CORPORATE DONATIONS TO ELECTORAL CAMPAIGNS: A CASE STUDY OF WHITE-COLLAR CRIME

Nubia Evertsson

Abstract: Mackenzie and Green (2008) and McBarnet (2006) have argued that it is possible for white-collar crimes to emerge from actions that are cloaked in legality. In this article I study this paradox, focusing on the case of corporate donations to electoral campaigns. In particular, I will present an intra-national study on corporate funding of elections in Colombia. The case examines the electoral donations from palm oil growers' firms to the 2002 and 2006 presidential campaigns of Álvaro Uribe. It illustrates how legal donations delivered by corporations were reciprocated by incumbents through favourable legislation and policy outcomes. Although donors were not prosecuted for giving electoral donations, since it is a legal practice, administrative and judicial authorities have demonstrated that the donors communicated with incumbents with the intention to commit fraud.

Keywords: white-collar crime; legal bribe; electoral donations

Introduction

It has become customary practice for corporations to obtain illegal benefits without violating the law, and to avoid being labelled as criminal. In this article, I study a case in point: the suspicious nature of electoral donations from private corporations and their impact on policy outcomes.

The term suspicious has been used to denote the rising number of scandals in the financing of elections that have unfolded worldwide. In England, for example, British Prime Minister David Cameron was in the eye of the storm after undercover *Sunday Times* reporters filmed the then Tory Party treasurer Peter Cruddas disclosing that a donation of £250,000 granted access to “premier league” politicians, while there was no point in “scratching around” with £10,000. He claimed, “If you’re unhappy about something, we will listen to you and put it into the policy committee at Number 10” (Sunday Times 2012). In France the reputation of former French President Nicolas Sarkozy was damaged after his budget minister Éric Woerth was accused of accepting an illegal donation of €150,000 from billionaire Liliane

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Bettencourt (owner of L'Oréal) for the 2007 presidential re-election campaign. In France donations are limited to €7,600 for parties and €4,600 for individual candidates (Chrisafis 2012). In Finland, known as one of the most open and transparent countries in the world, the 2007 campaign finance scandal exploded when it was revealed that politicians failed to report the identities of donors, because the law does not contain any sanction for those who evade it. Former Finnish Prime Minister Matti Vanhanen, for example, did not report having received a donation from a business group, KMS. In 2009 Mr Vanhanen stepped in to support the construction of the shopping centre Ideapark outside Helsinki, which was backed by KMS (Haider 2009).

The escalation of these problems has demanded more transparency in the financing of electoral campaigns worldwide (Group of States against Corruption 2012; Transparency International 2004). Indeed, the United Nations has requested that member states adopt the necessary legislative measurements to enhance the transparency of the funding of elections (UN Convention against Corruption, article 7, paragraph 3). As a result, the disclosure of donors' identities is now mandatory in 70 countries, the disclosure of campaign expenses exists in 99 countries, and the ceilings on donations and election expenditures are applied in 64 and 74 countries, respectively (Idea 2012). However, the scope of existing electoral regulations is limited. There are no specific measures that address the problem of delivering undue benefits to electoral donors. Even scholars who have studied how undue benefits have been granted to donor corporations have failed to recognize this behaviour as a transgression of the law.¹ This suggests, as Hillyard and Tombs have argued, that corporate crime and state crime "remain marginal to dominant legal, policy, enforcement, and indeed academic, agendas, while at the same time creating widespread harm" (Hillyard and Tombs 2007: 12).

In this article I address how electoral donations foster criminal offending and generate social harms. The analysis is based on a Colombian case study. In particular, I examine the financing of the 2002 and 2006 electoral campaigns of the Colombian President Álvaro Uribe. According to disclosures by the weekly newspaper *Cambio* (2009), undue subsidies were granted to a group of rich families, mostly connected to the palm oil-growing sector, who had made donations to Uribe's electoral campaigns. I followed the development of the case and documented how favourable changes in laws and regulations were introduced and special programmes delineated to compensate donor firms. Although senior officials and corporate leaders faced criminal sanctions, President Uribe, the leader responsible for the legal manipulation, was never investigated.

Colombia was selected because it constitutes a paradigmatic case of corruption. According to the 2012 Business Environmental Survey conducted by the World Bank (2012), corruption is the second largest concern for 53.2 per cent of business

leaders in this country.² This concern exceeds the Latin American and Caribbean average (39.9 per cent) and the world average (36.1 per cent). In Colombia, the most common form of corruption is bribery (World Bank 2012). Private corporations often pay bribes to obtain government contracts (32.8 per cent), a situation that contrasts with the results for the Latin American and Caribbean region and the world average (9.9 and 23.7 per cent, respectively).³ It is expected, as Harstad and Svensson (2011) argue, that the extended problem of corruption has also affected the way elections are funded. These scholars have demonstrated that in developing nations with extended problems of bribery, electoral donations are seen as a kind of bribe, because companies use this instrument to introduce permanent changes in laws and regulations. Indeed, Friedrichs (2004: 134–5) has argued that the private financing of elections constitutes a “legalized bribe”, because electoral donations are used to promote issues, not candidates.⁴

The remainder of this article is organized as follows. In the first section I present the theoretical bases of the analysis, which are grounded in Sutherland’s theory of white-collar crime and its conceptual development in the theories of performative regulation (Mackenzie and Green 2008) and creative compliance (McBarnet 2006). Collectively, these scholars argue that deviance emerges not only from actions that breach penal or civil laws but also from illegitimate actions that are cloaked in legality. In the second section I present the detailed case study. Special attention is given to President Uribe’s role in the formulation of public policy favouring the palm oil industry, which is analysed in light of the electoral support he received from players in this industry during the 2002 and 2006 presidential campaigns. I also describe how public officials transgressed regulations by using the law in “creative” ways. In the final section, following Friedrichs (2004), I develop the argument that electoral donations are a form of “legal bribe”, because they do not imply violations of a specific law. In Colombia there are no regulations that criminalize the undue delivery of benefits to corporate donors, as such. This harms society, as it reduces the credibility of and confidence in democratic institutions.

Theoretical Background

Mackenzie and Green (2008) and McBarnet (2006) have argued that the non-existence of corporate criminality can also denote how corporations can actively shape or manage laws and regulations to hide illegal activities. These forms of “neutralization” – known as performative regulations and creative compliance – are used by white-collar offenders to commit crime and create social harm without necessarily violating the law. Below I describe Mackenzie and Green’s (2008) and McBarnet’s (2006) forms of neutralization. I anticipate that these practices of neutralization were also observed in the case studied.

Performative Regulations

Mackenzie and Green (2008) argue that powerful business actors seek to divert the levels of control by influencing the formation of laws that regulate their activities, which renders economic and legal benefits to themselves and their corporations. By studying the Dealing in Cultural Objects (Offences) Act 2003 in England and Wales, they revealed how the interests of dealers in the antiquities market influenced and compromised the regulation of the trade. With the concept of performative regulation Mackenzie and Green (2008) outlined how these powerful businesspeople influenced formation of law, thereby demonstrating that anti-smuggling regulations had little deterrent effect on antiquities dealers. Four propositions support Mackenzie and Green's argument: First, agenda setting is usually used to influence the topics and direction of laws and regulations. Second, regulations mark out only certain activities as illegal and in so doing protect other activities from criminalization. Third, regulations do not represent robust mechanisms of legal control, because the law is used as a means to achieve personal interests. Fourth, contemporary regulations do not necessarily stand the test of time; therefore, what is not considered a crime today may be in the future. These considerations encouraged Mackenzie and Green (2008: 151) to argue that the regulation delivers a "legal structure that outlaws certain forms of criminal behaviour and at the same time creates a zone of legitimate behaviour outside its boundaries". This happens as a response to powerful interest groups that bring to bear influence on law formation. Therefore, private interests are above public interests when laws are made with the help, or under the influence, of those they are supposed to control.

Creative Compliance

McBarnet (2006) uses the term creative compliance to denote the use of technical legal work to manage practices that fall between lawfulness and illegality. This indicates that an illegal action can be legally structured and repackaged as a lawful practice, a process that requires high-level legal work. By analysing the Enron case, McBarnet illustrates how the top of the Enron hierarchy – the chairman, the chief executive officer, the chief finance officer, and the chief accounting officer – were in complete command of the accountancy and financial regulations and actively took advantage of its opportunities.⁵ According to McBarnet, Enron used three legal instruments to circumvent the law: special purpose entities (SPEs), derivatives market transactions, and valuation opportunities. An SPE is a legal figure created by the Security Exchange Commission to facilitate leasing activities. SPEs offer a parent company the possibility to set up a separate company, which it can control, but does not need to include in its accounts. According to McBarnet, Enron placed its assets and liabilities in its SPEs, which had only 3 per cent independent capital. This practice, known as the "3 per cent rule", facilitated distortions in Enron's

balance sheets that misled the market. In fact, Enron failed to report debts of tens of billions of dollars and received market capitalizations that exceeded six times the book value. This led to a significant increase in Enron's stock price; however, after the collapse of Enron US\$70 billion in shareholder value was wiped out (Partnoy 2002, quoted by McBarnet 2006: 1093). McBarnet further argued that

Enron made massive use of derivatives, taking advantage of the "regulatory black hole" there and used the opportunities in market-to-market accounting, where managers forecast future earnings, to be astonishingly optimistic in its valuations. (2006: 1095)

Enron's actions were not hidden, but released as legally required, although the disclosure has been marked as "impenetrable" or "obtuse", according to the report of the Investigative Committee of the Board of Directors of Enron Corp., which was installed after Enron collapsed (Powers et al. 2002, quoted by McBarnet 2006: 1095). McBarnet (2006: 1991) concluded that creative compliers used "the letter of the law to defeat its spirit and to do so with impunity".

In the following section I describe the case study and illustrate how the neutralization techniques described above were used to deliver undue benefits to electoral donors of the palm oil sector in Colombia.

AIS and the Electoral Donations to the Presidential Campaigns

On 23 September 2009 the weekly newspaper *Cambio* disclosed a series of irregularities in the distribution of subsidies granted by the AIS programme (which originally stood for Agro Ingreso Seguro, or guaranteed agriculture income). The editors of *Cambio*, Rodrigo Pardo and María Elvira Samper, singled out the Minister of Agriculture, Andrés Felipe Arias, as being directly responsible. The AIS programme was created under his administration, and it distributed resources to a group of companies that gave electoral donations to President Uribe. A scandal of this dimension immediately captured the attention of the media, academics, and authorities.

Four and a half months after the AIS case was exposed by *Cambio*, this weekly newspaper was closed by its board of directors without notice.⁶ In an interview published on 6 February 2010 in the newspaper *El Espectador*, Rodrigo Pardo – former director of *Cambio*, said:

I have heard rumours that the board of directors of *El Tiempo* was disappointed with the type of journalism that we were doing. In 2009, *Cambio* revealed the criminal links of the Regional Attorney Guillermo Valencia Cossio, brother of the Minister of Interior, with the Mafia, the secret agreement to locate American military bases in Colombia, and the AIS case.... I have been wondering if the type of journalism that we practised in *Cambio*,

I mean investigative journalism – independent, and which provided deep analysis – can possibly find a place in an editorial company such as *El Tiempo* or in any economic group that has a dependent relationship with the political power.... Our newspaper disclosed irregularities, week after week. This was reason for discomfort among members of the government. (Orozco 2010; translation mine)

Cambio was part of the economic conglomerate *El Tiempo* that the Santos family control in Colombia. Under the direction of Rodrigo Pardo and María Elvira Samper, *Cambio* adopted an investigative style of journalism. In an interview published on 4 February 2012, Luis Fernando Santos, chief of the board of directors of *El Tiempo*, explained to *La Silla Vacía* that “denouncing was one of the strengths of *Cambio*.... Some can argue that we closed it for this reason...but there was no political pressure behind our decision.... The numbers said there were fewer and fewer subscriptions and less and less advertising” (León 2010; translation mine). Although *Cambio* was silenced in February 2010, the judicial investigations of the AIS case continued.

I followed the case from its origins. The research team first verified whether these accusations had *prima facie* merit. Initially, we contacted the Electoral Council and requested access to the 2002 and 2006 financial reports on Álvaro Uribe’s electoral campaign. Then, we submitted a legal request to the AIS programme to obtain the complete list of beneficiaries of the subsidies allocated by this programme. Simultaneously, we accessed the public databases of the Chamber of Commerce to obtain the names of executive board members of those corporations identified as electoral donors to Uribe’s 2002 electoral campaign. According to Law 130/1994, corporate donations to political campaigns must be approved by the board of directors. For the 2006 presidential election a new regulatory framework was in force (Law 996/2005).⁷ Law 996/2005 established that private companies could not give electoral donations to presidential candidates, only individuals were permitted to donate.

After reviewing the electoral records, as previously described, it was established that palm oil growers gave corporate donations for about US\$800 million to the 2002 electoral campaign and “personal” donations of around US\$1.6 million to Uribe’s re-election campaign in 2006 (Consejo Nacional Electoral 2002, 2006). It was also possible to verify that subsidies were mostly granted to palm oil-growers’ firms that were also electoral donors to Uribe’s electoral campaigns, thus confirming *Cambio*’s allegations. Between 2007 and 2009 palm oil producers received subsidies of US\$22.6 million from the AIS programme, which was apportioned as follows: soft loans, US\$11.7 million for 18 beneficiary firms;⁸ subsidies for building irrigation and drainage systems, US\$5.9 million for 20 beneficiary firms;⁹ subsidies for the acquisition of new machinery, US\$4.2 million for 7 beneficiary firms;¹⁰ and subsidies

for covering the exchange rate fluctuations, US\$706,000 for 13 beneficiary firms.¹¹ Some companies received two or three subsidies.

The Challenges for Palm Oil Growers in Colombia

During the 1980s palm oil producers received a number of benefits from the government, such as tax reductions, soft loans, price controls, and subsidies for the acquisition of machinery (de Hart 2003). However, these benefits were removed when President César Gaviria (1990–94) introduced a neoliberal economic model. Law 101/1993 removed all protectionist measures that provided assistance to large-scale peasant producers in Colombia, except for subsidies given to small peasants. The palm oil sector, which had been protected for years, was suddenly exposed to full market discipline. As soon as Gaviria's government ended, the national palm oil growers' federation – known by its Spanish acronym Fedepalma – attempted to reverse this situation. In 1994 the price control mechanism that stabilizes the price of the internal market was reintroduced.¹² In 1998 the subsidy for the acquisition of machinery was re-established through Decree 130/1998, signed by the Minister of Agriculture Carlos Murgas – former president of Fedepalma and owner of Oleoflores S.A. This decree allowed small, medium, and large palm oil producers to be potential beneficiaries of the subsidies.¹³

The new millennium not only presented economic challenges for palm oil growers, but violence had also affected the sector (Echandia 1999). Palm oil crops are geographically situated near the main coca production areas, where combat between the guerrilla groups, the drug producers, and the army regularly take place. During the 1980s and 1990s many palm oil growers were victims of extortion by drug dealers, guerrillas, and paramilitary groups, which forced hundreds of families to abandon their land (Fedepalma 2007; Mesa 2009).¹⁴ Many small peasants were displaced from their land by the AUC paramilitary group, who took control of palm oil production in vast areas of the country (Goebertus 2008), while medium-sized producers had to abandon their crops because of kidnaps by guerrilla groups (Fedepalma 2007).¹⁵

The 2002 presidential election offered a platform for the palm oil producers to put forward their needs for security and economic stability. Jens Mesa and César de Hart, president of Fedepalma and president of the board of directors of Fedepalma, respectively, prepared a document which contained the policies and actions that the national government should adopt for strengthening the sector. The document entitled “Guidelines for Public Policy for the Palm Oil Sector in Colombia 2002–2006” was given directly to the presidential candidates. With this action Fedepalma aimed to place the palm oil sector on the public agenda of the new president, whomever it would be. In the document the demands for subsidies, low interest credit, and tax exemptions were clearly stated. President Uribe came to

power in 2002 with the promise to fight the guerrillas and reduce the rural violence that had hampered the growth of the agro-industrial sectors during the 1990s. For palm oil growers, President Uribe became their hope.

Compensating Donors with Performative Regulations and High Government Positions

On 7 August 2002, President Uribe took office, and shortly after, the Minister of Agriculture Carlos Gustavo Cano received the results of a study, “Tax Incentives for the Palm Oil Growers” – paid for by Fedepalma. The aforementioned study – conducted by the consultant Luis Alberto Zuleta Jaramillo – proposed to eliminate income tax for palm oil biofuel and to grant a ten year tax exemption for palm oil growers. The introduction of these measures required the assent of Congress. To this end, Fedepalma took advantage of a legislative bill that was presented by the Minister of Finance Roberto Junguito Bonnet on 24 April 2003. In that bill the government requested a tax exemption for sugarcane biofuel producers. The bill followed the ordinary procedure in Congress, which means that it was studied in the Senate and House of Representatives independently and then approved in joint session. On 15 May 2003 President Uribe sent *Mensaje de Urgencia*¹⁶ (urgent message) to Congress to speed up the process of studying the bill, which meant that the bill should be studied in joint sessions in Congress. The letter was submitted to the Secretary of Congress by the Minister of Agriculture. Since the bill had not yet been approved, it was still possible to introduce changes. On 20 June 2003, the Ministers of Finance and Agriculture agreed to modify the bill during the plenary sessions of the House of Representatives and the Senate. The modification considered that palm oil producers could receive a total tax exemption (Article 3) for a period of ten years after the cultivation entered into production (Article 4), if the number of hectares cultivated was reported to the Ministry of Agriculture (Article 5). By means of the bill, tax exemptions were extended to all biofuel products – sugarcane and palm oil. Finally, Law 818/2003 was approved in Congress on 8 July 2003 and then sanctioned by President Uribe.¹⁷

However, on 23 August 2003 the activist Fernando Reyes Ortiz demanded a review of Law 818/2003 in the Constitutional Court, because of irregularities in the law’s approval process. On 24 April 2004 some of the articles of Law 818/2003 were declared unconstitutional. In Decision C-370/2004 the Constitutional Court considered that the study of this law in Congress did not follow the constitutional principle of transparency. Articles 3, 4, and 5 had been added to the original text in plenary sessions in both chambers but they were not disclosed in the *Gazeta del Congreso*, as prescribed in article 154 of the Constitution.¹⁸ Any change in a legislative bill should be published, to inform legislators and citizens of the content of the modifications before the law is finally approved. In this case three quarters

of Law 818/2003 were modified, and these changes remained hidden from public view. On 10 May 2004 the Minister of Agriculture presented a new bill to the Congress with content similar to that of Law 818/2003, although with the addition of two new articles. The first article added included a sales tax exemption for biofuel sold to be combined with diesel oil (ACPM),¹⁹ and the second article added gave a sales exemption to diesel oil (ACPM) that uses biofuel. These additions extended the benefits initially granted to palm oil producers. On this occasion all formal procedures were fulfilled, and it concluded with the approval of Law 939/2004 on 31 December 2004.

In May 2006 a new presidential election was about to take place. President Uribe was seeking re-election for the first time. It was a historic event in Colombia, because it was the first time presidential re-election had been possible. On 26 May 2006 President Uribe won the 2006 elections with 62.35 per cent of the votes (Registraduría Nacional 2006). It was noteworthy that the cabinet appointed by Uribe for his second term in office included a group of persons with personal and commercial links to the palm oil sector. President Uribe appointed Oscar Iván Zuluaga as Minister of Finance (2007–10);²⁰ María Fernanda Zuñiga was designated president of Fiduagraria (2007–08);²¹ Sergio Díaz-Granados was appointed Deputy Minister of Industrial Development (2006–08);²² and Rodolfo Campo Soto was designated director of Incoder (2007–09).²³ These public officials were responsible for the implementation of public policies regarding the agro-industrial sector. Other appointments in high government positions were granted to persons with family links to the directives of Fedepalma. Martha Pinto de Hart was appointed Minister of Communications (2002–06),²⁴ and María del Rosario Guerra held the same office between 2006 and 2010.²⁵

During Uribe's second presidential period (2006–10) the main changes to the agriculture policy were adopted. One week after his re-election, President Uribe participated in the 34th congress of palm oil growers.²⁶ There, he announced his interest in changing the regulatory framework of the sector, in agreement with Fedepalma:

I want to ask the Minister of Agriculture, Andrés Felipe Arias, to unify all agriculture regulations in one *Conpes*.²⁷ A *Conpes* that will be approved by all parties, which should guide the actions of my government. (Uribe 2006: 2; translation mine)

While this can perhaps be seen as a form of reciprocation for the contributions given in the 2002 and 2006 electoral campaigns, it also provided a clear signal of what was about to come. On 9 April 2007 President Uribe sanctioned Law 1133/2007, which created the AIS programme. This programme aimed to distribute subsidies that would increase the productivity and the competitiveness of the agro-industrial sector. Three months after the AIS programme was created, it was incorporated

into the new regulatory framework that the government had announced. Conpes 3377/2007 – the so-called *Conpes Palmero* – was formulated and approved by the Council of Ministers in a record time of six months.

Based on the new regulatory framework, President Uribe signed two decrees. Decree 2629/2007 was introduced on 10 July 2007 with the purpose of changing the fuel composition for domestic consumption. It was established that from 2010 forward diesel should contain 10 per cent biofuel, and from 2012 gasoline should contain 20 per cent biofuel. With this regulation President Uribe created a guaranteed market for palm oil growers. On 23 October 2007, Decree 4051/2007 was sanctioned. It regulates the expansion of free trade zones. This decree changed the character of the free trade zones, now they could be allocated to a single operator.²⁸ Special tax exemptions were also granted to firms located in the new free trade zones. The import tax for machinery and equipment was abolished, the consumption tax for goods produced in the zone was eliminated, and income tax for producers was reduced from 33 per cent to 15 per cent. These requirements were suggested by Mauricio Acuña, president of Fedepalma, one year earlier during the 34th congress of palm oil growers. In reply to Acuña's requests, President Uribe replied on that occasion:

I give you an easy answer. Start building the palm oil processing factories now and consider that you will get those benefits, but do it now. These four years will go fast, we have to work fast. Build them and consider the benefits granted.

[addressing Minister Arias, President Uribe asked:]

Minister, what is needed to introduce these benefits on the decree of free trade areas? (Uribe 2006: 6; translation mine)

So, it is clear that President Uribe was behind not only the legal developments concerning the palm oil sector that were adopted by his government (Law 939/2004, Law 1133/2007, Conpes 3377/2007, Decree 2629/2007, and Decree 4051/2007) but also the appointment of high government officials with family connections to palm oil producers. However, returning to the denunciations that appeared in the weekly newspaper *Cambio* in 2009, one finds that the journalists were not concerned with the appointment of public officials or the legal developments adopted by President Uribe to compensate his electoral donors from the palm oil sector. *Cambio* was only concerned about the illegal subsidies granted by the AIS programme to the 2002 and 2006 electoral donors of Uribe's presidential campaigns.

An Attempt of Censure against Minister Arias

The irregularities in the distributions of subsidies granted by the AIS programme, which *Cambio* published on 23 September 2009, had echoed in Congress. A group of 14 senators of the Liberal Party and the Polo Democrático Party submitted

a motion of no confidence against Minister Arias based on the irregularities denounced by *Cambio*.²⁹ On 12 October 2009, Minister Arias was summoned to the Senate to respond to a questionnaire regarding the distributions of subsidies at the AIS programme and the pertinence of the agriculture policy introduced during Uribe's government. Senator Enrique Robledo, who led the motion of no confidence, said to the media before the debate, "The responsibility is President Uribe's, but the motion of no confidence is directed at Minister Arias" (León 2009; translation mine). He meant that Uribe was responsible for the irregularities, but he could not be held accountable for these facts. As the Colombian legislation does not allow the impeachment of the President, a motion of no confidence is only applicable to ministers, directors of public offices, and superintendents (Article 1, *Acto Legislativo* 01/2007).

It was a tense atmosphere in Congress, because many parliamentarians were absent or presented impediments to voting. After the debate only 30 of the 102 members of the Senate voted in favour of the motion of no confidence, and 42 against it. It was clear that Uribe's party, which had the majority in Congress, supported Minister Arias. After the debate Minister Arias stated, "We demonstrated that we did not do anything wrong.... [T]hey trust me and the policy that we have designed to improve the living conditions of peasants in Colombia" (León 2009; translation mine). Although attempts at censure did not succeed in Congress, official investigations were opened against Minister Arias and his closest collaborators.

Creative Compliance Mechanism and Sentencing

The Inspector General and the National Attorney opened official investigations based on the information disclosed by *Cambio*. The first notable effect of the disciplinary process carried out by the Inspector General was observed on 10 January 2010. The members of the families Díaz-Granados, Vives-Lacouture, and Dávila-Fernández invoked the principle of opportunity and returned US\$1 million, which corresponds to the total amount of subsidies granted by the AIS programme to these three families. This action was led by the Inspector General and approved by the Administrative Tribunal in Cundinamarca. After 21 months of investigation, on 18 July 2011, Inspector General Mario Ordoñez banned Arias from holding public office for 16 years. In Decision D-2009-878-183667, Inspector Ordoñez stated that, although Arias did not participate directly in the distribution of the subsidies, he signed four agreements with the Inter-American Institute for Cooperation on Agriculture (IICA) to administer the AIS subsidy programme.³⁰ These agreements were signed under the legal framework of "science and technology", which allows direct contracting.³¹ However, the purpose of the AIS programme was to "allocate subsidies to peasants", something that did not relate to the legal framework used. Through this mechanism Minister Arias had avoided calling for an open tender

for administering the subsidy programme. The Inspector General also found that *Convenios especiales* 003, 005, 052, and 037 should have been signed with the IICA based on technical and financial studies; however, in this case there were only operating designs.³² This violated article 26 of Law 80/1993. The Inspector General also established, based on the testimony of IICA employees, that this organization had distributed the subsidies following guidelines defined by Minister Arias. The conclusion of the Inspector General was that the contract between the Ministry of Agriculture and the IICA aimed to dilute the responsibility of Arias, but this was something that he as head of the ministry could not evade. He stated:

The Minister of Agriculture, as chief executive of this organization, is responsible for the contracting of this organization.... Mr Arias caused social harm, taking into account that he compromised public resources for about US\$300 million in the so-called *convenios especiales* of science and technology, without verifying that this form of contract was correct. Instead, he used the science and technology law to avoid public tenders affecting equal competition and transparency. (Decision D-2009-878-183667: 979; translation mine)

In the criminal case undertaken by Viviane Morales, Attorney General, the first action was to call to interrogation the beneficiaries of the subsidies and the former collaborators of Arias. On 22 February 2011 Attorney Morales laid charges against ten recipients of subsidies for embezzlement and false statements in a private document. In the case of implicated public officials the Attorney General considered that they were involved in embezzlement in favour of third persons, and illegal contracting. Neither the recipients of subsidies nor the public officials involved accepted the charges. On 12 April 2011 Attorney Morales requested that the judge of the case hold them in prison until a final verdict.

In the case of Arias, the investigation was conducted by the Supreme Court, in view of the administrative position he held when the offences were committed. On 26 July 2011 Magistrate Orlando Fierro ordered the imprisonment of Arias at the request of Attorney Morales. In a press communication of the Attorney General's office issued on 26 July 2011,³³ the Attorney General claimed that Minister Arias had attempted to destroy evidence in the case. She stated that between 16 April 2011 and 3 June 2011, Arias visited his former collaborators on ten occasions and for long periods – more than four hours on each occasion. This was used as evidence to demonstrate that Minister Arias was manipulating his former subordinates (Fiscalía General 2011). On 31 July 2011 President Uribe visited Minister Arias in the place of detention and shortly after declared to the media, “If there is evidence that Minister Arias or his collaborators have stolen a single peso, I would not defend them; I would not visit him in prison” (Semana 2011; translation mine).

With Minister Arias arrested, the inquiries of Attorney Morales became more vigorous. On 28 October 2011, the former Deputy Minister, Juan Camilo Salazar, decided to collaborate with the justice system and testify against his former superior, Minister Arias. On 30 November 2011, five members of the Dávila-Jimeno family, who had received irregular subsidies for irrigation and drainage for US\$1.2 million, also provided testimony and returned the money received. The final verdict of the Superior Tribunal of Bogotá was to sentence the public officials involved in the case to ten years in prison, while the illegal beneficiaries of the subsidies were sentenced to three years in prison. To date, the Supreme Court has not declared a sentence in the case of Arias.

Discussion and Conclusions

AIS constitutes a case of interest to scholars of state and corporate crime. The case illustrates how corporations manipulate and create regulations to attain their own organizational goals. It puts forward the role of whistleblowers/journalists in denouncing the crimes of powerful individuals and the harm caused to society at large when the public interest is displaced by individual and corporate demands.

McBarnet (2006) claims that the use of creative compliance mechanisms facilitates criminal involvement. As in the case of Enron, this study demonstrates that authorities can expose manipulation of the law and convict offenders who engage in its practice. Minister Arias used the “science and technology” regulation to avoid opening a tender process for hiring AIS administration services. It is clear that his intention was to bypass the law, as the Inspector General argued in Decision D-2009-878-183667. According to McBarnet, acts of creative compliance like this require sophisticated legal work, which in the AIS case was prepared by the consultant Luis Alberto Zuleta Jaramillo, who was initially hired by Fedepalma, and then by the IICA, to design the regulatory framework of the AIS programme. Previously, Zuleta had been contracted by the IICA to design the reintroduction of the benefits – subsidies, tax reductions, soft loans, and price controls – that President Gaviria had removed from the agro-industrial sector in the 1990s.

Additionally, Fedepalma also had the clear intention of influencing the political agenda and the formation of laws and regulations. The Fedepalma organization distributed two policy documents,³⁴ pressed for the introduction of Law 818/2003 in Congress, and used the 34th annual meeting of this organization as a platform to express their demands to President Uribe. As has been illustrated in this article, President Uribe publicly admitted that the benefits requested would be granted. Regulations produced under these circumstances exemplified the extended use of performative regulations in cases of white-collar crime (Mackenzie and Green 2008). One additional element was apparent in this case. President Uribe appointed business

leaders from the palm oil sector to various positions of trust in the government. This would appear to be a “clientelistic” reward for the donations delivered by the palm oil sector firms. Fedepalma took advantage of this situation to shape the decisions of the government.

Sykes and Matza ([1956] 1996) have argued that denial of crime is a frequent form of neutralization. In the AIS case public officials and recipients of subsidies claimed they were innocent, when the Attorney General Morales accused them of embezzlement and illegal contracting. However, after the pressure from Minister Arias was neutralized, some of the public officials involved accepted responsibility for their crimes and provided testimony. For Minister Arias, the positive result of the motion of no confidence was a signal of his innocence, but this was a political debate, which did not have criminal consequences. President Uribe also argued that Minister Arias was innocent, along with his collaborators. These declarations in the media did not have any legal support. Denial of crime does not imply innocence, even if the message is said by the President and disclosed by the media. In this case the unsuccessful motion of no confidence reinforced the appearance that political power can be used to hide criminal offences. It is important to note that no investigation was ever conducted by the electoral authority or the Congress, although it was clear that the illegal exchange had begun with the delivery of electoral donations in 2002 and 2006 to President Uribe, as *Cambio* revealed. President Uribe was never held accountable for these events.

There is a particular feature observed in this case which is often ignored by white-collar crime scholars. Congress exercised political control over the government officials by discussing and revealing the conflicts of interest of the legislation presented. White-collar crime scholars – with the remarkable exceptions of Lasslett (2012) and Tombs and Whyte (2007) – rarely take into account the role of the Congress in their investigations. Although the role of Congress in the case studied was marginal, the motion of no confidence against Minister Arias was important in debating the problems under discussion. That those in power were able to outmanoeuvre the political opposition is another matter. Congress has a veto function, but not a punitive role. The role of congress or parliament in democratic regimes is crucial for avoiding abuses of power, which can be easily hidden by the bureaucratic machine.

Friedrichs (2004) and Harstad and Svensson (2011) have argued that electoral donations are forms of “legal bribes”. Lambsdorff (2008) argues that bribery emerges when three conditions are fulfilled: expectation of reciprocity, existing relationships between the parties, and unclear/absent regulations. I have illustrated how, first, the expectation of reciprocity was clearly disseminated through various documents and public requests organized by Fedepalma; second, a relationship emerged between these donors and President Uribe which was consolidated during

his second presidential term when a number of public employees were appointed in positions of trust in the government; third, there was no enforcement of the principles of no reciprocation of electoral donors because of regulatory failure. This demonstrates that the electoral donations described in the AIS case were “legal bribes”. However, the legal character of this practice derives from the creative use of the electoral legislation. On the one hand, making electoral donations is a legal practice regulated by the Electoral Council in Colombia. On the other hand, there are “black holes” in the electoral legislation that do not criminalize reciprocation of donors. This denotes the problematic character of the legislation: it is used to allow the delivery of donations, but it cannot be used to criminalize offenders or to deter potential offenders, simply because it has a limited character. These contradictions between legality and illegality create tensions, but their convergence facilitates our understanding of electoral donations as “legal bribes”.

The detonating force in this case was the article published by the weekly newspaper *Cambio* in September 2009. It is very rare that investigations of corporate crimes originate in police investigations. Whistleblowers are key actors. However, one might ask how it is that the responsibility for disclosing white-collar offences resides in the hand of citizens and not of the authorities? *Cambio* was shut down for denouncing members of the government for their irregularities;³⁵ but what is the destiny of other brave citizens that disclose wrongdoings? Many journalists and activists have been assassinated or forced to leave Colombia for denouncing cases of corruption. According to the Committee to Protect Journalists, during the last 20 years 76 journalists have been assassinated in Colombia. In 51 per cent of the cases where the motive is known, it has been attributed to accusations in corruption cases (Committee to Protect Journalists 2012).

The AIS case reveals not only the manipulative use of the law and the introduction of performative regulations, but also denial of crime and harm to society.³⁶ This suggests that crime cannot be equated to harm as Lasslett (2010) has argued. AIS has harmed the confidence of Colombian society at large and has destroyed confidence in its democratic institutions. It is probable that many brave citizens will not play the role of whistleblowers in the future. Then, we will be in the hands of the powerful.

Funding

The research for this article was supported by the Swedish International Development Cooperation Agency (project SWE-2007-209).

Acknowledgements

I wish to thank Juanita León, Juan Esteban Lewin, and Catalina Lobo-Guerrero for collecting the material on which this article is based. Special thanks to Janne Flyghed,

Felipe Estrada, Lars Korsell, the members of the Nordic Group on Corruption and the anonymous reviewers of this journal for their suggestions and comments.

Notes

1. Political economists have followed Grossman and Helpman's tradition of arguing that money can redirect the decisions of policymakers. A remarkable exception is the theoretical contribution of Harstad and Svensson (2011), who clearly stated that electoral financing is a form/substitute of bribery. For literature reviews, see Smith (1995) and Stratmann (2005).
2. Drug production, guerrilla conflict, and the presence of paramilitary forces have dominated the international agenda, as well as the academic research agenda on Colombia. However, according to the 2002 study on governability conducted by the World Bank, the decisions of the Colombian state are captured by both legal and illegal organizations (Sáez 2002). Economic groups and criminal organizations control the political agenda of this country. This article offers an analysis of how powerful economic actors influence the policy formation in Colombia. This issue has received marginal attention within the research community.
3. According to the National Chamber of Commerce, the bribery rate for business corporations is around 10 per cent in Colombia (Confecamaras 2006).
4. From the legal point of view the term "legal bribe" is ludicrous, because something legal cannot be simultaneously illegal; however, from the criminological perspective it is possible to use this term, because it indicates that legality can co-exist with illegality.
5. Employees of the auditing firm Arthur Andersen and the banks Merrill Lynch and NatWest were also involved in this case.
6. *Cambio* was closed on 3 February 2010.
7. On 19 October 2005 the Constitutional Court ruled that the congressional reform aimed at introducing immediate presidential re-election was constitutional (Constitutional Claim Decision C-1040/2005). The Constitutional Court also established that it was necessary to introduce a "law of electoral guarantees" to avoid the use of the presidential office for campaigning. Therefore, Law 996/2005 was studied and approved by the Congress.
8. The beneficiary firms were Agropecuaria La Loma S.A., Asociación de Agricultores de Palma de Caunapí, BIO D-Palma, Extractora de aceite C.I. El Roble S.A., Hacienda la Cabaña S.A., Manuelita S.A., Aceites Manuelita S.A., Palmar de Vistahermosa, Palmar el Diamante, Palmas Oleaginosas de Casacara Ltda., Palmas Oleaginosas de Santander S.A., Palmas Pororó, Palmas San Rafael, Palmas Sicarare, Palmas Tamacá, Palmeras del Llano, Palmeros del Pacifico Sur, Inagro S.A.
9. The beneficiary firms were Aceites S.A., Asopalmaceite S.A., Agroindustrias JMD y Cia., Agropecuaria Mavil S.A., ASOPALMAG, C.I. Banapalma S.A., C.I. Palomino, C.I. Sociedad Palmeras de Iguamena, C.I. Tequendama, Cooperativa Palmas Risaralda, Extractora de aceite C.I. El Roble S.A., FMP y Cia. SCA., Inversiones Agropecuarias Doima S.A., Manuelita S.A., Palmas Oleaginosas de Casacara Ltda., Palmeras de Yarima S.A., Palmeras del Llano, Union Temporal Palmera Guzman, Inagro S.A., Biocombustibles del Caribe.
10. The beneficiary firms were Biocombustibles del Caribe S.A., Vicala S.A., Asopalmaceite, Inverpalmas Ltda., Oleoflores S.A., Palmas del César S.A., Palmeras de Alamosa S.A.
11. The beneficiary firms were Agrícola Sara Palma, ASOPALMAG, Entrepalmos S.A., Guicaramo S.A., Manuelita S.A., Aceites Manuelita S.A., Palma de Oriente, Palmas de Tumaco, Palmas del César S.A., Palmas Oleaginosas Bucarelia, Palmas Santa Fe S.A., Palmeras Santa Ana, Unipalma S.A.
12. This mechanism, known as the "Framework agreement on palm oil production" was signed by Minister of Agriculture Antonio Hernández on 12 September 1994.
13. Article 7 of Law 101/1993 included tax benefits only for small palm oil producers.

14. According to Álvarez et al. (1998: 39) and Ibañez and Querubin (2004), the strategy of armed actors has been to displace people and take control over their land to make it productive to fund their criminal activities.
15. One of the multiple examples of this form of violence is the case of the 123 families displaced from Hacienda Las Pavas, located in the south of the Department of Bolívar. During the 1980s these families were forced to sell their properties to Jesús Emilio Escobar, brother of the drug dealer Pablo Escobar. After Pablo Escobar was assassinated in 1993, these families slowly started to return to their land. In 2007 Hacienda Las Pavas was sold by Jesús Emilio Escobar to the firms Aportes San Isidro and CI Tequendama, which started palm oil production there; however, the 123 families did not retreat from the land. Shortly after, the central bloc of the AUC, under the direction of “Comandante Raúl” (an alias), started to instigate action against these families. On 9 July 2009 a police eviction of the 123 families was ordered by Incode, based on an administrative request by the firms Aportes San Isidro and CI Tequendama. Before the eviction day the group of families turned to the European Parliament and some international NGOs, seeking solidarity. The letter sent to these organizations was also published in the local media, which attracted attention to the case. After a number of inspections by various authorities, and civil demands, the Constitutional Court validated in Sentence T-267/2011 the rights of these families to stay on the land that had been illegally taken. This case has received international attention, since some of the palm oil produced by Aportes San Isidro and CI Tequendama is sold to the cosmetic firm The Body Shop. The Body Shop and the NGO Christian Aid have provided support to these families. More information is available at <http://retornoalaspavas.wordpress.com/>
16. *Mensaje de Urgencia* is a special power that the President can use to speed up the study of bills in Congress. This mechanism compels the Congress to study the bills in joint sessions (Article 163, Colombian Constitution).
17. The process of the study and approval of Law 818/2003 was documented in Decision C-370/2004 of the Constitutional Court, section VI, Consideration and Fundaments, based on *Actas* published in the *Gazeta del Congreso* numbers 182, 247, 289, 295, 396, and 542.
18. Note that only Articles 1 and 2 of Law 818/2003 – which referred to sugar-cane biofuel production – were approved by the Constitutional Court considering that they were the only ones included in the original bill that was published in the *Gazeta del Congreso*.
19. ACPM stood for Aceite Combustible Para Motores, or Combustible Oil for Engines.
20. Oscar Iván Zuluaga is the nephew of Mario Escobar Aristizabal, a majority owner of Sapuga S.A., the firm that produces palm oil in Puerto Gaitán.
21. Her father, Antonio Zuñiga Caballero is the legal representative of Urapalma S.A. She has been a member of the board of directors of Urapalma S.A., Palmura S.A., and Extractora Bajirá. On 15 September 2008 she resigned as president of Fiduagraria after the newspaper *El Tiempo* revealed that her father and her uncles Julio César and Carlos Alberto Zuñiga had bought 23,000 hectares from Afro-Colombian communities in the municipalities of Curvaradó and Jiguamiandó, Choco, by means of pressure by the paramilitary leader Vicente Castaño (*El Tiempo* 2008).
22. Grandchild of Alberto Dávila Diazgranados, owner of La Samaria S.A., which produces palm oil.
23. Between 1999 and 2007, he was general manager of Fundación Animar, a firm that produces palm oil and cacao in Colombia. Campo Soto was accused by the Attorney General of letting illegal contracts worth US\$5 million in favour of palm oil producers. Today he is in prison, waiting for final sentencing. His case emerged while the Inspector General Mario Ordoñez was investigating the irregularities of AIS. In Decision D-2009-878-183667 Inspector General banned Campo Soto for holding public office for 13 years. (Inspector General, Decision D-2009-878-183667: 528–638.)
24. Wife of César de Hart, president of the board of directors of Fedepalma.
25. Wife of Jens Mesa, president of Fedepalma.
26. The congress was celebrated in Villavicencio, 7 to 9 June 2006.
27. A *Conpes* is a document that contains the social and economic policies and the regulatory framework for further administrative and legislative developments.

28. Three free-trade-zone areas were granted to the palm oil firms Ecodiesel de Colombia, Biocombustibles Sostenibles del Caribe, and BIO D S.A.
29. These parties were in opposition to the government coalition.
30. *Convenio especial* 003 signed 2 January 2007, *Convenio especial* 055 signed 10 January 2008, *Convenio especial* 052 signed 16 January 2009, and *Convenio especial* 037 signed 14 January 2009.
31. Decree 591/1991 introduced a special regime for contracting activities related to scientific research. The core of the regulation allows state offices to contract directly with a single provider without calling for an open and public tender. Decree 591/1991 introduced ten different modalities for direct contracting of science and technology, of which the *convenio especial* is one. It is worth highlighting that the *convenio especial* is the only form of contract that does not accept unity between the signatories to the contract, which means that the signatories to the contract have independent legal responsibilities (Article 18, Decree 591/1991).
32. The private consultant, Luis Alberto Zuleta Jaramillo, was responsible for the operative design of the AIS programme and the design of the subsidies for covering the exchange rate fluctuations and for the acquisition of machinery. In 2002 Fedepalma contracted the services of Zuleta Jaramillo to conduct the study “Tax Incentives for the Palm Oil Growers”, and two other studies in 2006 and 2007 related to the tax exemptions in free-trade zones and biofuel. On eight occasions the IICA hired the services of this consultant to design the reintroduction of the subsidies removed by President Gaviria in 1993.
33. During the criminal investigation files and records are not available to the public due to confidentiality. Information is only made public through official press communications.
34. The “Guidelines for Public Policy for the Palm Oil Sector in Colombia 2002–2006”, distributed during the 2002 electoral campaign, and the study “Tax Incentives for the Palm Oil Growers”, given to the Minister of Agriculture in October 2002.
35. This can be likened to physical and psychological harm.
36. Hillyard and Tombs (2007: 17) have identified physical, financial/economic, emotional/psychological, and cultural safety forms of harm. However, these forms of harm are limited to the individual sphere, and they do not cover collective forms of harm. According to Green (2010), imperceptible harm and indistinguishable victims are some of the characteristics of state crime and corporate crime. Corruption, for example, has a damaging impact on the credibility that civil society has on democratic institutions. This can be considered a collective form of harm.

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