

7.2 Americas

Argentina

Corruption Perceptions Index 2007: 2.9 (105th out of 180 countries)

Conventions

OAS Inter-American Convention against Corruption (signed March 1996; ratified August 1997)

OECD Convention on Combating Bribery of Foreign Public Officials (signed December 1997; ratified February 2001)

UN Convention against Corruption (signed December 2003; ratified August 2006)

UN Convention against Transnational Organized Crime (signed December 2000; ratified November 2002)

Legal and institutional changes

- In December 2006 Congress passed the **law on political parties' financing**, which modifies the law on political party and electoral campaign finance. The maximum permitted expenditure for political parties in electoral campaigns increases from P1 (US\$0.32) to P1.50 per citizen. The law also stipulates that the bank accounts in which political parties deposit funds designated to sustain their campaign activities should be unified. The old law obliged parties to maintain two different accounts, one for current expenditure and another for expenditure during electoral campaigns. The new law also prohibits contracting publicity services from third parties. Given that the law is important only if put into practice during elections, it is too early to comment on its value.
- A 1992 law on financial administration regu-

lated the reach and method of **modifications to budgetary law**. Decisions that affected changes in expenses, financial applications and the purposes of the general budget were reserved to Congress. Since August 2006, however, the head of the Cabinet has had the power to modify the total amount approved by each law of budget.

- At the end of April 2007 a draft law was introduced **reforming the law on financial administration**. The constitution regards the National Auditing Office (AGN) as an autonomous public body responsible for providing the legislative branch with technical assistance. The draft sought to strip the AGN of its autonomy by granting highly discretionary power to the commission responsible for coordinating the AGN's activities with Congress to make decisions on the AGN's behalf. Civil society organisations pronounced against the draft law, which is now suspended.¹

¹ *La Nación* (Argentina), 21 May 2007.

Putting the brakes on government by decree?

In July 2006, after a long period of non-compliance, Congress sanctioned the Decrees of Need and Urgency Regime, which calls for the creation of a permanent, bicameral committee to validate decrees of need and urgency (DNU) ordered by the president.

These decrees became common during the presidency of Carlos Menem (1989–99) and were heavily used by his successors, Fernando De La Rúa, Eduardo Duhalde and Nestor Kirchner. Decrees of need and urgency enabled presidents to issue orders that were legislative in character, though they clearly undermined the role of Congress. In a Congress controlled by the executive, as now, DNUs mean that the president can rule unchecked.

According to the law, the new committee:

- is composed of eight deputies and eight senators, in proportion to their parties' representation in each chamber;
- operates even when Congress is not in session;
- decides its rulings on an absolute majority of votes;
- issues a statement on a decree's validity or invalidity at plenary sessions of each chamber of Congress; and
- has ten working days to arrive at a decision and to raise it in plenary sessions of each chamber of Congress.

Once a decision has been raised at the plenary sessions, both chambers must give it immediate treatment. If ten days pass without an official statement, both chambers will see to the express treatment of the decree.

There were two issues that mainly concerned members of Congress. The first involved the period of time allotted for Congress's consideration of DNUs. In the law finally sanctioned, time periods were not specified; the law states only that both chambers ought to 'give immediate treatment' to the committee's judgment.

The second issue concerns what becomes of DNUs that Congress does not review, a situation that may arise given that no specific time frame has been prescribed. The laws regulating DNUs state that they are valid until abolished, by express will, in both chambers of Congress. This would imply that, when Congress fails to review issues raised by the committee, there would be an artificial sanctioning of the decree – a practice that the constitution expressly prohibits.

The passing of the law provoked numerous questions among legislators, as well as among constitutional specialists. A case was brought before the Supreme Court in a bid to declare the unconstitutionality of the law creating the bicameral committee. It argued that the law violates the separation of powers, and establishes a system of 'tacitly sanctioning laws'.²

It is unlikely that the bicameral committee will succeed in becoming an effective mechanism for regulating DNUs. This appears to be even more so the case considering that the Senate constitutional affairs committee charged with the treatment of the law is chaired by Senator Cristina Kirchner, the president's wife, who was herself standing for office in October 2007. As an opposition senator in the 1990s, she opposed such a solution. As a possible president, she is likely to be even more convinced of the necessity to retain the option of decrees of need and urgency.

² Asociación por los Derechos Civiles, 'Acción de Amparo contra la Ley que Reglamenta los Decretos de Necesidad y Urgencia', 15 December 2006; see www.haciendocumbre.org.ar.

Corruption and a gas pipeline

The case of the Skanska pipeline is important, because it reflects on the integrity of the Kirchner presidency, which, from its beginnings in 2003, has sought to project the image of a political culture free from corruption.

The case concerns the construction of a natural gas pipeline from Bolivia in order to make up shortfalls in gas supply caused by the devaluation of the peso in 2002 and the consequent freezing of tariffs.³ Transportadora de Gas del Norte (TNG), the pipeline operator, organised competitive tenders. Some were won by Skanska, a Swedish company, despite complaints by TNG that the bids were coming in at too high a price. Nevertheless, the regulator instructed TNG to pay the excess amount, and still maintains that the operator's estimates were too low.⁴

Following an anonymous tip-off and an internal audit, evidence emerged that Skanska may have paid bribes to win the contract and been involved in tax evasion. Evidence was found that the company received receipts from Infiniti, which is considered a 'phantom company', and that Skanska executives had paid out P13.4 million (US\$4.3 million) in bribes.⁵ Skanska sacked seven of its executives – who were subsequently arrested – and paid the tax authorities US\$5 million.⁶

The president tried to dissociate the public authorities from the scandal, maintaining that it was purely private sector corruption. In May he acknowledged that government officials may have been involved, however, and two officials under investigation were fired.⁷

There have been other developments that indicate a political interest in ensuring that the investigation is not conducted with the necessary independence or rigour. First, the case has been split between two different courts, on the grounds that two separate offences had been committed: bribery and tax evasion. As a result, the judge who initiated the investigation, and is therefore the most qualified to lead inquiries, has been prevented from working on the part of the investigation pertaining to bribery. Meanwhile, the judge investigating the bribery offence has been offered the post of security minister in the city of Buenos Aires, an offer he promptly accepted.⁸ Similarly, the public prosecutor has been offered a Cabinet post in the province of Buenos Aires. This signals a serious threat to the investigation, because these kinds of cases need time, patience and strong levels of detailed knowledge relevant to the trial. If any jury backs off, the replacement will need a long period of adaptation, further delaying resolution of the case.

When acting judges are a threat to judicial independence

Federal judges of lower courts are elected by the Judicial Council, a multi-sector organ with representatives from the three branches of state. The selection commission makes an open call for the submission of résumés and objections, and issues a report that the plenary body uses to select the three most qualified candidates. That list is sent to the national executive branch, which convenes a public audience and presents observations about the candidates. The president then makes the choice and requests Senate approval. The lack of judicial appointments in accordance with the above

3 *The Economist* (UK), 10 May 2007.

4 *Ibid.*

5 *Offnews* (Argentina), 16 May 2007; *The Economist* (UK), 10 May 2007.

6 *The Economist* (UK), 10 May 2007.

7 *Reuters* (UK), 30 May 2007.

8 *La Nación* (Argentina), 29 September 2007.

process has led to the temporary status of acting judges being extended. At present, acting judges account for nearly 20 per cent of all working judges.⁹

The problem is that, once the list of qualified candidates has been sent to the president, it does not necessarily proceed to appointment. The Judicial Council passed Resolution 76/04, so that, in the case of prolonged vacancies (more than sixty days), it can designate a member from the list of the three most qualified candidates from the court that produced the vacancy. A judge so designated continues his or her duties until the definitive cessation of the vacancy, or until twelve months have passed, which can be extended by six more months by a well-founded decision.¹⁰ As a result, these judges, who provisionally assume the role of doling out justice, do not enjoy the privilege of tenure.

In view of the discretion the council can exert in its nominations and removals, this puts temporary judges in an extremely vulnerable situation and has an impact on judicial independence.¹¹ Additionally, in cases in which acting judges become part of the list of the most qualified candidates – after having successfully passed the selection process – the delay aggravates their vulnerability, as they are already waiting for appointment and Senate approval.

This way of appointing judges is contrary to the standards and principles designed to measure and guarantee the independence of the judi-

ary. The Basic Principles on the Independence of the Judiciary state that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives'. Moreover, the Inter-American Convention against Corruption presupposes publicity as a requirement for selection procedures. None of these requirements is heeded when the Judicial Council choose judges from a list of lawyers or secretaries of lower courts.

On 24 May 2007 the Supreme Court declared the judicial substitutions system unconstitutional and ordered Congress and the executive to establish a definitive system for regulating the replacement of judicial vacancies in accordance with judicial resolutions within a year.¹²

Water failures down to poor regulation and inadequate sanctions

According to World Bank data for 2006, an index displaying failures in water supply ranks Argentina lower than the region and the world (6.09, 13.32 and 13.57, respectively).¹³ A report by the general auditor indicated that, as of July 2004, the company responsible for providing water services in Argentina, along with the corresponding regulatory body, had not adequately fulfilled the terms of its mandate.¹⁴ It had not maintained adequate water quality and had failed to meet deadlines for the development of network infrastructure. In addition, the company failed to make significant investments despite this obligation being stipulated in its contract.

9 Ministry of Justice response to an access to information request by Poder Ciudadano. See the Report on Acting Judges, available at www.poderciudadano.org/up_downloads/news/272_1.pdf.

10 Law 25.876, article 1.

11 It should be emphasised that, from November 2006, the composition of the Judicial Council has been reformed. The dominant political party has broken the equilibrium that the constitution established for this multi-sectoral body.

12 National Supreme Court of Justice in *Rosza, Carlos Alberto y otro s/ recurso de casación*, R.1309 XLII; available at www.mpf.gov.ar/Novedades/R%201309%20L%20XLII%20ROSZA.pdf.

13 World Bank and IFC, 'Encuesta de Empresas' (Washington, DC: World Bank and IFC, 2007).

14 See www.agn.gov.ar/informes/Aguas.pdf.

The report also suggested that penalties imposed by the regulatory body for such breaches proved ineffectual. For example, the company promised to invest US\$2.5 million in a treatment plan in the south-east in 2001. When the company failed to make the investment, the regulatory body fined it a mere US\$8,740 – less than 1 per cent of the planned investment. Furthermore, some systems and item provisions did not follow contractual technical specifications. For six years of the company's contract excessive levels of nitrate and chromium were found in the water network, and for four consecutive years studies cited an increase in the number of wells containing arsenic. In 2003, while the company was transporting the sewage of 5.7 million inhabitants, it was treating only 12 per cent of the waste, allowing the rest to spill into Rio de la Plata without adequate treatment.¹⁵

Although there are no direct allegations of corruption, it is possible to identify a number of irregularities related to non-fulfilment of contracts, neglect of regulations and an absence of appropriate sanctions for non-compliance.

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Further reading

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- Fundación Poder Ciudadano, in collaboration with Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento (CIPPEC), 'Informe de Sociedad Civil en el Marco de la Segunda Ronda del Mecanismos de Seguimiento de la Implementación de la Convención Interamericana Contra la Corrupción' (Buenos Aires: Poder Ciudadano and CIPPEC, 2006).
- M. J. Pérez Tort and C. Ribeiro dos Santos, *Una Mirada Atenta sobre el Consejo de la Magistratura* (Buenos Aires: Fundación Poder Ciudadano and Talleres Gráficos Manchita, 2006).
- S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge: Cambridge University Press, 1999).
- Poder Ciudadano: www.poderciudadano.org.

15 Ibid.

Chile

Corruption Perceptions Index 2007: 7.0 (22nd out of 180 countries)

Conventions

OAS Inter-American Convention against Corruption (signed March 1996; ratified September 1998)
 OECD Convention on Combating Bribery of Foreign Public Officials (signed December 1997; ratified April 2001)
 UN Convention against Corruption (signed December 2003; ratified September 2006)
 UN Convention against Transnational Organized Crime (signed December 2000; ratified November 2004)

Legal and institutional changes

- **Eight bills were introduced** in December 2006 addressing transparency, anti-corruption measures and a new era of constitutional reform; some of the most important are discussed below.
- An **Access to Information Bill** was intended to bring Chile into line with global standards of transparency of information (see below). The bill considers the creation of an Access to Information Commission, composed of four members, to act as an appeal body for citizens whose requests for information have been refused. It was expected to pass Congress by the end of 2007.
- A **Constitutional Reform Bill** aims to resolve a number of issues related to congressional and political party matters. The bill seeks to estab-

lish the public nature of the declarations of assets and interests required of MPs, government officials and judges.¹ This was made necessary by a Constitutional Court ruling in 2005 that a conflict existed between the right to privacy and the public's right to know. The bill would also authorise the holding of primaries for the selection of party candidates in congressional elections, with public funding for those campaigns; partial state funding for party campaigns; increased power to dismiss members of Congress who have contravened regulations on political campaign finance;² and tighter conflict of interest regulations. Members of Congress who are lawyers would not be allowed to participate in court cases, since senators approve nominations to the Supreme Court; nor would they be able to vote in legislation affecting their personal interests.

1 The declaration of private interests by members of Congress, mayors, judges, high-ranking government officials – including ministers – and other authorities was established under Law 19.653 in 1999 and the assets statement requirement was required under Law 20.088 in 2005.

2 The financing of political party campaigns was regulated for the first time by Law 19.884 in 2003. The legislation set limits on political party contributions from private, anonymous and corporate sources, and also introduced the principle of public funding being allocated according to the number of votes obtained in the previous election.

Finally, the bill aims to widen the oversight of the state comptroller to state-owned companies and not-for-profit institutions that receive public funding.

- A **Revolving-Door Bill** would disqualify for one year some senior officials from accepting jobs in companies supervised by the bodies for which they once worked, and provides financial compensation for the ban. The same bill would prevent civil servants from working as lobbyists for two years after leaving office. Until now the law determined a six-month ban and for only a limited number of authorities.³
- Another bill seeks to improve the system for **depoliticising the civil service**. Created in 2003, the *Sistema de Alta Dirección Pública*, or High Public Management System, established a more objective human resources policy aimed at limiting the power of the presidency to appoint over 3,000 political supporters to positions in the administration. The new system intends to reduce this traditional network of patronage significantly, to about 600.⁴ The bill would eliminate weaknesses in the selection procedure and tighten the time frame for filling posts currently occupied by political appointees.
- A **bill for whistleblowers** was intended to protect public officials who have exposed institutional corruption. It passed through Congress in July 2007. Although a general improvement in the legal framework, its powers to protect whistleblowers are actually quite weak. Few public officials will be encouraged to risk careers and reputations under such conditions.
- While presenting this legislative agenda, the government enacted a **presidential decree on transparency and access to information** that obliges all twenty ministries and 240 agencies of the executive branch to publish a host of information relevant to the public on their websites (see below).

Back to the transparency agenda

Though corruption is far less entrenched in Chile than in other Latin American countries, it remains a recurrent phenomenon that is difficult to uproot. The most serious cases in the past decade have tended to be associated with the use of public funds for political campaign purposes.⁵

Cases of corruption revealed in 2002 led to a political agreement between the centre-left government of Ricardo Lagos and the opposition.⁶ The agreement included elements of reform that promoted greater transparency and better instruments for controlling corruption. For the first time, legislation was passed to regulate campaign financing, establish formulas for transparency and introduce a degree of public funding that enabled greater political competition and reduced pressure on candidates to solicit campaign funds. It also created a more open system of public procurement and contracting through internet publication. Declarations of interests and assets were also introduced for public officials.

Significant as these steps were, their implementation showed up important flaws. In political finance regulation, the implementation of three

3 Contained in article 56 of Act 18.575, as amended through Act 19.653 of 1999.

4 See www.lyd.com/LYD/Controls/Neochannels/Neo_CH3915/deploy/exp%2007%20ADP%20uaiLyDres.pdf.

5 According to the World Economic Forum Executive Opinion Survey, only 3 per cent of businesspeople pointed to corruption as one of three main problems for those doing business in Chile. Around a half, however, expressed concern about irregularities in political campaign funding and the difficulty of gaining access to information. See A. Bellver and D. Kaufmann, 'Transparenting Transparency: Initial Empirics and Policy Applications', preliminary draft discussion paper, presented at the IMF Conference on Transparency and Integrity, Washington, DC, July 2005.

6 'Acuerdos Politico-Legislativo para la Modernización del Estado, la Transparencia y la Promoción del Crecimiento' (2003); available at www.modernizacion.cl/1350/articles-47984_Acuerdo.pdf.

ways of designating private money (anonymous, secret and public) has proved problematic. In the case of public contributions, the purpose was to ensure that when the donation surpassed a certain amount the donor should be known to both the candidate and the public. In some cases it has proved hard to verify the real identity of the donor, since false names may be used; in some cases this means that only the candidate can identify the donor. In the case of anonymous contributions – allowed for small amounts – the fragmentation of the real contribution makes it difficult to prove that the threshold for each donor has not been exceeded.⁷

In November 2006 President Michelle Bachelet formed an Experts' Commission to draw up proposals to control corruption and improve probity in public affairs. The commission consisted of economy minister Alejandro Ferreiro Yazigi, under-secretary for finance María Olivia Recart Herrera, Carlos Carmona from the legal division of the Ministry of the Secretary General of the Presidency, and a group of experts, including Davor Harasic, president of Chile Transparente, TI's national chapter.

The group was brought together in reaction to a series of scandals related to campaign funding during the legislative election of December 2005. Several investigations revealed the diversion of public funds from the Sports Ministry agency Chiledeportes, and several emergency employment programmes. The Chiledeportes case was uncovered during an audit of dozens of small programmes conducted by the state comptroller. A considerable number of the programmes could not justify their use of resources. Later it came to light that part of the funds had ended up supporting political campaigns.⁸

Further irregularities, involving false invoicing, were discovered in the campaign financing reports of a few MPs. Using this technique, candidates could justify requests for more public funding while avoiding the obligation to return unspent private contributions. The investigation found that officials of the tax office had worked with a paper company that organised fraudulent invoices to evade taxes. In November 2006 the head of the electoral service filed a suit at the prosecutor's office to investigate irregularities in the accounting reports of some candidates.

The Experts' Commission made over thirty separate recommendations for changes in the institutional structure,⁹ which President Bachelet announced on the same day that Chile ratified the UN Convention against Corruption.¹⁰ The legislative agenda was broadly put into practice through the package of proposals sent to Congress in December 2006. Though these moves in favour of greater transparency are significant, whether they will have any observable impact on opportunistic behaviour will depend on their final design and President Bachelet's political commitment.

Law on access to information and presidential decree

On the Experts' Commission's advice, the government produced a bill on access to public information in December 2006. It also accepted a proposal to create a specialised autonomous body for access to information, with powers of control, supervision and discipline. Mexico's Federal Institute of Access to Public Information and the United Kingdom's Information Commissioner were the preferred models for similar institutions in Chile.

7 See www.cepchile.cl/dms/lang_1/buscar.html?tipologica=or&textobuscar=salvador%20valdes&pagina=4.

8 Report of the special investigatory committee of Chiledeportes, available at www.camara.cl/comis/doc/INF.aspx?prmID=50.

9 See www.chiletransparente.cl/doc/InformeFinal06.pdf.

10 Available at www.modernizacion.cl/1350/article-137949.html.

The previous government had made a timid attempt in 1999 to make information more transparent, by passing a regulation known as the Probity Law.¹¹ This established a set of obligatory principles for officials, including a high level of transparency in their everyday activities. An administrative resolution authorised services to decree the secrecy criteria autonomously, however.¹² By 2005 some 100 resolutions had been passed that limited access to information on internal investigations, disciplinary proceedings, tenders, correspondence and pay, among other procedures.¹³ Both the intention and the spirit of the law were clearly contravened.

The current bill does not grant Chile's access to information agency sufficient autonomy, proposing instead that its governing body should be appointed by the presidency. During the first parliamentary debate on the proposal it was conceded that Senate approval would be required for the appointment of the most senior board officials, but the legislative process had not ended at the time of writing.

The aim of the bill was to institutionalise the principles of transparency and access to public information incorporated in the 2005 constitutional reform. Shortly after introducing the bill to Congress the government proactively promulgated a presidential decree that obliged all ministries and departments to publish on the internet most of the information that the law, once passed, would have required. This includes complete lists of officials and advisers, current and concluded tender and purchasing processes, expenditures and fund transfers, information on the ownership of contractors and bidders, and

normative frameworks and all resolutions affecting third parties.

This presidential decree brings about a significant change of direction, although past experience tends to show that any move towards greater transparency can be swiftly reversed. For this reason it is essential to establish an institution whose principal functions are to monitor full compliance with the law, apply sanctions, offer technical assistance and recommend legal, regulatory and procedural improvements.¹⁴

Civil society monitoring is essential to this end, but it is not sufficient. A *Corporación Humanas* study in 2006 highlighted restrictions in access to the assets and interests statements of members of Congress,¹⁵ negating the very objectives that transparency policies aimed to achieve. These surreptitious forms of limitation are common and require a specialised independent body, able to guarantee that existing obligations are met. If access to this kind of information is denied or is accessible only with great difficulty, there can be no true accountability in government.

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Further reading

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- A. Fung *et al.*, 'The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?', Faculty Research Working Paper

11 Law 19.653.

12 Act 18.575, article 13, paragraph 11.

13 M. Sánchez, 'Secretismo de Chile: Revisión de la Práctica Administrativa 2001–05' (Santiago: Agrupación Defendamos la Ciudad, 2005).

14 D. Banisar, *Freedom of Information around the World: A Global Survey of Access to Government Information Laws* (Washington, DC: Privacy International, 2006).

15 See www.humanas.cl/documentos/RESUMEN%20ESTUDIO%20DECLARACION%20PATR%20abril07.pdf.

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Corporación Chile Transparente/TI Chile: www.chiletransparente.cl.

Mexico

Corruption Perceptions Index 2007: 3.5 (72nd out of 180 countries)

Conventions

OAS Inter-American Convention against Corruption (signed March 1996; ratified May 1997)

OECD Convention on Combating Bribery of Foreign Public Officials (signed December 1997; ratified May 1999)

UN Convention against Corruption (signed December 2003; ratified July 2004)

UN Convention against Transnational Organized Crime (signed December 2000; ratified March 2003)

Legal and institutional changes

- In August 2006 the Ministry of Public Administration released the **Annual Operative Programme of the Professional Career Service (SPC)**, a comprehensive document that establishes guidelines for the service's operation.¹ Twenty-four indicators are combined to evaluate the SPC of the federal public administration and identify measures to correct its functions. Of particular note are the indicators geared

towards increasing competitiveness in public service hiring procedures and improving the evaluation of public servants' performance. These indicators help to eliminate spaces for discretionary authority and other irregular practices in hiring processes, and confer transparency on the admission, evaluation and separation of public servants from their posts. The law for the SPC came into effect in 2003 and comprises close to 40,000 government posts subject to an open application process.²

1 See www.funcionpublica.gob.mx/pt/difusion_disposiciones_juridicas/doctos/POA_SISTEMA_2006_publicacion%2006.pdf.

2 Secretaría de la Función Pública (SFA), 'Informe de Labores' (Mexico City: SFA, 2007).

- In December 2006 Congress approved an amendment to article 73 of the constitution, granting it the autonomous power to set up **administrative courts to discipline public servants who harm the public interest** in the exercise of their duties. Such acts include the improper use of public funds and the illegal acquisition of goods. Although reporting such crimes is primarily incumbent on their managers, channels exist through which citizens can inform the authorities of wrongdoing by public servants. The reform will strengthen the independence of administrative courts, given that it grants a broad legislative framework that amplifies their scope of action and their powers.
- During its first year in government the administration of President Felipe Calderón presented its **Manifesto of Anti-Corruption Efforts and measures to promote accountability, transparency and access to information** on International Anti-Corruption Day on 9 December 2006. The manifesto focuses on six priority areas: accounting and fiscal reform; educational content; regulatory simplification; the promotion of transparency; institutional accountability; and the professionalisation of public service. To increase the efficiency of auditing, public accounting systems will be harmonised across the administration and auditing procedures in the federal executive branch will be intensified. The public administration ministry is seeking to strengthen the transparency institutions established by the outgoing Fox administration, including the Federal Institute of Access to Information (IFAI) and the SPC.
- The **National Network in Favour of Oral Trials** (*Red Nacional a Favor de los Juicios Orales*), a civil society organisation, submitted a constitutional reform bill in November 2006 to establish oral trials. The presidents of the Justice Commission and the Commission on Constitutional Issues have agreed to present it as a formal proposal to modify the federal

judicial system. The proposal was in its final round of discussion when this text was submitted (see below).

- In April 2007 Congress passed an amendment to article 6 of the constitution, which refers to the **right of access to information**. The amendment obliges all levels of government – federal, state and municipal – to standardise their access to information laws according to international practices. States used to make their own provisions regarding access to information, and the procedures and content vary significantly. The objective is to oblige states to adopt practices that have proved successful both nationally and internationally, such as the use of electronic portals to request information and to submit an appeal when a request is denied or when the user is dissatisfied with the information provided. The amendment came into effect in July 2007.

Towards trial by spoken testimony

A major concern regarding the administration of justice is the high incidence of corruption (see the *Global Corruption Report 2007*). The justice system is founded on the creation of a written file, which serves as the basis for all cases and which, once composed, is submitted to a judge, who passes the appropriate sentence according to the arguments presented. The system draws out the process of resolving cases significantly. Together with the large number of documents handled when a judge is absent, it creates numerous opportunities for corruption and contributes to the public's alarmingly low level of confidence in judges and the justice system.

These concerns have generated vigorous debate over the years. It was only in November 2006, however, that a formal proposal to introduce oral trials was presented to Congress. An important aspect of the proposal was that it resulted from

the work of the National Network in Favour of Oral Trials, which brings together representatives from academia, CSOs, the media, business groups and lawyers' associations. Several laws, such as the federal Law for Transparency and Access to Information, approved in 2002, were similarly crafted by fusing a citizens' proposal with an executive policy.

The network's intention is to reform five constitutional articles so as to incorporate oral trials into federal criminal cases. These include: restrictions on the use of preventive imprisonment; the prohibition of illegally obtained evidence; the incorporation of presumptive innocence into the constitution; principles of orality and publicity; the expansion of rights for victims of crimes; limitation on the district attorney's current monopoly of penal action; and a multiplication of the available channels for citizens to take direct recourse to justice. Some observers expect the bill, if passed, to unblock the courts' workload, rationalise the penal process and eliminate the opaque areas where corruption flourishes. By conferring more transparency on the many judicial decisions made in private, those involved should be better able to monitor the progress of their legal cases.

The bill seeks to construct a dual justice system, similar to that in Chile, in which minor cases are settled by reaching agreement on damage caused and the payment of a fine, while more serious cases are resolved through oral trials. It remains to be seen which courts will oversee each process. Trial exercises are currently under way.

The presidents of the Justice Commission and the Commission on Constitutional Issues received the bill in November 2006 and it is still being analysed and modified. President Calderón has declared himself in favour and encouraged legislators to put the bill to the vote as soon as possible. The climate appears to bode well.

There have been other projects to introduce oral trials at local level, some more ambitious than others. The most advanced state is Chihuahua, which instated a new penal code that includes oral trials in January 2007. In Nuevo Leon, the state of Mexico and Oaxaca, the implementation of similar provisions is under way, while oral trials are in the design or approval phase in six other states.

The quality and results of the first experiments have been mixed, as they depend to a great extent on state legislation. There has been a high degree of heterogeneity among the legal provisions, but the arguments in favour of oral trials are still little understood by the primary beneficiaries, the general population.

Access to information and what the 2006 election revealed

On 2 July 2006 Mexico witnessed the most contentious presidential election in its history. Never before had the count produced such a small margin between votes for the opposing candidates, in this case Andrés Manuel López Obrador of the left-leaning Coalition for the Good of All (*Coalición por el Bien de Todos*) and Felipe Calderón Hinojosa of the National Action Party (*Partido Acción Nacional*).

The Federal Electoral Institute (IFE) had to wait several weeks before announcing the official result, finally naming Calderón the winner with a majority of 0.56 per cent. López Obrador appealed for a recount to the Supreme Court in Electoral Matters (TEPJF), which approved a partial but representative recount of the votes cast in booths across the country. The recount repeated the result of the original and did little to resolve the controversy. On 5 August, the very day the verdict was reached, López Obrador reiterated his demand for a second, comprehensive recount of every vote cast. The TEPJF turned down the petition on technical grounds, later

ruling that the electoral process had not been tainted by pervasive irregularities.³

That same month a group of CSOs and media outlets petitioned the IFE to grant them access to the electoral ballots through an online information request under the Federal Law for Transparency and Access to Information. The group was poised to conduct a ‘citizens’ recount’ of ballots and had issued calls inviting interested parties to participate. A total of 16,806 people signed up.⁴

The initiative awoke the interest of several international organisations, including the National Security Archive and Global Exchange, which agreed to act as foreign observers. The IFE denied the group access to the ballots, on the grounds that they were not public documents and that releasing them would violate the confidentiality of the vote.

Faced with this obstacle, the network appealed to the Federal Institute of Access to Information, the agency in charge of upholding the right to public information as guaranteed by the Law for Transparency and Access to Information. Though lacking legal authority to impose sanctions, the IFAI can make recommendations. In August 2006 it issued a press release stating that the resolution of any electoral dispute remained beyond its jurisdiction. As a constitutionally autonomous entity, the IFE is not subject to the IFAI’s authority.

Towards the end of April 2007 – nearly nine months after the election – the electoral court upheld the IFE’s finding that there was no legal basis for releasing the ballots. In its ruling the

court argued that the denial does not limit the right to access the information in the electoral ballots, as that information was incorporated in the official election documents that constitute public information, *ipso facto*.⁵

The validity of the arguments presented by both sides is debatable. What is possibly more important, however, is that, regardless of the court’s decision, this stand-off over the vote count gave a clear indication of the growing influence of the access to information institutions and how they can force institutions to reconsider arguments, procedures and legislation, and to draw them into trials lasting several months.

Success for the National Water Commission

Although no major water-related scandals came to light in the past year, there have been several persistent problems.⁶ The large number of delinquent users, opacity in concessions and public bidding, and the illegal siphoning of water have the most significant financial consequences.⁷ Another problem is environmental crimes by organised groups that profit from, and exploit, the lack of enforcement of the National Water Law (*Ley de Aguas Nacionales*). It is not uncommon to find illegal drainage or wastewater dumped on beaches and tourist areas where the concessions granted to some hotels and industries do not comply with legal provisions.⁸

In 2001 the National Water Commission (*Comisión Nacional del Agua*), the body responsible for supervising the provision of water, began

3 TEPJF press releases 074/2006 and 081/2006; see www.trife.gob.mx.

4 *El Universal* (Mexico), 17 August 2006.

5 TEPJF press releases 074/2006 and 081/2006; see www.trife.gob.mx.

6 Transparencia Mexicana, ‘National Index of Corruption and Good Government, Results 2001, 2003, 2005’ (Mexico City: Transparencia Mexicana, 2006).

7 The National Water Commission publishes an annual report that features statistics based on water that has been recovered from irregular activities, available at www.cna.gob.mx.

8 Comisión Nacional del Agua (CNA), ‘Logros en Materia de Transparencia y Combate a la Corrupción, Enero-Junio 2006’ (Mexico City: CNA, 2006).

implementation of the Operative Programme for Transparency and Combating Corruption (POTCC), aimed at improving accountability and minimising opportunities for corruption in water provision and the internal administration. The POTCC is directed by the Ministry of Public Administration's Inter-ministerial Commission for Transparency and the Fight against Corruption. The POTCC submits an annual report to the ministry concerning the CNA's progress. The 2006 report points out that, between 2001 and December 2006, close to 29,000 delinquent consumers were 'reintegrated' into the payment system and approximately P1.35 billion (US\$121 million) in unpaid fees were collected.⁹

In order to address the problem of delinquent users, the CNA also created an electronic database, known as the Public Register of Water Rights, which was subsequently commended by the OECD.¹⁰ The database includes information about water permits, users and debtors, and is publicly available on the internet. It represents an important advance in access to information regarding the provision of and payment for water. It is expected to play a critical role in

helping to eliminate the discretionary assignment of concessions and permits.

Transparencia Mexicana (TI Mexico)

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⁹ CNA, 'Logros en Materia de Transparencia y Combate a la Corrupción 2006' (Mexico City: CNA, 2007).

¹⁰ OECD, 'OECD Environment Performance Reviews: Mexico' (Paris: OECD, 2003).

Nicaragua

Corruption Perceptions Index 2007: 2.6 (123rd out of 180 countries)

Conventions

OAS Inter-American Convention against Corruption (signed March 1996; ratified March 1999)

UN Convention against Corruption (signed December 2003; ratified February 2006)

UN Convention against Transnational Organized Crime (signed December 2000; ratified September 2002)

Legal and institutional changes

- **A new government, led by Daniel Ortega and the Sandinista National Liberation Front (FSLN), took power on 10 January 2007.** President Ortega's first step was to appoint his wife, Rosario Murillo, as coordinator of communications and citizenry, heading a new agency with responsibilities for advising the president, liaising with the media and disseminating information to voters. The opposition Movimiento Renovador Sandinista (MRS), Alianza Liberal Nicaragüense (ALN) and Partido Liberal Constitucionalista (PLC) objected on the grounds that it flouted Law 290 by placing power in the hands of a non-elected individual. Eleven days after assuming power President Ortega ordered reforms to Law 290, but withdrew them under pressure from the opposition.¹ With only thirty-eight of the ninety-two seats in parliament, the new government will have to adopt alliances with other parties if it is to press ahead with its ambitious programme of social reform.
- The FSLN victory would not have been possible without a **tactical alliance – and a *quid pro quo* – with the former president, Arnaldo Alemán (1997–2002),** of the PLC, who, despite his continuing authority over the party, had been sentenced to twenty years' house arrest in 2003 (see *Global Corruption Report 2005*) for embezzling US\$100 million. The decision to prosecute Alemán split the PLC and enabled Ortega to set one faction against the other in the elections held in November 2006. In March 2007 the administration released Alemán on parole, encouraging observers to conclude that the Ortega government was effectively the product of a power-sharing pact between the former revolutionary leader and a corrupt ex-president, boding ill for the future of accountability in Nicaragua (see also *Global Corruption Report 2006*). Alemán said he would like one day to return to the president's office.²
- Ex-President Bolaños, who retains a seat in the National Assembly and is a member of

¹ See www.laprensa.com.ni/archivo/2007/enero/17/noticias/politica/167835_print.shtml.

² *Associated Press* (US), 17 March 2007.

the Central American parliament, thereby enjoying double immunity from prosecution, was questioned in May 2007 about **discrepancies in his accounts amounting to US\$330,000**.³ On 23 May the attorney general, Hernán Estrada, announced investigations into sixteen corruption cases among the 340 allegedly committed on his watch. Bolaños is no stranger to corruption allegations and admitted in 2004 to having taken US\$500,000 in dubious money that year to finance his election campaign (See *Global Corruption Report 2005*).

- In its first months in power **the Ortega government announced its intention to introduce Consejos del Poder Ciudadano** (Councils of Citizen Power, or CPCs) by mid-July.⁴ Based on the Bolivarian Circles in Venezuela and the Popular Power Assemblies in Cuba, the CPC concept has been promoted as a medium for 'direct democracy'. Nevertheless, opposition parties, some media and the 600 plus member organisations of the civil society umbrella, Civil Coordinator, are concerned that the intentions of the CPC programme are to undermine genuine, participative democracy.⁵ The twelve members of a CPC are elected by their communities to represent their interests before ministries and agencies, and to present communal problems to the authorities. The functions are currently carried out by the municipal development committees established under the Civil Participation Law, suggesting either a duplication of duties or an attempt by the new government to capture a larger proportion of local power than it won at the elections.
- On 16 May 2007 **the National Assembly approved a law on access to public information** by a majority of sixty-seven to eighteen, the latter being mainly composed of deputies

from the MRS and ALN, who argued that the draft had been diluted to protect government interests.⁶ The law requires civil service employees to provide information about their activities under threat of a fine equivalent to six months' salary. It also guarantees the rights of journalists to protect the identity of their sources. Public organisations will have to publish electronically details of their structure, operations, services, fees, banks, names and wages of personnel, as well as information about contracts, subcontracts and tax exemptions for companies engaged in business with the state. Access to information offices will be set up nationwide to cope with requests, while a special committee will be created to decide whether to respond to citizens' curiosity about the wealth declarations made by public officials on a case-by-case basis.⁷

Probity Commission doesn't quite clean up

The Probity Commission of the National Assembly is composed of eight congressmen – five FSLN, one ALN, one PLC and the last from Resistencia Nicaragüense. All were sworn in by President Ortega in January 2007. The commission's purpose is to analyse the cases of public officers who have been linked to corruption, the embezzlement of public wealth or illicit enrichment. The congressmen examine individual cases and, when necessary, send a request to the joint direction of the National Assembly to cancel a suspect's immunity from prosecution to enable the suspect to be tried by a court.

Two cases in particular came into focus during the period under review. The first, known as the

3 Nicaragua Network, 'Former President Bolaños Questioned on Embezzlement', 'Hotline' brief, 22 May 2007.

4 Nicaragua Network, 'Councils of Citizen Power to be Inaugurated on July 19', 'Hotline' brief, 29 May 2007.

5 Nicaragua Network, 'Controversy over Councils of Citizen Power Continues', 'Hotline' brief, 31 July 2007.

6 *La Prensa* (Nicaragua), 17 May 2007.

7 *Xinhua* (China), 17 May 2007.

Tola case, began on 27 May 2006, when TV journalist Carlos Fernando Chamorro alleged in his weekly programme, *Esta Semana*, that potential foreign investors in the tourism sector were being subjected to extortion by officials within the FSLN. The reported author of the extortion attempt was Gerardo Miranda, a former FSLN congressman for Rivas, the site of the development, but two other FSLN cadres, Vicente Chávez and Lenín Cerna, were also named.⁸

Esta Semana showed film of Nicaraguan-born US citizen Armel González being solicited for a US\$4 million bribe in exchange for resolving a dispute with two local cooperatives, which have long contested the ownership of his US\$88 million resort development.⁹ Nicaragua's nascent tourism sector, particularly on the Pacific coast, was the source of most of the US\$282 million of foreign investment received by the country in 2006.

The second case concerned Alejandro Bolaños Davis, an ALN congressman who was suspended from office after he was shown to have lied about being born in the United States when applying to run for election to represent the town of Masaya. He apparently possessed four birth certificates, a sworn declaration and a forged identification card. The Electoral Supreme Court, the institution that has the task of generating citizens' identification cards, allowed Alejandro Davis two nationalities.¹⁰

While the Supreme Election Council, which is responsible for congressional ethics, retired Bolaños Davis six months after his election, the Probity Commission is having a hard time deciding whether to prosecute in either case.

The public character of water

In Nicaragua, top officials and transnational firms are alleged to have been involved in corrupt practices with regard to the payment of basic water charges, although no charges have been brought. It is suggested that bribes are paid in order to avoid paying the correct amounts relating to consumption.

The recently passed General Water Law aims to improve the regulation of the exploitation of natural resources and to prioritise human consumption in areas that now face problems of supply. It is also intended to regulate private companies and illegal connections. No agency is currently responsible for measuring the scale of the monetary losses that the country suffers each year in the water and health sectors.

The new law is also significant in that it prevents any future privatisation of water and guarantees its public character. Article 97 also vests the state with responsibility for protecting and conserving the waters of Lake Cocibolca, which has been granted the status of a natural drinking water reserve. Currently this water is heavily polluted by sewerage and chemicals from lakeside settlements and the private companies that work on its shores. The law will implement sanctions to entities that violate the regulation up to a maximum of two years in prison and C\$500,000 (US\$27,335) in fines. The biggest consumers, mainly producers of beers and sodas, must pay for water according to a price list issued by the National Water Authority, a new entity created by the law.

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⁸ 'Nicaragua Briefs: More on Tolagate', *Envio*, no. 312 (2007).

⁹ *Bloomberg News* (US), 3 October 2007.

¹⁰ *La Prensa* (Nicaragua), 30 June 2007.

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Paraguay

Corruption Perceptions Index 2007: 2.4 (138th out of 180 countries)

Conventions

OAS Inter-American Convention against Corruption (signed March 1996; ratified November 1996)

UN Convention against Corruption (signed December 2003; ratified June 2005)

UN Convention against Transnational Organized Crime (signed December 2000; ratified September 2004)

Legal and institutional changes

- **The Public Function Law 2000**, replaced by Law 1626, is scarcely operational because of constitutional challenges in the courts by public officials. The law establishes a test that must be taken for civil servants to be granted posts and receive promotions, and to improve the internal operations of government institutions, including the suppression of corruption. In combination with the proposed Law of Access to Public Information, Law 1626 constituted a dual-pronged attack on institutional inefficiency and malfeasance. Considerable political will will be required to resolve the stand-off. With Paraguay on the eve of elections in 2008, neither the government nor opposition will wish to alienate the civil service, which represents 200,000 direct votes and numerous indirect ones.
- **The National Integrity System (NIS) Steering Committee (CISNI)** is an autonomous body made up of public and private sector representatives that is also open to new members. CISNI's aim is to strengthen the NIS's role as the central consultative authority in relation to anti-corruption conventions. CISNI's autonomy has been undermined by the appointment of Carlos Walde as chairman, however. He is an economic adviser to President Nicanor Duarte Frutos and also a principle administrator of the US\$37 million Millennium Threshold Programme, whose main focus is anti-corruption. In 2006 TI

Paraguay published reports¹ that exposed Walde's family firm as the beneficiary of public contracts, in violation of legal provisions that forbid officials and their relatives from signing contracts with the state.² Walde's appointment produced a crisis within CISNI, leading to the resignation of the representative of the comptroller general's office and several member organisations. As a result, CISNI has lost credibility, to the point where the media were devoting more space to Walde's family's allegedly corrupt business activities than to the CISNI initiatives.³

- **In 2006 a bill on political funding was presented to parliament**⁴ with the aim of regulating the use of funds managed by political parties and investigating their origins. The bill has not prospered, however. While the specific reasons for this are unknown, it would not be far-fetched to suggest that support from both sides of parliament was not forthcoming because of the imminent elections. The bill on access to public information similarly failed to gain traction,⁵ although a bill to regulate direct purchases by official bodies is having more success.
- **A water law**, passed on 10 July 2007, declared the public ownership of all surface and underground water, regardless of whether it is located on private or public land. Landowners will henceforth have to pay the government to use their own wells, signalling an increase in bureaucracy that is likely to usher in a lucrative new arena for corruption.

Surrender of the judiciary

With elections planned for 2008, there are serious doubts over the legitimacy of the structures required to ensure a democratic system. Shortly after taking office in 2003 President Duarte promised to 'purge the public sector and the judiciary of corruption'.⁶ Many welcomed the impeachment proceedings that followed in the Supreme Court, which removed some judges for misconduct and led to others resigning. This was seen by others, however, as unacceptable interference with the judicial branch. The new members of the Supreme Court appeared to include professionals with lower-grade qualifications and experience than those they replaced, giving the impression that the president had all along intended to create a more pliable Supreme Court.

The president's control over the judiciary, as well as his apparent insincerity about addressing corruption, was exemplified by his treatment of friends and relatives discovered to be involved in corrupt practices. For example, the former interior minister, Roberto González, an inner-circle member of the president's, was implicated by one prosecutor in the smuggling of compact discs, but managed to frustrate the penal investigation with the assistance of another prosecutor.⁷ The prosecutors involved were impeached for alleged formal matters relating to the case, while González was eventually appointed minister for national defence, the post he currently holds.

1 TI Paraguay, 'Actualización de los Comentarios sobre la primera Ronda' (Asunción: TI Paraguay, 2006); see also *ABC Digital* (Paraguay), 6 August 2007.

2 Article 40 of Law 2051.

3 *ABC Digital* (Paraguay), 6 August 2007; *Última Hora* (Paraguay), 7 April 2006.

4 The bill was backed by several civil organisations and aimed to make political campaign funding more transparent. Apart from subsidies provided by the state, parties receive large amounts of private funding, the origin of which needs to be clarified.

5 This bill was also backed by civil organisations, including TI Paraguay.

6 Freedom House, 'Paraguay' in *Freedom in the World 2007* (Lanham, MD: Rowman & Littlefield, 2007).

7 See www.paraguayglobal.com/noticias_efe.php?ID=2494.

Further evidence of official willingness to manipulate legal norms arose during the internal elections of the ruling Colorado Party, when Duarte stood as candidate for party president in defiance of the constitution, which prohibits the head of the executive from holding additional offices.⁸

The Superior Electoral Court interpreted this to mean that, while the president would not be able to 'exercise' the two roles simultaneously, he could 'present himself as a candidate', thus enabling him to contest, and ultimately win, the internal election. The president appealed to the Supreme Court, which suspended the initial decision, allowing him to hold the two posts simultaneously while a final decision was made. This enabled him to hand power over to the party's vice-president, José Alberto Alderete, a person of his own choosing (see *Global Corruption Report 2007*).⁹ In doing so he strengthened his support base in the Colorado Party, putting him in a better position both to modify the constitution and to enable his re-election.

For good or ill, the Paraguayan constitution expressly prohibits the re-election of the president or vice-president.¹⁰ President Duarte used his influence in an attempt to modify the constitution, despite encountering a number of obstacles. First, changing the constitution was popularly regarded as a fundamental violation of the spirit of the original document, which sought to impede the president from promoting reforms for his own benefit. Second, the principle of non-retroactivity would prevent any con-

stitutional amendment benefiting the president who proposes it. He therefore tried to modify it through a referendum.

Colorado Party senators and deputies used every kind of weapon to obtain the votes required to support a referendum. For example, on 2 December 2006 Juan Carlos Galaverna, an influential Colorado senator, celebrated his birthday with an ostentatious party for 1,700 guests, including three of the nine Supreme Court judges, ministers, senators, deputies, military officers and business leaders. Not all parties that senior judges and politicians attend are necessarily events where influence is peddled, but the general public and media were particularly suspicious considering the political climate.

Indeed, the Judicial Ethics Tribunal, created by the Supreme Court in December 2005, took the same view. On 20 March 2007 it concluded that the three judges had violated eight articles in the judicial ethics code and should have refused the invitation.¹¹ The judges were unsuccessful in their appeal against the ruling,¹² but escaped impeachment proceedings that could have undermined the Colorado Party's five/four majority in the Supreme Court. Administrative proceedings were brought against Esteban Kriskovich, however, secretary and director of the Judicial Ethics Tribunal,¹³ whose removal from office was considered imminent.

The consequences of the judiciary's submission to the executive – which is what this episode

8 Article 237 stipulates: 'The President of the Republic and Vice-president may not hold public or private positions, whether paid or not, while retaining their functions. Neither can they exercise trade, industry or any professional activity, and must devote themselves exclusively to their functions.'

9 P. Lambert, 'Country Report: Paraguay', in S. Tatic and C. Walker (eds.), *Countries at the Crossroads 2007* (Lanham, MD: Rowman & Littlefield, 2007).

10 Article 229 states: 'The President of the Republic and the Vice-president shall last five non-renewable years in the exercise of their functions . . . They shall not be re-elected in any situation . . .'

11 See www.pj.gov.py/etica_documentos.asp.

12 See Reconsideración Resolución no. 9/2007 del Tribunal de Ética Judicial, Caso no. 23/06.

13 *La Nación* (Paraguay), 13 April 2007.

amounts to – have not yet become clear. The president did not secure his looked-for referendum, nor will he be able to run for the presidency in the 2008 election. Significant evidence remains that he wields undue influence over the judiciary, however. The president's failed efforts to change the constitution via referendum seem inconsistent with a provision in the Penal Code barring attempts to change the constitutional order.¹⁴ While the president's failure to change the constitution provides hope for Paraguay's fragile democracy, his actions have dealt a serious blow to the trust that the public places in its democratic institutions.

Managing the production of shared water power

Although Paraguay is landlocked and possesses no mineral or oil reserves, it does not want for water. Two hydroelectric dams, shared with Brazil and Argentina, have been built on the river Paraná. The Itaipú Dam is jointly owned with Brazil, and the Yacyretá Dam is shared with Argentina. Both dams produce an excess of energy, which the company managing Paraguayan power sells to its partners at below international market prices.

This has long been seen as an unfair situation, which can be remedied only by renegotiating clauses that allow Paraguay to sell the energy to third parties or to renegotiate prices closer to international market norms. Although these clauses do not signal corruption per se, the companies' status in Paraguay gives rise to significant corruption opportunities, which may help to explain the contracts' anti-competitive nature. There are also concerns that the dams may be

operating illegally. An inspection panel appointed by the World Bank in 2003 found that the Yacyretá reservoir had been operating above the official level and, as such, might have been producing additional energy that had not been accounted for.¹⁵

Neither the income produced by the hydroelectric plants nor the accounts of the two companies are controlled by the office of Paraguay's comptroller general. This is because 'bi-national bodies' are not subject to the internal control or supervision of state parties.¹⁶ This means that the dams remain beyond the supervision and reach of all three countries. Recently, Paraguay's comptroller general's office has attempted to find ways to audit the accounts of the dam's operating companies, and there have been proposals to reform the relevant legislation.¹⁷

Modifying the treaties between the three countries to allow control over the sums that circulate would foster transparency and reduce the discretion with which the companies currently operate. This may also provide an opportunity to discover a way of ensuring that energy produced in Paraguay is traded appropriately, for the benefit of the Paraguayan people.

Carlos Filártiga (TI Paraguay)

Further reading

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- Transparencia Paraguay, 'Encuesta Nacional Sobre Corrupción' (Asunción: TI Paraguay, 2006).

¹⁴ Article 273 of the Penal Code states: 'Whoever tries to achieve or achieves changes in the constitutional order outside the procedures provided for in the constitution shall be punished with a loss of liberty of up to five years.'

¹⁵ *Environmental News Service* (US), 10 May 2007.

¹⁶ See www.transparencia.org.py/index.php?option=com_content&task=view&id=242&Itemid=245.

¹⁷ See www.ministeriopublico.gov.py/mp/menu/varios/transparencia/planes/index.php.

‘Índice de Desempeño e Integridad en Contrataciones Publicas 2004/2005’ (Asunción: TI Paraguay, 2006).

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TI Paraguay: www.transparencia.org.py.

United States of America

Corruption Perceptions Index 2007: 7.2 (20th out of 180 countries)

Conventions

OAS Inter-American Convention against Corruption (signed June 1996; ratified September 2000)

OECD Convention on Combating Bribery of Foreign Public Officials (signed December 1997; ratified December 1998)

UN Convention against Corruption (signed December 2003; ratified October 2006)

UN Convention against Transnational Organized Crime (signed December 2000, ratified November 2005)

Legal and institutional changes

- The **Honest Leadership and Open Government Act of 2007** is widely considered a major step forward in reducing corruption in US politics. Enacted in response to public pressure following major congressional corruption scandals, it significantly strengthens congressional ethics and lobbying rules. It does not, however, create an independent ethics office to administer the rules free from partisan influence.
- The US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) announced on 26 April 2007 **the largest monetary sanctions imposed for violations of the Foreign Corrupt Practices Act (FCPA)**.

They fined Baker Hughes Inc. and a related subsidiary US\$21 million and required the disgorgement of over US\$23 million in profits related to approximately US\$4 million in bribes over a two-year period to the Kazakhstan state-owned oil company.¹ The companies also entered into agreements requiring anti-bribery compliance programmes, an independent compliance monitor for three years and further cooperation in ongoing investigations.

- The Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council have agreed on a final rule amending the **Federal Acquisition Regulation (FAR)** to require companies that win contracts with the US government to adopt written codes of

¹ SEC, press release, 26 April 2007; Department of Justice, press release, 26 April 2007.

business ethics and conduct; to institute training programmes and an internal control system; and to display Federal Agency Office of the Inspector General (OIG) fraud hotline posters or institute other mechanisms to encourage the reporting of suspected improper conduct. While there are exceptions to the new rule, it imposes significantly greater requirements than in current FAR regulations.

US lobbying disclosure and ethics rules strengthened

Corruption and ethics in government was a central issue in the 2006 mid-term elections, helping the Democrats regain control of both Houses of Congress. According to national exit polls, over 40 per cent of respondents identified corruption and ethics in government as more important than any other issue, including the war in Iraq.² As widely reported, the apparent catalyst for the public reaction was a series of high-profile ethics scandals involving prominent lobbyists and Congress members.

When they took office in January 2007 the new majority in the House of Representatives initiated important changes to internal ethics rules. In May the House passed landmark legislation to strengthen congressional ethics and lobbying requirements. The legislation, entitled the Honest Leadership and Open Government Act of 2007, was subsequently enacted and signed into law by President George W. Bush in October 2007.

The new law mandated changes to current congressional ethics and lobbying rules that are widely regarded as the most significant in a generation. The provisions included increasing transparency in Congress by requiring lawmakers to disclose 'earmarks' (spending measures for

favoured projects); lengthening the 'cooling-off' period from one to two years before former senators can engage in lobbying (in the House, the cooling-off period remains one year); prohibiting members of Congress and their staff from influencing hiring decisions by lobby firms on the sole basis of partisan political affiliation; requiring lawmakers to disclose small campaign contributions from numerous donors that are 'bundled' into large packages by lobbyists; and banning most lobbyist-paid gifts and travel to members of Congress and requiring lobbyists to certify that they did not provide or direct prohibited gifts or travel to members or staff.³ The lobbyist certifications are part of a package of amendments to the current Lobbying Disclosure Act (LDA) that will require more frequent (quarterly) filings, additional information (especially on political contributions activity) and timely public access over the internet (currently provided only by the Senate).

The new legislation dramatically increased penalties for LDA violations, raising the maximum civil fine fourfold to US\$200,000 and adding a new criminal penalty (up to five years' imprisonment) for 'knowingly and corruptly' violating the act. Other provisions mandate the spot auditing of lobbyists' filings by the comptroller general and semi-annual reporting by the Justice Department on its enforcement activity. The new lobbyist certification requirement is expected to facilitate enforcement against companies and individual lobbyists violating the rules.

One important reform *not* included in the legislation was a proposal to establish an independent ethics office to strengthen enforcement of the new rules. Many in Congress and among non-governmental organisations from across the political spectrum believe that this office is necessary, because congressional ethics committees, which are self-governing and subject to par-

² CNN.com (US), 8 November 2006.

³ Public Law no. 110-81.

tisan influence, have, for some time, been viewed as ineffective and secretive. Although both chambers have codes of conduct, enforcement has been uneven and sanctions often have been considered insufficient. An independent ethics office, with investigative and subpoena power, could be more transparent and could act independently of partisan influence.

Attention is now turning to the implementation phase, with congressional staff and lobbyists adapting to the new rules, and the House again considering whether to create an independent ethics office. To realise the full potential of the new and noteworthy ban on gifts, meals and free travel from lobbyists, Congress needs to ensure that there are strong enforcement mechanisms.

US response to corporate corruption abroad intensifies

In 2006/7 the United States intensified its enforcement of the Foreign Corrupt Practices Act, prohibiting bribery of foreign public officials. In 2006 the Department of Justice instituted twelve FCPA prosecutions, a record number for a single year; it was on track to exceed that number in 2007. Fines have also increased. On 26 April 2007 the DOJ and the SEC announced the largest monetary fine for FCPA violations against Baker Hughes and a related subsidiary, including fines of US\$21 million and the disgorgement of over US\$23 million in profits related to the payment of approximately US\$4 million in bribes over a two-year period to an official of KazakhOil, the Kazakhstan state-owned oil company.⁴

The increase in FCPA prosecutions is in part attributable to the impact of the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley), enacted in the wake of a series of corporate scandals. Within the Sarbanes–Oxley, sweeping corporate governance and accounting reforms applicable to publicly

traded companies are requirements for corporate chief executives and financial officers to certify to the accuracy of financial statements. Section 404 of the act mandates regular management assessment of corporate internal financial controls and requires external auditors to test and evaluate the systems.⁵ This has led to the voluntary disclosure to the government of violations found in the course of such reviews.

The decision whether and when a company should make disclosure of an actual or potential violation to the US government is often difficult. The government has emphasised that voluntary disclosures, when combined with other forms of cooperation, including, in some cases, waiver of the work product doctrine (protecting materials prepared in anticipation of *litigation* from *discovery* by opposing counsel), and the attorney–client privilege, may substantially mitigate or even eliminate penalties that could apply if the government discovered FCPA violations in the first instance.

Recently, and particularly in the context of voluntary disclosures, the DOJ and the SEC have begun to make more frequent use of ‘deferred prosecution’ agreements, under which the government agrees not to prosecute a company for a period of time, usually eighteen months to several years, in exchange for the company’s admission of liability and its agreement to comply with certain conditions, including the appointment of an independent monitor to ensure FCPA compliance. A compliance monitor was required, for example, as part of the Baker Hughes settlement referred to above. If the company can demonstrate reform at the end of the probationary period, the government will dismiss all charges against the company.

Through the use of compliance monitors, the US government hopes to create incentives for remediation and to deter future misconduct through

⁴ Department of Justice press release, 26 April 2007.

⁵ Public Law no. 107-204, sec. 104.

changes to corporate management and culture. It will take time to determine whether such changes, mandated through settlements, translate into permanent changes in corporate culture and practice.

Corruption an obstacle to progress in Iraq reconstruction

Corruption in Iraq, which is ranked 178 out of 180 on the 2007 Transparency International Corruption Perceptions Index, has been identified as one of the main obstacles to progress in the reconstruction process. With billions of dollars committed for Iraq reconstruction, the opportunities for corruption are substantial, particularly in public contracting.

The Special Inspector General for Iraq Reconstruction (SIGIR) is at the forefront of ensuring that procurement rules are followed and breaches detected. SIGIR is working in conjunction with other agencies involved in oversight in Iraq, including the Office of the Inspector General of the Department of Defense, the Department of Homeland Security (DHS), the Federal Bureau of Investigation (FBI) and the Department of Justice National Procurement Fraud Task Force, to coordinate and enhance procurement fraud investigations.⁶ This work has yielded positive results. SIGIR reported that, as of 19 June 2007, it had opened 300 cases.⁷

While estimates of losses due to contractor fraud are difficult to gauge, Special Inspector General Stuart Bowen, Jr., testified before the US House of Representatives that ‘the corruption SIGIR has uncovered to date within the US reconstruction program, while egregious in nature, amounts to a relatively small proportion of the overall US investment in Iraq’.⁸ Some attorneys knowledgeable about procurement also believe that the majority of contracts related to Iraq reconstruction are performed lawfully, and that, while corruption is of great concern, the system seems to be working.

One area of concern, however, is the adequacy of oversight for contracts and contractors that plan, define, procure and supervise the performance of all acquisition contracts. Experts believe that the number of acquisition personnel is insufficient, resulting in inadequate oversight of contracts and contractors.⁹ SIGIR has published numerous reports that underscore the risks of fraud and abuse associated with weak contract oversight.¹⁰ It has also noted differences among implementing agencies’ contracting procedures as a source of concern.¹¹

TI USA

6 Statement of S. Bowen, Jr., Special Inspector General for Iraq Reconstruction before the United States House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security, 19 June 2007; see www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-012T.pdf.

7 Ibid.

8 Statement of S. Bowen, Jr., Special Inspector General for Iraq Reconstruction, ‘Assessing the State of Iraqi Corruption,’ House of Representatives Committee on Oversight and Government Reform, 4 October 2007; see www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-015T.pdf.

9 *New York Times* (US), 24 October 2007.

10 See www.sigir.mil/reports/Default.aspx; statement of S. Bowen, Jr., Special Inspector General for Iraq Reconstruction before the Subcommittee on State, Foreign Operations and Related Programs, Committee on Appropriations, United States House of Representatives, 30 October 2007; see www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-017T.pdf.

11 Statement of J. McDermott, Assistant Inspector General – Audit, Special Inspector General for Iraq Reconstruction before the United States House of Representatives Appropriations Committee, Subcommittee on Defense, 10 May 2007; see www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-010T.pdf; Iraq Reconstruction, Lessons in Contracting and Procurement, www.sigir.mil/reports/pdf/Lessons_Learned_July21.pdf.

Further reading

- A. J. Heidenheimer and M. Johnston, *Political Corruption: Concepts and Contexts* (New Brunswick, NJ: Transaction, 2002).
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- M. Johnston, 'Understanding the Private Side of Corruption: New Kinds of Transparency, New Roles for Donors', Brief no. 6 (Bergen, Norway: U4, Chr. Michelson Institute, 2007).
- S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge: Cambridge University Press, 1999).
- International Handbook on the Economics of Corruption* (Cheltenham: Edward Elgar, 2006).
- S. Rose-Ackerman and B. S. Billa, 'Treaties and National Security', forthcoming in the *NYU Journal of International Law and Politics*.
- TI USA: www.transparency-usa.org.

7.3 Asia and the Pacific

Bangladesh

Corruption Perceptions Index 2007: 2.0 (162nd out of 180 countries)

Conventions

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

UN Convention against Corruption (accession February 2007)

Legal and institutional changes

- **The Public Procurement Act, passed on 6 July 2006**, provided comprehensive legal provisions to prevent corruption and promote competition on a level playing field. The Manual of Office Procedure (Purchase), inher-

ited from the colonial era and last revised in 1977, previously laid down methods for procurement in the public sector. The caretaker government engaged various stakeholders, including TI Bangladesh, to review the new procurement rules.¹ A public-private review committee on public procurement was formed

¹ TI Bangladesh recommendations were aimed at strengthening the new rules' conflict of interest dimension, stricter compliance with anti-corruption policy, and the introduction of social accountability by engaging citizens in various processes and levels. TI Bangladesh also argued for instituting a code of conduct for the public procurement authority, with clear delineation of enforcement indicators.