

4.2: Afghanistan’s Anti-Corruption Policy and Legal Framework Instruments and Agencies

Summary

This chapter introduces the reader to the policy and legal framework for the Government of Afghanistan’s anti-corruption efforts within the rule of law sector. This chapter provides an outline of strategic anti-corruption goals set forth in the Afghan Compact, the Afghanistan National Development Strategy, and the National Priority Program (NPP): National Transparency and Accountability Program. This chapter also provides an overview of the Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy and its establishment of the High Office of Oversight and Anti-Corruption and the Joint Independent Anti-Corruption Monitoring and Evaluation Committee. This chapter concludes with a review of the Major Crimes Task Force, the Anti-Corruption Unit of the Attorney General’s Office, and the Anti-Corruption Tribunals established by the Supreme Court.

Introduction

The Constitution of Afghanistan mandates the Government of the Islamic Republic of Afghanistan to “eliminate every kind of administrative corruption.”¹ The Constitution further mandates the Afghan Government to observe international treaties it has joined.² As discussed in Chapter 4.1, Afghanistan ratified the United Nations Convention Against Corruption (UNCAC) in 2008. The Government of Afghanistan has also made anti-corruption one of the cross-cutting sectors in the Afghanistan National Development Strategy (ANDS).³ This chapter provides an overview of the Afghan Government’s policy and legal framework to combat corruption including the Afghan Compact, the ANDS, and the National Transparency and Accountability Program.⁴ In addition, this chapter introduces the institutional arrangements within the rule of law sector established to combat corruption including the High Office of Oversight (HOO), the Joint Independent Anti-Corruption Monitoring and Evaluation Committee (MEC), the Major Crimes Task Force (MCTF), the Special Cases Committee, the Anti-

¹ 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission)(hereinafter Constitution), Art. 75(3):

http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf

² Ibid, Art. 7.

³ Afghanistan National Development Strategy (ANDS), Part I, Introduction, pp.5-6:

http://www.embassyofafghanistan.org/documents/Afghanistan_National_Development_Strategy_eng.pdf; The ANDS sets forth “the strategic priorities and the policies, programs and projects for achieving the Government’s development objectives.” See Chapter 1.1 for an overview of the ANDS.

⁴ See Chapter 4.1 for a discussion of the obligations under UNCAC.

Corruption Unit (ACU) of the Attorney General’s Office (AGO), and the Anti-Corruption Tribunals established by the Supreme Court.

Strategic Framework

In 2006, the Government of Afghanistan agreed to the following benchmarks related to anti-corruption in the **Afghan Compact**:⁵

- The UN Convention against Corruption will be ratified by the end-2006;
- National legislation will be adapted accordingly by the end-2007;
- A monitoring mechanism to oversee implementation will be in place by the end-2008; and
- A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end-2006 and fully implemented by end-2010.

That same year, in August 2006, President Karzai established by decree an inter-institutional committee on corruption headed by Chief Justice Azimi. The “Azimi Committee” was tasked with analyzing the root causes of corruption in Afghanistan and making recommendations on how to address administrative corruption. The committee’s report, termed the Azimi Report, was submitted in March 2008 and served as the anti-corruption framework for the ANDS.⁶

The **ANDS** established anti-corruption as one of six cross-cutting sectors.⁷ Within the ANDS, the Afghan Government restated its commitment to “controlling corruption, promoting transparency and accountability through establishing new and effective preventative mechanisms and implementing the Afghanistan Compact Anti-Corruption Benchmarks.”⁸ A **National Anti-Corruption Strategy**⁹ was developed as part of the ANDS setting forth the following strategic goals:¹⁰

- (i) enhancing Government anti-corruption commitment and leadership;

⁵ The Afghanistan Compact (London Conference 2006), pp. 7 & 8:

http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf

⁶ The High Office of Oversight’s website maintains a document entitled “Strategy and Policy for Anti-Corruption and Administrative Reform.” This document itself is not dated and information regarding its status could not be confirmed. From the introduction it appears to be a report by the Azimi Commission. The document properties refer to it as the “Azimi Report” created on August 10, 2009. The document reads as if it pre-dates the other strategies because it does not make any reference to the High Office of Oversight. Because the document’s status could not be officially determined, it is not reviewed in this chapter.

⁷ See ANDS, *supra* note 3, Part II, Chapter 8, p. 143.

⁸ *Ibid*, p. 146.

⁹ ANDS, National Anti-Corruption Strategy (February 13, 2008). Hard copy provided by the U.S. Embassy Interagency Rule of Law Office (IROL).

¹⁰ *Ibid*, p. 20; see also ANDS, *supra* note 3, pp. 146-147.

- (ii) raising awareness of corruption and evaluating the effectiveness of anti-corruption measures;
- (iii) mainstreaming anti-corruption into Government reforms and national development;
- (iv) strengthening the enforcement of anti-corruption aimed to strengthen the legal framework for anti-corruption and build a coherent and fully capacitated system of enforcement institutions required to support the effective implementation of the UNCAC;
- (v) reinforcing counter-narcotics integrity;
- (vi) reinforcing the integrity of public and business sector relationships; and
- (vii) increasing political accountability.

As discussed in Chapter 1.1, in January 2010, the Government of Afghanistan created five ministerial-level clusters to facilitate a more integrated approach to implementing the ANDS objectives.¹¹ One of the National Priority Programs proposed by the Governance Cluster includes the **National Transparency and Accountability Program**, also known as the “NPP2”.¹² As of February 2014, the NPP2 has not been finalized.¹³ The international community has set benchmarks for the Afghan Government to meet prior to endorsement of the NPP2, which it has failed to meet. Consequently, the NPP2 is the only NPP that has not been endorsed. The concept note, however, describes the program as intending to “build effective and independent oversight institutions for monitoring and evaluating the performance of Government institutions and officials.”¹⁴ The NPP2 has three components aimed “at countering rising perceptions of corruption by increasing the transparency and accountability of procedures and controls through specific projects.”¹⁵ The components are:¹⁶

1. Further legal and institutional development;
2. Strengthening accountability mechanisms;
3. Introducing transparency initiatives.

Outputs under the legal and institutional development component include: reforming the anti-corruption law, enacting an Audit Law, drafting a legal basis for the Major Crimes Task Force and legislation for the Anti-Corruption Tribunal, drafting amendments to the Penal Code, developing a whistle-blower and access to information law, and providing trainings on transparency and accountability.¹⁷ The expected outcome of all three components is to build “public trust in and legitimacy of, the Government and an enabling environment for social and

¹¹ ANDS Prioritization & Implementation Plan Mid-2010-Mid-2013 (hereinafter ANDS PIP), Vol. I, Introduction, pp. 11-12: <http://www.mfa.gov.af/ands-pip-english.pdf>. See Chapter 1.1 for a discussion of ANDS PIP.

¹² Ibid, Vol. I, pp. 15-16; see also ANDS PIP Vol. II.

¹³ See The Kabul Process, Clusters/NPPs, Cluster Archive, Governance Cluster: <http://www.thekabulprocess.gov.af/index.php/clusters--npps/archive/governance-cluster>.

¹⁴ ANDS PIP, *supra* note 11, Vol. I, p. 7.

¹⁵ Ibid, Vol. I, p. 16.

¹⁶ Ibid, Vol. II, pp. 32-33.

¹⁷ Ibid, Vol. II, p. 35.

economic development.”¹⁸ Moreover, components included in the National Priority Program for Financial and Economic Reform “are expected to have a positive impact upon transparency and accountability, through increasing understanding of planned and actual expenditures and outputs.”¹⁹

As a cross-cutting issue, anti-corruption components/elements are part of other sector development strategies and anti-corruption plans adopted by various Afghan ministries.²⁰ In August 2011, the Joint Independent Anti-Corruption Monitoring and Evaluation Committee (MEC discussed in more detail below) acknowledged that the “adopted national strategies and anti-corruption parts of other policies have to be coordinated and implemented.”²¹ The MEC recommended “the compilation/harmonisation of all existing [Anti-Corruption] strategies into one single document” by June 1, 2012 (11 Jawza 1391).²² Using the ANDS as the framework, the MEC states that “the new, completed strategy has to have the following elements: measure foreseen, responsible institution, timeframe for the implementation, benchmark for the implementation, estimated costs. There should be a separate part of the strategy devoted to the issue of monitoring of implementation and consequences for non-implementation or weak implementation of the strategy (including sanctions and/or other consequences for responsible authorities’ management).”²³ In addition to recommending one comprehensive *national* anti-corruption strategy, the MEC further recommended UNAMA take the lead in creating an “International Anti-Corruption Strategy” by June 1, 2012, “which will cover all international forces, organisations and institutions in Afghanistan and it will be harmonised with the national strategy.”²⁴

Anti-Corruption Agencies

Since 2001, Afghanistan has established a number of different agencies, committees, and commissions to address corruption issues. Some Afghan ministries have incorporated anti-corruption initiatives into their sector strategies. Financial control systems and practices have

¹⁸ Ibid.

¹⁹ Ibid, Vol. II, p. 32. See also Vol. II, pp. 23-31: National Priority Program for Financial and Economic Reform. The NPP for Financial and Economic Reform has been approved. A link to a PDF file can be found at The Kabul Process, Clusters/NPPs, Cluster Archive, Governance Cluster: <http://www.thekabulprocess.gov.af/index.php/clusters--npps/archive/governance-cluster>.

²⁰ Anti-corruption is an essential component of the ANDS’ Governance, Rule of Law and Human Rights pillar. See Chapter 1.1; see also ANDS, *supra* note 3, Part I, Ch. 6, Governance, Rule of Law & Human Rights, pp. 61, 13 & 151 (The ANDS recognizes that as a cross-cutting theme, anti-corruption measures must be mainstreamed into all sector strategies).

²¹ The Independent Joint Anti-Corruption Monitoring and Evaluation Committee, *Recommendations, Benchmarks and Follow-Up After the Second MEC Mission (July 14-27)* August 2011 (hereinafter MEC Recommendations), p. 1: http://www.iwaweb.org/Docs/resource_centre/PSM/MEC%20Recommendations%20&%20Benchmarks%202011.pdf.

²² Ibid, p. 2.

²³ Ibid.

²⁴ Ibid, p. 1 & 3.

been established by the Supreme Audit Office and the Ministry of Finance.²⁵ The Independent Administrative Reform and Civil Service Commission has adopted administrative reforms aimed at increasing transparency and accountability. In 2012, the HOO approved 48 anti-corruption action plans for various ministries and directorates.²⁶ The following sections are not intended to be an exhaustive review of the anti-corruption bodies established by the Government of Afghanistan or anti-corruption measures taken by all Afghan ministries. Instead, it is a focused review of anti-corruption bodies established within the Afghan rule of law sector including the HOO, the Joint Independent Anti-Corruption Monitoring and Evaluation Committee, the Anti-Corruption Tribunal(s), the Anti-Corruption Unit of the Attorney General's Office, the Special Cases Committee, and the Major Crimes Task Force. The Criminal Justice Task Force, which investigates drug-related corruption cases, is discussed in Volume 5.²⁷

The High Office of Oversight for the Implementation of the Anti-Corruption Strategy

The Law on Overseeing the Implementation of the Anti-Administrative Corruption Strategy (HOO Law) came into force by Presidential Decree in July 2008.²⁸ The HOO Law was enacted pursuant to the Constitutional mandate to eliminate administrative corruption and in accordance with obligations under UNCAC.²⁹ The HOO Law was created for the following purposes:³⁰

1. To take measures on overseeing the implementation of the Anti-administrative corruption Strategy and the procedure for administrative reform within all offices in order to prevent and combat administrative corruption effectively.
2. To oversee the performance of the offices related to administrative corruption cases
3. To evaluate the implementation of the measures taken for administrative reform and combating administrative corruption by the offices.

²⁵ The Supreme Audit Office was formerly the Control and Audit Office. The Supreme Audit Office reports to the President. Its mission is to audit financial matters within the Government. See SAO website for more information: <http://sao.gov.af/en>.

²⁶ Report of the UN Secretary-General, The Situation in Afghanistan and its Implications for International Peace and Security, A/66/728, S/2012/13, 5 March 2012 (hereinafter UN Report on Afghanistan March 2012), p. 20: <http://unama.unmissions.org/Portals/UNAMA/SG%20Reports/SG%20Report%20to%20the%20Security%20Council-March%202012.pdf>.

²⁷ The Criminal Justice Task Force investigates significant narcotics crimes and related crimes including corruption and money laundering. These crimes are tried before the Counter-Narcotics Justice Center (CNJC). See Volume 5.

²⁸ Presidential Decree No. 63 (21 July 2008); Law on Overseeing the Implementation of the Anti-Corruption Strategy, Official Gazette No. 957, 29 June 2008 (hereinafter HOO Law). Unofficial Translation by UNODC and JSSP; 16 SEPT 2008. The High Office of Oversight replaced the General Independent Administration of Anti-Corruption (GIAAC), established in 2004.

²⁹ Ibid, HOO Law, Art. 1. See also Constitution, Articles 7, 75(3), and 142; and UNCAC, Art. 6.

³⁰ HOO Law, *supra* note 28, Articles 2 & 9.

4. To ensure transparency in the performance of the offices in order to ensure accountability.
5. To establish a good administrative and management system related to public utility based on honesty in duty and accountable responsibility.
6. To protect public and private properties
7. To strengthen and expand the rule of law.

The HOO Law establishes the High Office of Oversight for the Implementation of the Anti-administrative Corruption Strategy (otherwise known as the High Office of Oversight and Anti-Corruption, the HOO, or HOOAC) as the highest government agency for coordination and oversight of the implementation of the corruption strategy.³¹ The law further provides that the HOO is an independent agency responsible to the President.³² No person or authority may impede the HOO's authority to oversee the implementation of the national corruption strategy.³³ The law gives the HOO the authority to establish administrative reform measures.³⁴

The HOO is composed of a Director General (appointed by the President), Deputies, central and regional directors and professionals, and administrative members.³⁵ All employees must meet the terms of the Civil Servants Law, hold a bachelor's degree or higher, must not have a misdemeanor or felony conviction, and must not be a member of a political party during their employment.³⁶ The HOO's current organizational chart is based on its expanded mandate discussed below.³⁷

³¹ Ibid, Articles 4 & 5.

³² Ibid.

³³ Ibid, Art. 6.

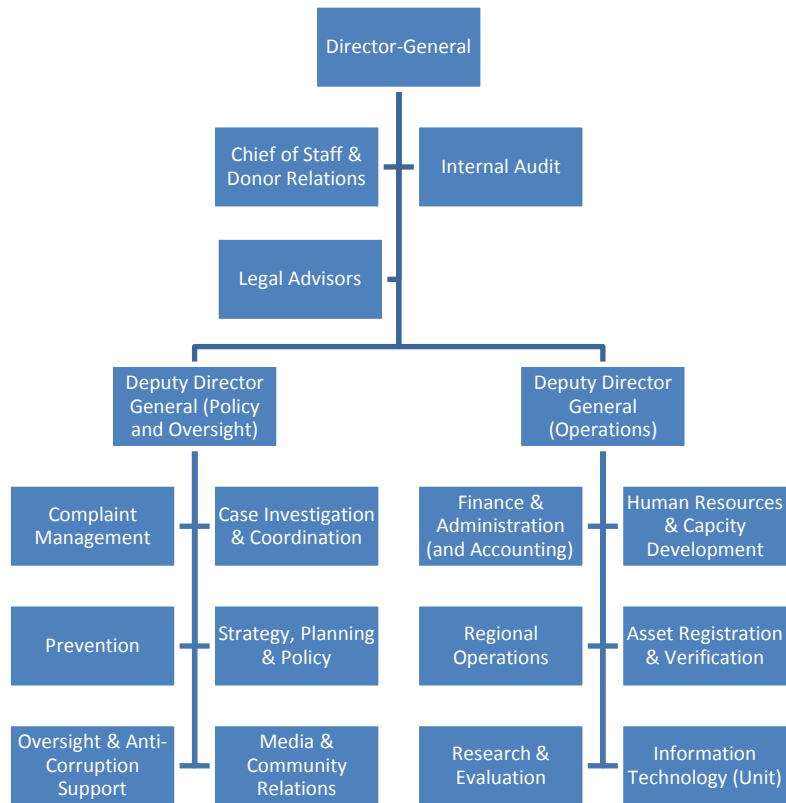
³⁴ Ibid, Art. 4.

³⁵ Ibid, Art. 8; *see also* HOO website, Introduction: <http://anti-corruption.gov.af/en/page/1733>

³⁶ HOO Law, *supra* note 28, Art. 16.

³⁷ HOO Strategic Plan 2011-2013 (December 27, 2010), p. 38:

http://www.pksoi.org/document_repository/doc_lib/HOO_Anti-Corruption_Strategic_Plan_2011-2013.pdf. A full description of each department can be found in the HOO's Strategic Plan or on the HOO's website (URL: <http://anti-corruption.gov.af/en/page/1740>).



The duties and responsibilities of the HOO are very broad and involve, among other things, providing advice to the President, overseeing the implementation of the national corruption strategy, conducting research and educational activities, coordinating interagency activity, and addressing complaints of administrative corruption.³⁸ These duties, however, are all confined to the HOO's oversight responsibilities. Although all government agencies are required to cooperate with the HOO,³⁹ and some are required to report their activities regarding cases of administrative corruption to the HOO,⁴⁰ the HOO Law limits the Office to an oversight function. For example, if during an inspection the HOO suspects a public servant of administrative corruption the HOO Law requires the case to be referred to the Attorney General's Office (AGO), or in the case of a judge to the Supreme Court, for investigation.⁴¹ Suspicious financial activities of offices or persons subject to the HOO Law are required to be referred to the Supreme Audit Office for inspection.⁴²

³⁸ See HOO Law, *supra* note 2828, Art. 9.

³⁹ *Ibid*, Art. 11.

⁴⁰ The Supreme Audit Office, the Ministry of Interior, the Attorney General's Office and the Courts are required to report to the HOO. See *Ibid*, Art. 18.

⁴¹ *Ibid*, Art. 13.

⁴² *Ibid*, Art. 10.

To address some of these shortcomings, the HOO's function and mandate were expanded in 2010 by a Presidential Decree (*farman*)⁴³ and an Executive Order of the President (*hukum*).⁴⁴ The Decree gives the HOO authority to conduct preliminary investigations of corruption complaints and requires the Ministry of Interior to assign judicial police to the HOO to assist in the investigations.⁴⁵ As of December 2010, four judicial police officers had been seconded to the HOO.⁴⁶ The Decree authorizes the HOO to "regularly assess the current and previous living standards of high level public officials and all other government employees (both civilian and military)."⁴⁷ If an individual's standard of living does not match his/her legal income, the HOO must refer the case to the AGO.⁴⁸

By Executive Order of the President, the HOO has also been tasked with reviewing and amending the Penal Code in coordination with the Ministry of Justice and to work with the Ministry of Finance to reduce corruption in customs service.⁴⁹ The Executive Order further calls upon the HOO to simplify administrative procedures as well as review and monitor the anti-corruption priorities of government agencies and major departments.⁵⁰

A new anti-corruption law has been drafted, which incorporates the expanded authority of the HOO including the ability to conduct preliminary investigations, review Afghan laws and regulations, as well as establishing a legal basis for monitoring and evaluating the living standards of public officials.⁵¹ As of this writing, the draft law was reportedly with Parliament. The international community has raised concern about the draft law giving the HOO powers that are reserved under the Constitution for the Attorney General.

⁴³ Decree of the President of the Islamic Republic of Afghanistan Regarding effective and practical fight against corruption, NO. 61, 1388/12/27 (hereinafter Presidential Decree No. 61). Hardcopy provided by the U.S. Embassy Interagency Rule of Law Office.

⁴⁴ Executive Order President of the Islamic Republic of Afghanistan Regarding implementation of government strategy on fighting administrative corruption (hereinafter Executive Order). Hardcopy provided by the U.S. Embassy Interagency Rule of Law Office.

⁴⁵ Presidential Decree No. 61, *supra* note 43, Articles 1-3 & 4.

⁴⁶ HOO Strategic Plan, *supra* note 37, p. 15.

⁴⁷ Presidential Decree No. 61, *supra* note 43, Art. 12.

⁴⁸ *Ibid.*

⁴⁹ Executive Order, *supra* note 44, Articles 1 & 4. According to the ANDS Annual Progressive Report 1389, anti-corruption laws have been reviewed and aligned with UNCAC. See ANDS Annual Progressive Report 1389 (published Sept. 28, 2011), p. 44:

[http://moec.gov.af/Content/files/ANDS%20Annual%20Progressive%20Report%201389_English\(1\).pdf](http://moec.gov.af/Content/files/ANDS%20Annual%20Progressive%20Report%201389_English(1).pdf). At the time of this writing, the Penal Code revisions were undergoing further review and possible revisions.

⁵⁰ Executive Order, *supra* note 44, Articles 2 & 3.

⁵¹ See Draft Anti-Corruption Law, December 19, 2011, provided by the U.S. Embassy Interagency Rule of Law Office. See also HOO Strategic Plan, *supra* note 37, p. 14.

In December 2010, the HOO issued its three-year Strategic Plan (2011-2013), which incorporates the HOO's expanded authority. The Strategic Plan describes the HOO's mission and mandate as follows:⁵²

[The HOO's] mission is to lead, coordinate and support national efforts and policy development to combat corruption effectively. More specifically, the HOO has a mandate to:

- Register and conduct preliminary investigation of complaints from citizens about alleged administrative corruption and refer cases where a crime was identified to the Attorney General's Office.
- Collect, register and verify data on the financial assets of a specified list of government officials and to make the results open and transparent.
- Identify major vulnerabilities to corruption in ministries and departments of government, and design and implement reforms in cooperation with these institutions to simplify administrative procedures and reduce the opportunities for corruption.
- Support government ministries and independent budgetary agencies in developing meaningful anti-corruption action plans and monitor and oversee their performance in implementing those plans.
- Develop cooperative relationships with civil society, the mass media and private sector organizations to promote public education and awareness about the problem of corruption and the legal rights of citizens to oppose corruption.

The HOO Strategic Plan sets forth three overall objectives: 1) pursue a multi-pronged approach to dealing with the problem of corruption; 2) strengthen staff capacity and professionalism; and 3) focus on achieving anti-corruption impacts.⁵³ The Plan is divided into three major functional areas: Policy and Oversight, Operations, and Overall Management.⁵⁴ Each functional area has strategic goals and specific activities for accomplishing the goals.⁵⁵ The activities are divided into set timeframes over the course of one, two, or three years and expected outcomes are listed.⁵⁶

⁵² HOO Strategic Plan, *supra* note 37.

⁵³ *Ibid.*, pp. 11-12.

⁵⁴ *See Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

Joint Independent Anti-Corruption Monitoring & Evaluation Committee

The 2010 Presidential Decree provides for the establishment of a Monitoring and Evaluation Committee (MEC) within the framework of the HOO.⁵⁷

The High Office of Oversight shall propose and establish within its framework the Monitoring and Evaluation Committee composed of Afghan and International Community experts within three months after the issuance of this decree. The Committee is responsible to cooperate to identify effective development criteria for institutions; and with necessary monitoring and evaluation on activities conducted against corruption at the national level, and on the aid of donor countries and international organizations, shall report to the President, Parliament, people and international community every six months.

The MEC held its inaugural meeting in May 2011 and meets quarterly.⁵⁸ The MEC “is tasked with developing clear and objective benchmarks for anti-corruption initiatives. It will also prepare periodic reports on national and international activity for the [Afghan Government], the Attorney General’s Office (AGO), and the public.”⁵⁹ The MEC was designed as an independent and impartial body to develop implementable benchmarks and to promote “international best practices, identifying effective development criteria for institutions, and monitoring and evaluating activities to be conducted against corruption.”⁶⁰ The MEC has developed, and is in the process of prioritizing, 64 benchmarks to combat corruption.⁶¹ The benchmarks include proposed amendments to the draft anti-corruption law.⁶²

The members of the MEC include three Afghan and three international anti-corruption experts.⁶³ The members serve two year terms with the option to extend.⁶⁴ The MEC made several

⁵⁷ Presidential Decree No. 61, *supra* note 43, Art. 8; *see also* MEC Terms of Reference, *supra* note 21, quoting Article 8 of the *Farman*.

⁵⁸ *See* United Nations Assistance Mission to Afghanistan (UNAMA), UN Missions, Featured News: *Joint Independent Committee Convenes to Combat Corruption*, 11 May 2011: <http://unama.unmissions.org/Default.aspx?ctl=Details&tabid=1741&mid=1882&ItemID=13548>; *see also* MEC Terms of Reference, *supra* note 21.

⁵⁹ Special Inspector General Afghanistan Reconstruction (SIGAR), Quarterly Report to the United States (U.S.) Congress, July 30, 2011 (hereinafter SIGAR July 2011), p. 91: <http://www.sigar.mil/pdf/quarterlyreports/Jul2011/LoresPDF/Governance.pdf>

⁶⁰ UNAMA, Featured News: *On Anti-Corruption Day, UNAMA reiterates its commitment to support Afghan institutions*, 9 December 2011: <http://unama.unmissions.org/Default.aspx?ctl=Details&tabid=1741&mid=1882&ItemID=15905>

⁶¹ UN Report on Afghanistan March 2012, *supra* note 26, p. 10.

⁶² *Ibid.*

⁶³ MEC Terms of Reference, *supra* note 21. Current members include: Mohammad Yasin Osmani (Afghan) former director-general of the High Office of Oversight (current chairman); Zakem Shah (Afghan), Former Minister of Commerce; Yama Torabi (Afghan), Director of Integrity Watch Afghanistan; Drago Kos (Slovenian) current Chairman of the Council of Europe's Group of States Against Corruption; Eva Joly, European MP and anti-corruption activist; and one vacancy.

⁶⁴ MEC Terms of Reference, *supra* note 21.

strategic, tactical and operational recommendations in August 2011, including drafting one comprehensive national strategy (as mentioned earlier in this chapter), improving customs, enhancing law enforcement – particularly the AGO, simplifying administrative procedures, improving public procurement, and addressing land confiscation.⁶⁵ In February 2012, President Karzai “told members of the MEC that the committee must limit its work to concentrating on international donors and determining how Afghan institutions are spending donor money.”⁶⁶ After some negotiations, however, the MEC is continuing its work under its original mandate.⁶⁷

Major Crimes Task Force

The Major Crimes Task Force (MCTF) was established in 2009 as “the principal Afghan government agency responsible for investigating and processing major anti-corruption, kidnapping, and organized crime cases.”⁶⁸ Accordingly, the MCTF has three main investigative units -- the Corruption Investigation Unit (CIU), the Kidnapping Investigation Unit (KIU), and the Organized Crime Investigation Unit (OCIU). A representative of the Ministry of Interior (MOI) commands the MCTF and a representative of the National Directorate of Security (NDS) serves as Deputy. The MCTF is mentored by a number of international partners including the United States.

“The mission of the Corruption Investigation Unit is to conduct criminal investigations to substantiate senior level corruption allegations throughout the Afghan Government.”⁶⁹ The CIU is composed of 30 investigators –15 from the MOI and 15 from the NDS. All members of the MCTF are required to go through a vetting process conducted by the U.S. Federal Bureau of Investigations (FBI) that includes a polygraph examination to “verify that they had no known ties with terrorist, extremist, or anti-government organizations.”⁷⁰

The MCTF and the HOO entered into a Memorandum of Understanding (MOU) regarding the investigation of corruption cases. Under the MOU, the MCTF will investigate only cases valued at US \$10,000 or higher. Following the investigation of high level corruption, the Anti-Corruption Unit (ACU) of the Attorney General’s Office is tasked with prosecuting the cases. The MCTF’s investigations, however, “are often stifled at the ACU, and completed investigations frequently do not result in charges.”⁷¹

⁶⁵ Ibid.

⁶⁶ SIGAR, Quarterly Report to the U.S. Congress, April 30, 2012 (hereinafter SIGAR April 2012), p. 103:

<http://www.sigar.mil/pdf/quarterlyreports/2012-04-30qr.pdf>.

⁶⁷ Ibid.

⁶⁸ SIGAR Audit-11-12 Anti-Corruption / Major Crimes Task Force, July 19, 2011, p. 1:

<http://www.sigar.mil/pdf/audits/SIGAR%20Audit-11-12.pdf>

⁶⁹ Ibid, p. 10.

⁷⁰ Ibid p. 4.

⁷¹ SIGAR, Quarterly Report to the U.S. Congress, October 30, 2011 (hereinafter SIGAR October 2011) p. 96:

<http://www.sigar.mil/pdf/quarterlyreports/oct2011/Lores/Governance.pdf>; see also SIGAR April 2012, *supra* note 66, p. 106; SIGAR Quarterly Report to the U.S. Congress, January 31, 2014 (hereinafter SIGAR January 2014), p. 137: <http://www.sigar.mil/pdf/quarterlyreports/2014Jan30QR.pdf>.

The Anti-Corruption Unit of the Attorney General's Office

In 2009, the AGO formed the Anti-Corruption Unit (ACU) pursuant to President Decree No. 337 and Article 19(1) of the Law on Overseeing the Implementation of the Anti- Administrative Corruption Strategy:⁷²

The Attorney General's Office, in accordance with the law, shall establish Anti-Administrative Corruption Prosecution Offices in the capital and provinces in order to investigate crimes of corruption and to file the case against those who commit corruption.

Prior to July 2010, the ACU consisted of about a dozen prosecutors who underwent a vetting process that include a polygraph examination.⁷³ In July 2010, the Attorney General prohibited the use of polygraph examinations as part of the vetting process.⁷⁴ Subsequently, the Attorney General hired 50 prosecutors to serve in the ACU.⁷⁵

From April 2009 to October 2011, the ACU investigated 1,103 cases.⁷⁶ Only 570 were submitted to the AGO.⁷⁷ Of the 570 submitted cases, 379 were rejected or closed and 28 cases were tried.⁷⁸ The remaining 213 continued to be processed.⁷⁹ Investigation and prosecution of low-level corruption cases appear to move through the justice system without interference. High level corruption cases, however, are dismissed or go without prosecution. For example, when Muhammad Zia Salehi, an aid to the President, was arrested on corruption charges the Attorney General dismissed the case and threatened to transfer two lead prosecutors on the case to a provincial office.⁸⁰ An investigation against a former governor of Kapisa for embezzlement and misuse of powers was closed without charges and two prosecutors were transferred to remote provinces.⁸¹ The ACU's investigation into the Kabul Bank crisis has focused primarily on low-level employees and bank regulators and not high-level officials.⁸² "As of June 30, 2011, the AGO's investigations of 20 senior officials—which were announced in November 2010—had

⁷² HOO Law, *supra* note 28, Art. 19(1).

⁷³ Polygraph examinations were a requirement of the international community providing salary supplements to prosecutors working in the ACU.

⁷⁴ SIGAR, Quarterly Report to the U.S. Congress, January 30, 2011 (hereinafter SIGAR January 2011), p. 109: <http://www.sigar.mil/pdf/quarterlyreports/Jan2011/HiRes/AntiCorruption.pdf>

⁷⁵ *Ibid.*

⁷⁶ Rule of Law Synchronization Conference, ISAF Counter-Corruption Update, CJIATF-*Shafafiyat*, October 24, 2011, slide 8. Previously available on Harmonieweb's Afghanistan Rule of Law Worksite (<https://www.harmonieweb.org>). All Afghanistan Rule of Law Worksite documents have reportedly been moved to All Partners Access Network (APAN: <https://community.apan.org/default.aspx>), however, at the time of this writing the documents could not be located on APAN.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ SIGAR January 2011, *supra* note 74, p. 109

⁸¹ SIGAR July 2011, *supra* note 59, pp. 91-92; *see also* SIGAR October 2011, *supra* note 71, p. 95.

⁸² SIGAR October 2011, *supra* note 71, p. 95.

not produced any prosecutions.”⁸³ And as late as October 2011, the DOJ was not aware of any prosecutions of high-level officials.⁸⁴

In October 2011, the U.S. Special Inspector General Afghanistan Reconstruction (SIGAR) reported: “The Afghan government has made little progress in prosecuting high-level officials because it lacks the political will to do so, according to [the Department of State]. It noted that the Attorney General still has not demonstrated a serious commitment to fighting corruption or bringing senior officials to justice.” The MEC reaffirmed this sentiment stating that the AGO “is mainly to blame for ineffective repressive response of the Afghan government to corruption issues.”⁸⁵

In response to international pressure to prosecute corruption cases the Afghanistan Attorney General established the Special Cases Committee (SCC) in January 2012.⁸⁶ The SCC is an Afghan-international committee “designed to initiate and monitor the progress of long-stalled, high-profile cases of corruption and organized crime.”⁸⁷ The SCC’s role is to “prioritize, organize, facilitate, and monitor efforts related to significant public corruption cases” and not to investigate and prosecute cases on its own.⁸⁸ SCC members include senior prosecutors from the AGO’s Anti-Corruption Unit and Military Anti-Corruption Unit, representatives from the CJIATF-*Shafafiyat*, the U.S. Embassy Kabul, the European Union Police Mission in Afghanistan (EUPOL), and the British Embassy.⁸⁹ Although the establishment of the SCC was seen as a positive development, it had little political support and was “effectively defunct” by June 2013.⁹⁰

The Anti-Corruption Tribunal(s)

The HOO Law requires the Supreme Court to “establish Anti-Administrative Corruption Tribunals in the capital and provinces in order to deal with crimes of administrative corruption.”⁹¹ Pursuant to the HOO Law and the provisions of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan,⁹² the Supreme Court established an Anti-Corruption Tribunal (ACT) in Kabul, which began to hear cases in January 2010. The

⁸³ SIGAR July 2011, *supra* note 59, p. 92

⁸⁴ SIGAR October 2011, *supra* note 71, p. 95.

⁸⁵ MEC Terms of Reference, *supra* note 21, p. 8.

⁸⁶ Department of Defense (DOD) Report on Progress Toward Security and Stability in Afghanistan, April 2012 (hereinafter DOD Progress Report April 2012), p. 80:

http://www.defense.gov/pubs/pdfs/Report_Final_SecDef_04_27_12.pdf.

⁸⁷ *Ibid.*

⁸⁸ SIGAR April 2012, *supra* note 66, p. 106.

⁸⁹ *Ibid.*

⁹⁰ *See ibid*; *see also* DOD Progress Report April 2012, *supra* note 86, p. 81; *see* SIGAR Quarterly Report to the U.S. Congress, July 30, 2013: <http://www.sigar.mil/pdf/quarterlyreports/2013-07-30qr.pdf>.

⁹¹ HOO Law, *supra* note 28, Art. 19(2).

⁹² Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, Official Gazette No. 1109, 19 June 2013 (1392/4/9)(hereinafter Law on Courts) (translation provided by UNAMA). *See* Chapter 2.1: Afghanistan’s State Justice Institutions for a discussion of the Afghan court system.

ACT was established with two primary courts and two courts of appeals with a total of 12 judges (three judges per court). The vetting process for the judges originally included a polygraph examination.⁹³ In July 2010, however, the Supreme Court no longer required polygraph examinations as part of the vetting process.⁹⁴ As a result, only five of the judges currently sitting on the ACT were vetted with polygraph examinations.⁹⁵

At the London Conference, the Afghan Government committed to establish a statutory basis for the ACT in order to ensure long term independence.⁹⁶ Drafting legislation for the ACT is also a benchmark in the National Transparency and Accountability Program.⁹⁷ The ACT does not, however, currently have any statutory basis or defined subject matter or territorial jurisdiction. The ACT hears cases based upon a request by the ACU to the Supreme Court for a change of venue. It is within the Supreme Court's discretionary power to grant the change of venue. The lack of a mandatory selection criterion allows the Supreme Court to hand-pick the cases that will be heard by the ACT. The lack of criterion gives the appearance that the Court lacks objectivity and undermines its credibility.

The ACT has also been subject to the same political interference experienced by the ACU.⁹⁸ In January 2011, it was reported that "cases were being diverted away from the ACU and the Anti-Corruption Tribunal to other courts and prosecutors."⁹⁹ In January 2011, SIGAR reported that eight mid-level government officials were convicted of corruption, but none of those cases were tried at the ACT.¹⁰⁰

Since the establishment of the ACT, the Supreme Court has used its administrative power to establish additional anti-corruption tribunals (*dewans*) within the structure of the Courts of Appeals in Balkh, Bamiyan, Herat, Kandahar, Kunduz, Nangarhar, and Paktia Province.¹⁰¹ The tribunals are limited to no more than six judicial members.¹⁰² In addition, six anti-corruption primary courts have been established in Balkh, Bamiyan, Herat, Kabul, Kunduz, and Nangarhar

⁹³ Similar to the ACU, the international community providing salary supplements to the ACT judges required a polygraph examination as part of the vetting process.

⁹⁴ SIGAR January 2011, *supra* note 74, p. 109.

⁹⁵ *Ibid.*

⁹⁶ *Afghanistan: The London Conference Communiqué: Afghan Leadership, Regional Cooperation, International Partnership*, 28 Jan 2010, (hereinafter *London Communiqué*), p. 6: <http://afghanistan.hmg.gov.uk/en/conference/london-conference/#>.

⁹⁷ ANDS PIP, *supra* note 11, Vol. II, p. 35.

⁹⁸ See SIGAR April 2012, *supra* note 66, p. 107.

⁹⁹ SIGAR January 2011, *supra* note 74, p. 109.

¹⁰⁰ *Ibid.*

¹⁰¹ Law on Courts, *supra* note 92, Art 53.

¹⁰² *Ibid.*

Province.¹⁰³ The primary courts are comprised of a head judge and no more than four members.¹⁰⁴

In 2011, the eight anti-corruption tribunals and eight anti-corruption primary courts were responsible for hearing all corruption cases within their respective regional zone.¹⁰⁵ In 2012, the Supreme Court issued a decision to allow all public security *dewans* to hear corruption related cases.¹⁰⁶ Accordingly, the anti-corruption tribunals and anti-corruption primary courts now only hear corruption cases coming from their own geographical jurisdiction.¹⁰⁷ The Supreme Court reports on five of the anti-corruption tribunals in its monthly Special Bulletin publication – Balkh, Herat, Kabul, Kunduz, and Nangarhar.¹⁰⁸

¹⁰³ Ibid, Art. 50. The Kabul Anti-Corruption Primary Court was established in March 2010. The Herat Anti-Corruption Primary Court was established in September 2010. The Balkh Anti-Corruption Primary Court was established sometime in 2010. See Supreme Court of Afghanistan, *Special Bulletin Volume 2* (04 Dec. 2010), p. 13: http://supremecourt.gov.af/Content/files/bulletin_vol2_eng.pdf; and Special Bulletin Volume 5 (20 March 2011), p. 21: http://supremecourt.gov.af/Content/files/Bulletin_Vol5.pdf.

¹⁰⁴ Ibid, Art. 62.

¹⁰⁵ See Supreme Court of Afghanistan, Special Bulletin of the Supreme Court, Vol. 31, June 2013, pp. 1 & 16: http://supremecourt.gov.af/Content/files/Bulletin_31.pdf.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. No information could be found at the time of this writing regarding the functioning of the other tribunals.

¹⁰⁸ See Supreme Court of Afghanistan, Publications, Special Bulletins: <http://supremecourt.gov.af/en/page/2870>.

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