

Export growth accelerates, trade deficit narrows

Earnings in US dollar terms increased by 33 per cent

Export earnings in US dollar terms increased by 33 per cent in May, 2003 in contrast to a decline of 16 per cent recorded in May, 2002.

The Central Bank said that this was an increase of US dollars 154 million over the previous month. The high export growth was supported by continued strong performance of industrial exports, which rose by 42 per cent in May, 2003.

All major industrial sub categories contributed to this acceleration of export growth. The textiles and garments sector, which grew by 40 per cent in volume, accounted for 59 per cent of the monthly increase.

Meanwhile, the expenditure on imports declined by 11 per cent in May, 2003 (in comparison to decline of 3 per cent in 2002) mainly reflecting the impact of high import value of power generators in May, 2002 and short term monthly fluctuating in some major import categories. As a result, the monthly trade deficit came down to US dollars 50 million in May, 2003, compared to a deficit of US dollars 230 million each in May, 2002 and April, 2003.

The cumulative export earnings during the first five months of 2003 increased by 17 per

cent, (during the first four months, the rate of growth amounted to 13 per cent) in contrast to a drop of 16 per cent in the comparable period in 2002. Similarly, cumulative imports increased by 7 per cent as against a decrease of 11 per cent in 2002. Consequently, the trade deficit in the first five months of 2003 declined to US dollar 616 million, compared with a deficit of US dollar 733 million recorded during the first five months of 2002.

Exports

Export earnings amounted to US dollars 459 million in May, 2003, the highest monthly exports so far in 2003 driven by a substantial growth in textile and garments. The cumulative export earnings during the first five months of 2003 were US dollars 1,961 million, compared with US dollars 1,676 million recorded during the corresponding period in 2002.

The largest contribution to export growth came from textile and garment exports, followed by rubber based products, machinery and equipment, food and beverages and diamonds. Earnings from textile and garment exports increased by 42 per cent to US dollars 226 million in May, 2003 continuing the

increasing trend recorded by this sector since October, 2002.

Other industrial exports that supported the export growth were machinery, mechanical and electrical equipment (37 per cent), rubber based products (95 per cent), crustaceans and molluscs and other fish products (74 per cent), footwear (94 per cent), diamond (33 per cent) and plastics (44 per cent). However, decreases were recorded in earnings from petroleum products (-16 per cent), travel goods (-34 per cent) and chemicals (-12 per cent) over May, 2002.

Monthly export earnings from agricultural products increased by 4 per cent, largely due to increases in the exports of tea, rubber, coconut and un-manufactured tobacco. Earnings from tea, amounting to US dollars 59 million, recorded an increase of 5 per cent in May, 2003 due to higher volumes, though prices were low. This was attributable to large volumes of tea exported to Middle Eastern countries following the end of the Iraqi conflict. However, tea production declined by 6.5 million kg in May, 2003, reflecting the impact of floods in low grown tea areas and heavy rains in medium and high grown areas.

The reduction in export earnings from minor

agricultural products was largely attributable to the substantially reduced earnings from the export of cloves, pepper and cinnamon.

Imports

The expenditure on imports, amounting to US dollars 509 million, declined by 11 per cent in May, 2003, compared with imports amounting to US dollars 575 million in May, 2002. The expenditure on imports during the first five months of 2003 was US dollars 2,577 million, an increase of 7 per cent over the imports in the first five months of 2002.

The major contributor to the drop in imports was the 34 per cent reduction in investment good imports, led by a 50 per cent decline in imports of machinery and equipment. This sharp decline in machinery and equipment imports was due to a substantially high value of power generators (i.e. US dollars 39 million) imported in May, 2002 which was not repeated in May, 2003.

These generators had been imported under the programme of switching over to alternative power generation sources in order to alleviate the island-wide power cuts at that time. When the import value is adjusted for these generators, the decline recorded in May, 2003 was

only 5 per cent. Imports of intermediate goods too declined by 9 per cent, reflecting declines in petroleum products, fertiliser, textiles and diamonds. Imports of consumer goods increased by 11 per cent in May, 2003. Within this category, food imports increased by 4 per cent due to higher imports of wheat, sugar and some fish products.

Rice imports were low, reflecting the impact of a record harvest in the Maha season. Imports of non-food consumer goods increased by 19 per cent reflecting increases mainly in motor cars and cycles, radio receivers and TV sets, and medical and pharmaceutical products.

Trade deficit

The trade deficit in the first five months of 2003 declined to US dollar 616 million, US dollars 117 million less than the deficit in the first five months of 2002. This reduction, together with increased foreign exchange inflows due to the growth in tourism, private transfers and capital account flows, strengthened the stability in the exchange rate and increased foreign exchange liquidity, thereby enabling the Central Bank to purchase US dollar 113 million from the market during the first five months of 2003.

Is whistle...

How, then, can legal recognition be obtained for the right, and the duty, to whistle-blow? And how may the law protect bona fide whistle-blowers from reprisals?

I must stress that I am not attempting this evening to make an authoritative or definitive statement on those issues, because that requires a much more detailed study as well as a consideration of all points of view. My task today is limited to identifying the possible arguments in favour of one point of view only, namely that whistle-blowing is entitled to legal recognition and protection. A three-pronged approach is feasible:

1. Constitutional provisions

1.1 The Constitution recognises, by implication from Article 12(1), a fundamental right to freedom from corruption or malpractice. That is confirmed by Articles 3 and 4 of the Constitution. Freedom from corruption extends to the private sector as well.

1.2 The freedom of speech recognised by Article 14(1)(a), read with Article 12(1), extends to the exposure of corruption - subject to very limited restrictions. That freedom, too, is not limited to the public sector.

1.3 Article 28 of the Constitution expressly imposes on every person in Sri Lanka fundamental duties: "to further the national interest", "to work conscientiously in his chosen occupation", "to preserve and protect public property, and to combat misuse and waste of public property", and "to protect nature and conserve its riches". In order to fulfil those duties, every person must only refrain from corruption and malpractice himself, but will often have to expose corruption of which he becomes aware - in order to protect public property, to advance the national interest, to preserve the environment, etc. At least some of these duties extend to the private sector.

1.4 The Constitution itself provides several remedies in respect of corruption and malpractice, thereby manifesting an intention to protect those who expose such conduct. Thus judicial remedies are provided by the fundamental rights jurisdiction of the Supreme Court (under Article 126), the writ jurisdiction of the Court of Appeal (under Article 140). Article 156(1) imposes on the Ombudsman the duty of investigating and reporting upon complaints or allegations of the infringement of fundamental rights and other injustices by public officers and officers of public corporations, local authorities and other like institutions. While that does not extend to Ministers, Articles 42 and 43 make the President and the Cabinet of Ministers responsible to Parliament for the due exercise of their powers and duties.

2. Statutes and subordinate legislation

2.1 Secrecy clauses, introduced by Acts of Parliament must be interpreted (in the absence of express provision to the contrary) as providing a shield of confidentiality only for lawful transactions, and not for corruption and malpractice - particularly in the light of the constitutional rights and duties outlined above.

2.2 Secrecy clauses, introduced by regulations (such as the Establishments Code) should

be interpreted in the same way; and in any event they would be unconstitutional and void if they are inconsistent with constitutional rights and freedoms.

3. Contractual provisions

Secrecy provisions in contracts, public and private - which expressly prohibit the exposure of crime and corruption, or which are sought to be so interpreted - would be illegal under the ordinary law of contract, as being contrary to public policy.

1.1 Article 12: Equality and equal protection. The Constitution is founded on the Rule of Law. The Rule of Law has a number of different meanings. A primary meaning is that everything must be done according to law - that people must be governed by laws (i.e. general rules of uniform application), and not by the arbitrary commands and dictates of rulers and their officials. People are entitled to the protection of equal laws, applying equally to rulers and their officials - who enjoy no special privileges or exemptions. Another meaning of the Rule of Law is that government must be conducted under a framework of recognised rules and principles which restrict the discretionary powers of public bodies and officials: absolute or unfettered discretions cannot exist where the Rule of Law reigns. Consequently, whenever the law confers powers (or discretions) on public bodies and officials, those powers are treated as having been conferred on them in the public interest; and not for private or political benefit; such powers are held in trust for the people, and must be exercised for their benefit; and they must be exercised lawfully and fairly, and not perversely, arbitrarily, or unreasonably. Where the Rule of Law prevails, there is no room for the arbitrary exercise of power.

It is by means of the fundamental rights guaranteed by the Constitution - and in particular, Article 12 - that the Rule of Law has been made a reality. Article 12(1) is today the most reliable shield against the unlawful, arbitrary, perverse, or unreasonable exercise of power.

Is Article 12(1) a shield against corruption as well? As stated above, a public official must exercise his powers for the benefit of the public, in the manner required by law. If, instead, he exercises his power in some other way, for instance because he has been bribed - that would not only be an abuse or misuse of his powers, but clearly an act of corruption as well. Article 12(1) entitles every person in Sri Lanka to freedom from such acts of corruption. Again, if he misuses his power - in order to benefit himself, or his family and friends, or a political party or politician, etc - that, too, would undoubtedly be a form of corruption or malpractice. Analysed in that way, it will be manifest that most (if not all) acts of corruption are the direct result of the excess, abuse or misuse of power, or of the culpable failure to exercise power, and they thus fall within the prohibition in Article 12(1). In other words, Article 12(1) necessarily prohibits the exercise of powers vested in public officials for a corrupt purpose - and it can therefore be asserted that Article 12(1) entitles every person in Sri Lanka to freedom from corruption.

Articles 3 and 4 of the Constitution provide for the exercise of the legislative, executive and

judicial powers - which are an essential part of the Sovereignty of the People of Sri Lanka. Whether those powers are exercisable by the Legislature, the Executive or the Judiciary, no one can be heard to say that the powers of the Sovereign People were delegated to institutions or persons to be exploited for corrupt purposes. Articles 3 and 4 confirm that powers must be exercised bona fide, lawfully, and reasonably, free of all forms of corruption or malpractice.

Does Article 12(1) apply to the private sector as well? There is a school of thought that fundamental rights, and Article 12 in particular, only afford protection against governmental or executive action, but not as against the acts and omissions of private bodies and individuals. This is based on two misconceptions. The first is an assumption that the language of Article 12 is the same as the corresponding section of the 14th Amendment to the American Constitution - which provides, "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws". Thus the 14th Amendment is a limited guarantee only against the acts of any State, while Article 12(1) applies to the acts of the State and all others. The second misconception flows, to some extent, from the first. Article 126(1) of the Constitution provides that the Supreme Court shall have sole and exclusive jurisdiction to determine questions relating to the infringement of fundamental rights by executive or administrative action. On the assumption that the fundamental rights are only a protection against executive action, it is often assumed that the only remedy is that under Article 126.

However, it is clear from Article 12 itself that the fundamental rights grant protection against private action as well. Thus Article 12(3) provides that no person shall, on the ground of race, religion, language, caste or sex, be subject to any disability or restriction, with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion - quite clearly, these are rights in respect of private, or "non-executive", action.

There are thus strong arguments in support of the view that Article 12 - including the protection it gives against corruption - would apply, to some extent at least, to the private sector.

What are the limits of the right? It seems to me that there are inherent limitations to the right to whistle-blow. Whistle-blowing is intended to remedy past malpractice and/or to prevent future malpractice. It must therefore be done in good faith for those purposes. If a malpractice has been remedied, and is unlikely to recur, whistle-blowing would be pointless. If a malpractice has occurred in an organization, an employee or member of that organization should first raise the matter internally, so that any past malpractice can be remedied and/or a recurrence prevented. Save in exceptional circumstances, he should not first complain to authorities outside the organization, as that would seem inconsistent with good faith. Subject to that, bona fide whistle-blowing would enjoy the protection guaranteed by Article 12(1), which would therefore preclude disciplinary action.

1.2 Article 14(1)(a): Freedom of speech. This is another possible basis for sanctioning the exposure of malpractice. The freedom of speech may be subjected to certain restrictions. Article

15(2) enables restrictions to be imposed by Acts of Parliament in the interests of racial and religious harmony, parliamentary privilege, contempt of court, or incitement to an offence. Article 15(7) enables further restrictions, by Acts of Parliament or emergency regulations, in the interests of national security, public order, for securing due recognition of the rights of others, and for meeting the just requirements of the general welfare of a democratic society. None of these provisions sanction the imposition of restrictions in order to prevent exposure of corruption and malpractice, which are of concern to every member of the public, and not merely those who are directly affected.

It is arguable that, save in extra-ordinary circumstances, the freedom of speech extends to the exposure of corruption and malpractice; and in the private sector as well.

1.3 Article 28: Fundamental Duties. Although Article 28 imposes fundamental duties on every person in Sri Lanka, Article 29 goes on to say that this does not impose a legal obligation enforceable in any court or tribunal. However, those duties are at least morally binding, and it is inconceivable that any person could be penalised for acting in the fulfilment of a moral duty imposed by the Constitution itself - to which every public officer must take an oath of allegiance.

At first sight these fundamental duties may appear not to be far-reaching. But can any one who is aware of corruption in his work-place and nevertheless refrains from exposing it, claim that he has fulfilled his duty either to further the national interest or to work conscientiously in his chosen occupation?

1.4 Constitutional remedies: Judicial, Executive & Legislative. Apart from remedies under statutes and the common law, the Constitution expressly provides extensive judicial remedies for the excess, abuse and misuse of powers, as well as the culpable failure to exercise powers. 16. Corruption and malpractice are not in any way excluded from the scope of those remedies. On the contrary, the Ombudsman's jurisdiction is defined in the widest possible terms, as extending to complaints or allegations of the infringement of fundamental rights and other injustices, which would cover all forms of corruption and malpractice in the public sector. 17. While Ministers and certain high officials are exempt from that jurisdiction, the President and the Cabinet of Ministers are responsible to Parliament for the due exercise of their powers and duties. 18.

Conclusion: The Constitution thus recognises the fundamental right to freedom from corruption and malpractice, and the fundamental right and the fundamental duty to expose corruption and malpractice, and it provides extensive mechanisms for the investigation of allegations of corruption and malpractice. In that context, penalizing bona fide exposure of corruption or malpractice would be a denial of the protection of the law guaranteed by Article 12(1)

2 & 3. Secrecy clauses in statutes and subordinate legislation, and in contracts.

Let me deal first with contractual provisions. Any contract is illegal which tends to corruption

in the administration of the affairs of the nation, because they "diminish the respectability, responsibility and purity of public offices, and [to] introduce a system of official patronage, corruption and deceit wholly at war with the public interest". 19. Weeramantry deals with the question when a contract would be void or voidable as being contrary to public policy:

"It is in the national interest that the public service and its members should be kept free of corruption... Consequently any bribe or personal advantage offered to a public officer in regard to the discharge of his public duties is illegal and a contract to grant any such benefit is void." 20

"All bargains tending to stifle criminal prosecution whether by suppressing investigations of crime or by deterring citizens from the public duty of assisting in the detection or punishment of crime are void as against public policy." 21

And that would apply to an agreement relating to a crime already committed, as well as to a future crime. Weeramantry adds that "an agreement not to institute an action for an injury to be committed by another is invalid" 22 (as Voet 23 observes) "as being a temptation to wrongdoing and as involving the forgiveness of a future offence". A secrecy clause which, expressly or by implication, prohibits the exposure of malpractice, past or future, would be a "bargain to stifle prosecution" and "a temptation to future wrongdoing". 24

Let me turn to statutory provisions. It can never be presumed that Parliament desired to conceal or condone corruption, or to "diminish the respectability, responsibility and purity of public offices, and to introduce a system of official patronage, corruption and deceit wholly at war with the public interest". On the contrary, it must be presumed that Parliament considered it to be in the national interest to keep the public service free of corruption. If, therefore, an Act of Parliament is capable of two interpretations, and one interpretation would permit the exposure of corruption while the other would compel concealment, the courts should not prefer the latter, as that would be contrary to the public interest, as well as constitutional rights and duties. Hence secrecy clauses, introduced by Acts of Parliament must be interpreted (in the absence of express provision to the contrary) as providing a shield of confidentiality only for lawful transactions, and not for corruption and malpractice.

Finally, the same principles of interpretation should be applied to secrecy clauses, introduced by regulations (such as the Establishments Code). If that is not possible, they will be unconstitutional and void to the extent that they conflict with constitutional rights and freedoms.

4. Professional Ethics. If the constitutional and legal position in regard to whistle-blowing and whistle-blowers is as outlined above, professionals may consider it desirable that their own codes of ethics should set out clear guidelines as to the rights and duties of whistle-blowers and of professionals to whom exposure is made.

In conclusion, there is a further challenge that faces professionals and professional associations. Even if whistle-blowing does get legal recognition and protection, what action will be taken, once corruption and malpractice are exposed, to remedy and to penalise past malpractice, and to prevent future malpractice?