves the accountability loop open.'<sup>11</sup>

Nor do the committees have the adequate technical capacities or incentives to enforce accountability. A positive move occurred in September 2004 when the membership of COPA and COPE was increased to 19, widening participation in the monitoring process. The two committees also have longer, uninterrupted sittings. This has had little visible impact upon accountability, however. Provisions were made in September 2004 for COPA and COPE for the creation of sub-committees to handle different tasks simultaneously, but they have yet to be appointed and, in addition, they would suffer from inadequate secretarial provision and the absence of a filtering process for prioritising items for discussion. To help address these issues, the World Bank and UNDP initiated a capacity-building programme in early 2005, based on reports prepared by Ernst and Young. Two consultants have been recruited to provide COPA and COPE members with advanced training, financed by the Treasury.

Another problem is the large proportion of ministers and deputy ministers to MPs; at this writing it stood at 81, out of 225 parliamentarians. One by-product of such concentration of MPs in office is that it dramatically dilutes legislative scrutiny of executive activities. Provisions were made in the parliamentary period January

2002–February 2004 for both committees to be headed by an opposition MP, but the chairman elected to COPE, Rohitha Bogollagama, defected to the ruling United Peoples Freedom Alliance (UPFA) in November 2004. He is now technology minister, but continues to serve as chairman of the Parliamentary Oversight Committee, raising concerns about his independence – and possible lack of scrutiny in his own ministry.

A number of diagnostic studies on parliamentary oversight mechanisms and the auditor general's department were conducted in recent years, leading to the drafting of a new Audit Act at the end of 2003 that aims to strengthen the powers and independence of the auditor general, and make the position an 'officer of parliament'.<sup>12</sup> Discussions with the strong union in the auditor general's department are continuing, while the finance ministry and cabinet have still to approve the draft before it is submitted to parliament. Thus, contrary to Commonwealth practice, the auditor general remains a public officer and subject to the administrative control of the executive.

The auditor general's reports are customarily referred to the two oversight committees for review and proposed recommendations. In the past, delays in submission meant the reports were usually outdated by the time they came up for consideration with the result that committees could not deal with issues in a timely manner. In addition, their contents were not debated in parliament. In September 2004, the auditor general began forwarding preliminary findings to the committees to facilitate a more updated review practice. The reviews are still not very useful, however, due to the infrequency of meetings, narrow focus on excess expenditure and the lack of follow-up by the ministries concerned.

With regard to the Fiscal Management (Responsibilities) Act of 2003, the government fulfilled its duties by submitting two reports on fiscal policy and performance in 2004.<sup>13</sup> However, the reports were considered too technical, while public awareness of the act's provisions is minimal. Civil society has so far taken no initiative to participate in the process of scrutiny, despite the provisions made for this in the act.

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## Switzerland

### Conventions:

Council of Europe Civil Law Convention on Corruption (not yet signed)

Council of Europe Criminal Law Convention on Corruption (signed February 2001; not yet ratified; Additional Protocol signed June 2004)

OECD Anti-Bribery Convention (ratified May 2000)

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (signed December 2000; not yet ratified)

### Legal and institutional changes

- A new **law on freedom of information** entered into force in April 2005. Until then, the principle of non-disclosure was paramount, every document was considered confidential and people had to give reasons for seeking access to records. The list of exemptions to the new law includes limits to protect public or private interests, such as commercial and industrial information; the contents of penal proceedings; and information related to internal or external security. The authorities are required to stipulate the legal context of any official denial of access.
- In March 2005, the National Council (lower house of parliament) passed a law requiring companies quoted on the stock exchange to **disclose the salaries** paid to individual members of their boards and the total amount paid to management. The same principle will apply to other executive benefits, such as bonuses, stock options, loans, profit sharing plans, assisted mortgages and all other components of payment. The bill is aimed at protecting shareholders by increasing transparency. The law passed the Council of States (upper house of parliament) in June 2005.

## Switzerland ‘redefines’ money laundering

Instant transactions make all financial centres vulnerable to playing host to money launderers, but Switzerland is particularly at risk since around 30 per cent of all internationally invested private assets are managed from there.<sup>1</sup> Recent legal proposals, however, include a selective definition of the underlying criminal activity required for a transaction to be categorised as ‘money laundering’ that could be seen as an incentive to certain kinds of illegal operations.

Switzerland is a signatory nation of the OECD’s Financial Action Task Force (FATF), the main forum against international criminal money flows, and international cooperation has helped in its fight against money laundering. However, the financial authorities have some way to go. A recent OECD report recommended that Switzerland strengthen its money-laundering oversight, specifically calling for greater transparency, the independence of the intermediaries and a tighter deadline for reporting suspicious transactions.<sup>2</sup> In January 2005, the finance ministry launched a consultation round that is hoped will produce new legal measures to ensure full compliance with the 2003 revision of FATF’s 40 recommendations. The proposals extend the list of crimes connected to money laundering to include commercial piracy, counterfeit goods, insider trading, human trafficking and some aspects of smuggling. The list of intermediaries subject to due diligence will be extended to include dealers in art, precious stones and precious metals, and property managers.

In March 2005, the Council of States (upper house of parliament) accepted the Federal Council’s draft proposal to bring into Swiss law the Council of Europe Criminal Law Convention on Corruption. While this was a positive step, dangerous loopholes are built into the draft. Corruption involving private entities (for example, a Swiss firm that bribes a foreign firm to buy its goods or services) is categorised as a simple offence (punishable by fines or imprisonment of up

to three years) and not a crime (sanctioned with imprisonment of up to 20 years). This has serious consequences because, under the Swiss criminal code, the money must have derived from a crime for laundering to have occurred. Thus, funds transferred and traceable to an offence – such as bribery among companies or the case of cigarette smuggling mentioned below – are not considered money laundering under Swiss law. The same problem arises with funds arriving in the country with the purpose of evading another jurisdiction’s tax system. Tax evasion has proven to be a very effective means of detecting money laundering crimes, but the Swiss authorities cannot respond to foreign requests for information about suspected evasion because of domestic banking secrecy regulations and the narrow definition of ‘crime’. Finally, with regard to domestic oversight of money laundering, when an intermediary accepts money arising from private corruption, the intermediary is not required to report it under Swiss law. Transparency International Switzerland views this situation as seriously deficient and hopes that the National Council (lower house of parliament) will recategorise private corruption as a crime in autumn 2005, when it is scheduled to discuss the draft law.

A positive development came in November 2004 when finance minister Hans-Rudolf Merz approved a plan to bring the oversight of money laundering under a single regulator, provisionally entitled the Federal Financial Market Authority (FINMA). Originally proposed in 1998, the project was delayed due to the standard, lengthy consultation with other official agencies and private interest groups that accompanies any legislative reform in Switzerland. It is now due to be implemented in two years. Responsibility for oversight of money laundering is split between the finance ministry, the Swiss Federal Banking Commission, the Federal Office of Private Insurance, the Swiss Federal Gaming Board and 11 self-regulating bodies supervised by the finance ministry. According to the finance minister, the new entity will allow the regulator to deal

better with the wide scope of transactions and improve communications between the various anti-money-laundering agencies.

The Money Laundering Reporting Office Switzerland (MROS) is the Swiss version of a financial intelligence unit. The organisation's function is to insulate the prosecution and enforcement agencies from intermediaries while simultaneously protecting their client-banker confidentiality commitments. Under the Money Laundering Act of 1997, intermediaries (including banks, lawyers and accountants) must file a suspicious transaction report with the MROS whenever they perceive one, or risk losing their licence. The number of reports actually filed is low compared to other major financial centres, suggesting widespread non-compliance within the country's 7,000-strong financial services sector, and the ultimate sanction has never once been imposed. MROS referred 821 suspicious transactions for further investigation in 2004, compared to 863 a year earlier. Significantly, with just eight permanent staff responsible for oversight in one of the world's largest financial centres, the MROS is vastly understaffed.

According to MROS, 11 per cent of the 821 cases filed for criminal investigation in 2004 involved sums larger than 1 million Swiss francs. The outcomes of the ensuing investigations are less widely publicised. The judgment in March 2002 against Pavel Borodin, currently State Secretary of the Union of Russia and Belarus, resulted in a fine of just US \$177,000, or the equivalent of 0.3 per cent of the funds he is alleged to have siphoned out of Russia, according to an investigation by a Swiss judge. The lack of cooperation from the Russian authorities proved to be the case's undoing.<sup>3</sup> The crucial role of international cooperation is also indicated by the fact that referrals outnumber domestic requests by two to one: suspicious transactions referred onward after foreign requests amounted to 1,701 in 2004, compared to 821 from domestic sources. In 2002, the finance ministry returned US \$77 million of laundered funds to the government of Peru from accounts belonging

to former intelligence director Vladimir Montesinos after it was determined that they had resulted from criminal activities. Another important case involved the fortune accumulated by the late Nigerian dictator Sani Abacha. The Supreme Court ruled in February 2005 that US \$458 million were illegally obtained and ordered the amount returned to Nigeria (in addition to US \$200 million returned in 2003).

Not all the money-laundering news has been positive. The problem of legal interpretation resurfaced when a court in 2001 gave a suspended sentence to an Italian who had smuggled 1,000 tonnes of cigarettes a month in defiance of EU rules and laundered the proceeds in Switzerland. Under existing law, laundering criminal assets from smuggling is only a fiscal offence, rather than a crime. The MROS annual report for 2004 provided for the first time an account of the cases it has referred for prosecution since the law entered into force in 1998. Of the 2,708 transactions reported, only 47 convictions were obtained and 1,397 cases are still in the courts. More worrisome is the fact that there is an unknown number of cases that have not been reported to MROS.

Switzerland has made progress in devising legislation and designing institutions to combat money laundering, but international cooperation is essential to improve the number of convictions, and since two crimes must be proven (the predicate crime and money laundering), this is an especially difficult task. What is also required is more insistent pressure on intermediaries to report suspicious transactions, and to overcome their tendency to report cases by new customers, rather than by established clients. MROS is to be congratulated for reporting the status of cases referred in the past, but the numbers show a disturbing trend toward the suspension of investigations before they get to court. The rate of successful prosecutions must also be increased if Switzerland is to gain a credible reputation as a foe of money laundering.

Above all, the National Council must be encouraged to consider private corruption a

crime. If the current draft law is allowed to stand, some cases of money laundering will continue to be ignored due to the narrow categorisation of the crime under the Swiss penal code.

## Political finance in the spotlight

The principle that politics is voluntary and unremunerated is paramount in Switzerland. Parties do not benefit from government funding, apart from small contributions to party factions, and politicians work on a voluntary basis, while supporting themselves through other jobs. Initiatives to professionalise parliament have tended to fail because of the prevailing opinion that politicians choose their profession through conviction, rather than for financial gain. As a result, Swiss politicians finance their own election campaigns and find their own sponsors. Nor is there any requirement to declare the source or amount of any financial aid they receive. This makes Switzerland's party funding system one of the murkiest in Europe.

Since 1 December 2003, a new law on the Federal Assembly has introduced a little more transparency. Parliamentarians are now required to declare their membership of administrative boards and all consultant activities to prevent conflicts of interest arising. If they fail to publish the information, they are subject to removal or exclusion from their positions for a period of six months. But watchdog groups, including TI Switzerland, point out that the new law does not go far enough since it does not address the question of parliamentary sponsorship. The existence of this loophole was highlighted by last year's 'donation scandal'.

In summer 2004, it was alleged that Anita Fetz and Roberto Zanetti, both Socialist Party MPs, had not declared their membership of the board of Pro Facile, a foundation that runs investments. This left them open to disciplinary action, but the case blew into a scandal because the foundation had been applying the controversial methods

developed by hedge-fund manager and socialite Dieter Behring to the 'donations' it received. His system promised investors a return of 8 per cent, half of it accruing to the foundation. This fell way beyond the conventions of good foundation management. In October 2004, Behring was arrested on suspicion of investment fraud involving hundreds of millions of francs.<sup>4</sup> Behring had allegedly been a major backer of Fetz's political ambitions, giving large sums to her re-election campaign. Behring later went to prison for six months before being released on bail in April 2005,<sup>5</sup> and Fetz resigned from office after the media broke the story.

For the notoriously discreet Swiss, the 'donations scandal' was a *grande affaire*. Why had Fetz, previously considered of open and honest character, not declared her membership of Pro Facile in the first place? As board member of two respected banks, why had she not resigned immediately instead of waiting for the media to expose the foundation's alleged fraudulent practices? Why had she not admitted that Behring was her election sponsor?

The scandal also focused attention on the flaws of Switzerland's existing system of political financing. Until there are regulations that require politicians to declare donations and other support, the space for irregularities and corruption will persist. Until parties are obliged to account for their use of funds and disclose the identities of their donors, it will be impossible to decide if they are acting according to their own principles or in the interests of their sponsors. It would be naive to believe that no return service is expected for the large sums that sponsors invest in politicians' election campaigns.

In spite of the damage to their profession caused by the 'donations scandal', not one of the major parties has come up with proposals to increase the transparency of private money in the political system. This, no doubt, reflects a reluctance to disclose their own funding sources.

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## Further reading

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## Uganda

### Conventions:

- AU Convention on Preventing and Combating Corruption (ratified August 2004)
- UN Convention against Corruption (ratified September 2004)
- UN Convention against Transnational Organized Crime (ratified March 2005)

### Legal and institutional changes

- The government issued a White Paper in October 2004 recommending that the Inspector General of Government (IGG) be given more latitude to arrest and prosecute persons involved in **corruption or abuse of public office**. This would amend sections of the Leadership Code Act of 2002 to bring it in line with the 1995 Constitution, which grants the IGG prosecutorial powers. A previous constitutional ruling in May 2004 trimmed the IGG's powers. To strengthen the institution, the White Paper proposed the creation of an anti-corruption tribunal to try cases. The agency was re-energised after the appointment in January 2005 of a new IGG, Justice Faith Mwendha, and her deputy, Raphael Obudra Baku. They instructed all MPs and political leaders to declare their wealth before the end of March 2005 and warned that those who did not comply would face legal action (see below).
- In July 2004, the Directorate of Ethics and Integrity (DEI) launched a four-year **strategy to combat corruption and rebuild integrity in public office**. The programme, due to

run from 2004 to 2007, aims to improve the enforcement and coordination of existing law and to ensure that the public is actively involved in the fight against corruption. The DEI has drafted whistleblower protection legislation that will be submitted to parliament after the presidential and parliamentary elections in March 2006. The DEI is also reviewing the Prevention of Corruption Act 1970 with a view to presenting a new version to parliament.

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## Institutional failure looms

Despite an extensive legal framework and ample opportunity for participation by media and civil society, the lack of political will to curb corruption has led Uganda to the brink of institutional failure. Corruption by politicians and officials is one of the biggest challenges facing the country.

One case involved Major Roland Kakooza Mutale, a senior adviser to President Yoweri Museveni who made a major contribution to his re-election in 2001. A May 2003 report by the Inspector General of Government recommended that Mutale be sacked for refusing to declare his wealth under the 2002 Leadership Code Act. He was relieved of his post as adviser soon afterwards.

This was the start of a widening rift between the IGG and the government. Senior officials were already disgruntled to find their wealth and possessions published in the media in 2002. Mutale took the matter to court and got President Museveni to swear an affidavit in his support, effectively condoning his refusal to comply with the law.<sup>1</sup> By March 2004, a constitutional court ruling in Mutale's favour had contrived to render entire sections of the Leadership Code Act null and void. This duel between the IGG and the government is a clear demonstration of a flagging institutional system in Uganda. It also exposed a weakened judiciary that is unable to temper the powerful executive.

A second incident occurred in May 2004 when the solicitor general refused to surrender files on the James Garuga Musinguzi case when asked by the IGG. The IGG had expressed alarm at the amount of compensation awarded by the government to Musinguzi, a city tycoon and rancher. Musinguzi was due to receive US\$13 billion

(US \$7.4 million) as compensation for the confiscation and redistribution of his ranches in Rakai. The case was handled out of court through an 'amicable arrangement' between the solicitor general's office and Musinguzi.<sup>2</sup> When the solicitor general refused to hand over the file, the ombudsman ordered his arrest. Mutale promptly mobilised a platoon of soldiers to protect him.<sup>3</sup> This interference in the execution of the IGG's duties was a serious breach of the 1995 constitution which states that the IGG 'shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority and shall only be responsible to parliament'.<sup>4</sup> The fact that Mutale could carry out such an operation without legal or political backlash indicates how cosmetic the government's commitment is to implementing the rule of law. It also raises questions about the IGG's survival.

Another negative milestone was passed in August 2004 when the High Court nullified a report into allegations of corruption at the Uganda Revenue Authority.<sup>5</sup> A petition was issued by two members of the commission of inquiry after a disagreement with the chairperson over sections in the report. Instead of allowing further inquiries to be made regarding the contested passages, the court decided to expunge the document altogether. The decision reflected a failure of the court's moral responsibility to bring acts of corruption to justice; it also meant that no further legal action could be taken against those implicated. Following cases like these it is no surprise that, according to various auditor general reports from 2001 to 2003, more than US\$2 billion (US \$1.1 million) is lost to corruption every year.

A further setback nearly occurred in September 2004 when the cabinet proposed

to the Constitutional Review Commission that the offices of the Ombudsman and the Human Rights Commission be merged, a move that would have stripped the latter of its powers of prosecution. The proposal was dropped after protests from public and civil society organisations questioning the government's commitment to fighting corruption.<sup>6</sup>

Uganda's institutions are facing challenges of a systemic nature, making them subject to the whims of politics. The constitution of 1995 is a case in point: while clearly providing for presidential term limits and the question of succession, parliamentarians voted to scrap term limits in July 2005, paving the way for President Museveni to seek re-election in March 2006. The decision to amend the constitution sets a bad precedent that a hallowed document can be altered to suit the political climate.

### Corruption 'decentralised' along with government functions

Political corruption at local government level has increased since 1996 when the new government ushered in a process of decentralisation of governance to local councils under the 1997 Local Government Act. Uganda's local governments have responsibility for revenue collection, planning, resource allocation and service delivery, including primary education, primary health care, water and sanitation, rural roads and agriculture. Such weighty responsibilities combined with weak legislation, lack of oversight, poor remuneration, costly campaign bids and an electorate that expects favours from politicians, rather than transparent government, provide ample opportunities for corruption.

In some cases, local politicians have virtually taken over the award of tenders, especially for the construction of schools, dams and health units, usurping the mandate of district tender boards. In a tender for electrical installations for the

Kasaali maternity ward in Rakai district in 2003–04, the only pre-qualified firm, Kamungolo General Services, was not awarded the contract, which went instead to a firm that had not even put in a bid.<sup>7</sup> In Kabira sub-county in 2004, the construction of teachers' residences for Bukaala Primary School was awarded before a call for tenders was issued, making it effectively futile for other contractors to bid.<sup>8</sup>

Decentralisation was aimed at offering citizens increased participation at the local level. But a detailed study of corruption in local government found that people's confidence has been eroded, and the quality of public infrastructure and services is deteriorating.<sup>9</sup>

The main channels of political corruption in Uganda's local government bodies are: influence peddling; diversion of resources; giving contracts and jobs to supporters and family members; presenting bogus allowance claims; colluding with civil servants to embezzle resources; bribery; presenting false documents in order to qualify for elected or competitive positions; using public vehicles for personal work; and political interference in decision-making.

The position deemed most corrupt by the general public is that of district chairman, which wields so much power that it has virtually usurped local boards, commissions and civil servants, including tender boards and public accounts committees, in deciding resource allocations. Residents of Baitambogwe and Buwaya in Mayuge reported that many politicians and council or board members have new properties and expensive lifestyles, yet they have no other clear sources of income to back up such wealth. Politicians feel pressure to amass wealth before leaving office so that re-election bids can be financed, and so they can survive if not re-elected.

The health and education sectors are worst hit by local-level corruption. The Muggi Health Centre II in Buwaya sub-county, Mayuge district is one example. There, the local MP halted construction

of the health facility in 2002 because he wanted it built at Kasutaime – just two kilometres from an existing health centre – an area where he was seeking to bolster his political support. Also in Mayuge district, local councillors interfered in the selection process for 30 nursing assistants in 2003,<sup>10</sup> handpicking their favourites regardless of whether minimum qualifications were met. In the education sector, there are many examples of sub-standard construction across the districts studied, and of scholarships going to relatives of members of the district bursary commission, or district councillors.

An important causal factor is that local government positions are poorly paid and there are few institutional and legal constraints to prevent politicians from embezzling money. Indeed, the Local Government Finance and Accounting Regulations and the Local Government Act 1997 exempt politicians from accounting for public resources. Civil servants must account for the budgets they control, but politicians who may have influenced or pressured civil servants to misuse funds cannot be held liable. This problem is further compounded

by a weakness of the Local Government Act, which gives politicians authority over civil servants, including recruiting them.

The private sector, as main supplier of goods and services to local government, further fuels corruption. The fact that much of the private sector is informal makes it difficult to tackle bribery. Public sector and donor-sponsored programmes aimed at improving performance, sensitising the private sector to the problems of corruption and improving the regulatory framework have had little effect.

There is a clear need to fight corruption and break a cycle of despondency in which voters are reluctant to ‘waste time’ holding politicians to account, rather than demanding immediate, if piecemeal, returns for votes or support.<sup>11</sup> Initial steps must include improving the legal and institutional framework so that politicians do not hold sway over civil servants, and civil servants cannot determine outcomes of tendering process or other resources allocation mechanisms that are vulnerable to corruption. Politicians must also respect the rule of law and declare assets before and after taking up office.

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8. Transparency International Uganda, *The Impact of Political Corruption*.
9. Ibid. Research took place in 2004–05 in four districts: Kampala, Mayuge, Ntugamo and Rakai.
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## Ukraine

### Conventions:

Council of Europe Civil Law Convention on Corruption (ratified March 2005)

Council of Europe Criminal Law Convention on Corruption (signed January 1999; not yet ratified; Additional Protocol signed May 2003; not yet ratified)

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (signed December 2000; not yet ratified)

### Legal and institutional changes

- Although delayed, plans to set up an independent body, the **National Bureau of Investigation**, remain a top priority. In March 2005, the government set up a working group on the development of a concept for the bureau, which will focus on fighting corruption. It remains to be seen, however, how the creation of this agency will complement existing anti-corruption bodies.
- In April 2005, an **anti-smuggling programme** was approved by cabinet to address the problem of bribing to avoid customs duties and import taxes. A 'single window' concept was introduced with instant dismissal for anyone reported demanding or receiving a bribe (see below).
- In May 2005, the president issued an edict regarding the liberalisation of entrepreneurial activities and state support of entrepreneurship. The aim is to review laws, in order to eliminate conflicting regulation, licensing and other procedures that affect **business activities**. These are often so confusing and uncertain, in terms of relevance, that the only way to satisfy all the requirements one is presented with is to employ an intermediary 'expert' who will pay an inevitable bribe. It is therefore hoped that this new edict will help curb corruption.
- In June 2005, the government approved an action plan for 2005 for the **adaptation of Ukrainian legislation to that of the European Union**. This includes a series of policy commitments to uphold European norms and values in the political, social and economic spheres, all of which would be instrumental in reducing corruption (see below).
- In July 2005, the president issued an edict regarding the **dissolution of road traffic police** structures, after months of frustration at the lack of obvious progress in reform and several public warnings (see below).

## Yushchenko's new anti-corruption measures: the first six months

In January 2005, Viktor Yushchenko was inaugurated as the new president marking the end of the 'orange revolution'. This had been initiated by widespread popular protest in response to allegations of massive corruption, voter intimidation and direct electoral fraud during Ukraine's presidential election in November 2004. In the former regime, despite the fact that corruption was endemic, existing legislation appeared to support the hypothesis that corruption was not a problem and any transgressions were considered to be minor. If laws were applied they were generally misused to intimidate opponents of the regime, such as opposition activists or journalists, while criticism from foreign investors was ignored. Moreover, local business people who spoke out were often harassed by state bodies, including the tax authorities. Transparency and openness were thereby discouraged and foreign investment dwindled to a mere trickle of what should have been achieved by a country with the size and potential of Ukraine. One principal driving force behind the 'orange revolution' was the sense of public outrage at the extreme methods used by the outgoing corrupt regime to remain in power.

In June 2005, one of the main themes of the roundtable conference organised by the World Economic Forum was the issue of corruption in Ukraine. Ten action steps were proposed to the president and all appeared to be accepted with enthusiasm. The first nine steps have an indirect impact on corruption, but the tenth deals specifically with corruption in the following way: blacklisting companies; basing future appointments to the civil service and judiciary on merit and not on politics; raising salaries of civil servants to reduce incentives for corruption; introducing a new system of public procurement such as an efficient online system; and disclosing salaries and business affiliations of senior members of government, judges and legislators. It remains to be seen, however, how these

recommendations will be implemented concretely in the near future.

President Yushchenko now faces a huge challenge to implement successful reform, while the expectations of his electorate to address rampant corruption hang heavily on his shoulders. Various initiatives have been pursued by the new government with varying degrees of success. The most notable is a new anti-smuggling programme approved by cabinet in April 2005 to address the problem of bribing to avoid customs duties and import taxes. A 'single window' concept was introduced with instant dismissal for anyone reported demanding or receiving a bribe. This was initially reinforced by officers of the security services observing customs officers while performing their duties. In the first month of this operation, the revenue from customs reportedly doubled, but it did cause delays. Customs duties on some items have been dramatically reduced, but it is clear that all duties need to be reduced to a level that renders the payment of a bribe uneconomic.

At the June roundtable conference, President Yushchenko repeated his earlier declaration that neither he nor his government would steal from the Ukrainian people and then made a commitment to make public the financial declarations of his ministers and top officials. Many civil servants at all levels have grown accustomed to supplementing their meagre salaries through corrupt means and have assets that could never have been acquired through previously declared personal incomes. Yet no formula has been found for providing them with reasonable remuneration. However, there is a limit to what the government can afford in terms of public sector wages and other measures could also be explored. In addition, it probably needs some form of amnesty to get the declaration process going in a thoroughly honest and open manner.

In July 2005, the road traffic police was restructured, after months of frustration at the lack of obvious progress in reform and a number of public warnings. It is not yet clear how this restructuring will work out, but it

seems to reflect a similar initiative taken in Georgia, where a completely new force was recruited and trained in the space of a few months and then paid appreciably more than under the previous regime.

In the meantime, the opening up of the media is currently under way, one of the most important measures a state can take to expose corrupt behaviour to public scrutiny and hold officials to account. The media operates more freely in contrast to the previous regime, when intimidation, pro-government ownership, favouritism in granting broadcast rights and frequencies, and government press guidance were the order of the day. However, self-censorship and concentrated ownership of the media are still a concern. A confidential hotline for people wishing to report instances of corruption has also been established.

Perhaps the most significant change to come out of the 'orange revolution' was a series of policy commitments to uphold European norms and values in the political, social and economic spheres, all of which could be instrumental in reducing corruption. The key document outlining this is the EU-Ukraine Action Plan, but the Ukrainian authorities have gone beyond the commitments contained in the plan and stated their intention to fulfil all the Copenhagen criteria for EU membership, with the hope of submitting an application in three years' time. This has far-reaching implications for the relationship between

the state and society, for the development of democratic institutions and a democratic political culture, for the expansion of civil society and for the protection of human rights. Most studies show that these factors are strongly associated with lower levels of corruption.

Whilst Yushchenko's commitment to route out corruption is well publicised, his ability to achieve lasting change depends on whether his 'pro-reform' team will achieve a working majority in the March 2006 parliamentary elections. Currently, parliament is still dominated by powerful business groups who are quite prepared to reject government initiatives if they do not suit their interests. This is due to the fact that the different personalities with varying political agendas only came together to unseat Kuchma's previous corrupt regime. So there is frequent public controversy between MPs and it is difficult to see how the prime minister can run an effective cabinet when there is no dominating vision. Another problem is the lack of evidence that acts of corruption committed by the previous regime or during the fraudulent presidential election process will be pursued and prosecuted effectively. Unless there are exemplary prosecutions of important individuals, the public will be hard pressed to believe that any real change has taken place. Nevertheless, the authorities must avoid perceptions of political retribution so strongly associated with the previous government.

*Transparency International*

### Further reading

TI Ukraine: [www.transparency.org.ua](http://www.transparency.org.ua)

## United Kingdom

### Conventions:

Council of Europe Civil Law Convention on Corruption (signed June 2000; not yet ratified)

Council of Europe Criminal Law Convention on Corruption (ratified December 2003; Additional Protocol ratified December 2003)

OECD Anti-Bribery Convention (ratified December 1998)

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (signed December 2000; not yet ratified)

### Legal and institutional changes

- In July 2004, the Cabinet Office announced the appointment of Sir Patrick Brown, a former permanent secretary, to undertake a review of the arrangements for **senior civil servants** moving to jobs in industry, including the requirement for a cooling-off period before jobs are taken up. Sir Patrick's terms of reference require him to 'ensure that [the rules] are compatible with a public service that is keen to encourage far greater interchange with private and other sectors'.<sup>1</sup> His report will be published in 2005.
- The government published its updated strategy to **fight money laundering** in October 2004.<sup>2</sup> However, the new strategy did not address deficiencies in the UK's anti-money-laundering regime, notably the lack of supervision of trusts and company service providers (see below).
- In December 2004, the Export Credits Guarantee Department (ECGD) revised the strengthened procedures to combat **bribery and corruption** that it had adopted in May 2004. This followed lobbying by major customers and industry bodies, and has the effect of significantly weakening the provisions (see below).
- The Freedom of Information (FOI) Act came into force on 1 January 2005. It provides a general right of **access to all information** held by public authorities in the United Kingdom (though separate legislation applies to Scotland). A request for information is made directly to the public authority holding the information. There are 7 absolute and 16 qualified exemptions. Absolute exemptions include information supplied by, or relating to, bodies dealing with security matters, where disclosure would breach parliamentary privilege, and where disclosure would constitute a breach of confidence. Qualified exemptions include the need to safeguard national security; information relating to the formulation of government policy; ministerial communications and advice by law officers; and information held by public authorities with audit-related functions. There is a right of appeal against any refusal to release information to the Information Commissioner.

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### Too little priority given to foreign bribery and corruption

The OECD's Phase Two Evaluation of the United Kingdom's Application of the OECD Anti-Bribery Convention was published in March 2005. While it complimented the United Kingdom on some progress made, its general tenor was critical and conveyed a sense of disappointment at the low level of priority accorded to the subject of foreign bribery, reinforcing a perception that there

is a lack of will in government to address the problem.

The OECD regretted that legislative changes to reform the corruption laws had not been enacted, but acknowledged an attempt to make progress in 2003 by consulting an all-party Joint Parliamentary Committee (JPC) on a draft corruption bill. The OECD found no indication, however, of when there might be sufficient time in the legislative programme for it to be enacted. The JPC strongly criticised the draft bill, arguing that it would not be 'readily under-

stood by the police, by prosecutors, by jurors and by the public, including – especially – the business and public sector communities, and their advisers, both here and abroad'.<sup>3</sup> Anti-corruption laws continue to derive from ancient common law offences and statutes that were adopted between 1889 and 1916, and updated for overseas bribery offences by part 12 of the Anti-Terrorism Crime and Security Act of 2001.

In the six years since the United Kingdom ratified the OECD Convention, not a single company or individual has been indicted or tried for the offence of bribing a foreign public official, though several UK companies have allegedly been implicated. It took until February 2002 for foreign bribery to be effectively criminalised. The OECD report expressed concern that 'the very large number of investigative bodies has resulted in excessive fragmentation of efforts, lack of specialised expertise, lack of transparency both for the public and investigative authorities, and problems in achieving coherent action'. At present, initial reports of foreign bribery are channelled to the National Criminal Intelligence Service (NCIS); cases are then passed to the Serious Fraud Office (SFO) for vetting, but if the SFO does not accept a case for investigation and prosecution, it is passed to one of 43 police forces. The OECD would prefer to see a single body, such as the SFO, holding centralised responsibility for both investigation and prosecution.

The government has taken action to remedy a similar problem of fragmentation in the fight against serious organised crime – in particular large-scale drug and people trafficking – which it sees as a priority. Legislation was passed by Parliament in April 2005 to establish the Serious Organised Crime Agency (SOCA), which will absorb the NCIS, the National Crime Squad and parts of Customs and Excise. The SFO is already under-resourced, however, and there is concern that setting up SOCA may weaken its ability to pursue overseas corruption cases since both agencies draw on a limited pool of experienced personnel.

The OECD report suggests there is a lack of awareness of the OECD convention and the foreign bribery offence among law enforcement agencies, judicial authorities and UK officials involved with UK companies operating abroad. It recommends more effort to raise awareness among these groups, and also among trade unions and small- and medium-sized enterprises that do international business. It recommends measures to publicise the conditions under which parent and affiliate companies can be liable in connection with foreign bribery, and to encourage UK companies to report to the appropriate authorities any instances of foreign bribery they encounter in their operations.

The OECD report welcomed the confiscation provisions of the Proceeds of Crime Act 2002 in the context of combating money laundering and the theft of state assets. But the act requires all confiscated sums to be paid over to the Treasury, and there is no requirement for the whole of any confiscated sum (with or without a reasonable deduction for costs) to be repatriated to the country of origin. However, the United Kingdom can deal with asset sharing on an ad hoc, purely administrative basis. The Home Office has an agreement with the Treasury to return up to 50 per cent net of costs without further authority.

The OECD examiners were concerned that the lack of a clear definition of what was understood by the UK authorities to constitute a facilitation payment to foreign public officials could result in a much wider range of payments being effectively exempted than was intended by the convention. Furthermore, responsibility for investigating defence contracts where the Ministry of Defence (or the Defence Export Sales Organisation) is party to the contract rests with the Ministry of Defence police, a situation that clearly gives rise to potential conflicts of interest. Finally, the Crown Dependencies, which are seen as financial and tax haven jurisdictions, still allow the deduction of bribes for tax purposes if 'wholly and exclusively for purposes of

trade' – a clear contradiction of the OECD convention and one which the UK Treasury needs to address.

Finally, in the area of money laundering, the abuse of companies and trusts for laundering dirty money is a recognised risk. Tackling this abuse requires effective regulation of the service providers, who set up and maintain these vehicles. The United Kingdom has included such service providers within its revised money-laundering regulations, but so far it has not implemented an effective supervision regime. The supervision of trusts and company service providers is under discussion in the EU in connection with the implementation of its Third Money-Laundering Directive. But the United Kingdom has already recognised the case for such a regime by pressing the governments of its overseas territories to improve regulation of company formation and management.<sup>4</sup> While there are now regulatory structures in place in Gibraltar, Guernsey, Jersey and a number of other jurisdictions, there is still no supervisory regime in the United Kingdom.

## ECGD buckles under business pressure

In May 2004, the UK's Export Credits Guarantee Department (ECGD) introduced a number of requirements designed to guard against bribery and corruption in the business it insures. It changed procedures to include requirements for listing the names and addresses of all agents, and amounts of commission paid to them; stronger powers to inspect exporters' contractual documents; and requirements for due diligence in relation to the activities of applicants' joint venture or consortium partners.

While most ECGD customers accepted the changes, there was strong opposition from a minority of large companies, led by British Aerospace (BAe) Systems, Airbus Industrie-UK and Rolls-Royce, supported by the Confederation of British Industry (CBI). In letters to the ECGD, BAe said that the provisions were 'unduly onerous'. Airbus felt that its network of agents was part of

its 'competitive advantage' and that it was inappropriate to disclose this information. The companies succeeded in obtaining a qualification of the expression 'to the best of our knowledge and belief' in relation to the due diligence required from ECGD applicants, significantly weakening due diligence requirements. Following a number of meetings between the ECGD and these parties, revised procedures became effective in December 2004.

The OECD advised that the changes could weaken the ECGD's ability to detect and prevent foreign bribery.<sup>5</sup> A number of the changes were criticised in the report on the ECGD of the all-party House of Commons Trade and Industry Committee, to which TI (UK) made detailed submissions.<sup>6</sup> The committee observed: 'Applicants for ECGD support have no longer to give the department information on the involvement of agents in the project for which support is requested; they will not be required to vouch for the honesty of third parties to the project, except for those employed directly by them; and the ECGD no longer reserves the right of audit of exporters' documents as part of the monitoring of projects.'

A further change provides that agents' commissions do not have to be disclosed if they are less than 5 per cent of the contract price, and are not covered by the credit to which the ECGD's guarantee applies. In a large contract, 5 per cent of the price could be a substantial sum, but such sums can be, and often are, funded outside the guaranteed credit. In April 2005, the chair of the committee said: 'We are not at all convinced that the changes [to ECGD's anti-bribery rules] will not seriously weaken the department's ability to contribute to the government's policies against bribery. We do not understand that, while some of the ECGD's customers felt that they could comply with the more stringent requirement, others decided they could not.'<sup>7</sup>

TI (UK) and The Corner House, an NGO, expressed strong opposition to the changes in the media and in discussions with ECGD. In December 2004, The Corner House instituted legal proceedings for judicial

review against the government, claiming that ECGD had significantly weakened its rules without consulting interested NGOs, thereby breaching its own consultation policy. In January 2005, the government settled out of court. Although the changes to the anti-bribery rules would remain in effect, it agreed to institute a full public consultation on them, pay The Corner House's legal costs and make public the correspondence between ECGD, CBI and the three companies that led the opposition to the May 2004 changes, as well as records of the meetings chaired by the Secretary of State for Trade and Industry. The public consultation will close in June 2005, and the government intends to publish its response three months later.

The weakening of the ECGD's anti-bribery procedures contrasted with the recommendation in the Report of the

Commission for Africa that developed countries should ensure they do not contribute to the problem of corruption by encouraging 'their Export Credit Agencies to be more transparent, and to require higher standards of transparency in their support for projects in developing countries'.<sup>8</sup> On the corruption issue, the commission also recommended that: countries and territories with significant financial centres should take, as a matter of urgency, all necessary legal and administrative measures to repatriate illicitly acquired state funds and assets; and that all states should ratify and implement the UN Convention against Corruption during 2005. If the United Kingdom is to be effective in leading international action to reduce the damage done by corruption to developing countries in Africa and elsewhere, the government must find the political will to take stronger action at home.

*Transparency International (UK)*

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## United States of America

### Conventions:

OAS Inter-American Convention against Corruption (ratified September 2000)

OECD Anti-Bribery Convention (ratified December 1998)

UN Convention against Corruption (signed December 2003; not yet ratified)

UN Convention against Transnational Organized Crime (signed December 2000; not yet ratified)

### Legal and institutional changes

- In February 2005, Senators Trent Lott, John McCain and Russell Feingold, and Representatives Christopher Shays and Martin Meehan, introduced the 527 Reform Act in Congress. The proposed legislation would amend the Federal Election Campaign Act of 1971 and its 1974 amendments, to require '527s', organisations created for explicit political purposes but with no formal ties to parties or particular politicians, to comply with **campaign finance laws**, including provisions requiring them to register with the Federal Election Commission (FEC), to improve their transparency and to comply with stricter reporting requirements (see below on 'Transparency in campaign finance').
- In March 2005, Congressmen Mike Pence and Albert Wynn introduced the 527 **Fairness Act**. Critics maintain it would do nothing to change the legal status of 527 groups, and would set back campaign finance reform by repealing limits on contributions to political parties and federal candidates established by the Federal Election Campaign Act of 1974.

### Legislative ethics

Throughout late 2004 and early 2005, media reports alleging that some Congress members had been involved in ethics breaches and conflicts of interest affairs raised serious questions about the effectiveness of Congress' current system of self-regulation. The main focus was congressional travel funded by lobbyists or registered foreign agents in violation of ethics rules, and the increasing amount of corporate-financed congressional travel, which is permitted, but which raises conflict of interest concerns.

Attention also focused on pressure by House and Senate leaders on trade associations and other interest groups to hire members of the Republican party in order to maintain their access to legislative processes.<sup>1</sup>

Both the Senate and the House of Representatives have codes of ethics for their members, which are enforced by internal standing committees. Civil society organisations and the media drew attention to the system's weaknesses, including a prohibition on outside groups from making complaints. The House Committee on Standards of Official Conduct (known as the

ethics committee) adopted a rules change in 1997 that prohibits outside groups or individuals from filing complaints unless accompanied by certification signed by a House member. In January 2005, another rule change made it harder to launch an investigation by requiring a majority vote of the committee, rather than a tie vote, as previously required to trigger an automatic investigation within 45 days. Because the current committee is evenly divided between Democrats and Republicans, there were concerns that political considerations would play an even larger role in decisions.

Also in January, after the ethics committee reproached Tom DeLay, who heads the Republican majority in the House, for ethical misconduct, the Speaker replaced the committee's chairman and two other members in what many considered to be an attempt to stifle criticism. The Speaker also proposed (and the House approved) additional reforms, including the automatic dismissal of an ethics charge if the committee did not take action within 45 days; the change would have effectively allowed either party to kill an investigation merely by delaying action. Previously, charges could only be dismissed by a majority vote of the committee. A second rules change would have hampered the panel's ability to collect evidence in support of an ethics investigation by allowing only one lawyer to represent the defendant and witnesses, potentially inhibiting the fact-finding process.

Objections to these reforms hindered the committee's operations, with some committee members refusing to allow the panel to meet.<sup>2</sup> Since the media was then airing numerous ethics and conflict of interest allegations, the ethics committee stalemate effectively prevented any investigations from taking place. Under intense public and internal pressure, the House majority repealed the new rules in late April 2005. As public scrutiny of congressional travel intensified, the Speaker proposed that any congressional trips financed by companies or special interests

would require advance written approval from the ethics committee.

While the attempts to weaken the committee were ultimately defeated, questions remained about how it would function in the future. There was concern that the majority party would try to undermine the non-partisan nature of the staff.<sup>3</sup> These recent events demonstrate that the self-regulating system is inherently vulnerable and creates unhealthy pressure on the committee, especially when a case concerns an influential politician.

Given the inherent vulnerabilities of a self-regulating system and the weak track record in Congress, many believe that the process should be administered by an independent body of non-members with the requisite expertise and authority to investigate complaints and recommend sanctions. In the House of Representatives, the ethics rules should permit non-members, including non-governmental organisations, congressional staff and other employees, to file complaints without the support of a House member.

Consideration should be given to other reforms, including the appointment of an independent outside counsel with experience in public corruption cases to conduct initial investigations and make recommendations to the ethics committee on whether further action should be taken.

## Sarbanes-Oxley update

Following the 2001 and 2002 Enron and WorldCom scandals, the US Congress enacted the Sarbanes-Oxley Act of 2002 (SOX)<sup>4</sup> and the Securities and Exchange Commission (SEC) issued rules to implement it. Along with recent amendments to the Federal Organizational Sentencing Guidelines, these intensified US corporate efforts at enhancing corporate compliance programmes, internal control mechanisms and accounting systems.

Many large corporations have taken the opportunity to tighten their operations and internal flow of information, recognising

that enforcement of these controls can lead to more effective corporate oversight and management.<sup>5</sup> However, some corporations, including foreign corporations listed in the United States and smaller US companies, have expressed concern that the costs of complying with legislation related to maintenance, audit and reporting on internal control systems are too high (US \$7.8 billion in 2004).<sup>6</sup> Concern has also been expressed about the lack of guidance and resulting rigidity or inconsistency of auditors in their interpretations of what is required under the SOX section 404 internal controls reporting requirement.

In response, the Public Company Accounting Oversight Board (PCAOB), a private, non-profit corporation created by SOX to oversee the auditors of public companies, held public hearings in April. Chairman William McDonough noted that '[I]t is clear to us that the internal control assessment and audit process has the potential to significantly improve the quality and reliability of financial reporting. At the same time, it is equally clear to us that the first round of internal control audits cost too much.'<sup>7</sup>

In May 2005, the SEC and PCAOB issued guidance on 'Implementation of Internal Control Reporting', noting: 'Both management and external auditors must bring reasoned judgment and a top-down, risk-based approach to the 404-compliance process. A one-size-fits-all, bottom-up, check-the-box approach that treats all controls equally is less likely to improve internal controls and financial reporting than a reasoned, good faith exercise of professional judgment focused on reasonable, as opposed to absolute, assurance.'<sup>8</sup>

Action in high-profile corporate governance cases also progressed this year. Though the Justice Department case against Enron executives has yet to come to trial, a jury convicted former WorldCom CEO Bernie Ebbers of fraud and conspiracy in connection with the firm's bankruptcy. He was also found guilty of seven counts of filing false documents. In sentencing Ebbers

to 25 years in prison, the jury rejected the argument that the CEO, by being unfamiliar with the details of company accounts, was therefore not responsible for falsifications made by the company. This sets a strong precedent for upcoming accountability trials, involving executives from Enron, HealthSouth, Tyco International and Qwest Communications.

## Transparency in campaign finance

Since coming into force in November 2002, the Bipartisan Campaign Reform Act, also known as the McCain-Feingold bill, has outlawed 'soft money' – the unlimited, mostly unregulated cash donations to national party committees by individuals, corporations and unions. An unintended consequence of the legislation was the shift of soft money to non-party political groups, known as '527s' (named after the section in the Internal Revenue Services (IRS) tax code that defines their status). According to the Center for Responsive Politics, 527s raised and spent more than US \$479 million on activities to influence voting in the 2004 presidential and congressional elections.<sup>9</sup>

During the 2004 presidential election, campaign finance reform groups filed legal complaints with the FEC against some 527s, alleging unlawful election campaign spending and arguing that they were virtual extensions of national parties, rather than independent advocacy groups.

There was also concern that the public's ability to monitor these organisations was limited under existing law. Currently, 527s are governed by the IRS and many are not required to register with, or to disclose expenditures to, the FEC. IRS registration does not always reveal the organisation's underlying identity and, while the IRS requires them to disclose contributions, it does not require disclosure of contributions of less than US \$200, regardless of the aggregate total raised. Moreover, some have chosen to pay a penalty equivalent to 35 per

cent of a contribution, rather than reveal the contributor's identity.

In early 2005, legislation was introduced in Congress that would bring such organisations under the FEC's authority. The 527 Reform Act, introduced in both the House and Senate, would oblige 527s to comply with campaign finance laws, including provisions requiring them to register with the FEC and to disclose contributions and sources.

However, the FEC needs to be strengthened to make it more effective. It lacks real enforcement authority; can only issue findings of violations in the area of campaign finance reporting; cannot investigate anonymous complaints; and can only seek court injunctions when it has exhausted its entire enforcement process. Investigations are cumbersome processes that often take years to complete and any penalties that arise occur long after the election in which the violation occurred.

Civil society organisations, including Transparency International USA, have called for the FEC to have greater political independence, and adequate funding and staff to review, investigate and hold offenders accountable. Currently, the FEC's six voting members are evenly divided between the two major parties and serve staggered six-year terms. They are appointed by the president and confirmed by the Senate. In practice, however, the congressional party leadership determines nominations to the FEC. This could result in most FEC members being party loyalists, or having some connection to the political community that the FEC regulates. Since four votes are needed to take any action, the FEC often deadlocks along partisan lines.

## Public contracting

As reported in the *Global Corruption Report 2005*, the US bidding processes for contracts in Iraq raised serious concerns. While the US Federal Acquisition Regulation (FAR) permits the use of sole-source or limited competition processes, the US government relied on them extensively in the early stages

of the reconstruction effort, undermining public trust.

Under pressure from the public and contractor agencies, Congress requested the Government Accountability Office (GAO) to investigate procurement in Iraq. Its report, issued in June 2004, reviewed 25 contract actions accounting for around 97 per cent of the total dollars allocated for reconstruction as of 30 September 2003.<sup>10</sup> It found that 14 new contracts were awarded using other than full and open competition and, out of 11 task orders reviewed ('framework agreements' in EU procurement parlance) seven did not comply with the FAR. These task orders were issued for work that went beyond the scope of the contract and should have been competitively bid for, or justified under regulations that allow for less than full competition in specific circumstances. The GAO concluded that the failings stemmed in part from 'inadequate staffing, lack of clearly defined roles and responsibilities, changing requirements and security constraints'.<sup>11</sup>

Under intense scrutiny from the media, Congress and civil society, the agencies responsible for post-war contracts have become more responsive to requests for information.<sup>12</sup>

In June 2005, the leasing of 100 Boeing KC-767A tankers to the US military entered a new phase with the publication of the Department of Defense Inspector General's (DOD IG) review of the case. The US \$23.5 billion KC-767A tanker programme was cancelled in 2004 after public concern about its excessive cost and questionable need. The review found that 'the Air Force did not demonstrate best business practices and prudent acquisition procedures in developing this program, and did not comply with statutory provisions for testing'.<sup>13</sup> It found that there was no urgent need for the aircraft and that the Air Force failed to conduct an analysis of the alternatives to the purchasing which was required under best business practices.<sup>14</sup> The review concluded: 'Senior officials of the Air Force acquisition community and the Office of the Secretary of Defense were focused on supporting a

decision to lease tanker aircraft from Boeing, rather than developing objective acquisition information that would have questioned, as a matter of procedure, whether such a decision was appropriate.<sup>15</sup> Both the Air Force and Boeing officials were sentenced to prison in 2004 and 2005 for violating the federal conflict of interest law. Boeing is taking further remedial steps, including hiring a special compliance officer and, under its new leadership, is working to embed ethical behaviour into the company's culture.

Beyond questions raised by such high-profile scandals, other issues have caused concern. The DOD has downsized its civilian acquisition workforce by half,<sup>16</sup> resulting in fewer personnel who understand procurement integrity. Furthermore, contractors hired to replace some acquisition personnel are not covered by official ethics rules because they are not government employees.<sup>17</sup> Congress is looking at how to ensure that contractors are covered by similar ethical structures as part of their contractual arrangements.

*Nancy Izzo Jackson, with contributions from Michael Johnston, Mark Glaze, Holly Gregory and Chris Yukins*<sup>18</sup>

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## Vanuatu

### Conventions:

UN Convention against Corruption (not yet signed)

UN Convention against Transnational Organized Crime (not yet signed)

ADB-OECD Action Plan for Asia-Pacific (endorsed November 2001)

### Legal and institutional changes

- In November 2004, the government passed the Constitution (Fourth Amendment) Act 2004 which rules that **MPs who cross the floor** will lose their seats. In addition, there can be no vote of no confidence 'within 12 months of a general election ... within 12 months of the formation of any government ... or within 12 months before the end of the life of a parliament'. The amendment could halt the instability that has dogged the government's ability to implement reform or to enjoy political continuity. In 2004 alone, there were three no-confidence motions and two cabinet reshuffles to ensure that parties did not leave the ruling coalition. Instability has a flow-on effect on corruption in that anti-corruption initiatives are not effectively carried forward from one government to the next, and politicians, aware of the brevity of their tenure, are tempted to grab as much as possible before losing power. However, there is concern that the 12-month 'grace period' may have the opposite effect by encouraging politicians to act corruptly with impunity since they will be legally protected from removal (see below).
- The **Office of the Public Prosecutor** became the focus of a commission of inquiry after it attempted to arrest the then prime minister, Serge Vohor, in mid-September. The office is responsible for handling prosecutions under the Leadership Code Act and Ombudsman Act, so all anti-corruption cases were effectively suspended. This almost resulted in the discharge of a high-profile case against the former minister for forestry, fisheries and agriculture, Stephen Kalsakau, and a number of members of the Vanuatu Maritime Authority. In May 2005, the former public prosecutor left Vanuatu and an acting public prosecutor was appointed.

## Bribery and MPs

In April 2004, parliament was dissolved so that then Prime Minister Edward Natapei could avoid a vote of no confidence.<sup>1</sup> There were rumours that candidates from various parties had won votes through bribery in the general election of 6 July. None were substantiated, but the Office of the Ombudsman confirmed it was investigating a number of bribery complaints. In May, MPs' funding allocations, which can be distributed throughout their constituencies as they see fit, were raised from 1.2 million vatu (around US \$11,000) to 2 million vatu (around US \$18,000). There is some control on how this money is spent, as applications must be submitted to the speaker of parliament before the money is released. However, the misuse of MPs' allocations has been the subject of more than one ombudsman's report,<sup>2</sup> and current controls could be strengthened. Payments from the members' allowances are perceived by some as paybacks for votes, or a way of buying votes.<sup>3</sup> The accuracy of this perception has not been adequately investigated, but raising allowances increased the scope for parliamentary corruption.

No one party held a clear majority after the election and it took until 29 July for Serge Vohor to form a new government. Vohor leads the predominantly francophone Union of Moderate Parties (UMP) and had been prime minister twice before. The new government was immediately challenged by a no-confidence motion. In mid-August, the coalition changed its composition to avert the no-confidence vote.<sup>4</sup> There were rumours at the time that various parties and politicians were bribing backbenchers to cross the floor. Vohor publicly stated: 'Any time that there is talk of motions of no confidence in parliament, then there are people in the background causing problems with their money.'<sup>5</sup>

By the end of November, a motion of no confidence in the prime minister was lodged. The catalyst was Vohor's decision to establish diplomatic relations with Taiwan without the consent of the Council of Ministers and despite the government's support of a

one-China policy. Allegations were made by the governing and opposition factions that MPs had been bribed by Taiwan and China, either to swing the vote or support the no-confidence motion.<sup>6</sup> None of the allegations was substantiated.

The no-confidence vote was successful and in December Ham Lini, brother of the founding prime minister, Father Walter Lini, and leader of the National United Party, became the new head of state. Vohor kept the subject alive with media claims that the opposition intended to take some embassies to court to make them disclose payments to MPs.<sup>7</sup> In late January, he said he had proof of bribery and called for an inquiry into the prime minister's actions. Lini, however, shrugged off the need for an inquiry, stating that the allegations were unfounded.<sup>8</sup>

The sheer number of allegations of bribery of, or by, MPs in the past 12 months is of concern. Unlike other corruption-related issues, there is no grey area in respect of accepting a payment to cross the floor, or paying a voter for support. The fact that rumours to this effect circulate so freely, and seem quite plausible, suggests there is widespread belief that MPs are by and large acting in their own interests. Of more concern, perhaps, is the possibility that voters are prepared to accept an environment in which bribery flourishes in the hope they will one day benefit themselves.

The Leadership Code Act was intended to ensure greater transparency of MPs' income and expenditure by requiring them to file annual returns, but this is clearly inadequate. It was amended in 1999 to make annual returns confidential unless they were subject to an investigation or prosecution. The Office of the Ombudsman is responsible for investigations into breaches of the Leadership Code, but it can only do so after receiving a complaint or if it 'has formed the view on reasonable grounds that a leader may have breached this Code'.<sup>9</sup> Since returns are confidential, it is hard for a member of the public to file a complaint on the basis of an inaccurate accounting, or for the ombudsman to 'form a view' that the return contains incorrect information.

In addition to their confidentiality, many politicians simply do not even bother to file returns. This was the subject of an ombudsman's report in 2000 though no prosecutions resulted.<sup>10</sup> The failure of the Office of the Public Prosecutor to prosecute in this matter, when the ombudsman had provided clear evidence of breaches, suggests that its discretion in deciding whether to go forward may be another area of weakness in the Leadership Code Act. Nor is there a legal framework governing the disclosure of donations to political parties, or how parties spend those funds. This is an area that could be usefully regulated.

### Political interference in boards

A common source of corruption accusations in Vanuatu is government interference in the composition of boards of state-owned enterprises. Nepotism, and the opportunities for misappropriation of funds, are usually the motivating factors. In 2005, allegations surfaced of interference in the board of Air Vanuatu, the islands' international airline. Numerous re-mergers and de-mergers of Air Vanuatu and Vanair, the domestic airline, have occurred in recent years. In 2004, the two re-merged.

In early 2005, Air Vanuatu's CEO, Jean Paul Virelala, made comments in the media about Air Vanuatu losses of 280 million vatu (US \$2.6 million) in 2004 due to competition from Virgin Blue and 'political bickering amongst its directors'. Around the same time the media became aware of plans by the Minister for Public Utilities, Maxime Carlot Korman, to increase the size of the Air Vanuatu board from 17 to 28, apparently in order to make more political appointees. Few of the appointees had experience of airline management.

In January, Virelala, who had been in his post for almost 13 years, and marketing manager Joseph Laloyer had their contracts terminated. The board then launched an inquiry in order to establish why losses had

been so high in 2004. Virelala and Laloyer both maintained there were political motivations behind their dismissal.<sup>11</sup> Virelala is a supporter of the UMP, the party led by Serge Vohor that was ousted in December 2004. Virelala suggested that the dismissals were aimed at making way for Korman's son, Manu Carlot, to be appointed marketing manager.

In early February, the government appointed a commission of inquiry to look into Air Vanuatu's affairs, but its work was delayed after the Council of Ministers decided that an internal review should take priority. This effectively means that, despite all the allegations of nepotism and mismanagement, the airline's troubles will be treated as a commercial, rather than a political, matter. Nor is there any guarantee that the findings of the internal inquiry will be made public. 'Our politicians will call it the "Melanesian Way" or *kastom*: giving favours to their supporters or their *wantoks* at the expense of the nation and the grassroots ni-Vanuatu people', observed Marie-Noelle Ferrieux, president of Transparency International Vanuatu. 'This type of irresponsible politics and selfish and self-centred leadership is one of the main reasons why Vanuatu is one of the poorest countries in the world.'<sup>12</sup>

For many, the Air Vanuatu saga is both too complex and too familiar to be of much concern. This apparent acceptance of corruption is perhaps the most worrying aspect of the situation. It is too simplistic to claim that people accept political interference in boards because they see it as a legitimate use of the *wantok* system. Part of the problem is the lack of timely and detailed information and good investigative journalism. Rumours of wrongdoing circulate constantly, but it is difficult, if not impossible, to form clear opinions of whether a situation is corrupt or not. In the event that an ombudsman's report or prosecution does arise, it tends to be so delayed that the original source of the rumours has long passed from public attention. 'Switching off' is perhaps the only logical response that people can have.

Anita Jowitt (University of the South Pacific)

## Further reading

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## Notes

1. The events surrounding the dissolution, and the general impact of instability on corruption, were discussed in the *Global Corruption Report 2005*.
2. These reports are: 'Public Report on the Misuse of MP Allocation Fund', by MP Vincent Boulekone, 19 February 2002, and 'Public Report on the Misuse of MP Allocation Fund', by Stanley Reginald, former MP for Banks and Torres, 8 April 2003.
3. Boulekone, Public Report on the Misuse of MP Allocation Fund.
4. This is discussed further in Anita Jowitt, 'Review of Political Events in Vanuatu 2004', *Contemporary Pacific: A Journal of Island Affairs* (Honolulu: University of Hawaii, 2005).
5. *Vanuatu Daily Post* (Vanuatu), 10 August 2004.
6. Port Vila Presse online (Vanuatu), 25 January 2005, [www.news.vu/en/news/politics/050125-watch-out-for-bribery-vohor.shtml](http://www.news.vu/en/news/politics/050125-watch-out-for-bribery-vohor.shtml)
7. Port Vila Presse on-line (Vanuatu), 9 January 2005, [www.news.vu/en/news/politics/050109-vanuatu-opposition-hunt-down-brib.shtml](http://www.news.vu/en/news/politics/050109-vanuatu-opposition-hunt-down-brib.shtml)
8. Port Vila Presse on-line (Vanuatu), 25 January 2005, [www.news.vu/en/news/politics/05/01/25-watch-out-for-bribery-vohor.shtml](http://www.news.vu/en/news/politics/05/01/25-watch-out-for-bribery-vohor.shtml)
9. Leadership Code Act 1998, section 34(1)(b).
10. Vanuatu Office of the Ombudsman, 'Public Report on Failure of Some Leaders to File Annual Returns to the Clerk of Parliament', 29 February 2000.
11. [www.news.vu/en/business/Airlines/050203-changes-in-airline-alarms-Virelala.shtml](http://www.news.vu/en/business/Airlines/050203-changes-in-airline-alarms-Virelala.shtml)
12. [www.news.vu/en/news/national/050222-drama-in-vanuatu-flag-carrier.shtml](http://www.news.vu/en/news/national/050222-drama-in-vanuatu-flag-carrier.shtml)

## Venezuela

### Conventions:

- OAS Inter-American Convention against Corruption (ratified June 1997)
- UN Convention against Corruption (signed December 2003; not yet ratified)
- UN Convention against Transnational Organized Crime (ratified May 2002)

### Legal and institutional changes

- In July 2004, the legislature approved secondary legislation that expands the powers of the post of **ombudsman** created in 1999. The new law specifies that scrutiny of abuse of power and flaws in the provision of services will henceforth be among the ombudsman's responsibilities.

- The law to partially reform the penal code entered into force in March 2005. It fails to eliminate a provision that criminalises ‘offensive expressions’ directed at public officials which makes it **difficult for civil society organisations to denounce corruption**. Indeed, the reform raises sanctions on those accused of ‘damaging the reputation’ of public officials from a previous maximum of 18 months in prison to three years. The Inter-American Press Association says the law seriously limits press freedom. In February 2005, journalist Ibéyise Pacheco was sentenced to nine months in prison for defaming a colonel in the army. The reform also penalises civil society organisations for ‘giving or receiving national or foreign resources of any kind, if they are aimed at conspiring against the integrity of the territory of the republic, the institutions of state or destabilising social order’. The terms are very broad, which means that NGOs run the risk of being investigated for receiving foreign funds for pro-democracy work. The old penal code, which is less broad, was invoked against members of the NGO SUMATE, who were accused in November 2004 of ‘betraying the country’ for using funds received from the US organisation National Endowment for Democracy to encourage participation in the referendum on President Hugo Chávez’s mandate.
- Nine new **Supreme Court justice** positions were created in December 2004 in a process that has been criticised for political interference (see below).

## Lack of independence of the judicial system

An independent judiciary is vital in a democratic state and crucial to the fight against corruption. The independence of Venezuela’s judiciary has been called into question since a law on the Supreme Court in May 2004 replaced regulations that had been in force since 1976. The law was approved by a simple majority in the National Assembly, rather than the two-thirds majority required under the constitution. Deans of law faculties in four of the country’s universities filed a writ of unconstitutionality that sparked a nationwide debate about the judiciary’s loss of autonomy.<sup>1</sup> One of the main concerns was that the bill was promoted by Congressman Luis Velásquez Alvaray, a pro-government politician appointed to the Supreme Court who is also president of the commission responsible for naming or removing judges.

The law’s most important change was to increase the number of judges from 20 to 32. The reason given was that the additional manpower would clear the backlog of work in the Supreme Court, although they were largely up to date with their caseload,

according to the judicial authorities.<sup>2</sup> In the event, 17 new judges were appointed since 5 more vacancies had arisen through retirement or dismissal. National and international NGOs<sup>3</sup> and some sectors of the opposition insisted that the real motive behind the new law was the need to stuff the judiciary with supporters of President Chávez.

A nominations committee, composed of various sectors of society, is supposed to supervise the selection of Supreme Court judges under the constitution. In this case, the nomination committee was made up of five Congressmen from pro-government parliamentary groups and six representatives of organisations known to sympathise with the government. For example, Juan José Molina Bermúdez was legal adviser for Podemos, a party that supports the government, and had filed successful writs with the Supreme Court that made it difficult for the opposition to collect signatures for a referendum in August 2004 to revoke President Chávez’s mandate. Another member was Gustavo Hidalgo, who was named director general of the executive of the Supreme Court in February 2005. Civil society organisations concerned with the

administration of justice felt excluded from the process, and said so publicly.

Omar Mora Díaz, the new Supreme Court president, defines himself as 'revolutionary' (which tends to mean pro-Chávez) in interviews. The day he assumed the post, he announced a purge of judges including three who had handed down sentences that were deemed favourable to the opposition. The new law relaxes procedures for removing judges if the Moral Council of the Republic (made up of the ombudsman, the prosecutor general and auditor general) considers they have committed 'grave errors'.

This loss of independence does not only affect high-level judges. According to the Supreme Court, more than 70 per cent of judges in March 2005 were provisional, meaning they can be appointed and dismissed without administrative proceedings. This weakens the autonomy of the judiciary because judges may favour the interests of those who can help keep them in their posts. The predicament became more acute in early 2003 when competitions to enter the judicial career path were suspended, contrary to the constitution. A presidential veto in November 2003 stopped the National Assembly from adopting a code of ethics for judges – also a constitutional requirement. In February 2005, Mora Díaz presented a 'plan for the revolutionary transformation' of the judiciary, which includes the widespread removal of judges and their replacement by new judges who would be intensively trained – for one month.

As well as concerns that the lack of independence may make it difficult to process corruption cases affecting government interests, there are more immediate corruption concerns. In January, days after taking up his post as head of the judiciary directorate, Luis Velásquez Alvaray dismissed all its coordinators and directors. Before taking up the post, Velásquez Alvaray had presided over a parliamentary commission that investigated judicial corruption.

Since February, a number of complaints filed by the former head of the executive directorate, Yolanda Jaimes, to the auditor

general in November 2004 have been leaked to the press. One called for an investigation into overpriced training courses for judges that had been organised by the executive directorate. According to Jaimes, US \$520 was paid per teaching hour, compared to US \$40 charged by the most expensive company providing the same service. Another complaint involved the investment of judiciary employee pension funds in risky financial instruments.

Audited reports for the second half of 2004, made public by the new administration of the judicial directorate, indicated that 3,000 employees had been hired without authorisation and others on the payroll did not exist. There was no register of service providers or purchases, including expensive analyses by consultancy firms that were never completed. Contracting regulations were regularly breached and companies chosen that did not comply with the technical requirements for winning the contract.

Media coverage of these irregularities coincided with the announcement of a new strategic plan for the judiciary. The plan requests an additional US \$47 million for the judiciary, but fails to include mechanisms to ensure greater transparency of the judiciary and of its use of funds.

## Corruption at Venezuela's state oil company

The state oil company, *Petróleos de Venezuela* (PDVSA), is the fifth largest oil producer in the world, generating more than 40 per cent of the country's annual budget. In the first half of 2005, a series of complaints have called into question the management and transparency of 'the industry', as it is known.

The company has not presented audited financial statements since 2002, though the law requires it to do so annually. Without these figures it is difficult to monitor the health of the company and scrutinise how it uses its resources. According to the Central Bank of Venezuela (CBV), it is

possible to assert that, at the end of calendar year 2004, there was a shortfall of US \$3.5 billion between the money reportedly paid by PDVSA and the amount that entered the CBV. No one knows where the money went, only that it was not registered by the CBV.<sup>4</sup>

According to José Guerra, former manager of CBV's investigations department, PDVSA should have filed receipts for US \$9.9 billion in the first quarter of 2005, but only filed US \$6.4 billion. Energy minister Rafael Ramírez told a press conference in May that PDVSA produced 3.3 million barrels per day during the first quarter of 2005, but 'It is not known what PDVSA did with the US \$2.4 billion shortfall.'<sup>5</sup> Domingo Maza Zavala, a member of the CBV's board of directors, said that the amount received by the bank in the first quarter was US \$4.8 billion, which means the shortfall might be as high as US \$4.2 billion.

Since August 2003, moreover, the Minister for Energy has failed to publish the annual report 'Oil and Other Statistical Figures', or PODE, which has provided vital statistics related to the petroleum sector and international companies operating in Venezuela since 1956. Since oil production was nationalised in 1976, PODE printed the monthly, quarterly and annual information supplied by PDVSA, including net receipts, daily average production, daily amount of crude processed in refineries, price of royalties and the sales price of crude and refined products. As well as violating constitutional provisions on access to information<sup>6</sup> and anti-corruption law,<sup>7</sup> these omissions deprive the public of knowledge of the real daily level of oil production (the government says production is 3.3 million barrels a day; industry sources put the figure at 2.6 million).

In terms of undue benefits, other allegations have arisen involving multi-million-dollar commissions illegally paid for export sales.<sup>8</sup> Hydrocarbons are increasingly sold through intermediaries who receive commissions on each operation. One example of this questionable practice is the export of hydrocarbons with no registered destination. Failure to specify where the oil is going gives the administration enormous scope to hide the real cost of transporting the oil. Another issue recently in the news was the mass dismissal of PDVSA officials for corruption, though the allegations have not been detailed and the accused not formally charged.<sup>9</sup> Minister Rafael Ramírez has referred to 'administrative irregularities', though not corruption, in his explanation for the dismissal in early 2005 of 30 managers and the decision not to renew the contracts of 8,000 employees in PDVSA installations in the west.<sup>10</sup>

The internal controls applied to the complex processes of exploitation, processing and exporting oil and its derivatives have also been relaxed. Auditor general Clodosbaldo Russián insists that since 2000 PDVSA has been externally supervised; the auditor general's branch office for the PDVSA headquarters has been closed; and auditors are only sent in 'when the case requires it'. In February, the Minister of Energy and Mines was named president of PDVSA, ending decades of formal separation between the government and the management of the oil industry. Julio Montoya, vice-president of the Commission of Energy and Mines of the National Assembly, which is investigating the above allegations, said in May 2005 that to date the company had committed 226 illegal acts.<sup>11</sup> At the time of writing the investigations were in full flow.

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### Further reading

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## Notes

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4. See [www.descifrado.com/articulo.php?idart=10876&cat=Gobierno](http://www.descifrado.com/articulo.php?idart=10876&cat=Gobierno)
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