
Chapter 6

Private-to-Private Corruption: The Last Piece of the Puzzle

Bribery and corruption involving public officials have been on the international policy agenda for decades. Corrupt practices within and between enterprises (“private-to-private corruption”), on the other hand, have only recently emerged as an area of concern. Private-to-private corruption’s harmful effect on the business and investment climate, and on the public interest more generally, is increasingly acknowledged—especially as private enterprises provide more public services. The inclusion of a non-mandatory offense of private-to-private corruption in the UN Convention against Corruption testifies to the global recognition of the increasing importance of tackling private-to-private corruption.

Few jurisdictions in Asia and the Pacific have taken comprehensive measures to counter private-to-private corruption (Hong Kong, China and Singapore are notable exceptions). These jurisdictions’ experience in addressing private-to-private corruption through preventive measures and law enforcement provides valuable insights on both challenges and effective approaches.

In Hong Kong, China where private-to-private corruption has been a criminal offense for decades, there is a high level of community awareness of this crime’s detrimental effects. Until the mid-1980s, the majority of corruption cases reported to the Independent Commission Against Corruption (ICAC) involved public officials. Because of more rigorous enforcement, private-to-private corruption cases have since outnumbered public-sector corruption by about two to one.

ICAC has investigated a wide range of private-to-private corruption cases: bribery has been used to manipulate share prices, to the detriment of honest

investors; in the banking industry exposed banks to financial risks; to obtain an advantage over honest competitors; and to conceal poor quality construction.

Because cases of private-to-private corruption are particularly difficult to investigate, ICAC uses the full scope of powers and investigative means, including granting immunity to informants. However, enforcement remains a challenge; prevention is therefore particularly important. ICAC established the Hong Kong Ethics Development Centre, in cooperation with partners from the private sector, to provide consultancy services to the business sector and to advise businesses on potential weaknesses and preventive measures.

Like Hong Kong, China, Singapore aims to reduce private-to-private corruption's negative impact on the business and investment climate; on public service delivery; on fair competition; and on public safety. Singapore has a similar empirical experience with private-to-private corruption cases, suggesting that these patterns are widespread, if not universal.

Singapore's anti-corruption agency, CPIB, prosecutes private-to-private corruption cases vigorously, and also sponsors a broad program of education and prevention measures.

Rethinking the Definition of Corruption

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The traditional definition of corruption—the abuse of public power for private gain—requires the involvement of public officials. This is reflected in the OECD Anti-Bribery Convention, and laws such as the FCPA; and this focus on public sector has informed much of the global fight against corruption. While criminal law addresses public corruption, often only civil law is available to fight private-to-private corruption.

Efforts by both independent and corporate lawyers focus on protecting companies from legal risk and curbing regulatory reach, with the result that private-to-private corruption is frequently ignored.

Companies themselves, however, generally do not distinguish between public and private corruption. Companies sanction employees similarly for public and private corruption, encourage whistle-blowing for both types of offenses, and have common mandates for notifying authorities. Corporations therefore use the same methods for fighting corruption in public- and private-sector relationships.

Businesses face significant opportunities to commit corrupt acts. Two areas of particular risk are the purchasing function (vulnerable to fraud, kickbacks and misuse of gifts, and hospitality) and sales and marketing (especially the granting of favors, offering bribes and misuse of gifts and hospitality). SMEs are also especially vulnerable to extortion. Countermeasures must rest on strong corporate integrity policies including anti-corruption standards, training and enforcement, and effective whistle-blower protections.

Private-sector anti-bribery practices should include the following six steps:

- assessment of the corruption risks specific to the business;
- development of detailed anti-bribery policies;
- implementation of these policies;
- self-monitoring of the effective implementation of the policies;

- public reporting on the policies and related programs;
- where appropriate to enhance the credibility of the programs, independent assurance of the effectiveness of these efforts.

Private-to-private corruption is clearly a significant problem facing businesses today. It is time to embrace a more modern definition of corruption: the abuse of entrusted power for private gain.

Some international business anti-corruption initiatives have taken this definition on board. TI's Business Principles for Countering Bribery, the PACI Principles and the ICC's Code of Conduct address illegitimate payments to all partners.

Combating Corruption in the Private Sector— the ICAC of Hong Kong, China

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In many countries, the offense of bribery is confined to the conduct of public officials and those who seek to corrupt them. Since its inception in 1974, the Independent Commission Against Corruption (ICAC) in Hong Kong, China has been empowered by legislation to investigate corruption offenses in the private, as well as the public, sector.

In the early days after the ICAC was put in place, the community was more concerned with corruption in the public sector. In the first 15 years after it commenced operation, over 50% of the corruption complaints ICAC received related to public-sector corruption. In the first 10 years, the proportion went from 87% in 1974 down to 65% in 1983. This downward trend has continued, and now private-sector corruption complaints exceed public-sector complaints.

Since the mid-80s, the ICAC has been pursuing corruption in the private sector as vigorously as in the public sector. Over the years, the ICAC has allocated more and more of its investigative resources to private-sector corruption, as the volume of complaints relating to the private sector has increased. Since 1989, private-sector corruption has taken up more than 50% of the complaints received by the ICAC. As at the end of October 2008, 65% of the complaints received in 2008 related to private-sector corruption.

Different manifestations of private-sector corruption

I would now like to talk about the different forms of corruption that Hong Kong, China's ICAC has encountered in the private sector. In Hong Kong, China corruption in the private sector has usually involved a third party corrupting an employee to gain an advantage in relation to the affairs or business of the corrupted employee's principal. Various factors can trigger this behavior, but it is usually prompted by the desire for monetary gain. The third party is invariably looking to obtain an advantage over his competitors in the dealings he has with

the employer of the person he is bribing. But, of course, corruption has many faces and is not limited to this simple situation. Although this may be the most common form of private-sector corruption, there are many other forms as well.

Corruption is used also to facilitate other crimes, such as fraud, which may be committed by the senior management of a company. Senior management of companies may also bribe employees of other companies to benefit from that other company which will have a much wider effect on society. This occurred, for instance, when the management of a listed company bribed a fund manager to make him purchase a large block of shares; this was done in order to keep the price of the listed company's shares high and maintain market confidence in the company. When the activities of the corrupt management were uncovered, the share price of the listed company dropped and many innocent investors in the company suffered a loss.

Another example is where a company may use bribery to conceal poor standards in the performance of its work; this happens in the construction industry.

A further area in which the ICAC has encountered corruption that has had serious consequences for an institution is in the banking industry. Bank staff who are bribed to approve large loans which are insufficiently secured can put the financial position of the bank at risk.

Thus, corruption can manifest itself in various forms, some of which may affect only the particular company that is the victim of it; others may involve a large group of people; and some forms may affect virtually the whole community. Some say that the true victim of corruption is society. Although this is more readily apparent with public-sector corruption, it is equally true of corruption in the private sector.

Investigating private-sector corruption

What all these different forms of private-sector corruption have in common is that, as with public-sector corruption, they are committed in secret and therefore very difficult to investigate.

Hong Kong, China's Prevention of Bribery Ordinance—its anti-corruption law—gives the ICAC special powers to support its investigation of corruption. We have found that in order to investigate corruption properly, we need to make use of every investigative tool available. These involve powers to obtain, on the authority of the ICAC Commissioner, access to bank records and the records of other financial institutions, as well as access to the records held by government departments. Our High Court has granted additional powers to compel suspects

and other involved persons to provide us with information. We are also empowered to obtain Production Orders in respect to the records of the Inland Revenue Department and to apply for the search warrants in respect of any premises.

Legislation also allows ICAC to apply to a judge to use electronic surveillance as an evidence-gathering tool and telephone interception as an intelligence-gathering tool. These tools are particularly useful in undercover operations. One of the lessons we have learned over the years is that being proactive in our operational work can yield great successes in fighting corruption. This has required the ICAC to learn how to: gather intelligence on corruption and effectively analyze it; develop and handle informants; and make imaginative use of the intelligence they generate.

ICAC uses its own forensic accounting experts and persons with technical expertise in computer forensics. Both of these specialist areas have become increasingly important in the investigation of private-sector corruption.

However, even with all these special investigative techniques and expertise available to us, we still find it difficult at times to obtain the evidence required for a successful prosecution. Thus, we often seek the assistance of someone with inside knowledge of the corruption that is taking place in order to penetrate the secrecy surrounding the corrupt conduct. If an insider is willing to become an informant and assist us, the Secretary for Justice—who is responsible for all prosecutions in Hong Kong, China according to the Basic Law—will consider granting this informant partial or full immunity to enable him to testify against the main suspect of the investigation.

The importance of corruption prevention

Since its inception, the ICAC has recognized that along with enforcement, it is equally important to work with the community to ensure zero tolerance for corruption. It therefore has adopted a three-pronged strategy in combating corruption that consists of enforcement, prevention, and education.

In combating private-sector corruption, success did not come easily, because there was strong resistance from the business community in the beginning. This resistance was partly due to a misconception that the ICAC was opposed to all business rebates and commissions—even ones accepted as normal and proper. However, through ICAC's corruption prevention and community education activities, we were able to dispel this misconception. Today the business community is supportive of ICAC and has become one of its key partners in the fight against corruption.

The establishment of the Hong Kong Ethics Development Centre (EDC) is a testimony of the change in attitude of the business sector—from initial suspicion of the ICAC and hesitation to working with it, to active partnership in anti-corruption activities. ICAC set up the EDC in 1995 to promote business and professional ethics as the first line of defense against corruption. Six leading chambers of commerce in Hong Kong, China are represented on the advisory committee that steers the work of the EDC. The EDC provides a wide range of consultancy services on corporate ethics programs. The EDC also partners with various professional bodies and chambers of commerce in Hong Kong, China to disseminate ethical governance messages to their members. Upon request, ICAC also provides any business with assistance in developing specific practices and procedures to prevent corruption.

The rule of law

At the very basic level, corruption is all about treating people unequally—unfairly obtaining an advantage at the expense of the honest, decent citizen. The law protects the concept of equality of treatment: it is a fundamental human right and, as such, it is a core component of the rule of law. Of course, it is also the rule of law that ensures the protection of the rights of every individual citizen. Anti-corruption legislation works in support of the right to equality of treatment by ensuring that Hong Kong, China's citizens are protected from the effects of corruption.

In one of Hong Kong, China's leading cases on one of its more unusual anti-corruption offenses—illicit enrichment by government officials—our Court of Appeal discussed whether an aspect of this offense which reverses the burden of proof was in accord with human rights law. The Court of Appeal upheld this provision. The Court declared that the public had a right to protection against corruption and the equal-protection-clause in our Bill of Rights Ordinance guaranteed this right. The Court said, "If the law only protected persons accused of corruption, but failed to protect members of the general public from the evils and perils of corruption, then it would deny them equal protection."

Conclusion

I hope that this information and experience demonstrates the need for a private-sector corruption offense. Hong Kong, China's experience has certainly taught it the need for such an offense and I am sure that many other countries have learned the same lessons from fighting corruption. Indeed, the importance of having a private sector corruption offense was recognized by the drafters of

the UN Convention against Corruption (UNCAC). Like Hong Kong, China, the authors of this Convention realized that in order to effectively eradicate corrupt practices from a society, it is necessary that the citizens of that society do not tolerate corruption in the private sector and that the private sector not be treated any differently from the public sector. This is why the UNCAC encourages the creation of a private-sector bribery offense.

The mission of the ICAC may have a slightly different emphasis now compared to its mission when it first started its work. However, this mission is still to combat corruption within the whole of Hong Kong, China's society so that every citizen can feel free of this evil.

Singapore's Strategies to Fight Corruption in the Private Sector

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Singapore's approach to fighting corruption

In the 1940s and 1950s, corruption was more or less a way of life in Singapore. Through persistent efforts in combating corruption since 1959, when Singapore attained self-government, the Government has managed to curb corruption. The Government made hard-hitting and decisive changes that were pertinent in saving our nation from corruption. The political leaders took it upon themselves to set good examples for public officers to follow. They created, by sheer personal example, a climate of honesty and integrity, making it known to public officers and the society in no uncertain terms that corruption in any form would not be tolerated.

Administrative measures

Alongside the statutory measures dealing with corrupt offenders, strict rules and regulations govern the conduct of public officers to ensure a high standard of discipline. For government officials, the Instruction Manual (IM) stipulates that each officer has to conduct himself in a manner which upholds the integrity of the Public Service. He or she must not act in such a way that gives rise to public perception that he or she has obtained special advantage through his or her official position or connections. Each officer has a duty to exercise care to preserve his or her ability to be fair and impartial. He or she should avoid becoming beholden to any party because of past favors or special concessionary treatment.

Generally, the government instruction manual requires public officers to report any corrupt act that comes to their knowledge, and regulates the wrongdoing of public servants. It also obligates public servants to declare any conflict of interest, gifts received, etc.

Other measures exist to address specific areas: For instance, when a successful bidder for a government procurement contract signs the contract for delivery of goods or services, the bidder will be reminded that bribing public officers administering the contract may render their contracts to be terminated. A clause to this effect forms part of the standard contract conditions. A contractor found to indulge in corruption is prosecuted. In addition, this contractor is debarred from future government contracts for up to 5 years.

These rules help uphold good conduct of public officials and help deter the private sector from committing corruption. Applied to the interface between public and private sectors, they help reduce corruption tendencies.

Corruption in the private sector

CPIB is empowered to investigate corruption in both the public and private sectors.

Why deal with private-sector corruption?

There are good reasons why CPIB also deals with corruption in the private sector:

First, corruption in the private sector affects public interest. Some people used to think erroneously that private-sector corruption is a private affair between the giver and the taker. However, consider the following: When a supermarket purchaser takes bribes from a supplier, the supplier will inevitably mark up its cost to cover the bribes. As a result, the supermarket, which purchased the goods at a higher price will sell it an even higher price. The public suffers in the end.

Second, Singapore is a small nation without natural resources. It has to depend on trade and foreign investment. To attract investment, Singapore has to ensure that business costs are low. Corruption, however, increases business cost regardless of whether it takes place in the private or public sector.

Third, the private sector is a key pillar of Singapore's economy and drives national economic growth. Singapore needs a level playing field for all, and the private sector must be clean to attract foreign businesses to work and invest in Singapore.

The private and public sectors are also intertwined, which is another reason why it matters that CPIB watches over the private sector as well. As the government outsources more and more of its traditional functions to the private sector, many private companies are now performing functions that the

government used to carry out. Corruption in segments of the private sector that are involved in strategic functions can also impact key areas of government and society at large.

Lastly, many private-sector enterprises have huge public shareholdings. If the enterprise is not well run and commits crimes, its share price may be affected—this has consequences for the public interests.

Types of private-sector cases

Private-sector corruption cases can come in various forms. A selection of cases that we have seen in the private sector illustrates this variety:

- Some cases involved contracts or procurement of services or supplies. An example of a recent case involves senior staff management of a car company for receiving expensive gifts in return for awarding agency contracts.
- Other cases involve corrupt offenders who were in charge of supervising contractors or suppliers, for example, but did not check the quality of work or product delivered and overlooked deficiencies. This can result in serious repercussions, for example in building works.
- There are those who have access to sensitive data and divulge it to unauthorized persons in return for rewards. These cases for instance involve people working in areas where there are storehouses of data about customers. These individuals abuse their access to this data by passing it on to persons such as illegal moneylenders who are looking for their debtors, and private investigators tracing whereabouts of persons of interest.
- There are those who are in positions of authority such as a Chief Executive Officer or General Manager, who took bribes in return for granting approval to the bribe givers in various matters.
- In some cases, corruption occurs in conjunction with other offenses. For example, the corrupt may also “cook” the company’s books to hide corrupt transactions. They may manufacture false invoices to reflect fictitious transactions. Once uncovered, CPIB will deal with these as well, as CPIB officers are also empowered to investigate other crimes uncovered in the course of a corruption investigation.

Preventive measures in the private sector

The private sector is a key pillar of Singapore’s economy. Corruption in the private sector increases business costs and reduces investment. Thus, CPIB takes proactive action against corruption through the following measures:

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- Giving anti-corruption prevention talks and working with private companies to disseminate anti-corruption messages.
 - Taking a total enforcement approach by dealing with givers and receivers bribes in a private-sector transaction. Enforcement actually has preventive value.
 - Facilitating complaints by civic-minded members of the public through different means, including e-mails, and safeguarding them through protection of informers by law.
 - Conducting thorough investigations and securing evidence, including documentary and computer evidence, against corrupt offenders in the private sector to ensure a high conviction rate, which gives confidence to the public to come forward.
 - Debarring contractors who engage in bribery involving government contracts and terminating such contracts.

Code of governance for private companies

The private sector in Singapore is large and comprises a wide variety of different industry types. How clean the private sector is depends largely on its internal state of affairs. Efficient company systems and processes promote productivity and reduce opportunities for malpractice and corruption.

Singapore's Code of Corporate Governance, under the purview of the Monetary Authority of Singapore and the Singapore Exchange, serves as a guide for private companies' conduct. It addresses the following matters:

- Board matters—on responsibilities, separation of duties between Chairman and CEO, Independent Directors, access to information.
- Remuneration—on a formal and transparent procedure, and disclosure of remuneration policy.
- Audit and accountability—on an audit committee to review internal controls, financial review, operational and compliance controls.
- Communication with shareholders—on timely and regular engagement and communication with shareholders.

The Code of Corporate Governance is a broad guide for companies, and individual companies have to build their specific systems and measures to enhance good corporate governance.

Charity sector

A governance code has also been introduced in the charity sector, after a series of malpractices in charity organizations were uncovered. For instance,

not long ago, the CPIB prosecuted the CEO of the National Kidney Foundation for using a false document, resulting in a three-month jail sentence. The Government has since reviewed the laws, and a Commissioner of Charities was established to oversee all charity organizations; also, a Code of Governance was promulgated for the charity sector. The Code is a set of principles and standards accepted as an industry's best practices, which stakeholders in the charity sector aim to adopt as an exercise of good faith.

Tough punishment

To successfully combat corruption, in addition to adopting strict and effective enforcement, we need tough punishments meted out on convicted offenders to serve as a deterrent to the "like-minded".

Punishment can be severe and depends on the impact and severity of the act. In fact, many private-sector cases have resulted in jail sentences comparable to those applied for public-sector corruption.

We have a case whereby the Assistant General Manager of a public listed recycling firm was sentenced to eight years in jail for bribing various staff from various companies to the tune of SGD 1.8 million in return for certain favors. The accused in this case had claimed in his defense that he was merely following the CEO's instructions. However, the court did not accept this excuse; it viewed it seriously and meted out an 8-year sentence.

In another case, an ex-Assistant Vice President of a foreign bank operating in Singapore was sentenced to a 15-week jail term following a conviction for taking a SGD150,000 bribe as a reward for recommending loan applications. However, on appeal, his jail term was increased to 15 months by the Chief Justice, who felt that the sentence meted out by the lower court does not reflect the potential harm that the act had caused. The accused was in a senior position and breached the trust that the bank had placed upon him, and his corrupt act undermined the integrity of the banking profession and Singapore's aim to be a financial hub.

Apart from criminal sanctions, the Prevention of Corruption Act (PCA) also provides for civil recourse for recovery of bribe money. This was tested in court recently. The CPIB had prosecuted a facilities manager in a large private company for taking about SGD 300,000 as bribes in return for awarding contracts. He was convicted and sentenced to 10 months in jail and ordered to pay to the State a penalty of about SGD 300,000, equal to the amount of bribes he had pocketed. After the prosecution, his company brought a civil suit against him to recover the amount of bribes he had accepted during his incumbency.

The accused appealed to the court, on the grounds that he had been ordered to pay back the equivalent of the bribe as a penalty and cannot be required to pay a second time, and on a second occasion, through the civil suit. The Court of Appeal dismissed his appeal stating that the law expressly provided for two distinct provisions—a criminal proceeding to disgorge benefits, and civil proceedings to recover the bribe money. Hence, there can be a double disgorgement. This sends a clear message to corrupt offenders: they will be made to pay heavily for their corrupt activities; this constitutes a further deterrence against corruption.

Conclusion

It is imperative to deal with corruption in the public and private sectors, as there is a great linkage between the two sectors. Singapore has dealt with both sectors for a long time.

In Singapore, we are glad that many established companies have codes of conduct and measures that govern their official staff. This makes it more difficult for employees in private-sector companies to dabble in corrupt activities and then claim ignorance. CPIB has also engaged and reached out to the private sector to raise their awareness on corruption issues.

Effective laws and clean government institutions are key elements in reducing corruption from greasing contracts between the public and private sectors. Private enterprises can also help to prevent and reduce corruption by adopting ethical business conduct, practicing good governance, and maintaining standards of goods and services in the marketplace.

I have shared the experience we encountered in Singapore. It may not be replicated anywhere else, as every country has its unique character and circumstances. Nonetheless, corruption is a common problem that we all face. We therefore have scope for sharing and learning from each other and together—we will fight the disease of corruption and make the world a better place to live in.



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