

# PART 2

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## Prosecuting Bribery Effectively

### 2.1 Increasing the detection rate of bribery

#### Report on the technical workshop

**Chaired by S. K. Sharma, Director of Prosecution,  
CBI, India**

As noted in the first part of this publication, corruption is a particularly difficult crime to investigate because of its hidden nature and the fact that there is rarely an individual victim that could come forward, claiming a loss or harm, and thereby trigger an investigation. The successful prosecution of this type of crime is therefore strongly dependent on the receipt of verifiable information from those that might come across corruption, i.e., from within public administration and from the public at large.

In India, the legal framework for corruption is rather comprehensive and, on the condition that information about corrupt officers has been provided to authorities, conviction rates in corruption cases have been quite high. Yet, and India is no exception in this, such information has been received far too rarely for a long time, leaving many corrupt acts undetected and leading the country to be considered one of the most corrupt countries in the world.

India has tried to cope with this problem by introducing a number of reporting obligations both for public servants and the public at large to raise the detection rate. In addition, decentralized sources of information have been institutionalized, creating a vast net of vigilance institutions at different levels of the state administration.

*Lack of  
information  
about corrupt  
officers*

*Reporting  
obligations*

### ***Reporting obligations***

*Reporting obligations* Reporting obligations, addressed to public servants as well as all other citizens, and punitive measures for failure to comply with these obligations, are defined in section 39 of the Code of Criminal Procedure (1973), which makes it mandatory for any person, regardless of occupation or professional status, to report to a magistrate or officer of the law any alleged corrupt offense by a public servant, or else face the possibility of prosecution. Also, any high-value transaction within or between federal offices has to be reported, since such purchases tend to be where most corruption in governmental departments occurs. In addition, a number of sections of the Indian Penal Code strengthen these provisions.

In practice, however, section 39 has very rarely been invoked. Reporting obligations have not lived up to the expectations and have done little to encourage citizens or public servants to come forward with information about corrupt acts that they might have come across in their daily or professional life. One of the reasons for this seems to be the fear of potential whistleblowers of being subjected to harassment and reprisals on the job, and the fact that they cannot be sure whether their time and courage will lead to concrete follow-ups.

*Provisions protecting informants* Existing provisions intended to protect whistleblowers or those who uncover corruption unfortunately do not significantly improve this situation. Under the Indian Evidence Act, any information involving corruption provided to relevant public authorities must be treated with the strictest confidence. However, considering the inability of these provisions in recent years to encourage citizens to come forward with such information, there seems to be a clear and pressing need for legislation protecting whistleblowers to strengthen the provisions under the Evidence Act. Recently, the Indian Law Commission has been

examining the “rule of law” concepts inherent in whistle blowing as these relate to the limits to which whistleblowers can, on good faith, disclose information.

### ***Institutionalizing the sources of information: Vigilance institutions***

Considering the relative failure of the reporting obligations in place, India also in the 1960s institutionalized the sources of information within public service in addition to the reporting obligations. To this end, the Central Vigilance Commission at the federal level, State Vigilance Commissions at the state level, and Central Vigilance Officers at the department level have been established. These institutions complement the Central Bureau of Investigation (CBI), the main federal investigating authority.

The Central Vigilance Commission is the apex vigilance institution at the federal level. It enjoys statutory status and independence from any executive authority. Its role is to supervise the functioning of the CBI and to advise various central Government organizations in planning, executing, reviewing, and reforming their vigilance work.

The CBI in its authority receives support from the central vigilance officers. Such officers, civil servants, or senior police officers are appointed in every department or organization within state-level bureaus. They cooperate with the CBI or any other federal authority investigating suspected corrupt activities. Besides, the central vigilance officers exercise a preventive function, e.g., they examine the rules and procedures of their respective departments, identify corruption-prone areas, and survey officers working in these areas.

However, vigilance management in public sector undertakings still faces some constraints. While these enterprises constitute an important segment of the economy and account for more than

*Institutionalizing  
the sources of  
information*

*Cooperation  
between  
vigilance and  
law enforcement  
institutions*

*Vigilance  
management in  
public sector  
undertakings*

50% of gross domestic capital formation, the competencies of the Central Vigilance Commission in this area are limited—allegedly because of the autonomous status of these enterprises. The work of the CBI and the Central Vigilance Commission is in fact often considered to be an obstacle to their commercial competitiveness.

### ***Conclusion***

Reporting obligations, provisions protecting those reporting acts of corruption, and even the establishment of vigilance institutions have not proved to be sufficiently efficient in strengthening India's fight against bribery and corruption. Despite these provisions, corruption in the public service is still widespread and the detection rate is low because of the above-mentioned difficulties in obtaining verifiable information by relevant agencies. As this shows, even a well-designed legal and institutional framework does not ultimately guarantee success in the fight against corruption. Apathy and anxiety at the prospect of being subjected to harassment by colleagues and superiors may discourage the reporting of illicit practices. In addition, a lack of confidence that law enforcement agencies will take up the complaint and investigate the reported matter further discourages citizens from taking the risk of exposing themselves by blowing the whistle. Thus, trust that reporters will be protected and anti-corruption education are fundamental preconditions of success in the fight against corruption, as well as proof of the capacity and will of relevant law enforcement agencies and political leaders not to let corruption go unpunished.

## **2.2 Ensuring full cooperation of law-enforcement agencies during investigation**

### **Report on the technical workshop Chaired by John Dempsey-Brench Detective Chief Inspector, UK**

Investigation into sophisticated crime such as corruption requires particularly close cooperation between the law enforcement agencies involved. When gathering evidence using modern equipment or techniques, the police applying these means depend on the advice of skilled lawyers to ensure that the evidence produced is admissible in court. It is essential when further evidence is required by the Crown Prosecution Service (CPS) that the police expedite their request to provide this evidence. The various law enforcement authorities must record the decisions taken and inform each other about the decisions so that this information is available to the prosecution when the case is tried in court. Cooperation is not restricted to exchange of legal advice and information; the agencies can also routinely delegate representatives to work in each other's offices. Investigations in Britain against corrupt officers within law enforcement agencies have highlighted these aspects, and the lessons learned in the course of these operations have proven to be valuable experience to the British law enforcement agencies for their investigations into corruption even beyond police services.

Following very serious and harmful corruption cases within the British law enforcement establishment during the 1990s, the Metropolitan Police Service launched a number of special operations. One of them, referred to as Operation Othona (see chapter 3-5), targeted corruption within the service itself. Combating corruption within the law enforcement agencies entailed particular

*Combating  
corruption  
within law  
enforcement  
agencies*

difficulties resulting from the perpetrators' knowledge of police tactics and their experience in analyzing and investigating cases. The operation consequently required significant modifications in investigation methods, which have radically changed the cooperation between the different agencies.

*Cooperation by providing legal advice at an early stage*

The operational procedure formerly followed within the police service was to conduct an investigation, collect the elements of proof, and bring charges against suspects before submitting the documents to the Crown Prosecution Service (CPS). As a consequence of this procedure, the CPS faced legal arguments for any mistake made by the police services once the cases were brought to trial. Dealing with such legal challenges became a very lengthy and expensive process for the CPS. When more sophisticated and unexplored methods, e.g., covert policing techniques or undercover officers, were used during the investigation, legal pitfalls entailed still more acquittals in court. The Metropolitan Police Service eventually overcame its "professional pride," which had previously stood in the way of its obtaining the best and most thorough legal advice available. Hence, the service sought cooperation with the CPS to secure successful prosecutions and acquire evidence admissible in court. The CPS for this purpose provided a dedicated team, which gave early advice, both before and during investigations. These teams consisted of lawyers and caseworkers skilled in handling cases involving informants and covert policing techniques, and experienced in conducting sensitive and intensive inquiries. The police services also consulted the CPS every time they employed technical surveillance, undercover officers, or informants, to ensure that the evidence gathered would be admissible in court. It also undertook to make sure that specialists had obtained the authority to use such equipment. The collected evidence was then shared with the CPS.

Cooperation also paid off when cases were tried in court. Formerly, senior investigating officers, when cross-examined, could often not explain and justify why certain decisions had been taken in the course of the investigation because of the lack of a proper system for record keeping, a problem which, again, often entailed acquittals. Nowadays, detectives from the Metropolitan Police Service keep a systematic set of detailed records for each investigation and continuously share them with the CPS.

*Cooperation in preparing for court hearings*

As a lesson learned by all sides—police forces, the National Crime Squad, and the CPS—the cooperation is no longer restricted to mutual exchange of legal advice and information; the agencies today actually have representatives routinely working in each other's offices.

*Representatives in offices of partner agencies*

The contribution of this type of cooperation to the success of investigation into corruption was demonstrated in a later case. In an operation targeting a corrupt retired police officer, the CPS offered legal advice throughout the process, including the time when the Anti-Corruption Unit was obliged to use an untrained officer to act as an undercover agent. The CPS's legal advice also ensured that the use of then unexplored means of investigation, such as audio and video recorders and other covert devices corresponded to the criteria of legality, necessity, and proportionality such that the evidence collected was admissible in court.

## **Conclusion**

Full cooperation of law enforcement agencies during all stages of the investigation and the trial in court is key to success, in particular when investigating sophisticated crimes such as corruption. Such cooperation covers legal advice, exchange of information, record keeping, and mutual access to these records. Institutionalizing cooperation by exchanging representatives to work in each other's office can be particularly fruitful.

## **2.3 Gathering evidence abroad: International legal assistance as a key to success**

### **Report on the technical workshop chaired by Bernard Bertossa, Former Attorney General of Geneva**

Corruption cases very often have a transnational character: the briber and the person receiving the bribe are from different countries, and assets are transferred via several financial centers that are located in still other countries. Therefore, in investigating and prosecuting corruption cases, international legal assistance is often the key to success. Such legal assistance covers both taking and handing over of evidence, and confiscation and repatriation of the illicit assets. However, a defective legal framework, numerous material conditions, and often lengthy procedures render these operations difficult. Therefore, a clear view of the legal framework, provisions, conditions, and formal procedures is crucial to the success of requests for international legal assistance, the collection of evidence abroad, and the repatriation of the proceeds of corruption. Informal contacts may also help in hurdling the difficulties that formal procedures entail.

### ***Legal framework of international legal assistance***

*No universal treaty* In criminal matters, there is no universal treaty governing the gathering of proof abroad. Only model treaties of this kind exist, prepared under the auspices of the United Nations. However, many international conventions on specific offences contain provisions requiring signatory countries to grant each other mutual assistance at an international level, as, for instance, article 9 of the OECD Convention on Combating Bribery of Foreign

Public Officials in International Business Transactions. However, often such provisions remain rather general, leave room for differing interpretations or approaches, and contain little detail as to how the promised mutual assistance is to be provided.

In addition to multilateral treaties, there exist many bilateral agreements, exchanges of letters, or simple declarations of reciprocity in this field, which, however, again usually contain only undertakings in principle. Finally, several countries have adopted internal legislation regulating international mutual assistance. Such legislation may not derogate from binding rules in treaties or international conventions and applies without reservation only if the assistance is requested by a country to which the requested country is not bound under an international treaty.

*Bilateral arrangements*

When no treaty, convention, or bilateral agreement exists between the requesting and the requested country, the provision of assistance is not mandatory but still possible. The requested country usually requires an undertaking of reciprocity on the part of the requesting country. In this respect, common law countries are usually more restrictive than civil law countries.

*Ad hoc arrangements*

### ***Material conditions for international legal assistance***

Regardless of the legal basis underlying a request for legal assistance, such assistance is granted only if the following material conditions exist. First, a general prerequisite for mutual legal assistance is the criminalization of the act in both the requesting and the requested country (dual criminality rule). The assistance must relate to criminal proceedings properly so-called, i.e., proceedings against the perpetrators of an offense under ordinary law. While the dual criminality rule seems clear and easily applicable, it entails serious obstacles to gathering evidence abroad. This is

*Dual criminality rule*

particularly true in cases of corruption because countries have developed the necessary legislation criminalizing bribery and corruption to varying degrees. Most countries, for instance, have not criminalized private-to-private corruption, and even bribery of foreign public officials does not constitute a criminal offense in some countries. This latter loophole, however, is nowadays covered, at least in those countries that have implemented the 1997 OECD Anti-Bribery Convention. Legislation on money laundering also remains largely deficient in many countries.

*Varying definitions of a corrupt act* Another major difficulty in this respect is the diversity of definitions of corruption in different countries. This is particularly evident in the area of public administration. Many societies consider the giving of bribes in exchange for services by public officials as legitimate or at least acceptable. In fact, it is sometimes difficult to distinguish between obtaining a favor (which is punishable by law) and having a right recognized (which is not punishable).

*Fair trial* A second prerequisite for the provision of mutual legal assistance is the guarantee of a fair trial and respect for the fundamental rights laid down in the International Covenant on Civil and Political Rights in the legal system of the requesting country.

*Unilateral exceptions* Some countries refuse to assist in fiscal proceedings. The request for assistance may also be rejected if the proceedings concern political or military misdemeanors or if the granting of assistance constitutes a problem for public order or the higher interests of the requested country. This type of difficulty often arises when the case concerns bribery in relation to the sale of weapons.

*Bank secrecy and diplomatic immunity* Contrary to what is often believed, however, bank secrecy provisions cannot be used to deny a request for mutual assistance. Diplomatic immunity is also a frequent defense in corruption probes involving diplomatic or military envoys and attachés. However, in Switzerland, for instance, diplomatic immunity provisions do not apply to private

economic activities and therefore also cannot be used to justify denying a request for mutual assistance.

### ***Procedure of acquiring evidence abroad***

If the material conditions for legal assistance exist, the request for assistance has to be issued in writing by a judicial or administrative authority with criminal jurisdiction in the requesting country. A request from a parliamentary or governmental authority is not admissible.

*Form of request*

The request must contain a description of the facts behind the proceedings. This description must be as detailed as possible and must indicate in what way the evidence being sought is useful or necessary. In principle, the requested country does not verify the truthfulness of this description. However, common law countries are usually more demanding in this respect and often require proof of the alleged facts.

*Fishing expeditions*

The request must also set out in as detailed a manner as possible the nature and object of the proof sought abroad. Requesting undefined proof ("fishing expeditions") is not admissible.

If the two countries concerned are parties to a convention or treaty authorizing direct correspondence between their judicial authorities, the request is sent directly to the competent judge or magistrate of the requested country. Otherwise, the request is made through the intermediary of central offices (if such exist) or diplomatic channels.

*Channels of communication*

The request is executed by the competent judicial authority of the requested country, in accordance with its own rules of procedure. If the requesting authority makes an express request, it may sometimes be allowed to apply the rules of procedure of the requesting country. In theory, the requesting judge may participate in the taking of evidence, but this is often difficult for practical reasons such as lack of resources. After having

*Procedures for execution of requests*

gathered the evidence sought, the judge or magistrate from the requested country communicates it to the requesting authority through the same channel that was originally used to make the request.

*Right of appeal*

In a great number of countries, the person in respect of whom the request for mutual assistance was made is allowed to appeal against the sharing of evidence with the requesting country. Such appeals may cause considerable delays in the provision of gathered evidence. For example, in several European countries—particularly in some that are considered “tax havens” such as Liechtenstein, Luxembourg, and Switzerland—national legislation relating to international legal cooperation offers defendants in corruption cases many opportunities to appeal against judicial decisions that would disclose information on their financial status. Defense lawyers, of course, frequently have a vested interest in seeing judicial processes extended. Finally, banks can also readily appeal against the decision to transfer the documentation, and litigation regarding such matters can drag on indefinitely. These possible reasons for delays in the procedure may mean that, while authorization to provide requested information to a foreign authority may be granted within a relatively short period of time, the requesting party might not actually receive the requested documents for several years.

***Confiscation and repatriation of proceeds, extradition, and proceedings against third parties***

A widely discussed issue in relation to mutual legal assistance in corruption matters, in particular in the context of the negotiations of the UN Convention Against Corruption that took place in 2002–2003, is the confiscation and repatriation of the proceeds of corruption, and extradition and proceedings against third parties. There is currently

no internationally binding legal instrument concerning the repatriation of funds in particular.

If ever funds are repatriated these days, the reasons are usually more political in nature than based on legal obligation. The assets are transferred only under the additional condition that the repatriated funds are not likely to end up in the pockets of other corrupt agents in the requesting country. Occasionally, funds are returned to banks or other private entities rather than claimant governments, as, for instance, the funds that had been confiscated by Swiss officials at the behest of the Nigerian Government in the Abacha case and the Philippine Government in the Marcos case. In the Abacha case, the funds were sent directly to the Bank for International Settlements, which considered them as partial payment for outstanding loans from the Nigerian Government. In the Marcos case, the Swiss authorities and the Philippine Government agreed that approximately \$500 million would be returned to Manila on the condition that an independent court would administer the equitable distribution of the funds.

*Repatriation*

As for extradition, permits to arrest and extradite suspects from other countries are usually very difficult to obtain, especially if these persons are nationals of the requested country.

*Extradition*

Banks through which money has been laundered are increasingly being held legally culpable for what they should have known about these transactions. It has become far more difficult nowadays for banks to simply claim that it is not their responsibility to scrutinize the activities of their clients. For example, over the past few years, five Swiss bank employees have been sentenced and two banks in Switzerland have been facing serious penalties in civil cases stemming from the billions of dollars in assets secreted in that country by the Abacha family.

*Proceedings  
against third  
parties*

### ***Corruption-specific obstacles to international legal assistance***

Sometimes the requested legal assistance is never provided, despite the fact that all formal and material conditions exist. This happens particularly often in investigations involving influential politicians, and the reasons are manifold.

*Political influence* First, as noted earlier (cf. sup. 1.2), public figures and political parties, even under indictment, have special powers, particularly within the public institution under their control. They may try to use these means to prevent evidence from being found or handed over. Governments and lawmakers are sometimes the very people involved in corrupt practices, either for personal or for political reasons. Significant progress is therefore difficult to achieve, unless the legal authorities are granted actual independence and effective instruments to investigate the perpetrators of these practices that the lawmakers themselves define as being criminal.

*Independence of the judiciary* Even judges do not always have enough independence vis-à-vis the executive power, nor—at times—the necessary integrity or courage. There are corrupt magistrates who are more interested in “carrying out orders” or advancing their careers than in concluding investigations. Judges are frequently accused of being an instrument of political parties or individual members of the government or—in the case of international mutual assistance—of the government as such in its foreign affairs strategy. Such accusations discredit the investigation, even when they are completely unfounded.

*National economic interests* Alleged “national interests,” such as the need to safeguard the country’s economy against foreign competition, protect employment, etc., are often cited in defense of corrupt acts. The accused persons cynically justify corrupt acts as being perpetrated for the well-being of the citizens or for the economic wealth of a country.

Last but not least, the financial strategies used to camouflage a corrupt act or the profits derived from it have become increasingly sophisticated, and neither prosecutors nor judges always have the instruments needed to uncover them. Financial intermediaries have specialized in these strategies and are able to eliminate paper trails. The systematic use of offshore or other shell companies render camouflage ever more effective. Furthermore, getting legal authorities in fiscal havens to collaborate in legal investigations is often difficult. It is even more difficult when lawyers and other professionals, who can oppose the judge because of secrecy provisions, or people who enjoy immunity (heads of state, diplomats) are used as financial intermediaries. The judiciary is powerless before this type of privilege.

*Complex financial transactions*

### ***Informal networks***

Considering the legal and practical difficulties encountered when seeking legal assistance through formal procedures, informal remedies merit specific attention.

While informal contacts between prosecutors and law enforcement officials from different jurisdictions are unfortunately not very efficient, it is actually not unethical in the least to establish personal contacts with counterparts abroad. In international cases, meetings between investigating magistrates are common, as are meetings between attorneys. Obviously, informal networks and contacts cannot replace the formal procedure of requesting and obtaining legal assistance. However, informal discussions between colleagues from different jurisdictions can be very useful in determining who is best suited to perform what duties in regard to a multijurisdictional line of inquiry, and what could be the best investigative approach. This method also can do much to help resolve or minimize the types of problems inherent in translation needs or protocol

*Forms of informal contacts*

differences, such as how best to word formal requests for information. Experience indeed shows that prosecutors can demand and receive evidence relevant to criminal proceedings from their foreign counterparts much faster when informal networks are working well. Close informal links can even sometimes be the only truly practical way to move an investigation forward. In countries where decisions involving international assistance in prosecutions can be made at the nonfederal level, close ties with authorities in regional, provincial, or cantonal positions can also be useful, as these authorities can often act much faster than their counterparts at the national level.

### **Conclusions**

*Enter into direct contact* Nothing prevents magistrates or other authorities from entering into direct contact with a foreign jurisdiction to demand information about the best way to collect evidence (what form the request should take, to whom it should be sent, etc.). Where relevant, the central authority of the requested country is usually willing to provide this type of information.

Certain conventions provide for the possibility of spontaneous communication to the foreign judge or magistrate of any information that could be useful to the proceedings. As a possibility, this option exists even in the absence of any specific convention. Actual evidence, however, cannot be transmitted, since this would normally contravene mutual assistance regulations. But most other types of information collected in independently established investigations could be exchanged freely.

*Open own proceedings* As far as international bribery is concerned, the requested judge or magistrate, upon learning of the implication of its own country's citizens, should open his/her own proceedings. For instance, if the requested country is concerned only because its financial center was used, its authorities should open

their own proceedings for money laundering (the most frequent and fatal mistake in money laundering is to launder money from different illegal activities through the same account). In both cases, it can be highly useful for the investigating authorities of the two countries to define a common strategy, notably as regards the exchange of necessary evidence.

When the person against whom proceedings are brought in a certain country lives abroad, the proceedings may be delegated to the country of residence. In such a case, all the evidence gathered is included in the case file that is transferred to the investigating authority abroad. In the context of bribery, this allows, for example, the transfer of all the documents concerning money laundering carried out in this third country to the country in which the corrupt official lives.

*Delegate proceedings*

If an act of a corrupt public official has caused material damage to the country concerned, the latter may ask to join as a civil party in the proceedings abroad for the crime of money laundering. In such a case, it will usually have access to the foreign acts of procedure.

*Involve injured parties*

The confiscation of the proceeds or instruments of corruption plays a major role in combating corruption. For this purpose, autonomous procedures may be opened in any country to which such financial proceeds have been traced.

*Start confiscation proceedings*