Summary of round tables

Introduction

- The Forum aims at promoting and defending better awareness of the specificity of the Supreme Audit Institutions (SAI) holding jurisdictional functions within INTOSAI, and at contributing to promote the recognition of the advantages of such an organisation.
- The discussions have led to better understanding of the differences and convergences between the SAIs holding jurisdictional functions.
- A consensus has been established concerning the fact that the jurisdictional function positively impacts the entire SAI. It gives it greater independence and greater credibility. It strengthens its working methods.
- Surveys were carried out in the form of questionnaires to the 10 SAIs participating in the working group[1], the results of which were summarised: they concerned the three discussion topics of the round tables during the day.
- The three round tables allowed a successive analysis of the institutional position of the SAI, the guarantees of its independence and its relationships with constitutional powers, the nature and scope of the jurisdictional mission, and the role of the public prosecutor.

  Discussions bore witness both to the diversity and vitality of this model and the common characteristics which enabled the adoption of a Formal Declaration.

Round table no. 1: The Institutional Position of the SAI and its Relationships with the Constitutional Powers

- This round table enabled us to analyse how the independence of each jurisdictional SAI is guaranteed and how each one designs and presents it. Generally, the jurisdictional function influences the institution as a whole. Furthermore, the jurisdictional function strengthens the independence of the SAI because a jurisdiction is by nature to be independent.

  Introduction to the subject and presentation of the results of a prior survey by François Kruger, First Advocate-General (France), moderator of the round table

- Independence is based on seven foundations:
  1. the status – constitutional or legal – of the SAI;
  2. the rules relating to its composition and the status of its members;
  3. autonomy in the management of resources;
  4. autonomy in programming;
  5. the free conduct of audits;

[1] Brazil, Chile, Spain, France, Italy, Morocco, Portugal, Peru, Tunisia and Turkey.

6. control of the consequences;
7. the presence of a public prosecutor who is not subject to political power strengthens the independence of the SAI.

Turkey (Mr Azmi Es, director of international relationships – Turkish Court of Accounts)
The Court of Accounts is mentioned in the current Constitution, as it was always the case in all the Republican constitutions of the country. This jurisdictional function was sometimes debated, but it was recently confirmed by the Constitutional Court. The members of the Court of Accounts have the same status as judges. The SAI decides its own programming and has free access, for its work, to all necessary documents or information connected with its controls.

Peru (Ms Violeta Santin, department manager – "Contraloria general" – *General Comptroller of Peru*)
The General Comptroller Office is mentioned in the Constitution, which recognises its independence. The Comptroller General is chosen by Congress based on a proposal of the executive power for a term of office of seven years. The General Comptroller Office is independent in its programming and in monitoring its audits. It issues binding recommendations to other public institutions; its jurisdictional power is limited to administrative liability – but not civil or criminal.

Tunisia (Mr Amor Tounakti, Commissioner General of the government at the Tunisian Court of Accounts)
The new Tunisian constitution, which followed the revolution, has increased the independence of the Court of Accounts. The organic law governing the Court of Accounts is currently under discussion, but its text is largely known. It is planned for the Court of Accounts, while retaining its equidistant status from the other powers, to assist Parliament, which follows the example of the French experience. Independence is not an aim in itself, to the detriment of other objectives of the institution, but a resource to serve the legitimacy and quality of its work. The Court of Accounts has autonomy of resources, but its budget is determined by the finance ministry, with which negotiations may be difficult, in periods of tight budgets. The conduct of audits, which the Court programmes autonomously, reveals the independence of the SAI and its rapporteurs. The monitoring of recommendations was until now attached to the executive power (President of the Republic): it will now be done by the Court of Accounts.

Speech by an expert witness: Mr José Tavares, Director General of the services of the Portugal Court of Auditors
These functions are based on the law and are therefore democratically legitimated.
The jurisdictional SAIs must improve their communication in order to demonstrate that the functions that they exercise are a "plus", a benefit and not a disadvantage: a jurisdictional SAI can fulfil all of the missions that a non-jurisdictional SAI accomplishes, while the reverse is not true. The status of jurisdiction is a guarantee of independence. In this regard, it is important to separate the two functions of audit and jurisdiction, as was done in Portugal by a law in 1996.

François Kruger speaking to conclude the round table
Two images illustrate the importance of the jurisdictional function. The image of the stick and the lever shows that the jurisdictional function is a lever; because although the jurisdictional aspect, the "stick", inspires fear, it acts as a lever on the regularity of administration. The image of rock and sand shows that the jurisdictional aspect constitutes the rock of the SAI; in case of political evolutions, it is the sound basis for preserving the independence and the influence of the SAI.

Round Table no. 2 – The Importance and Scope of The Jurisdictional Mission of The SAI

- The second round table related more specifically to the jurisdictional mission as such – its organisation and scope. It enabled the following questions to be answered: What are we judging? Who are we judging? And how?

  Introduction to the subject and presentation of the results of a prior survey by Ms Ruth Israel Lopes, Prosecutor at the "Contraloria general" (Republic of Chile), moderator of the round table

- The questionnaire preparing this round table showed that, in its various forms (civil liability or criminal liability, or "administrative" liability in the disciplinary sense; financial responsibility *sui generis* , etc.,), all of the SAIs do exercise a jurisdictional function contributing to punishing violations or, more often, contributing to the reparation of damages. 80% of the SAIs consider that the functions of "knowing and determining" the responsibility of accountants or public managers form part of their duties.
- The jurisdictional function offers the possibility of determining a policy on jurisprudence: The SAI can then prioritise its controls and its proceedings.
- Even though the jurisdictional function represents, from a quantitative point of view, a smaller share of the activity of the SAI, it influences the entire practice and culture of the whole institution.

Portugal (Ms Helena Fereira Lopes, judge at the Portugal Court of Auditors)
The Court judges the financial liability of individuals, those responsible for damages and administrators, without distinction between public accountants and other players in public administration. The various offences giving rise to intervention by the jurisdiction include: the disappearance of public funds, the misappropriation of funds, failing to collect income and unjustified payment. The SAI may impose the reimbursement of the missing amounts, which is the most frequent case.
The public prosecutor triggers proceedings. He/she gives an opinion on the legality of the facts detailed in the reports. He/she may qualify the facts differently from the qualification proposed by the divisions of the Court ("chambers"). The first and second chambers adopt the reports without judging; when the chief public prosecutor decides to send these reports to the third chamber, this is where the judgement function is exercised.

Morocco (Mr Driss Aziz, Advocate-General at the Court of Accounts of the Kingdom of Morocco)

The Court of Accounts originates in the national accounts commission attached to the Finance Ministry; in 1979, this commission was transformed into a jurisdictional body.

The Moroccan Court of Accounts exercises its jurisdiction over public accountants (required to produce their accounts annually and subject to the principle of specific personal responsibility), as well as over all public administrators (pursuant to budgetary and financial discipline). The Court of Accounts has been mentioned in the Constitution of the Kingdom of Morocco since 1996. In 2004, a chamber of budgetary and financial discipline was established, within the Court, in order to better distinguish the audit functions from the jurisdictional functions.

The jurisdictional procedure before the Court of Accounts is written and contradictory.

With regard to public accountants, the rule of the double ruling applies: the first ruling is provisional, the accountant responds and the second is definitive. This procedure also applies to persons declared as de facto accountants: it is rare (only seven cases of de facto administration since 2003).

Speech by an expert witness: Mr Nicolas Groper, judge at the *Cour des comptes* (France), jurist[2]

The jurisdictional mission is fundamental for three reasons.

Firstly, the jurisdictional activities structure the organisation and work of the *Cour des comptes*. They bring a culture of precision, attachment to the principles of regularity and a culture of requiring proof. They can inspire procedures in respect of the right to defence. The jurisdictional activity, which exercises specific responsibilities placed under the jurisdiction of a specialist judge, is particularly well adapted to an essential aspect of public administration: the compliance with specific rules, often technical, intended to protect the public finances.

Secondly, the power to impose penalties has an important deterrent effect – even when it is not often used. When the administrator or accountant knows that he/she is liable for penalties, he/she will internalise the risk. It is also an alternative channel which constitutes a happy medium before the implication of criminal liability, which is reserved for serious breaches and breaches of integrity.

Lastly, the jurisdictional activity enables work to improve administration, always through this leverage effect. Due to its formal character, it provides a more effective incentive for change.

From another point of view, we should not underestimate the fact that the jurisdictional mission of the SAI is an asset in improving the governance of states. It is also, for some countries, a decisive element which triggers the support of international donors for setting up independent control bodies having real prerogatives, as in Africa, for example.

Ultimately, missions of the jurisdictional type are sources of credibility amongst citizens and strengthen the legitimacy of the SAI.

[2] Author of "The liability of public administrators before the financial judge", Dalloz, 2009.

- The last round table of the day was devoted to the Public Prosecution (status, organisation and missions), to its place within the SAI. The initial enquiry covered the public prosecutor and the role of the citizen in triggering procedures or inspections.

Introduction to the subject and presentation of the results of a prior survey by Gilles Miller, Advocate-General (France), moderator of the round table

- Beyond the diversity of names, organisations and statuses of the different Public Prosecutions studied, this institution is characterised by the function of the preservation of the interests of Society and, in general, the initiation of legal proceedings; it ensures the proper application of the law.
- However, convergences appear in terms of independence with regard to powers and the statutory and institutional positioning. The members of the Public Prosecutor's office usually have either the capacity of a public prosecutor or a status separate from that of the magistrate but offering equivalent guarantees. The questionnaire preparing for the round table enabled the following main points to be established. Generally, the Public Prosecution's role is exercised through a General prosecutor specific to the accounts jurisdiction, as is the case in Brazil, Italy, Turkey, Morocco, Tunisia, Spain and France. In Portugal and Spain, the public prosecution dedicated to the Court of Accounts is also linked to the chief public prosecutor of the State.
- The "contraloria general" of Peru and Chile, in Latin America, present a specific model. The organisation of the SAI is not collegial, although it houses a subdivision that judges cases (which can rule with a single judge or in a collegial formation[3]): the function of the Public Prosecution is to some extent shared with a civil servant who does not exercise all of the functions usually devolved to the Public prosecution. It defends the financial interests of the State or the injured administration and represents it. In these two countries, this national public prosecutor (separate from the SAI's prosecutor) is the body which has a monopoly on proceedings.
- In six countries, the members of the Public prosecution's office have a status equivalent to that of judges. In Chile and Peru, the members of the Public prosecution's office have the status of civil servant. Irremovability is guaranteed in Spain, Tunisia and Italy. In France, Morocco and Turkey, irremovability is not guaranteed by the law but constitutes a de facto guarantee. In Brazil and Portugal, the head of the supreme Public Prosecutor's office has a term of office of 2 years (Brazil) or 6 years (Portugal).

- Two points are common to the public prosecutors and are worth noting:

  - the chief public prosecutor or his/her equivalent never receives any instructions from the government or a minister;

[3] As in Chile: single judge in the first instance and collegial formation chaired by the Auditor General in appeal.

- the chief public prosecutor or his/her equivalent is the SAI's usual interlocutor with the judicial power or authority.

Italy (Ms Alessandra Pomponi, assistant to the chief public prosecutor to the Court of Accounts)

The General Public Prosecutor's office at the Italian Court of Accounts can initiate proceedings against accountants or public administrators for breaches of financial regulations.

The information comes from audits of the Court of Accounts but also, and above all, from numerous other sources: the administration, citizens or the press. The chief public prosecutor has real liberty in the procedure that he/she undertakes and monitors, independently of possible criminal proceedings.

In 2014, the ECHR accepted that it is possible for the SAI to initiate proceedings even at the same time as a criminal action. The double jeopardy principle is not infringed because the two actions have different purposes.

The Public Prosecutor has broad powers of investigation: he/she can access all necessary documents and hear all persons that are considered useful to the conduct of the enquiry. Thus, concerning financial offences and corruption, the chief public prosecutor can order interim measures and, for example, freeze the assets of the person subject to proceedings – to the extent of the financial harm caused to the State.

In 2014, the Italian Court of Accounts issued 847 convictions, 285 of which concerned corruption. In accordance with transparency principles, the judgements and results of the activities of the prosecution are public: they are published on the SAI's Internet site and elsewhere.

All members of the SAI – including the General Public Prosecutor's office – are selected based on open competition. The president of the SAI and the chief public prosecutor are chosen in a different manner, but both are ex-Section Presidents of the Court. The president is appointed by the government and the Council of the Court (which brings together the Section Presidents and the supreme public prosecutor's office) gives a qualified opinion on this appointment. The chief public prosecutor is chosen by this same presidency council: at the end of these selection procedures, the appointments of president and chief public prosecutor take the form of a decision by the President of the Republic. The Constitution states that the judges cannot be removed, which is consequently the case for the members of the SAI.

Brazil (Dr Paolo Coelho Bugarin, chief public prosecutor to Federal Court of Accounts of Brazil)

Brazil has an organisation adapted to its federal character: so each state or autonomous territory (34) has its own Court. Some large municipalities have their own external auditing institution.

The Court is divided into 3 chambers. The jurisdictional deliberations of the SAI lead to a public audience, at the end of which the SAI may pronounce financial penalties. The entire procedure is subject to the adversarial principle and respect for the rights of the defence.

The SAI has broad powers: it can, for example, freeze the assets of an institution or an individual. During all sessions in chambers, the representative of the Prosecution expresses the positions of the public prosecutor's office. None of the subjects that the SAI handles is unknown to its public prosecutor's office, which may give its opinion on any of them.

The Public Prosecutor office acts as specialist public prosecutor to the Federal Court of Accounts. It includes, with the chief public prosecutor, 7 prosecutors and 3 substitutes. The federal State public prosecutor's office is parallel and separate, with no hierarchical link between the two. On the contrary, according to the terms of the constitutional court, the relationship established between the Court of Accounts and its prosecution is qualified as organisationally intimate. It is broadly associated with the life of the SAI.

Spain (Mr Lui Reda Garcia assistant prosecutor to the Spanish Court of Auditors)
The nature of the Spanish public prosecution is particular: it is both a member of the national public prosecutor's office and attached to the Court of Auditors. The constitution which governs the office of the nation's chief public prosecutor partly applies to the public prosecution. It exercises three missions: oversee the application of the law, guarantee the independence of the SAI and satisfy the general interest. Three principles apply: the unity of action, legality and impartiality.
All members of the public prosecutor's office are recruited by open competition, which leads to them having a career within the national prosecution service. Although each prosecutor partly reports to the chief public prosecutor of the nation (including the public prosecutor that manages the prosecution service of the Court of accounts), his/her independence is ensured by the intermediary of the chief public prosecutor of the nation, who cannot be removed and is appointed for four years.

The functioning of the SAI is collegial ("Court of Accounts" model). Within the Court of Auditors, a committee of fourteen members approves all audit reports which must be submitted to it; so the public prosecutor is a member of it. He/she therefore has the resources for proposing inspections and for identifying facts which require proceedings.
The same case may equally give rise to proceedings before the Court of Auditors and before the criminal jurisdiction. If necessary, decisions having the same purpose will be combined.

Speech by an expert witness: Mr Roch-Olivier Maistre, chief auditor at the *Cour des comptes* (France)[4]

The public prosecutor's office at the French *Cour des comptes* not only has the monopoly on proceedings with regard to public accountants of the State and its operators before the *Cour des comptes*, but also with regard to administrators at fault before the Cour of budgetary and financial discipline[5] and relationships with the court judge. But it also bases the legitimacy of its action on its interventions in all audit procedures of the *Cour des comptes*, including in its non-jurisdictional missions. It communicates its comments

[4]Former First Advocate-General, former president of a legal section, Mr Maistre is currently one of the "judges" at the Court of budgetary and financial discipline.

[5] Jurisdiction associated with the *Cour des comptes*, for judging public administrators responsible for certain breaches of administration rules.

(findings) on all of the reports "produced" by the judges and rapporteurs of the Cour, gives its opinion on compliance with procedural rules, on the quality of the preparation of the case and contradictory proceedings, and on the interpretation of the rule of law, such as concerning the actions subsequent to an audit. This control of the quality of work of the Cour is one of the specifics of the role of the public prosecutor's office at the French SAI.

The chief public prosecutor, who takes part in all the committees or commissions created within the SAI, is also associated with all of the major administration decisions of the Cour which concern the audit; programming of work, creation of deliberation groups and assignment of judges. This intimate knowledge of all of the work of the SAI enables him/her to play an active role in all fields in which it intervenes.

The members of the public prosecutor's office of the Court des comptes are judges: when they leave the functions of Advocate-General, they reintegrate a chamber of the Cour if they so wish.

The chief public prosecutor monitors the implementation of the work of the Cour.