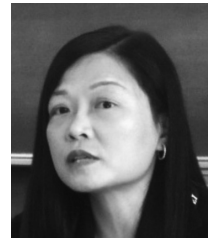

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INVESTIGATIVE MEASURES TO EFFECTIVELY COMBAT CORRUPTION

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I. INTRODUCTION

Corruption is not easy to detect, let alone investigate. From a place ravaged by corruption to one now being recognized as one of the world's leading cities to combat corruption, Hong Kong, China has come a long way. And it has come a long way through the efforts of the Independent Commission Against Corruption (ICAC) working in partnership with a determined public. Established in February 1974 as an independent anti-corruption agency, the ICAC adopted a holistic and coordinated strategy in combating corruption on three fronts — enforcement, prevention and education. These distinct tasks are entrusted to three departments of the Commission: Operations, Corruption Prevention and Community Relations. The Commissioner of ICAC is directly answerable to the Chief Executive of the Hong Kong Special Administrative Region and is independent from the civil service, and this independence of operation is very important to the effectiveness of our work. Our three-pronged strategy is enshrined in the ICAC Ordinance.

The Operations Department is the largest department in the Commission, comprising about 70% of the ICAC's workforce of over 1,300. It is tasked to investigate corrupt activities both in the public and private sectors by enforcing tough laws designed to ensure that corruption remains a high risk crime. All reports received by the Report Centre are considered within 24 hours on a daily basis by the Directorate officers of the Operations Department for investigation under utmost confidentiality. Pursuant to the ICAC Ordinance, the Commissioner has the statutory duty to investigate corruption complaints, including anonymous complaints so long as they contain sufficient details for investigation to be pursued. While it is our statutory duty to investigate corruption, the power to prosecute rests with the Department of Justice. This demarcation of responsibilities guarantees the impartiality in the performance of prosecution function and this is particularly important given the special powers of investigation possessed by the ICAC.

“Prevention is better than cure”. The Corruption Prevention Department is entrusted with the important task of examining the procedures and practices of government departments and public bodies to plug corruption loopholes and reduce corruption opportunities. The department also provides confidential and tailor-made corruption prevention advice free of charge, upon request, to companies in the private sector with a view to strengthening corporate governance.

The Community Relations Department is responsible for fostering a culture of probity in the community and enlisting public support in anti-corruption work. We have a network of seven regional offices to maintain face-to-face contacts with people from all walks of life through corruption prevention talks at schools and workplaces, as well as district activities. Members of the public can also report corruption through the regional offices which will refer all such complaints to the Report Centre to follow up. The department produces television drama series based on real corruption cases and also uses television and radio commercials to spread anti-corruption messages.

II. THE NATURE OF CORRUPTION

In sharing the ICAC's experience in investigating corruption and in addressing the problems associated with its investigation, it is necessary to look at the nature of corruption as a crime first. It

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is essential to have an understanding of its nature in order to be able to properly appreciate the difficulties involved in investigating it.

A. A Secret Crime

The feature of corruption that singles it out from other crimes is the secrecy surrounding it. Each corrupt transaction involves at least two parties: the offeror and the acceptor of a bribe who, through the transaction, create mutual obligations to each other and, from the transaction, derive mutual benefits. There is an understanding between the two parties of what they expect from each other and it leads to a situation in which both parties get what they want. This secrecy, which is a consequence of both parties getting what they want, is a major impediment to the effective detection and investigation of corruption. Third parties, including law enforcement agencies, are unaware of the deal between the corrupter and the corruptee. As a crime, corruption can be described as invisible in nature. How can you investigate something of which you have no knowledge?

B. A Crime that Leaves No Trace

Even when detected there are features of corruption that make it hard to investigate. Quite unlike other crimes, there is no obvious crime scene where the perpetrators of corruption effect the commission of the offence. The corrupt transaction can be processed in the absence of the parties concerned, and there may be no direct physical handing over of bribe monies. In these days of electronic banking, there is no need for the corrupt to even meet. Without physical contact with each other, they can launder the bribe through companies and off-shore bank accounts. Proving that there was a payment, linking the parties to the payment and then proving the payment was a bribe is a painstaking and sometimes, ultimately unsuccessful process of investigation. Proving that what was offered was in fact a bribe may be a problem if what was offered was not the payment of money but was instead a less obvious form of advantage. Proving a corrupt purpose which is not apparent may also be a problem. It might be no more than expedition or delay in taking action which can be easily camouflaged by the pretence of some form of lawful justification.

C. A Victimless Crime?

Another characteristic of corruption as a crime that makes it difficult to investigate is that very often, there is no identifiable or immediate victim. With other crimes, you have a victim who has been assaulted or robbed and who, because of his/her experience, is eager to cooperate in bringing the criminal to justice and who has direct evidence of the commission of the crime. Not always but quite frequently this victim is an innocent person who will present himself/herself to the court as a truthful witness.

Where is such a person in a corrupt transaction? Almost invariably there is none. Sometimes an employee to whom a corrupt offer is made reacts righteously and immediately reports it. Likewise a person who receives a corrupt solicitation may similarly respond. But more often than not the corrupt overture goes unreported and leads to a completed corrupt transaction. Where then is the victim? In this situation, the victim is the general public who is unaware that the crime has been committed and that it has been victimized. For instance, when a person pays a bribe for expediting his/her export licence application with the customs department, the victim is the public whose applications have been delayed in the course of processing. When corruption becomes entrenched in the civil service and widespread in society, the general public may be placed at risk as the quality of the public service declines. Corruption as a social problem then becomes visible and operates as an unofficial tax levied on the provision of public services. As public interests are subordinated to private aims, corruption essentially confers benefits on the parties involved in it at the expense of the general public.

**III. INVESTIGATING CORRUPTION:
ARMING YOURSELF WITH THE WEAPONS**

A. A Full Range of Offences

It is the very unique nature of corruption with its features of secrecy, invisibility and no identifiable victim that renders it a difficult crime to detect and investigate. What then, can be done to overcome the problems that are created by corruption having these features?

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The first thing that can be done is to ensure that appropriate laws are in place that can meet the needs of the investigating law enforcement agency. A full range of offences to prohibit corrupt conduct in both the public and private sectors is required. Under our Prevention of Bribery Ordinance (POBO), section 4 regulates public sector corruption; sections 5, 6 and 7 deal with corrupt activities relating to public body contracts, tenders and auctions; whereas section 9 concerns corrupt transactions in the private sector.

Apart from general anti-corruption provisions, special statutory offences are required in order to enable the prosecution of government servants who are believed to be corrupt but against whom there is insufficient evidence of bribery. Under section 10 of the POBO, it is an offence for a government servant to maintain a standard of living beyond his/her means or be in possession of unexplained property or pecuniary resources. It is important to have such a provision to regulate illicit enrichment, otherwise corrupt government servants who know how to accumulate their wealth through corruption in an undetectable manner can avoid any enforcement action.

Section 10 has been described as a draconian offence as the burden of proof of the absence of corruption is on the defendant and the onus on the defendant to provide an explanation to prove he is innocent deviates from the Common Law principle that a person is presumed innocent until proven guilty and that the prosecution bears the burden of proving his/her guilt. However, in a Court of Appeal decision, it was held that section 10 does not infringe the Bill of Rights because what triggers the requirement for the defendant to give an explanation is the fact that the standard of living that he/she maintains is incommensurate with, or the pecuniary resources or property that he/she controls are disproportionate to, his/her present or past official emoluments to an extent which is unreasonable in the circumstances. The Court of Appeal recognized that a balance has to be struck between fighting corruption and protecting the rights of innocent people, but accepted that corruption requires special powers of investigation and special offence provisions.

In order to overcome the jurisdictional problem that would otherwise arise when a corrupt transaction takes place out of Hong Kong, our POBO contains a public servant bribery offence which criminalizes the offering, solicitation or acceptance of a bribe wherever it occurs.

It is worth noting that corruption offences often go hand in hand with other offences, usually to enable the more effective commission of those other offences. This is why corruption offences are regarded as offences which are used to facilitate other crimes. Because such other crimes are inextricably linked to the corruption offence, consideration should be given to empowering the anti-corruption agency the authority to investigate those other crimes.

In many cultures, it is perfectly normal for persons to exchange gifts either as an expression of gratitude or as a sign of respect. However, it is sometimes the case that corruption abuses existing cultural practices and transforms them into a tool for paying bribes. It may be considered desirable to incorporate into the anti-corruption legislation a provision that prevents reliance on cultural practices as a justification for bribery. In our POBO, we have section 19 which states "In any proceedings for an offence under this Ordinance, it shall not be a defence to show that any such advantage as is mentioned in this Ordinance is customary in any profession, trade, vocation or calling."

B. Special Powers of Investigation

Apart from seeking out live witnesses, evidence of corruption has to be gathered from all possible sources. However, corrupt transactions nowadays are processed in a very sophisticated way. Bribes are rarely handed over in cash or deposited into local bank accounts. They may be disguised as consultancy fees, dividends of share investment or even remitted to overseas accounts. It has become more difficult to identify and trace corrupt proceeds.

To facilitate the investigation of corruption, it is essential to have strong powers of investigation. For instance, in our POBO, the ICAC is given a number of different special powers of investigation. Under section 13 of the Ordinance, the ICAC Commissioner is empowered to issue authorizations to require banks or financial institutions to provide specified banking records to investigators. Under section 13A, an application may be made to a High Court Judge to obtain access to records of the

Inland Revenue Department. Under section 17, applications may be made to a magistrate or a High Court Judge for the issue of search warrants to authorize ICAC officers to enter and search premises for evidence of corruption. Under section 14(1)(a) and section 14(1)(b), an application may be made to a High Court Judge to authorize the ICAC Commissioner to issue a notice for it to be served on a suspect requiring him/her to reveal the property in his/her possession, his/her expenditure and liabilities and provide information on money or property sent out of Hong Kong. Under section 14(1)(c) and section 14(1)(d), a non-suspect may be required to provide information on property or to appear before an ICAC officer to furnish information or produce documents to facilitate the investigation. Under section 14C, an application may be made to a High Court Judge to freeze accounts or restrain assets. Further, under section 17A, an application may be made to a magistrate for the issue of a notice to be served on a suspect requiring him/her to surrender all his/her travel documents and not to leave Hong Kong for a period of six months and the period may be extended, upon further application, for another three months.

C. Investigating Corruption: Going to Battle

The majority of law enforcement agencies are complaint reactive in nature. Their investigations will usually be commenced upon the receipt of a complaint or the referral of information that a crime has been committed. There then commences a fairly standard process of investigation including the gathering of evidence from the victims and other witnesses who were present at the crime scene or who possess knowledge of the crime. This reactive strategy functions well for crimes that are detectable and which have identifiable victims.

But, as explained earlier, that is not the position with corruption. Hence, the first hurdle encountered by agencies when investigating corruption is the source of the report or information. The secret nature of corruption means that the only persons who have direct knowledge of the crime are the perpetrators and their accomplices and in most cases, there are no immediate victims. Since most corrupt activities are unknown to outsiders, a large number of corruption cases may not be brought to the attention of the investigating agency, resulting in the existence of a “dark figure” of unreported and undetected corruption cases.

In order to be an effective enforcement agency against corruption, it is necessary to get the support of the public and to encourage them to report it. This, in turn, very much depends on their awareness of the harm caused by corruption and their confidence in the integrity and effectiveness of the enforcement agency.

Criminal investigations can be either reactive or proactive in nature. Each has its problems and difficulties and these will be discussed below.

1. Reactive Investigations

For reactive investigations, information of corruption usually comes from complainants. The lesson that the ICAC has learnt after over 39 years of investigating corruption is that developing public confidence in it is crucial to the success of its work. It is only when the public has confidence in, and respect for, the anti-corruption agency that they will provide the agency with the support that it needs. The ICAC not only values but also needs community support. In 2012, 2,832 investigations were conducted by the ICAC resulting from the 3,932 corruption complaints received during that year. 93% of the complaints received were made by members of the public of which 75% identified themselves. Our investigations are still predominately complaint reactive. This reliance upon community support is, of course, recognized in the preamble to the United Nations Convention Against Corruption (UNCAC) which urges States Parties to bear in mind that the prevention and eradication of corruption require . . . the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations”.

In ICAC, we have a Report Centre that operates 24 hours round the clock as well as a hot-line the number of which is well known to the general public for them to report corruption. Some of the complainants who report corruption are persons who were involved in the crime and who bring it to the attention of the investigative body. In such cases, the investigating agency has to guard against the motive of these “tainted” complainants in order not to be misled into directing the course of the

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investigation along the wrong path. Though it should be said that there are some instances where the complainants are not the main culprits and have been involved as reluctant parties in the corrupt activities or have been forced unwillingly into facilitating or concealing them.

In those cases that are reported by complainants who were not involved in the corrupt activities, their complaints are very often based on suspicion or hearsay information which may be difficult to verify at the covert stage. What they can provide is speculation or circumstantial information rather than direct knowledge or evidence of the corrupt activities alleged.

Another source of our complaints comes from referrals by government departments, public bodies or the Joint Financial Intelligence Unit. Reports of corruption are also made by the management of private organizations or business firms. There is an established referral mechanism or liaison point between the ICAC and these public or private organizations for them to refer any information or intelligence of corruption so that the ICAC can follow up. It is necessary for an anti-corruption agency to set up a system in this regard so that referrals are made pursuant to the established mechanism rather than on the basis of personal acquaintance so that it will not be affected by any subsequent change in personnel.

2. Proactive Investigations

The process of investigating corruption involves penetrating the many layers of secrecy, and through the use of imaginative investigative techniques, gradually removing the veils of secrecy that surround it. The first step in this process is coming into possession of information which alerts the anti-corruption agency to the existence of corrupt activity. The second step is transforming this information into useful intelligence and the third step is investigating this intelligence in a way which will generate evidence to allow the prosecution of the corrupt.

Proactivity simply means not waiting for the information on corruption to come to the law enforcement agency as happens in a complaint reactive investigation, but seeking out this information from a range of sources. Proactivity, or intelligence-led investigation as it is sometimes called, is becoming increasingly important to law enforcement agencies as a tool to supplement and work in conjunction with complaint reactive investigations.

How does the anti-corruption agency develop intelligence sources? It does so, firstly, as part of its process of engagement with the community. This engagement can take many forms but one of the most important is that of developing contacts within the various elements of the public and private sectors. This is quite separate from developing informants. Rather this is a form of liaison work. As people get to know the anti-corruption agency and get to trust it, they will be more inclined to pass on pieces of information to it. Such persons are not paid informants. They are public-spirited members of the community, who, because of their work, become aware of matters which might otherwise not become known to the anti-corruption agency. When they pass on a piece of information known to them, they are not making a complaint as they may not know whether corrupt conduct is actually taking place. But what they have encountered causes them to be sufficiently concerned at the possibility of some form of serious irregularity that they wish to refer it to the anti-corruption agency.

Another source of corruption information comes from informants who generally fall into two categories. The first is people from the underworld who are of a dubious character, probably with criminal records, and who maintain associations with people inhabiting this world. By this means, they have access to information on the activities of the people with whom they associate. No law enforcement agency can operate effectively if it does not have sources within the criminal underworld. Acquiring and developing these sources is not easy and great care must be taken in handling them. The informant may be hoping for a reward or trying to exact revenge. He may even be deliberately trying to mislead the law enforcement agency. Informants are not usually acting out of a sense of public spirit and good will and they and honesty are more often than not strangers to each other. Nevertheless, if treated with caution, informants can be a very valuable source of intelligence.

The second category of informant is a person working inside the organization in which corruption is occurring, and who has knowledge or suspicion that corruption is taking place. This kind of person

is also known as a “whistle blower”. When corruption information is provided by a “whistle blower”, his/her anonymity must be preserved. Under section 30A of our POBO, it is an offence to disclose the identity of a complainant or informer unless he/she testifies as a witness in the relevant criminal proceedings.

The most productive type of informant is the one who can facilitate the infiltration of undercover agents to collect direct evidence of corruption against the offenders. However, when embarking on an undercover operation, a proactive form of investigation, the safety of the agent should always be the primary concern. In no circumstances should the operation continue if the agent is at risk. Tape recordings should be made, as far as practicable, of all meetings between the suspects and the agent to preserve evidence. There should be a proper system in place to log these audio or video tapes. Strict adherence to a system is required as these tapes may be of evidential value and their authenticity may become an issue at the time of trial. Furthermore, the undercover agent must make notes at the first available opportunity after each meeting whilst his/her memory is still fresh. No matter how good his/her memory is, his/her testimony will be queried in the absence of any notes to support it if he/she subsequently testifies at court. Every undercover operation entails an element of risk to the agent and therefore it should not go on for too long a time. Investigators therefore work under time constraints.

Intelligence gathering, therefore, is all about obtaining pieces of information from different sources that help you to piece together a clearer picture of a corruption problem. No law enforcement agency can be effective unless it possesses the capacity to acquire criminal intelligence, to analyze it and to develop it into investigations that are able to detect crime and produce evidence that will enable the successful prosecution of those complicit in it.

In investigating corruption, problems are encountered by the law enforcement agency at both the covert and the overt stages.

3. The Covert Stage of the Investigation — Developing Intelligence

At the covert stage of an investigation, the law enforcement agency is developing its intelligence in order to confirm that criminal activity has taken place or is about to take place, to identify those involved in it and to learn what they have done or intend doing and when and where they did it or intend doing it. At this stage, telephone interception can be a very valuable intelligence gathering tool. In Hong Kong, telephone interception and electronic surveillance are regulated by the Interception of Communications and Surveillance Ordinance (ICSO) which requires that any telephone interception or certain type of covert surveillance be authorized by a High Court Judge. To ensure compliance by law enforcement agencies when conducting telephone interception and covert surveillance operations, there is a Commissioner on Interception of Communications and Surveillance who oversees all such operations.

It is our experience that telephone interception provides law enforcement agencies with the means to acquire useful intelligence at the covert stage. It enables us to confirm that criminal activity is about to take place or has taken place, it helps us to identify the suspects and it provides us with information on their plans and how they are going to carry them out.

In order to properly develop this intelligence, the law enforcement agency must have the capacity to conduct physical surveillance. Physical surveillance enables the law enforcement agency to identify the relatives and associates of the suspects and the places they live, work and frequent.

Also during the covert stage, evidence can be obtained from public records, such as companies and business records, land registry records, etc. Evidence can also be obtained from confidential records possessed by organizations such as banks, financial institutions and government revenue department.

By all of these means, a picture is gradually revealed of who is doing what, where and when. It is crucial that at the covert stage the investigators are able to pull aside as much of the veil of secrecy as they can. The overt stage of the investigation takes place when suspects are arrested and interviewed, when search warrants are executed and civilian witnesses approached and statements taken from them. The effectiveness of any interview with a suspect will largely depend upon the investiga-

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tors being able to convince the suspect that they already know what he has been doing. If the investigator is questioning from a position of ignorance, he is likely to lose his advantage of dominance over the suspect.

But, returning to the covert stage of the investigation, how else might the investigation be developed, especially how might it be developed to generate admissible evidence? One such way is by electronic surveillance. In Hong Kong, covert surveillance involving the use of surveillance devices is regulated by the ICSO and the product of covert surveillance is admissible in court. Electronic surveillance can take many forms. The obvious and most common forms are audio and visual surveillance by means of surveillance devices to obtain evidence of meetings amongst the suspects and of what is said during the meetings.

Another such way is by undercover operations. Undercover operations can be a particularly effective means of penetrating the criminal enterprise and obtaining evidence against all who are part of it. But undercover operations can be resource intensive. They require the use of physical and electronic surveillance and telephone interception. Those working undercover may have to assume different identities and their private lives will be disrupted. Their lives may be placed at risk. There are many problems and risks associated with undercover operations but the end result can be enormously successful in terms of the evidence they generate.

Another subject that is worth mentioning is ambush operations. An ambush operation takes place when the anti-corruption agency is aware that a corrupt payment will take place at a particular location on a particular day and arranges its officers to lie in wait and arrest the suspects as, or shortly after, the corrupt transaction is concluded.

By all the aforesaid means the anti-corruption agency is able to make use of the covert stage of the investigation to gradually remove as much as possible the veil of secrecy surrounding the corrupt activity. It may start with only minimal information but it gradually develops it into useful intelligence and the intelligence into admissible evidence.

4. The Overt Stage of the Investigation

The problems encountered by investigators are not confined to the stage of covert investigation, however. At the time of overt action, the most important task is to secure the evidence before it is destroyed. Good planning for overt action is the key to the success of every corruption investigation. This is because the secretive nature of the crime renders it difficult to collect evidence at the covert stage and if the evidence is not secured at the first available opportunity when overt action is taken, it can easily be destroyed.

Unlike other crimes where evidence may be available at the crime scene, evidence of a corrupt transaction need not be present at the scene, even in an “ambush” situation when the suspects are arrested. If money does change hands, it is of utmost importance to recover the bribe money at the scene. Thorough planning for the overt action or “ambush” should include a contingency plan in case of any sudden last minute change in the arrangement by the suspects.

Since corruption entails secrecy and a “satisfied customer” situation, sometimes it is necessary to get the cooperation of accomplices in order to get evidence against the main culprits. Consideration may have to be given to gaining the cooperation of accomplices who played a lesser role in order to implicate the main culprits. This, however, is a matter on which legal advice should be sought and followed.

5. Evidence Collation and Analysis

Financial analysis of the involved persons will very often be conducted at both the covert and the overt stages of investigation. This includes retrieval of financial transactions records from banks and financial institutions, property transactions records and other investment details. Analysis of such data helps identify payments of bribes and laundering of corrupt proceeds. This is done not only for the purpose of evidence collection but also with a view to restraining and confiscation of the ill-gotten gains.

With the increased use of off-shore bank accounts as vehicles to eventual disposal of bribe monies, laundering of crime proceeds has now taken a more convoluted route and become more difficult to be unveiled and detected by law enforcement agencies. This necessitates the deployment of experts with the required professional knowledge and skills to do fund tracing and asset identification to prove the chain of bribe payments and to identify, freeze and confiscate the crime proceeds. To this end, the ICAC has its own in-house Forensic Accounting Group, staffed by qualified accountants, to conduct fund tracing and financial analysis and to give expert evidence in criminal proceedings. There is also a separate Proceeds of Crime Section specifically tasked to deal with the identification, freezing and confiscation of corrupt and related crime proceeds. It cannot be emphasized enough that apart from imprisonment, an effective deterrent that can be imposed on the corrupt is to deprive them of their ill-gotten gains.

Another important aspect of evidence collation which requires professional skills is computer forensics. Advances in technology have both posed difficulties to, as well as provided additional avenues for, evidence collation. On one hand, the ever-increasing use of smart-phones and the internet has provided the criminals a convenient platform to communicate with one another in furtherance of their crime. On the other hand, this provides additional avenues for law enforcement agents to gather evidence. To this end, officers of our Computer Forensics Section apply their knowledge and expertise to retrieve evidence of corruption and give expert evidence in criminal proceedings.

6. After Overt Action

The problems do not cease after a case is turned overt. When the evidence comes from an informant with a criminal background, it is almost certain that his/her credibility and bad character will be attacked by the defence. It is, therefore, unsafe to proceed with a prosecution based merely on the uncorroborated evidence of a tainted informant. The same problems apply to cases where an accomplice testifies for the prosecution. Because of his/her status, he/she will be regarded as a tainted witness when he/she testifies under immunity. Therefore, it is important to get corroborating or supporting evidence and not to solely rely on the evidence of immunized witnesses to prove a case of corruption.

Safety of witnesses is another problem that may be encountered by investigators. If the law enforcement agency's assessment is that the safety of a witness or his/her family members is at risk, it will be necessary to arrange protection for them. Pursuant to the Witness Protection Ordinance, the Witness Protection Section in the ICAC is tasked to implement the Witness Protection Programme to ensure the personal safety and well being of ICAC witnesses who may be at risk as a result of their assistance in ICAC investigation and subsequent prosecution. This implements what is required under Article 32 of the UNCAC.

IV. CORRUPTION — A TRANSNATIONAL CRIME

The increasing mobility in international travel and the rapid means by which money can now be transferred have assisted criminals to evade justice by fleeing their jurisdictions and hiding or laundering their corrupt proceeds. The rapid development of international financial and banking systems has enabled the speedy transfer of money from any one place in the world to another. As corruption has become increasingly transnational, so the fight against corruption has become more proactive requiring more and more investigations to be undertaken jointly or with the cooperation with our counterparts in other jurisdictions. To this end, the UNCAC provides a timely set of benchmarks for the criminalization of corruption and the development of a global consensus for the implementation of anti-corruption measures and strategies.

To be able to effectively investigate any form of transnational crime, including corruption, close liaison and mutual cooperation with law enforcement counterparts on the regional and international fronts are important. To achieve this, there needs to be partnerships between jurisdictions that will provide prompt, efficient and responsive cooperation of both a formal and informal nature that cater to the requirements of both the requesting and requested jurisdictions.

Informal cooperation between law enforcement authorities is quick and effective and there is

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significant scope for expansion of this process at both the covert and overt stages of an investigation. At the covert stage of investigation, informal mutual assistance involves the sharing of intelligence and the conducting of joint investigations including undercover operations. But this can only happen if the party seeking assistance can trust the party providing the assistance not to breach the secrecy of the investigation. Over the years, the ICAC has worked hard to build up such trust and to develop close relationships with overseas law enforcement agencies and the cooperation this has produced has been of great assistance in the investigation of cross border crimes.

At the overt stage of investigation, the collection of evidence will be with a view to prosecution and so must be obtained without delay. The delay in obtaining evidence can pose great problems to law enforcement officers, such as ensuring witnesses remain cooperative or running a prolonged witness protection programme. As witnesses have to testify based on their memories, the longer the delay, the poorer their memories are likely to become. Long delay can also lead to an application by the defence for a stay of proceedings based upon a claim that the delay has prejudiced the defendant's right to a fair trial. If such a claim by the defence is successful, the confidence of the public in the effectiveness of the criminal justice system is placed at risk.

The importance of expeditious mutual cooperation from foreign jurisdictions can be illustrated by a case example. This case involved an arrest operation conducted by the ICAC. Under Hong Kong law, an arrested person can be detained up to a maximum of 48 hours. Very soon after the suspects were arrested in Hong Kong, we were able to obtain assistance from a law enforcement agency in another part of the world to locate a very important witness whose evidence was crucial to the case. Within hours ICAC officers flew to that jurisdiction to interview the witness and secured important evidence before the arrested persons were released on bail in Hong Kong.

Apart from informal cooperation, there must also be put in place a legislative underpinning to the obtaining of evidence, in an admissible form, outside the jurisdiction for use within the jurisdiction. This is referred to as mutual legal assistance (MLA). The breadth of MLA, ranging from collection of evidence to search of premises and to asset recovery, can be seen in the articles of UNCAC. MLA is a very important part of the UNCAC and State Parties are encouraged to develop both official and unofficial channels for working more closely together and helping one another.

V. CASE STUDIES OF CORRUPTION INVESTIGATION

The above gives a general idea of the problems that are often encountered by anti-corruption agencies in investigating corruption. In order to better illustrate some of these problems, two cases investigated by the ICAC detailed below reveal what problems were associated with them and the way we went about tackling them.

A. "Operation Bridge": A Proactive Success Story

"Operations Bridge" illustrates the effectiveness of deploying special investigative techniques in an undercover operation. It concerned an investigation into the corrupt activities of three government officials, one from the Customs and Excise Department and two from the Immigration Department. Because of their law enforcement backgrounds, they were extremely alert and this posed difficulties to us when we deployed covert investigative methods. The breakthrough came when we deployed an undercover agent, from an overseas law enforcement agency which rendered great assistance to the ICAC in this particular investigation. Since the undercover agent was non-Chinese, the corrupt officials did not have any suspicions of him and they let down their guard and were at ease when they engaged in conversations with the undercover agent in order to further their corrupt activities. All their discussions and meetings were audio/video tape-recorded and transcribed, and subsequently produced at court. The three government officials and others who were involved were all convicted and received heavy penalties.

This undercover operation produced very good results which would not have otherwise been possible had there not been the infiltration by the undercover agent. Thus in investigating secretive crime of this nature, an imaginative use of special investigative techniques is necessary in order to achieve what might otherwise not be achievable. Of course, in this unique undercover operation, it

would not have been possible without the support of our overseas counterpart who agreed to deploy the undercover agent to assist us.

The importance of proactivity and international cooperation is recognized by the UNCAC which specifically encourages joint investigations and international cooperation in fighting corruption. The value of international cooperation cannot be emphasized enough especially in an era when crimes, including corruption, is increasingly becoming more transnational in nature.

It is worth mentioning that at the covert stage of investigation of “Operation Bridge”, an associate of the informant who was the Immigration Chief of an overseas jurisdiction visited Hong Kong. The Immigration Chief solicited huge sums of money from the informant in return for the sale of diplomatic passports of his country. In response, the ICAC deployed one of its own officers as an undercover agent and posed as the head of a drug trafficking syndicate who wanted to obtain diplomatic passports to facilitate his transnational drug trafficking activities. The Immigration Chief was caught “red handed” in a hotel room when he accepted monies from the ICAC undercover agent, after he had stamped the official seal and issued diplomatic passports “under camera”. He was prosecuted, convicted and sentenced to heavy penalty. The success of this undercover operation illustrates how important it is to “expect the unexpected” and how being prepared to react swiftly to an unexpected development enables the law enforcement agency to convert what might be regarded as a problem into an opportunity. In an undercover operation, it is not just necessary to be able to respond to changing circumstances, it is also necessary to be able to respond to such circumstances positively and to turn them to your advantage.

In its preamble the UNCAC recites that States Parties are: “Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively.” This conviction has led to the inclusion of Article 50(1) which requires States Parties to take such measures as may be permitted by its laws and as may be necessary to allow for the use of controlled deliveries and special investigative techniques in order to combat corruption effectively. In Hong Kong, we have found that the use of these techniques, in the way described above, is crucial to ensuring our investigations are effective. Removing the many veils of secrecy surrounding corruption is never easy and law enforcement needs more than just hard work and persistence to do so. Being committed to the task is necessary but, on its own, is not enough. It must be supported by imaginative use of every investigative technique available.

B. Uncovering Bribery and Greed through Covert Surveillance

This case illustrates the effectiveness of using covert surveillance as an investigative tool to collect evidence. It concerned an Executive Director (ED) of a publicly listed company (Company A) who, through the arrangement of two middlemen, both investment advisers, offered bribes to a Fund Manager of an international financial institution for arranging the Funds managed by his financial institution to buy in a large tranche of Company A’s shares. The ED also offered bribes to a Senior Analyst of an international investment bank in return for the latter causing a favourable research report to be written on Company A so as to promote its shares.

On the day of overt action, when the ED made a corrupt payment to the two middlemen, they were arrested red-handed. Subsequently the Fund Manager and the Senior Analyst were also arrested. When interviewed under caution by ICAC officers, they all admitted offering and/or accepting bribes.

The management of both the financial institution and the investment bank confirmed that none of their employees were allowed to accept any advantages.

In the course of covert investigation of this case, valuable evidence was gathered through covert surveillance by the audio and video tape-recording of two meetings held by the suspects.

The first meeting took place in a private room of a hotel restaurant. Present were the ED, the Fund Manager and the two middlemen. The second meeting took place in another restaurant in a commercial office building. Present were the ED and the two middlemen. During the two meetings, they discussed matters pertaining to their corrupt dealings. Both meetings were audio and video tape-

recorded by ICAC officers.

Though being severely challenged by the defence at the time of trial, the judge ruled the video and audio tapes admissible. Indeed, vital evidence was secured from the above two meetings through covert surveillance. Nothing could be more convincing of the guilt of the defendants than playing in court the actual conversations of them discussing their corrupt dealings. In view of the secretive nature of corruption, this type of evidence is not normally available. It was only through the effective deployment of covert means of recording that this highly incriminating evidence of the actions and words of the offenders could be obtained. A significant feature of this case is that it highlighted the need for a statutory backing to covert surveillance, an important area of law enforcement work. As a consequence of this case and other legal challenges, our Government conducted a review of the legal basis for telephone interception and covert surveillance and this led to the enactment of the ICSO.

After trial, apart from one of the middlemen who had testified under immunity for the prosecution, the ED, the Fund Manager, the Senior Analyst and the other middleman were convicted of bribery offences and were sentenced to imprisonment.¹

VI. CONCLUSION

As in any criminal investigation, success comes through commitment, hard work and persistence by persons who have been trained in how to investigate corruption. Despite all I have said, and the lessons that I have tried to impart, there is still no guarantee of success. Inevitably, there will be occasions when you know corruption has taken place, but you cannot prove it. You, however, must never allow failure to lessen your belief in the importance of what you are doing. The community is depending upon you to keep up your work even though there are times when you may be disheartened by your inability to prosecute the corrupt. So keep believing and remain committed, for the struggle is worth it in the end.

¹On appeal, the conviction of the Senior Analyst was quashed as the Court of Appeal found the conviction, based on hearsay evidence, against him unreliable.