ADB-OECD Anti-Corruption Initiative for Asia-Pacific
Combating Corruption in the New Millennium

Effective Prosecution of Corruption

Report on the Master Training Seminar

Ghaziabad, India
11–13 February 2003

Asian Development Bank

Organisation for Economic
Co-operation and Development

This publication was prepared by the Secretariat of the ADB-OECD Anti-Corruption Initiative for Asia-Pacific composed of the Asian Development Bank (ADB) and Organisation for Economic Co-operation and Development staff. The views expressed in this publication do not necessarily represent the views of ADB or its member governments or of OECD and its member countries.

ISBN 971-561-508-2
Publication Stock No. 100403

Published by the Asian Development Bank
P.O. Box 789, 0980 Manila, Philippines

Contents

The following governments have endorsed the Anti-Corruption Action Plan for Asia-Pacific: Australia; Bangladesh; Cambodia; Cook Islands; Fiji Islands; Hong Kong, China; India; Indonesia; Japan; Kazakhstan; Republic of Korea; Kyrgyz Republic; Malaysia; Mongolia; Nepal; Pakistan; Papua New Guinea; Philippines; Samoa; Singapore; and Vanuatu.

Foreword

Over the last decade, societies have realized to what extent corruption has damaged their welfare and stability. Governments, the private sector, and civil society alike have consequently declared the fight against bribery and corruption a priority in their overall endeavor and politics.

In the Asia-Pacific region, 21 countries have translated this commitment into action by jointly developing and endorsing an Anti-Corruption Action Plan in the framework of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. This plan comprehensively assembles the regions' objectives and needs for reform to develop effective and transparent systems for public service; to strengthen anti-bribery action and promote integrity in business; and to support active public involvement in the fight against corruption. One of its most central aspects is the need to render investigation and prosecution of corruption more effective.

Considering the countries' expressed need for capacity building in this reform area of the Action Plan, and the specific obstacles that hamper successful prosecution in this particular field of crime, the ADB/OECD Initiative organized a master training seminar on the subject Effective Prosecution of Corruption. The seminar hosted by the Government of India on 11–13 February 2003 at the Training Academy of the Indian Central Bureau of Investigation (CBI) in Ghaziabad assembled 32 representatives of prosecution agencies and specialized investigation units from 14 countries of the Asia-Pacific region. The aim of the plenary discussions and case study workshops was to build capacity within the responsible law enforcement authorities and to strengthen the participants' practical knowledge in areas where they face particular challenges, such as investigating high-profile cases; ensuring cooperation between law enforcement agencies; reporting corruption within public administration; and obtaining international legal assistance.

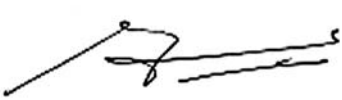
These challenges are not unique to the Asia-Pacific region; nor are their remedies. The seminar therefore called upon experts both from Asia, such as Mr. S. K. Sharma, Director of Prosecution of the Central Bureau of Investigation of India, and from outside the region. These included Mrs. Eva Joly, former investigating judge of the Court of First Instance of Paris, France; Mr. Bernard Bertossa, former

prosecutor general of Geneva, Switzerland; and Detective Chief Inspector John Dempsey-Brench of the National Crime Squad of England & Wales. ADB and OECD express their sincere appreciation to the experts for their valuable contributions.

The present document assembles the seminar's background papers and case studies, and the experts' and participants' views on the key topics that formed the basis for discussion at the seminar. As such, the publication aims to make the expertise exchanged and acquired during the seminar accessible to a broader public and thus to contribute to the overall aim of combating corruption in the new millennium.

The seminar on which this publication is based was, with the support of Enery Quinones, head, Anti-Corruption Division, OECD, managed by Gretta Fenner, project manager of the Anti-Corruption Initiative for Asia-Pacific, Anti-Corruption Division, OECD, and coordinated by Jak Jabes, director for governance and regional cooperation, ADB, and Frédéric Wehrlé, coordinator for anti-corruption initiatives, Anti-Corruption Division, OECD. ADB and OECD express their sincere appreciation to the Government of India for hosting this seminar, and are in particular grateful for the assistance provided by Bhaskar Khulbe, Cabinet Secretariat, Government of India, and Mr. Abhay, Director of the Indian Central Bureau of Investigation's Training Academy in Ghaziabad. Consultancy services by Joachim Pohl, legal expert at the OECD Anti-Corruption Division, and editing by David Hayhurst, under contract to the OECD, are thankfully acknowledged.

The views expressed in this publication do not necessarily reflect those of the ADB's Board and member countries or of the OECD and its member countries. It is published jointly by the ADB's Regional and Sustainable Development Department and the OECD's Directorate for Financial, Fiscal and Enterprise Affairs.



Jan P. M. van Heeswijk
Director-General
Regional and Sustainable
Development Department
ADB

William Witherell
Director
Directorate for Financial, Fiscal
and Enterprise Affairs
OECD

Executive Summary

Prosecution of corruption is a particularly difficult endeavor and successes in this field are still too rare. The detection rate is often low because of the lack of verifiable information that is received from public servants or other citizens. Particular difficulties arise when an investigation involves prominent politicians and wealthy businessmen, or when it involves international bribery cases that require assistance from foreign jurisdictions in collecting evidence. Shortcomings that are at the root of these problems can be found at the legislative level; in addition, many law enforcement agencies are technically not up to dealing with complex crimes such as corruption in an appropriate manner.

Responding to this lack of capacities in relevant law enforcement agencies, the seminar on which this publication is based addressed the above-mentioned difficulties in its plenary presentations and discussions, as well as through practical work on hypothetical cases prepared by the invited experts. The aim was both to identify possible remedies to be taken by legislators and to develop practical measures and strategies that would allow prosecutors and investigators to deal with such difficulties in the immediate absence of adequate legal and institutional reforms.

Investigating high-profile cases

Legal and institutional shortcomings may have a strong impact on the effectiveness of prosecution when investigations target corrupt businessmen or politicians, as Mrs. Joly pointed out on the seminar's first day; these cases are often characterized by a high degree of sophistication concerning the methods of committing and camouflaging the crimes. This complexity contrasts with the broad lack of training of investigators and prosecutors in specific relevant matters such as forensic accounting, public funds, or insider trading. Unsuitable institutional provisions, especially insufficient independence of the law enforcement agencies from interfering government bureaus, add to these problems.

The influence a leading figure can exercise on his or her trial constitutes a second major obstacle. Supported by skilled lawyers, such defendants can obstruct the prosecution with lengthy appeals, and

sometimes they even manage to influence the legislative bodies to amend legal provisions in their favor. Prominent defendants also benefit from the support of the public, which often displays sympathy for "successful" businessmen or politicians. The media, publicizing details and opinions from the trial, may also cause interference, following their own logic or even commands from the perpetrator's entourage.

Most of these hindrances must be addressed at the legislative level. Yet, a number of rules, to be applied at a technical and personal level by prosecutors, may help to control and diminish the mentioned effects and render prosecution of corrupt individuals in powerful positions more successful.

Reporting of corruption cases within public administration and by citizens at large

Another difficulty arises from the secret nature of corruption and, in most instances, the lack of individual victims that would come forward with information about an act of corruption and thus trigger an investigation.

India, as Mr. Sharma pointed out, has adopted several ways to try to overcome the lack of information impeding the launching of otherwise often successful criminal proceedings. The country has adopted general reporting obligations addressed both to civil servants and to the public at large, and has institutionalized such reporting by establishing a vast net of vigilance institutions within public administration. Vigilance officers and commissions at all levels of administrative departments monitor and survey potentially corrupt actions and identify corruption-prone procedures and areas. These vigilance officers and commissions cooperate with the Central Bureau of Investigation, India's federal prosecuting agency. Experience shows that these mechanisms have, however, somewhat failed to live up to the expectations because potential reporters of corruption seemingly do not feel sufficiently protected against harassment on the job caused by their blowing the whistle on corruption. A person, in seeking to uncover instances of bribery, may also fear the vengeance of the accused, especially when his or her reporting leads to the launching of an investigation and possibly the conviction of the criminal.

Coooperation between law enforcement agencies

Cooperation between law enforcement agencies is another key to successfully collecting evidence and bringing about efficient prosecution of corruption. Legal provisions not only require following demanding procedural rules, but also assign certain steps of the procedures to different agencies. These agencies must ensure that their actions are coordinated to acquire evidence, and must seek mutual advice to ensure the admissibility of the evidence when the case is tried in court.

As Mr. Dempsey-Brench reported, the law enforcement agencies in England and Wales have learned much about the need for cooperation in the course of particularly difficult investigations targeting corrupt police officers. Measures have been taken to institutionalize the exchange of legal advice, to improve record keeping about ongoing investigations, and to ensure access to the information for all agencies involved in the investigation and prosecution of the case.

International legal assistance

In foreign bribery cases, international legal assistance, covering notably the gathering of evidence, repatriation of proceeds, and extradition is a key to the successful prosecution and deterrence of corrupt practices.

Yet, today borders still constitute significant barriers for prosecutors. Not so for criminals, who actually make use of them to flee from detection and prosecution and to conceal the evidence and profits of their crimes. In addition, and especially when the crime involves money laundering, perpetrators typically take advantage of the services provided in offshore centers. Investigating these monetary transactions is a very arduous and time-consuming task and without legal assistance from concerned foreign jurisdictions it can be a hopeless endeavor.

However, varying principles that apply to the provision of mutual legal assistance make it difficult to obtain such assistance speedily and severely impede the efficient prosecution of transnational criminal activities. Regional or international conventions—when they exist—provide only a general framework for support. Under these conditions, as Mr. Bertossa pointed out, informal networks between relevant judicial authorities in different countries may constitute an important

remedy, even in the absence of universal treaties or regional agreements.

Key findings

Corrupters and those corrupted still benefit enormously from banking secrecy laws, the speed and number of electronic fiscal transfers, tax havens and other offshore centers, and difficulties of international cooperation in prosecution. Additional problems arise from a lack of independence of the law enforcement authorities and undue influence exercised on them, in particular by prominent politicians or wealthy businessmen. Because of the lack in many states of legal provisions ensuring the protection of whistleblowers, the detection and prosecution rates remain low despite otherwise comprehensive legal and institutional anti-corruption frameworks. Most of these aspects require legislative measures. The seminar also pointed out practical guidelines and generally applicable strategies for prosecution agencies to overcome the obstacles at least partly. The strategies of "starting at a low level, and working one's way up" and "following the money" have proven particularly efficient even in corruption cases involving high-ranking, influential perpetrators and international transactions.

PART 1

The Challenge of Prosecuting Corrupt Businessmen and Politicians

1.1 Coping with high-profile judicial cases: Experience of prosecutors from Asia and the Pacific, and from Europe

Report on the technical workshop
Chaired by Eva Joly
Special Counsellor to the Norwegian Government

According to a fundamental democratic tenet, everyone is equal under the law. This noble principle, however, does not do much to help police or prosecutors act effectively when corruption suspects are wealthy businessmen or prominent politicians. The success rate of prosecutions against senior government officials and corporate executive officers in major multinational enterprises is still low. This is true throughout the world and even in countries that have enacted comprehensive anti-corruption legislation and have otherwise well-functioning institutions at their disposal. The lack of success in this very sector is due to an institutional framework that is often unsuitable for coping with the specific complexity of the crimes, the need to find a balance between the defendant's rights and prosecution, the impact of public interest, and the institutional and psychological pressures these entail.

The challenge of prosecuting high-profile corrupt individuals

a. Unsuitable institutional provisions

Statutes, procedures, and institutions are usually tailored to the efficient prosecution of average and petty corruption. They do not take into account the particularities of high-level corruption, especially the sophisticated means criminals involved in such schemes employ to commit and disguise their illicit activities.

Lack of adequate training

High-level corruption mobilizes extensive resources to camouflage "levies," "commissions," and "kickbacks" and to transfer the acquired assets to safe financial havens. The sophistication and complexity of these crimes contrast with the broad lack of sufficient capacity and appropriate training of many law enforcement agencies. This is particularly true of cases involving public funds or insider trading. There is a clear and pressing need for more specialized training, covering especially forensic accounting.

Interference from governmental bureaus

In addition, when investigating high-level corruption cases, law enforcement agencies often face interference from government bureaus. Rather than being able to conduct their investigations as they themselves see fit, they are often obliged to follow orders from superiors who are close to the political power structure and might try to influence the course of prosecution.

b. Impact of influential defendants and their entourage on the proceedings

Institutional and psychological pressures

Leading figures often owe their political or financial success to their personal skills: intelligence, charisma, popularity, and vast networks. They might try to employ these during the investigation as a powerful tool to influence the procedure and its outcome.

Such defendants do not tend to back away from conflict; on the contrary, they have the support of skilled lawyers and utilize lengthy appeals, processes, and other stalling tactics to wear down public opinion, which tends to demand results quicker than sound judicial systems can deliver. In some cases, the power of leading figures under judicial scrutiny enables them to intentionally weaken a sound legislative framework even during sometimes lengthy investigations. The prominence of the defendant comes into play even during the trial, especially when the case is heard before a jury. Many citizens display seemingly "instinctive" tendencies to be pro-defendant, and are often especially sympathetic toward the more well-dressed, well-spoken, and politically or economically successful defendants who are likely to be involved in a high-profile case.

Political and personal influence

Other hindrances have effects at a more personal level. It is obviously very difficult to request individuals conducting inquiries never to put concerns about their professional careers first. Prosecutors do not act in a political or social vacuum. The more prominent and powerful the figures being investigated, the stronger the constraints. Those with an interest in undermining prosecutors' efficacy or credibility often look to the prosecutors' colleagues or subordinates, seeking the opportunity to appeal to their personal priorities. For these reasons, it is important that prosecutors continually ensure that they have the full and uncompromised loyalty of all their confrères and staff.

c. Institutional and psychological pressures

Prosecutors dealing with high-profile cases have to be prepared to undergo sometimes very intense institutional and psychological pressures. For instance, influence from sources such as those mentioned above tends to make prosecutors doubt the validity of their own courses of action.

Regulations restricting disclosure of information even within law enforcement agencies may be detrimental to personal relations with colleagues and may consequently lead to isolation and frustration especially in lengthy investigations.

Public pressure

Investigations targeting high-profile defendants and especially politicians usually give rise to wide public attention. While this interest contributes an important share in developing public awareness about corruption and as such may be viewed positively, it also entails serious obstacles to the investigation and causes pressure on law enforcement agencies. Such pressure grows with the media coverage. Following their own mechanisms and principles, journalists may inquire into the cases themselves or prematurely disclose confidential information to the public. They may also comment on strategic moves of the prosecution and thereby influence the public's view of the case. Moreover, certain media may have sometimes well-defined interest in a specific outcome of the case. As such, they may influence public opinion in favor of the defendant or the prosecutor, thereby inevitably weakening the principle of impartiality.

Strategies for successful prosecution

a. Remedies at legislative and international level

Institutional, legislative, and international remedies

Some of the above-mentioned obstacles to the successful prosecution of corrupt individuals in high positions have to be solved at the legislative or even international level. More specifically, regional and international instruments and networks may provide mechanisms to strengthen and facilitate international cooperation. At the national level, barring convicted corrupt officials from reentering elected politics and strengthening the independence of law enforcement agencies may be useful tools. Finally, the fostering of cooperation and loyalty within law enforcement agencies by corresponding

institutional structures and mechanisms is important.

b. Practical tips

Drafting and amending legislation is a lengthy procedure and this is even truer for international agreements. However, prosecutors and law enforcement agencies at large may make use of the following practical tips to investigate such corruption cases more successfully—keeping in mind that even a single top conviction could send the right message: that there is no longer impunity for high-profile criminals.

"Follow the money"—and seize it

– It is vital to focus on all possible financial angles in corruption cases, especially when it comes to eventually being able to confiscate ill-gotten money, property, or other assets. The fact that corrupt individuals are often more afraid of losing the fruits of their crimes than of serving jail time can work to a prosecutor's great advantage. Some countries (e.g., Ireland and the UK) are, under certain circumstances, legally entitled to seize such assets without being obliged to fully prove these were gained through crime if the defendant is unable to explain the origin of such assets.

– Prosecutors should also consistently take full advantage of whatever beneficial transparency laws are at their disposal. In some Scandinavian countries, for example, the earnings of public officials are freely disclosed to the public. This provides the prosecutor with an invaluable tool for determining an individual's demonstrable network if there are reasons to believe the suspect to have other, illegally obtained assets to support him or her. In Norway, those convicted of serious crimes such as drug trafficking or bribery must be able to demonstrate the sources of their assets. Otherwise, prosecutors may ask the court to seize properties from the convicted felons and declare them public property.

Avoid ambiguous situations

– Ambiguous situations, e.g., conducting interrogations in prison, or calling witnesses whose integrity might be called into question by the defense, can constitute a risk and weaken the case. Prosecutors should always anticipate likely consequences when deciding on the strategy for the investigation.

c. Remedies at the personal level: Lessons from the experience of a French investigative magistrate

Work in teams and share information

– Prosecutors should work in teams and share information and pressure with close and likeminded colleagues, especially information that is not yet widely known. The necessity of sharing key information with colleagues becomes particularly vital in light of the personal risks that prosecutors sometimes undergo in high-profile cases.

– Besides, it is a wise precaution to inform one's colleagues outside the team about what the team is doing. This helps to lower the likelihood of resentments. However, advice from those who do not share one's immediate concerns should be avoided; their motives and agendas can be very difficult to ascertain.

Take advice

– All of the above points reinforce the need for prosecutors to present in court the technically strongest cases they can put forward. To this end, prosecutors should not hesitate to seek the advice of their more experienced colleagues. The technical merits of a prosecutor's evidence should help him or her, at least partially, to overcome the personal qualms that are a routine feature of bringing high-profile defendants to trial.

Dealing with the media

– When dealing with the media, prosecutors must be aware of how journalists work and think; everything prosecutors may say publicly tends to have some degree of resonance. A journalist is never a prosecutor's friend *per se* and the media always have their own agenda, which could easily clash with

a prosecutor's. Violation of secrecy laws by disclosing details to the media must be particularly avoided, starting with situations that might constitute a risk of such violation. A prosecutor might even consider taking professional training in dealing with the media.

Control personal behavior

– A prosecutor's own professional and personal behavior must be exemplary. Asking for favors or committing even the most minor legal or ethical infringements may cause public exposure. Also, prosecutors should avoid striving for professional advancement while a major inquiry is in process. Being seen as overly personally ambitious is bound ultimately to work against a prosecutor's case.

Self-preservation strategies

– Severe psychological pressures, coming from many directions simultaneously, are inescapable. These burdens should not be over-internalized or personalized. Lawsuits against prosecutors' offices can be commonplace and a very serious cause of stress. It might be a great advantage to maintain, at a personal level, a support group of friends to help keep up one's self-esteem and relieve stress.

– No one has to "take on the weight of the world." A prosecutor has done his or her job well if he or she secures a conviction or convictions in proportion to the evidence presented.

– Prosecutors should strive as much as possible to humanize defendants in their own minds. There are a number of small psychological tricks that can be employed to tell oneself that the accused are far from the insuperable forces they can appear to be.

Conclusions

The lack of success in prosecuting influential politicians or businessmen is to a large part due to an unsuitable institutional framework, the influence that these individuals and their entourage have on the proceedings, and hindrances arising from

institutional and psychological pressures. Legislative, institutional, and international remedies have to be found; however, since reform at these levels usually progresses slowly, prosecutors are well advised to adopt other remedies for the meantime. This addresses aspects at a methodological level, such as the use of procedural provisions hardly used so far, and also at a personal level, particularly with respect to personal security.

1.2 Difficulties encountered by the judiciary: A summary of key issues

By Bernard Bertossa,* Former Attorney General of Geneva, Switzerland

The judiciary encounters greater—and at times insurmountable—problems when indicting perpetrators of corruption than for other types of organized or serious crimes. These difficulties are sometimes of a political, legal and operational nature and are briefly summarized below.

Political difficulties

Public figures and political parties under indictment have special powers, particularly among the public institution under their control, which they use to prevent evidence from being found. Even the judge does not always have enough independence vis-à-vis the executive power, nor—at times—the necessary integrity or courage. There are corrupted magistrates, who are more interested in "carrying out orders" or advancing their careers than in concluding investigations.

The judge is frequently accused of being used as an instrument by one political party against another, by one state figure against the other, or by one regime against another. These accusations, even when they are completely false, manage to discredit the investigation. Reasons related to the country's interests are often used to "justify" corrupt acts: it was necessary to defend the country against foreign competition, to protect employment, etc. The

* Published in: A. Alvazzi del Frate and G. Pasqua (eds.), *Responding to the Challenges of Corruption.* Acts of the International Conference (Milan, 19–20 November 1999), organized by ISPAC/Centro Nazionale di Prevenzione e Difesa Sociale, UNICRI publication no. 63, Rome/Milan, 2000. Permission to publish was granted on 20 October 2003.

accused persons cynically justify corrupt acts as being perpetrated for the well-being of the co-citizens or for the economic wealth of a country.

Legal difficulties

The non-incrimination of foreign public officials for corruption still represents a major obstacle. This loophole was, however, partially covered when the Member States of the OECD incorporated the principles of the 1997 Convention on Corruption in their national legislation.

There is a lack of common regulations, or even worse, a complete lack of regulations defining those violations of duties that should be considered as corruption. This loophole is particularly evident in the area of public administration, which is unfortunately easily corruptible. There is an absence in many countries of laws incriminating private corruption that does not directly involve public officials. There are still largely incomplete sets of legislation on money laundering.

Many states consider bribe-giving in order to obtain legal services by public officials as being legitimate. It is often difficult to distinguish between obtaining a favor (which is punishable by law) and the recognition of a right (which is not punishable by law).

Practical difficulties

Serious cases of corruption almost always involve actors from different states, and the money used to corrupt is usually transferred through complex channels, which often involve banking institutions of various countries. The considerable obstacles met at the level of international penal cooperation favor both corrupters and corrupted persons.

The financial strategies used to camouflage the methods used to perform a corrupt act or the profits

derived from it are becoming increasingly sophisticated and the judges often do not have the instruments needed to uncover them. Appeals for compensation are also becoming more and more frequent. Financial intermediaries have become specialized in these systems and are able to eliminate paper trails. The systematic use of offshore or other shell companies represents an effective form of camouflage. Furthermore, the legal authorities of the fiscal havens rarely collaborate in legal investigations. Lawyers and other people tied by professional secrecy and who can oppose the judge are used as financial intermediaries, as are people who enjoy immunity (heads of state, diplomats). The judge is powerless before this type of privilege. Although the confiscation of the profits of corruption is often an effective instrument, experience very often shows that the judges do not take advantage of it, especially at the international level.

Governments and lawmakers are often the very people involved in corrupt practices, either for personal or for political reasons. It is therefore reasonable to believe that any significant progress will be difficult to achieve, at least in the short term, unless the legal authorities are granted more concretely effective instruments to investigate the perpetrators of these practices which the lawmakers themselves define as being criminal.

PART 2

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

Lack of information about corrupt officers

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.

Reporting obligations

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.

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

Institutionalizing the sources of information

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.

Cooperation between vigilance and law enforcement institutions

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.

Vigilance management in public sector undertakings

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

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.

Combating corruption within law enforcement agencies

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

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 in preparing for court hearings

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.

Representatives in offices of partner agencies

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.

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.

Bilateral arrangements

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.

Ad hoc 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.

Material conditions for international legal assistance

Dual criminality rule

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

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

Form of request

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.

Fishing expeditions

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.

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.

Channels of communication

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.

Procedures for execution of requests

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

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.

Repatriation

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.

Extradition

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.

Proceedings against third parties

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.

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.

Complex financial transactions

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.

Informal networks

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

Forms of informal contacts

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

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.

Delegate proceedings

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.

Involve injured parties

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.

Start confiscation proceedings

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.

PART 3

Case Studies and Experience from Selected Countries

3.1 Investigation and prosecution of high-level corruption: A hypothetical case for training

By Eva Joly - Special Counsellor to the Norwegian Government

In February 1998 the Government of Uurdistan decided to equip its air-defense army with nine new MAC 2 fighters. It called for bids mainly from two companies and chose the Rapace model from the Nerodonna Company in Oustland. The total amount of this public procurement was $9 billion.

In January 2000, the Swiss investigating magistrate Pol Hardy, when working on an international letter rogatory from the Mexican authorities, investigated the accounts of a high-ranking public official, Mr. Green, who had an account in the Union des Banques Suisses in Geneva. In the course of this investigation he found, among a list of credits, the amount of $1.8 billion of which had been paid by "a client of the bank". After establishing that the money had been paid through the account of Mr. Nelson, a well-known intermediary from Vaduz (Liechtenstein), Pol Hardy followed the money trail and found that on 24 December 1998, the very same day the account "Rosita" had been credited, the amount had been split into $1.2 billion and $600 million and credited to two other accounts in the bank, "Anita" and "Josephine." This amount was very unusual in the profile of Mr. Green's account. Pol Hardy, who had been asked by the Mexican judge to "ask all relevant questions," questioned Mr. Green and asked him to explain the movements in his accounts.

Mr. Green told the judge that he had personally known Mr. Nelson for 20 years and had agreed to lend him the use of his account, which bore the name of his dog, as a favor, since Mr. Nelson had told him that this was a very secret, but to him very honorable, operation. Mr.

Green said the operation had nothing to do with his Mexican client, but that he had been told that Mr. Nelson sometimes worked as an intermediary for the Nerodonna Company. He did not know who owned the "Anita" and "Josephine" accounts.

On seeing the new evidence from Pol Hardy, the Geneva prosecution service decided to initiate a criminal investigation into money laundering in Switzerland. After a long investigation, it turned out that the "Anita" account belonged to the wife of the president of Uurustad, and "Josephine" to the mother of the chief executive of Nerodonna.

In May 1999, Igor Hansen, a brilliant young army captain of Uurdistan, was found killed in an office in the army headquarters. During the criminal proceedings, it was established that Igor had had close links with the Ministry of Defense and, according to rumors, was called "Mr. Five Percent."

A search was made in Mr. Hansen's house. It was obvious from the luxury furniture and valuable oeuvres d'art that all this did not come only from his salary. Correspondence with Mr. Nelson and Vaduz was found among his papers. The preliminary investigations also established that Mr. Hansen had participated in the Rapace transaction. A doctor of laws law fluent in six languages, he had translated all the contracts that the Minister of Defense had entered into on behalf of the Uurdistan Government and had been present during all the negotiations.

Igor Hansen, when found, wore a Cartier watch that bore the serial number 492555061693 on its underside. One piece of evidence that particularly intrigued the investigators was a suitcase containing many gold bars, which turned up during the search of the house. Uurdistan newspapers published the news of Mr. Hansen's death and its very special circumstances.

Questions for Training:

1. How should the death of Mr. Hansen be investigated?
2. Which are the next steps to be taken in Switzerland and in Uurdistan?
3. What difficulties will a prosecutor/investigating magistrate probably meet in the course of investigation and prosecution, both in Switzerland and in Uurdistan?

3.2 Bribery and international mutual legal assistance: A hypothetical case for training

By Bernard Bertossa, Former Attorney General of Geneva

In 1995, the Ministry for Economic Affairs of Briberyland decided to replace all of its information technology equipment, which had become obsolete. After receiving bids from a number of foreign companies, the ministry's administrator awarded the contract to the American firm Smith Corp. for $75 million. The new information technology environment was installed in March 1996, and the ministry paid Smith Corp. the agreed amount.

In April 1996, the public prosecutor of Briberyland received a letter from the Indian company Delhi Corp., which had also submitted a bid for the contract. Delhi Corp. informed the public prosecutor that Smith Corp. had been awarded the contract because it had paid commissions. It said that "John," an employee in the ministry, had received these payments.

The public prosecutor initiated an investigation of John, which showed that he enjoyed a lifestyle beyond what his government salary could possibly provide. However, there were no suspicious funds in the only bank account that John held in Briberyland. But during a search of John's house, the police did discover the business card of a representative of the BSA Bank in Zurich, Switzerland.

After sending letters rogatory to the Swiss authorities, the public prosecutor learned that John did not, in fact, have an account at the bank. However, his name did appear as having signatory authority over an account opened by a registered company, Fraud Ltd., headquartered in Nassau, Bahamas, with the BSA's subsidiary in Geneva, Switzerland. The beneficial owner of this account was an individual known as "Pablo," an independent foreign exchange broker operating in Briberyland. This account had been opened in January 1996. In March of that year, it had been credited with $7.5 million from a New York law firm. A few days later, $4 million had been transferred to a bank in London and $3 million to a bank in Luxembourg.

Informed of these facts, the public prosecutor of Briberyland sent letters rogatory to London and Luxembourg. The replies to these letters brought to light the following:

- The recipient account in London belonged to Oxy Inc., headquartered in the British Virgin Islands. Pablo was the beneficial owner of this account. Since the account had been opened in 1990, large cash amounts, from different origins, had been deposited and had later been transferred abroad. The account currently contained $10 million.
- The recipient account in Luxembourg had been opened in the name of John's wife. A sum of $3 million had been the only deposit made to this account. This sum had not yet been touched.

The public prosecutor of Briberyland decided to question Pablo, who admitted that accounts had been opened in Geneva and London and said that he had made these accounts available to some of his customers in Briberyland to enable them to avoid domestic taxes.

The public prosecutor then asked John and his wife to come in for questioning. However, the prosecutor then received news that the justice ministry had promoted him to the position of chief judge in another city, effective immediately. A colleague known to be close to those in power, and to have no interest in prosecuting bribery-related offenses replaced the prosecutor. In fact, the new public prosecutor closed the case without further investigation.

Before leaving his post, however, the former public prosecutor of Briberyland had contacted his Swiss, British, and Luxembourg colleagues whom he had dealt with regarding the letters rogatory connected with his investigation, to inform them of the situation.

In the meantime, John and Pablo had hired lawyers in Geneva, London, and Luxembourg. Arguing that the case had been closed in Briberyland, the lawyers contacted the banks to request that the balance of the accounts be transferred to two separate accounts opened in two different banks in Singapore. Before making the transfers, BSA Bank in Geneva contacted the local prosecutor, who decided to initiate his own criminal proceedings for the crime of money laundering.

The prosecutor of Geneva ordered the seizure of the account of Fraud Ltd. in the BSA's Geneva branch. He then sent mutual assistance requests to authorities in London and Luxembourg, in which he asked that the accounts of Oxy Inc. and of John's wife be frozen, and that all documentation concerning these accounts be handed over to him. He also sent letters rogatory to Briberyland to obtain a copy of the closed investigation file.

The authorities in London and Luxembourg met these requests, but the new public prosecutor of Briberyland took no action whatsoever on the case.

After analyzing the bank documents received from London, the prosecutor of Geneva observed that a significant portion of the amounts transferred from the account of OXY Inc. had been transferred to an account with the FRITZ Bank in Vaduz, Liechtenstein. After sending letters rogatory, he found out that this account had been opened in the name of a private company, BRIBY S.A., headquartered in Cyprus. The documents completed when the account was opened had been signed by a lawyer in Vaduz and by the administrator from the Ministry for Economic Affairs of Briberyland.

The prosecutor of Geneva again sent letters rogatory to Briberyland, confirming his initial request and explaining what had been discovered in Vaduz. He asked for permission to question the administrator. The new public prosecutor of Briberyland merely replied that the account of BRIBY S.A. had been opened at the request of the state and that the funds belonged to Briberyland. The prosecutor of Geneva was asked to stop investigating these funds.

Through unknown sources, the press of Briberyland had been informed of the Swiss request. Published articles raised questions about the decision to stop the criminal proceedings initiated in Briberyland.

Question for Training:

What further steps do you think might be taken in this hypothetical case in each of the countries concerned?

3.3 India: Prosecuting corrupt public officials – The role of communications and referrals from public administrations

By S. K. Sharma, Director of Prosecution, CBI, India

Public sector corruption is rampant not only in Asian Pacific countries but also worldwide. It embraces almost all spheres of everyday life in countless countries. In a strictly limited definition, the word "corruption" implies allowing the decisions and actions of public servants to be influenced not primarily by the perceived pros and cons of a particular circumstance, but rather by the prospect of personal gain or other such entirely selfish considerations.

Today, there is a vast and concerted international effort to deal with corruption in the public sphere and to develop a universally workable system to defeat it. Lord Macaulay, president of the First Indian Law Commission and author of the Indian Penal Code Act (XLIV, 1960) was well aware of the corruption and bribery then widespread in the country. As such, chapter IX of the act was incorporated into the Indian Penal Code, consisting of sections 161 to 165A IPC (*vide*). These sections deal with the acceptance of any form of gratification other than legal remuneration in respect to an official act by a public servant. Under the act, obtaining valuable assets without consideration by a public servant was made a punishable offense.

However, the provisions of the Indian Penal code proved inadequate in the prosecution of allegedly corrupt public servants. The Indian Parliament, with a view to curbing corruption, enacted the Prevention of Corruption Act of 1947. (This was amended in 1964, on the basis of the recommendations of the Sanathanam Committee.) The Anti-Corruption Laws (Amendment) Act (1964), the Criminal Law (Amendment) Act (1952); the Criminal Law (Amendment) Ordinance (1944), the Delhi Special Police Establishment Act (1946), the Criminal Law (Amendment) Act (1966), and the Anti-Corruption Laws (Amendment) Act (1967) were all passed with a view to making anti-corruption legislation more effective, and to helping ensure timely trials for anti-corruption cases.

The Provision Regarding Attachment of Ill-Gotten Wealth Obtained Through Corrupt Means was incorporated into the Criminal Law (Amendment) Ordinance in 1944. The Prevention of Corruption Act (1947) was later repealed with the passage of the Prevention of

Corruption Act (1988) (*vide*). Since the provisions of sections 161 to 165A of the Indian Penal Code are already part of the aforementioned Prevention of Corruption Act (1988), they were struck from the code.

The Delhi Special Police Establishment Act (1946) was also enacted to create the infrastructure needed to investigate possible cases of corruption among officials of the national and state government, with the consent of these administrations.

Establishment of the CBI

The Central Bureau of Investigation (CBI) was established as a branch of the national Government's Ministry of Home Affairs by Resolution 4/31/61-T (1963). Investigation work is done through the Special Police Establishment (SPE) wing of the CBI, which derives its police powers from the Delhi Special Police Establishment Act. The act permits the CBI to probe into specified offenses or classes of offenses pertaining to corruption or other forms of malpractice involving public servants, with a view to prosecution. The Special Police Establishment, a CBI division, functions under the administrative control of the Cabinet Secretariat.

Considering the legislation and law enforcement bodies described above, India can claim a reasonably sound infrastructure for tackling public sector corruption. However, this bureaucratic network would be of no use if there were no communications and referrals from the state's public administration. As the second most populous nation on earth, public servants are part of a vast network of ministries, departments, and directorates spread throughout the country. For this reason, communications and referrals from public administrators are vital in identifying corrupt public officials, so that alleged incidents involving corruption among them can be noted and scrutinized.

With the need to make the prosecution system function in a timely manner in mind, the Central Vigilance Commission was created in 1964 in accordance with recommendations from the Committee on the Prevention of Corruption under Ministry of Home Affairs Resolution 27/4/64-Avd. The commission has jurisdiction and other powers in respect to matters to which the executive powers of the union extend. The commission has also been given the responsibility of overseeing general supervisory work in federal government ministries and departments.

The commission also advises on any cases pertaining to:

– Gazetted officers of the national Government;

- Senior officers on the Delhi police force;
- Board-level appointees in the public sector;
- Officers of port trusts or dock-level boards;
- Insurance firms;
- Cooperative societies; and
- Any other societies receiving grants from the national Government.

Chief vigilance officers

Chief vigilance officers are assigned to federal ministries and departments, public sector bodies, banks, etc. These officers are entrusted with the task of keeping an eye out for any serious irregularities and offenses, or for any abuses of office by public servants for personal gain. Their reports are sent to the Chief Technical Examiners Organization, which functions under the administrative control of the Central Vigilance Commission.

On the basis of the officers' recommendations, criminal cases are registered by the CBI for investigation. Cases in which only departmental irregularities are observed are passed on to the respective departments or public sector bodies. The latter may then decide on the necessity for taking action at their end. If, during departmental inquiries, cases of misconduct are proven, minor or major penalties can be imposed on the concerned officers or public servants, including dismissal from service. If it is found that an offense under the Prevention of Corruption Act has occurred, the cases are then referred directly to the CBI.

Apathy and education

But in spite of the aforesaid bureaucratic infrastructure, the struggle against sleaze would be impossible if a sense of duty to report any corrupt actions taken by civil servants cannot be instilled among law-abiding members of the public and public officials alike. In India, it has been remarked that it has proven very difficult to encourage either group to report suspicions to the police or to magistrates. The criminal procedure system in India is such that people hardly take any interest in reporting corruption cases to the police, much less in offering to cooperate during any investigations of such cases concerning civil servants. The major problem remains the question of how to educate the public and encourage such reporting. Public

workers and regular citizens need assurance that their time will not be wasted, and that they will not be subjected to any form of harassment either during or after any investigation.

Apart from this, there should be a reporting obligation for civil servants. Public servants are the most valuable sources for uncovering corruption in this sector, since they are obviously the first to be aware of possibly corrupt activities by their colleagues. Unless public servants take active interest and consider it their duty to report corrupt acts, the fight against public sleaze will prove ultimately futile. But there remains a general tendency among public sector colleagues not to report illicit acts committed by co-workers. It is possible that such tendencies develop because they do not want to become targets of contempt or retribution from their colleagues. Nevertheless, I am of the opinion that unless this sense of initiative is instilled in the minds of civil servants, the fight against public sector corruption is difficult to win.

In India, the law regarding reporting obligations for public servants is codified in section 39 of the Code of Criminal Procedure (1973), which provides the following:

Sec. 39 – The Public to Give Information of Certain offences – (1). Every person aware of commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of Indian Penal Code 45 (1860), namely:

- Sections 121 to 126, inclusive, and Section 130 (viz., offences against the state specified in Chapter VIII of the Code;
- Sections 143, 144, 145, 147 and 148 (viz., offences against public order also specified in Chapter VIII);
- Sections 161 to 165A, (viz., offences relating to illegal gratification);
- Sections 272 to 278, inclusive, (viz., offences relating to the adulteration of food and drugs, etc.);
- Sections 302, 303 and 304, (viz., offences affecting life);
- Section 364-A, (viz., offences relating to kidnapping for ransom, etc.);
- Section 383, (viz., offences of theft resulting in death, wounding or restraint);
- Sections 392 to 399, inclusive, and Section 402, (viz., offences of robbery and decoity);
- Section 409, (viz., offences relating to criminal breach of trust by a public servant, etc.);

- Sections 431 to 439, inclusive, (viz., offences or acts of mischief against property);
- Sections 449 and 450, (viz., offences involving trespassing on private property);
- Sections 456 to 460, inclusive, (viz., offences of lurking house trespass); and
- Sections 489-A to 489-E, inclusive, (viz., offences relating to currencies)

shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie on the person so aware, forthwith give information to the nearest Magistrate or Police Officer of such commission or intention.

This section, therefore, makes it obligatory for every person including public servants to give information to the authorities regarding the commission of the offenses mentioned. Subclause (iii) of subsection (1) of section 39 of the Code of Criminal Procedure (1973) makes it obligatory for every person to report to the nearest magistrate or police station the commission of offenses relating to demand for illegal gratification from a public servant.

Subsection (2) of section 39 of the aforementioned code makes it clear that, for the purposes of this section, the term "offense" includes any act committed abroad that would constitute a criminal offense on Indian soil. As such, even offenses committed outside the country are also included in this section.

Not only does section 39 make it obligatory for any person to report the commission of a crime relating to corrupt activities of public servants, the failure to give information required by the section may also constitute an offense under sections 118, 176, or 202 of the Indian Penal Code. Section 118 provides the following:

Sec. 118 – Concealing Design to Commit Offence Punishable by Death or Life Imprisonment

> Whoever intending to facilitate, or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or imprisonment for life,
>
> Voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

If offence be committed shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years,

If offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to a fine.

Similarly, section 176 of the Indian Penal Code provides the following:

Sec. 176 – Omission to Give Notice to Public Servant by Person Legally Bound to Give It:

Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice, or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with a fine which may extend to five hundred rupees, or with both;

Or, of the information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to one thousand rupees, or with both;

Or, if the notice of information be required to be given is required by an order passed under Subsection (1) of Section 565 of the Code of Criminal Procedure (1898), with imprisonment of either description for a term which may extend to six months, or with a fine which may extend to one thousand rupees, or with both."

In the same way, section 202 of the Indian Penal Code provides the following:

Section 202 – Intentional Omission to Give Information of Offence by Person Bound to Inform

Whoever knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which

may extend to six months, or with a fine which may extend to one thousand rupees, or with both.

Section 125 of the Indian Evidence Act (1872) also covers aspects of the interest and integrity of the information given with regard to offenses under the provisions of this section. Official communication with regard to the crime is privileged, and a police officer or a magistrate cannot be compelled to disclose the source of information received by him with regard to the commission of the offense.

The above provisions show that, even in that era, lawmakers were aware of how important it is to encourage the public to report crimes. They were also aware that the security of the informer was a critical factor in such matters. However, it must be stated that current provisions relating to reporting obligations in India remain inadequate. Other countries have dealt with such matters by enacting whistleblower protection laws. Such provisions now exist in Great Britain, Australia, New Zealand, and the United States, and in other countries.

Whistleblowers can play a very important role in providing information about corruption and abuse of office. Public servants working in the same department know which individuals may be acting unethically or illegally in their department. But unfortunately, as already mentioned, they are rarely bold enough to convey such information to higher authorities for fear of reprisals. If adequate statutory protection is granted, there can be no doubt that the government will be able to get more information regarding corruption and abuse of office.

Whistleblowers acting on good faith represent the highest ideals of public service while challenging abuses of power. There is a close connection between whistleblowers' protection and the right of employees to expose corruption or abuse of office. The protection of whistleblowers vindicates important interests supporting the overall enforceability of criminal and civil laws. This aspect may be called the "rule of law" concept when applied to whistleblowers. Again, blowing the whistle on corruption can be seen as supporting the public good by encouraging disclosure of certain types of information. This aspect—namely, the "public information" or "public interest" concept—is employed in cases of whistle blowing.

The Law Commission of India has also studied the issue of whistleblower protection at the request of the Chief Vigilance Commissioner. The commission recently conducted an in-depth study of this matter, taking into consideration similar legislation in other countries. In 2002, it then recommended a bill titled "The Public Interest Disclosure and Protection of Informers Bill (2002)."

3.4 United Kingdom: Cooperation between police and prosecution services in England

By John Dempsey-Brench, Detective Chief Inspector, UK

The challenge of corruption in the British police forces

Corruption has the ability to exist in varying degrees of seriousness at all levels and ranks within any police system. In the United Kingdom, there has always been concern about the conduct of police officers, particularly in respect to tampering with evidence or abusing power for gain. The discovery of corruption within British police forces, unfortunately, is not a new phenomenon. There were several high-profile corruption scandals during the 1960s and 1970s, many of which were concerned with the vice industry in and around the London region. These included officers accepting bribes and protection money, as well as fabricating evidence.

The then commissioner of the Metropolitan Police Service (MPS), Sir Robert Mark, sanctioned an operation to rid the MPS of corrupt officers. The result was that, between 1972 and 1977, more than 500 officers were either forced to resign or took early retirement.

From 1977 to 1993, there were new priorities for British police forces. Terrorism, drugs, and an increase in street violence meant that the issue of corruption was not constantly targeted and was soon no longer seen as a priority. But in the early 1990s, corruption started to reemerge in a new format. Major proactive investigations were being compromised, trials and prosecutions were collapsing, and information was being leaked to newspapers. It was clear that corruption had reemerged as a serious problem. While successful in identifying corrupt and unethical practices, the early investigations failed to get to the root of the problem. In 1995, the push to drive out corruption was reawakened with a number of high-profile cases arising once again from within the MPS.

The overall response, while well intentioned, was flawed. Investigative teams consisted mainly of uniformed officers who lacked the expertise and experience of veteran detectives. There was no formal liaison between the investigators and the Crown Prosecution Service (CPS), and there was no ability to respond immediately to serious allegations.

Making investigation and prosecution more efficient: Form investigation and prosecution teams

By the late 1990s, crucial lessons had been learnt. It was decided that so-called "Specialist Investigator Teams" needed to work with "Specialist Prosecution Teams" if the fight against corruption was to be successful. The professional relationship between the Specialist Investigator Teams and the Specialist Prosecution Teams needed, however, to be nurtured carefully. Room could not be left to allow defendants to accuse the CPS of overstepping its authority as independent prosecutors and be branded as "investigation prosecutors." The need for and the benefits of early consultation between the police and the CPS were duly recognized.

The following draft protocol is currently widely regarded as the being the most appropriate and significant way forward in establishing a constructive framework on which successful investigations and prosecutions of corrupt police officers may be conducted.

Draft Protocol on Early Consultation with and the Referral of Cases to the Crown Prosecution Service Casework Directorate for Advise

1. Introduction

This draft protocol seeks to identify those cases that would benefit from early consultation or formal submission to the Crown Prosecution Service's Casework Directorate for advice prior to the commencement of proceedings. It also provides guidance on the types of cases and circumstances where the early involvement of the Casework Directorate in offering advice and consultation could assist investigating officers in bringing focus to investigations, and help to ensure that appropriate offenses are charged at the commencement of proceedings.

The involvement of a crown prosecutor in the early stages of investigations can eliminate unnecessary work, ensure that the evidence necessary to support a prosecution is obtained, and assist in accurately formulating the charges that are to proceed. Crown prosecutors, however, cannot advise on operational decisions. Guidance should always be sought from supervising officers.

A list of the offenses which must be referred to the Casework Directorate is in the annex at the end of this section. In addition, cases of the type described in point 5 below should also be referred.

2. Consultation and advice

Consultation and advice is likely to be of particular benefit in cases that are serious, complex, or sensitive. This advice has the potential to lead to

- The early establishment of a prosecution team, therefore hopefully helping to ensure that the ongoing investigation is focused toward the case and charges are likely to proceed to trial.
- Helping to ensure that charges in indictable cases are appropriate, and that such cases are ready to proceed to the Crown Courts swiftly through the expedited provisions within the Crime and Disorder Act (1998).
- Early identification of evidential difficulties, and the means of resolving them.
- Early identification of possible lines of defense, and lines of inquiry that may be directed to rebut them.
- Reduced post-charge consultation and investigation, and fewer adjournments at court.
- Early identification of appropriate CPS resources required, including the allocation of lawyers and caseworkers, and, in appropriate cases, the early involvement of suitably experienced counsel.
- Improved presentation of evidence within case file preparation.
- A reduction in attrition, discontinuance, and late alterations to charges. This includes early identification of cases that cannot pass the requirements of the Code for Crown Prosecutors, either evidentially or on the public interest criterion, and therefore save police investigation time.

3. Involvement of crown prosecutors during covert investigations and before charges are laid

The early involvement of the Casework Directorate may be sought at any stage in the course of an investigation or in the preparation of a file. (Such requests need not be delayed pending the submission of a file.) The early involvement of a Casework Directorate lawyer should always be sought in the types of cases listed in point 5 below.

Investigating officers wishing to seek consultation or advice from a Casework Directorate lawyer should first seek advice from their supervisory officer in order to ensure that the issues are clearly

identified, and that advice is not sought on operational matters. Investigating officers should also inform their supervisors of any advice given in due course.

Early consultation may take place at any stage during the course of an investigation, and does not require the submission of formal statements or reports. This serves as an early opportunity for investigators to discuss the proposed investigation with a Casework Directorate lawyer, so that likely issues may be identified, potential charges may be discussed, and emerging evidential difficulties may be advised upon. Such consultation may take place via a face-to-face or a telephone conference. Casework Directorate lawyers may attend incident rooms, where they will facilitate the assimilation of the evidence and material available, and any discussion of the case. The lawyer will make a brief record of the issues identified and any guidance given.

Early consultation will also allow a Casework Directorate lawyer to provide general guidance in relation to lines of enquiry, and on the legal elements required for a successful prosecution. (Such guidance may ordinarily have to be provided orally in conference, and may not require the submission of case papers.) Early consideration can also be given to disclosure issues. Such consultations will also allow the lawyers and Casework Directorate managers the opportunity to identify the resources required to be applied to more complex investigations, including, in appropriate cases, the early involvement of suitably experienced counsel.

The Casework Directorate managers should be notified of any covert operations that might result in criminal proceedings. This will facilitate early advice on the admissibility of evidence from such operations, as well as potential European Convention of Human Rights and/or other abuse arguments relevant to the proposed operations.

4. Contact points and locations

The Casework Directorate has three offices in England located in London, York, and Birmingham. Each office has lawyers who have experience in handling cases involving police corruption.

Occasions do arise when cases of exceptional sensitivity develop, perhaps due to the suspected involvement of a member of CPS staff, police officers, or court staff with strong local connections, or due to particularly sensitive covert (i.e., reactive and proactive) operational activities. To accommodate such circumstances, the London bureau

has special office facilities, with high levels of additional security. These are staffed by lawyers and caseworkers with specialist knowledge of this type of work built up over a number of years. While this specialist unit presently undertakes work from all over England and Wales, it is hoped to devolve the non-London-based work to other branches in the Casework Directorate in 2003.

5. Requests for formal advice

Files submitted for advice must contain all relevant information, statements, copy documents, videos, and transcripts of interviews (including video interviews) to enable a full assessment of the case to be made. The files should be accompanied by a report containing police observations as to the strength of the evidence, the reliability and quality of witnesses, and any other comments that may be pertinent. The investigating officer's view of the issues in the case should be set out, and the points upon which advice is sought should be identified. The identity of the investigating officer and supervisor should be clearly indicated.

- Where a file is submitted for advice on a limited evidential issue, the statements submitted can be directed to that issue only.
- Where, exceptionally, a file is submitted for advice on an overriding public interest factor, that file can be limited in content to material sufficient to decide on that individual aspect of the case.

The views of the investigating officer and supervisors will be of considerable assistance to the Casework Directorate lawyer in reaching a decision in the case. In appropriate cases, an early conference may be arranged prior to or following the submission of the formal file.

Where it is likely that an investigation will be ongoing before a final conclusion can be reached, a copy file should be submitted to be retained by the Casework Directorate while the investigation continues. The directorate is then alerted to the security implications of handling and storing such material. All staff members are then security clearanced and material is stored in secure cabinets.

Where an offender has a duty to return to a police station on bail under section 47 (3) of the Police and Criminal Evidence Act (1984), that return date should be clearly marked on the file. Any other factors requiring the advice to be provided within a certain time period should also be clearly identified. In complex and sensitive investigations,

supervisory officers should contact Casework Directorate management to agree an appropriate time frame for the consideration of the case and the provision of the required advice.

There may be cases in which the police conclude that the evidence does not justify any consideration of the commencement of proceedings. Where the evidence in a case is manifestly insufficient to proceed, the investigating officer or a supervisory officer may decide to take no further action. However, where the insufficiency of the evidence is less obvious, early consultation with a Casework Directorate lawyer may enable further lines of inquiry to be identified and any evidential or legal difficulties to be resolved, thereby allowing the case to go forward for prosecution.

6. Cases in which early consultation and referral for advice will always be considered

Early consultation and the obtaining of advice prior to the commencement of proceedings will always be considered in complex and sensitive cases. Indicators of such cases are:

- Serious offenses of perverting the course of justice, perjury, or misfeasance in public office.
- Cases involving surveillance or covert human intelligence sources, especially cases where public interest immunity applications may have to be made.
- Cases involving integrity testing or test purchases, undercover officers, or any other sensitive technique, including those covered by the Regulation of Investigatory Powers Act.
- Cases involving a number of defendants, or a number or series of offenses.
- Cases involving difficult questions of evidence such as corroboration, similar fact evidence, or the evidence of accomplices.
- Cases involving significant breaches of PACE codes or difficult or disputed identification issues.
- Cases potentially involving complex disclosure issues, especially where there is significant unused material, some of which may be in the possession of third parties.
- Cases involving organized crime or drug trafficking.
- Cases involving allegations of sexual offenses (involving children or adults) where there is little or no corroboration.
- Cases of exceptional difficulty, sensitivity, or other public

concern; cases potentially involving contested points under the European Convention on Human Rights (Human Rights Act).
– Allegations of incitement to racial hatred or conduct likely to stir up racial hatred.

7. Consultation and advice on investigative issues

Consultation helps to ensure that a separation of the functions of investigation and prosecution is maintained. It is the role of police officers to investigate offenses, and of the CPS to prosecute. Casework Directorate lawyers will not direct the course of an investigation or become involved in operational decision making. They will, however, advise on lines of inquiry, the legal elements requiring proof in each offense, and the nature and extent of evidence required.

Crown Prosecutors may provide the police with advice and guidance in respect of any matter bearing on the need for, and/or the quality, reliability, and admissibility of, evidence in any possible prosecution, including the manner in which that evidence may be presented.

8. Areas and issues upon which advice can and should be sought

A Crown Prosecutor may advise the police about the potential legal and evidential consequences of any possible prosecution of any act or admission at the investigative stage. However, it is for investigators to make decisions about the appropriateness of any police operational matter. For example, a lawyer will provide advice upon integrity tests and undercover operations to avoid possible claims of agent provocateur activity, and to safeguard the admissibility of evidence obtained by such means.

Advice should *not* be requested or given if its nature may necessitate the calling of a Crown Prosecutor, CPS caseworker, or counsel as a witness in a prosecution.

The Casework Directorate should be consulted in any case involving a participating informant, a potential accomplice witness, or a resident informant/protected witness. The Casework Directorate lawyer should be consulted regarding any decision as to whether an individual should be treated as a defendant or a witness, and in regard to the conduct of any debriefing procedure.

A Crown Prosecutor may advise investigators and represent the prosecution in any pretrial applications (such as warrants of further

detention), to ensure that the proper legal steps are taken and that an investigation may continue without prejudice to a possible prosecution.

9. Disclosure

Casework Directorate lawyers can also advise investigating officers as to the retention, recording, and revealing of unused material, including, where appropriate, the arrangements for disclosure to the defense.

Early consultation will help in ensuring continuity in the management of unused material. It will also help in early identification of potential Public Interest Immunity (PII) issues, and to ensure that the prosecution team, including counsel, has a comprehensive knowledge of any unused material both disclosed by and subject to PII.

Early contact should include decisions regarding the future disclosure of the identity of any confidential source, as well as of any intercepted material that may undermine the prosecution case and thereby require disclosure.

Annex: Police Complaint Cases which must be referred to the Casework Directorate

The following police complaint cases must be referred to the Casework Directorate, to be handled there in accordance with an agreement between the CPS and the PCA:

- Allegations against officers of or above the rank of superintendent (except allegations relating to the use of motor vehicles other than where death was the cause in the execution, or purported execution, of duty);
- Allegations against police officers of any rank
  - Which were referred to another force for investigation;
  - Which involve interference with the administration of justice;
  - Which pervert the course of justice (or attempt/conspire to do likewise);
  - Which contravene the Perjury Act (1911), s1 (i.e., perjury in a judicial proceeding);
  - Which constitute offenses akin to perjury (e.g., false witness statements tendered in criminal proceedings under the Criminal Justice Act (1967, s89) or the Magistrates Courts Act (1980, s106);

- Subornation of perjury;
- Assist an offender under the Criminal Law Act (1967, s5);
- Conceal an arrestable offense under the same Law);
- Permitting escape from custody, assisting escape and harboring an escapee;
- Wasting police time under the Criminal Law Act (1967, s5);
- Any other offense that is intended or likely to interfere with the administration of justice (e.g., forgery of witness statement, theft of exhibit in pending trial);
- Corruption;
- Misconduct in a public office;
- Offenses committed in the execution, or purported execution, of duty which result in:
  - Death;
  - Serious injury, other than offenses relating to the use of a motor vehicle. (Serious injury is defined by s87(4) PACE 1984 as a fracture, damage to an internal organ, impairment of bodily function, a deep cut, or deep laceration.)
- Offenses involving the use or discharge of a firearm in the execution, or purported execution, of duty;
- Concerning death(s) in police custody;
- Serious offenses facilitated by the use of the officer's position of authority, for example:
  - Serious assault on a prisoner, potential witness or vulnerable victim; and
  - Blackmail
- Offenses that should, in any event, be referred to the Casework Directorate, whether or not police officers were the subject of the allegation;
- Offenses under the Data Protection Act (1998) and Computer Misuse Act (1990); and
- Offenses in one of the forces specified in S1 1985/1986 other than those whose duties lie within a single CPS area. (See the footnote to "s3(3) Prosecution of Offences Act (1985)" in Stone's *Justices' Manual*.)

For the full list of offenses, see Stone's *Justices' Manual* 1-2901.

3.5 Investigation and prosecution of police corruption: Operation Othona

By John Dempsey-Brench, Detective Chief Inspector, UK

The first major wave of corruption scandals involving British police occurred in the 1960s and 1970s, primarily in and around London. These primarily centered on officers accepting bribes or demanding protection money from those involved in prostitution, illegal gambling, or other vice-related activities. A series of inquiries resulted in the forced resignation or early retirement of more than 500 officers in London's Metropolitan Police Service (MPS) alone.

By the early 1990s, it was becoming apparent that very serious and harmful corruption had made a return within many branches of the British law enforcement establishment, including the Crown Prosecution Service (CPS). Technical surveillance equipment, as well as intelligence- and evidence-gathering methodology, had progressed since the 1970s. But too many investigations were being compromised in their early stages. Some prosecutions and court cases were also collapsing, often in their very early stages. In some cases, suspicions of jury and evidence tampering were evident. Unfortunately, internal efforts by police forces to tackle corruption were often questioned by the media, who felt sure that the problems were even more serious than the police were actually saying.

The actual extent of corruption in several institutions eventually became clearer, because of anecdotal evidence and intelligence operations. One of the most serious cases in the 1990s involved Mark Herbert, a CPS administrator. Herbert had been placed in a very sensitive administrative post, giving him access to most of the records of cases being conducted by CPS, including the names and addresses of all individuals under scrutiny, all the names and addresses of informants, and of all police officers involved in ongoing investigations.

It eventually came to light that Herbert had tight links with one of London's most powerful organized crime families, and was selling to it highly confidential data relating to some major investigations. Apart from the damage the Herbert case did to the CPS's reputation, the scandal seriously affected the MPS's and the National Crime Squad's (NCS) desired initiative to start working much more closely and thoroughly with the CPS in major investigations.

At this time, the MPS and NCS began to realize just how extensively some operations were being compromised at the investigative or prosecution stages. Also, it was consistently receiving clear and reliable evidence that both cash and drugs were being routinely stolen in the course of police searches. (Drugs were often then resold, with some officers even becoming traffickers and importers.)

Equally serious was evidence that police officers were also involved in committing armed robberies, blackmailing people who could testify or were actually testifying in cases in court, using their own standing with judges to alter court proceedings, providing bail for co-opted individuals charged with crimes, etc.

Operation Othona

Operation Othona ran from 1993 to 1997. It was launched by the order of MPS Commissioner Sir Paul Condon to tackle corruption within the MPS. It was also intended to address the problem of the disorganized intelligence gathering and handling procedures then being used. Another priority was to stop the systematic leaking of highly sensitive information from within the MPS itself.

Othona's primary objective was to penetrate the operational strata of the network (or networks) of corrupt MPS officers. The most sophisticated and proactive intelligence gathering methods available to the MPS were used. It was hoped that, once the true dimensions of the corrupt network of officers had been verified, an effective strategic analysis of the threat could be formed.

Determined to keep knowledge of Othona's existence as confidential as possible, the MPS's Anti-Corruption Unit secured a safe, covert location to serve as its operational headquarters. (This location had never been used in any previous police operations.) Then, the unit gave selected, well-experienced officers plausible operational "covers" by granting individual sick leave permission, early retirement, geographical relocation, etc. Even the surveillance equipment used was sourced from outside the MPS.

Over the four years in which Othona ran, the following illicit activities on the part of MPS police officers were revealed:

- Stealing of drugs and cash during police searches;
- Sharing of rewards between officers and informants;
- Fabrication of applications for informant rewards;
- Sale of intelligence relating to operations;

– Drug trafficking; and
– Collusion with informants for crimes to be committed, then sharing of the proceeds.

Mistakes

Unfortunately, major mistakes were made in the course of Othona. Originally, 150 experienced detectives were selected. But uniformed officers were later also recruited to add extra manpower. Most of these officers were much less experienced than the original team members. Many lacked the skills and background needed in such sensitive and often wide-ranging probes. Also, the uniformed officers had a distinct lack of technical knowledge of sophisticated surveillance devices, or even of more standard surveillance procedures.

After concluding that initial investigative results were quite poor, Othona's directors came up with a new organizational structure. The most crucial features of the new model were the ways in which the core "internal" team would interact with other units. Although this new structure was not particularly elaborate, it proved demanding in man-hours and involved over 1% of the entire MPS's staff strength.

Operation Othona: Integrated police team structure

– *Internal Team*: This essentially consisted of an intelligence cell and management provision.
– *Prevention Strategy Team*: This team held the unique role, of shutting down any loopholes that emerged during operations in which police officers may have been able to act in a corrupt manner (i.e., being much more attentive to circumstances surrounding bail provisions regarding evidence being offered). The team was generally allowed to operate at their own discretion regarding actions to pursue in specific cases.
– *Source Unit*: This was felt necessary to provide integrity for the overall surveillance, in accordance with the fact that corruption had penetrated senior levels of many departments of the Metropolitan Police Service. It was hoped that having a source unit would enable the entire team to pinpoint where and when any eventual problems first arose.
– *Witness Protection Unit*: This was considered particularly important in helping ensure the protection of informants. In the course of events, this unit was responsible for handling

exposed corrupt police officers, who then decided after being charged to provide information to investigators about other officers' illicit behavior. Before this investigation, trying to persuade officers to testify against colleagues had been almost completely ineffective. But since Operation Othona had proven so successful in prosecuting corrupt officers, they were willing to negotiate for reduced sentences by providing information on co-conspirators. (Witness protection in the UK now averages £30,000 per person. Othona's budget eventually ran into millions of pounds. But this was considered money well spent in the cause of exposing such profound and high-reaching corruption in the nation's largest police force.)

- *Integrity Unit*: This unit's duties required close cooperation with the CPS.
- *Other Units*: It was considered absolutely essential to enlist the collaboration of several other police agencies in many joint operations. These included the Ministry of Defense Police, the National Criminal Intelligence Service, NCS, foreign police forces, and various other undercover police operatives.
- *External Development Team*: This team was made up of skilled surveillance officers accustomed to using sophisticated equipment. Since most of the targets of the investigation were themselves skilled and experienced officers who had served on major crime squads, the targets themselves had the highest technical knowledge of the latest devices.
- *Ghost Squad*: The ghost squad should probably be considered this investigation's biggest success. A ghost squad essentially consists of officers whose activities and whereabouts were concealed from other units. This was very important for monitoring the actions of the other units that were part of the operation. This proved to be an expensive, but ultimately very effective factor in the overall operation.

Interacting with the CPS

It was obvious from the early stages of Othona that the investigation was entering many unexplored areas, especially in terms of the methods being used. It was felt certain that defense attorneys would present many challenges to some of the methods employed, once individual cases were brought to court. The CPS's cooperation was felt to be vital in the interests of being able eventually to secure successful prosecutions.

The CPS's initial response to MPS requests for assistance was very positive. The CPS realized that it had its own reputation to consider in the overall environment of battling corruption. It provided a dedicated team that

- Could provide early advice, both before and during investigations;
- Could understand intelligence-led operations against allegedly corrupt officers; and
- Was staffed by lawyers and caseworkers skilled in handling cases involving informants and covert policing techniques, as well as being experienced in conducting sensitive and intensive inquiries.

The CPS, however, was soon to experience its own problems. Secure office space was unavailable. But an even more serious problem was a group mentality within the British public.

This overall mentality seemed to hold that the types of activities being investigated were barely possible. The vast majority of British police were honest and law-abiding public servants. Therefore, how could it be possible for corruption to be as common and as serious as the MPS Anti-Corruption Unit thought was possible?

This mindset provided a huge advantage to corrupt officers, who often succeeded in breaching some of the most impregnable security systems. Specialist government security advisors were contacted to help the investigators prevent any hacking by such officers while Othona was an active operation. The MPS also deliberately avoided advising the CPS on how to proceed with any disciplinary action against any corrupt officers that CPS itself had identified. Such advice could easily reveal that breaches in CPS security systems had occurred, leading other corrupt agents to alter their behavior.

Operational liabilities

Othona soon became a very expensive operation. The CPS chose to appoint a barrister from the government's Treasury Council at the beginning of virtually every Othona-related investigation to probe subjects such as disclosure of information. Some inquiries lasted up to 18 months, with legal counsel normally charging very large fees.

The selection and vetting process for CPS operatives was also problematic. Any person that the CPS considered for the operational team needed to disclose any professional contacts they had previously

had with any police force. All potential prosecutors also had virtually every aspect of their lives closely scrutinized.

There was also the issue of finding the right balance between the prosecution/investigative teams and the various police forces. This created the paradoxical situation of seeking advice from the CPS, while also insisting that such advice not be interpreted as altering the direction of any investigations.

Mistakes

There was a tendency from the outset of Othona for the MPS to think that it knew best how to conduct thorough investigations. Standard operational procedure was to

- Conduct an investigation;
- Bring all case papers together; then
- Bring charges against suspects, but before case papers had been submitted to the CPS.

The CPS was then forced to rely too heavily on the results of any MPS-led investigation. This led to an unintended result: any mistakes made by the MPS meant that the CPS would then be caught up in legal arguments when cases were eventually brought to trial. Dealing with such legal challenges then became a very lengthy and expensive process for the CPS.

This led the prosecution/investigative teams to contact the CPS earlier in subsequent investigations, to ensure that any gathered evidence would help to provide the strongest possible legal arguments for any and all future indictments.

Because of these experiences, the MPS soon realized that, for practical purposes relating to Othona, any relevant advice offered at the outset of investigations had to be ongoing advice.

MPS/CPS Cooperation in gathering legally admissible evidence in Operation Othona

- *Technical surveillance*: The MPS chose to consult the CPS every time any form of technical surveillance was to be employed. The MPS made sure that specialists were able to obtain the authority for the use of such equipment. Then, it shared all information gathered through surveillance with the CPS.
- *Use of undercover operatives*: The MPS employed the same principles. Seeking CPS advice was seen as essential because

it might have been too easy for an undercover operative to overstep the mark and become an agent provocateur. This would probably guarantee future legal challenges in a court case. (This later proved to be a wise precaution when, in the course of one investigation, a piece of technical equipment was compromised. The CPS was able to prevent the full details of the compromise from being exposed.)

- *Use of informants*: This is a highly sensitive area regarding gathering admissible evidence and avoiding difficult court challenges. The MPS sought information and advice from the CPS at every stage of Othona in which informants were involved.
- *Standards of evidence*: British juries in general are quite reluctant to convict allegedly corrupt police officers, regardless of the evidence presented to them. The MPS was well aware that all evidence they gathered had to be of the highest possible standard. When prosecuting an ordinary member of the public, the evidence standard from the CPS's perspective is 51% (i.e., that should be the realistic assessment of chances of successful prosecution). In dealing with cases involving police officers, the CPS calculated an evidence standard of 90%.

Problems encountered during Othona

It proved to be very difficult to persuade honest police officers to testify against their colleagues. (The Anti-Corruption Unit eventually managed to overcome this, once it had managed to secure prosecutions.)

Resident informants in the UK are obliged to admit all prior criminal convictions before they can even be considered for resident informant status. Such informants can find themselves under great pressure in weighing how much "self-incriminating" information to offer to police. They quite often run the serious risk of being charged with offenses on the basis of what they might choose to disclose about their own illicit acts that prosecutors otherwise probably would never know about. (It is extremely rare for resident informants to be offered leniency when providing any information.)

Difficulties involved in prosecuting police officers

Because of their own often extensive experience with such matters, police defendants in Othona-related prosecutions were often

well aware of some of the weak spots in the cases against them. These tended to revolve around the following:

- *The Regulation of Investigatory Powers Act (2000)*: This was new legislation at the time of most Othona-styled prosecutions. The act was therefore untested in British courts, or by active operations. The act amended the list of authorities that were legally permitted to approve what types of surveillance operations (i.e., involving private dwellings, hotel rooms, etc). The act also redefined the number of authorities that were likely to be needed for certain operations.
- *The Human Rights Act (1998)*: This was most often used as a defensive legal challenge concerning questions regarding the legality, proportionality, and necessity of investigative tactics used during Othona. The MPS felt that most such challenges were fundamentally unfounded in the cases of police officers. It was felt that the police should rightly be held to higher ethical standards of professional conduct than the average citizen should. To date, most defensive legal challenges involving prosecutions of police officers under the act have been successfully countered.
- *Public Interest Immunity*: This is often a particularly sensitive area in relation to the use of informants. Naturally, informants can only be recruited with the understanding that they can and will be protected. Frequently, court cases reach the stage where prosecutors are faced with the dilemma of choosing to continue with a course of action that could strengthen their legal case, or risk exposing an informant. Generally, the reluctant choice is made to drop a case in such circumstances.
- *Integrity tests*: The use of such tests was a very new step for the investigators involved in Othona. Both random tests (i.e., presenting officers with the opportunity to commit petty theft) and directed tests (i.e., those based on intelligence gathered against an officer suspected of already being corrupt) were used. This was also an area where advice was sought consistently from the CPS, since it would have been too easy to provide integrity tests that might have been ruled unlawful in subsequent court cases.

All such tests need to be

- Intelligence-led (i.e., based on actual intelligence supporting suspicions of illicit activity, as opposed to just "fishing" for proof of some wrongdoing);

- Essentially passive (i.e., not acting in ways that could be interpreted as agent provocateur behavior); and
- Proportionate (an officer suspected of involvement in cannabis trafficking, for example, should not be tempted with integrity tests involving heroin or other more dangerous drugs.)

Police record keeping

The Anti-Corruption Unit found, in the earlier cases relating to Othona, that senior investigating officers were unable to refer to any detailed records of policy decisions that had been made by other investigating officers. When senior investigating officers were cross-examined in court, they often had a good recollection of why certain decisions had been made. But they were often left without clear details as to *why* these decisions had been taken. Defense counsels often jumped on this and, in some cases, created enough doubt in the minds of juries to gain acquittals.

As a result, MPS detectives now keep a very complex and systematic set of detailed records for each investigation. These are kept from the day an inquiry is launched, and are shared in full with the CPS.

Disclosure

In major criminal investigations, the MPS now always appoints a single disclosure officer to work with the CPS. The CPS now also appoints its own disclosure officers. This helps greatly in the early detection of potential public interest immunity issues. This also helps minimize the ability of police defendants to exploit their own knowledge of details relevant to the case to embarrass or discredit the prosecution.

Appendices

Appendix 1. List of participants

Country delegations

Bangladesh

Mr. Ruhul QUDDUS
Advocate
Supreme Court of Bangladesh
155, Green Road
Dhaka 1205, Bangladesh

Mr. Azam MUHUMMED
Senior Information Officer
Ministry of Science and Information & Communication Technology
Room # 325, Building # 6, Bangladesh Secretariat
Dhaka, Bangladesh

People's Republic of China

Mr. Hairong CUI
Deputy Director General
Department of Case Review
Ministry of Supervision
A2, Guang An Men Nan Jie
Xuan Wu District,
Beijing 100053, China

Mrs. Ning WANG
Section Chief
Foreign Affairs Department Ministry of Supervision
No. 41 Ping'anlixi Street
Xicheng District, Beijing 100813, China

Cook Islands

Mrs. Janet MAKI
Solicitor General
Crown Law Office
P.O. Box 494,
Rarotonga, Cook Islands

Mr. Maara TETAVA
Deputy Commissioner
Police
P.O. Box 101
Rarotonga, Cook Islands

Fiji Islands

Mr. Timoci ROMANU
State Prosecutor
Office of the Director of Public Prosecutions
P.O. Box 3606BA,
Fiji Islands

Mr. Josaia WAQAIVOLAVOLA
State Prosecutor
Office of the Director of Public Prosecutions
P.O. Box 2355
Government Buildings
Suva, Fiji Islands

India

Mr. Bhure LAL
Secretary (Coordination and Public Grievances)
Cabinet Secretariat
Government of India

Mr. U.S. MISHRA
IPS
Special Director
Central Bureau of Investigation

Mr. Bhaskar KHULBE
Director, Department of Personnel and Training
Ministry of Personnel,
Public Grievances and Pensions
Room 19A, North Block,
New Delhi, India

Mr. ABHAY
Director
Training Academy, Ghaziabad
Central Bureau of Investigation, India

Mr. J.S. WADIA
Deputy Legal Advisor
Central Bureau of Investigation
Government of India
New Delhi, India

Mr. Mahendra KUMAR
Senior Public Prosecutor
CBI Academy
Ghaziabad, India

Mr. P.V.K. Ramana PRASAD
Additional Chief Legal Advisor
Anti-Corruption Bureau, Andhra Pradesh

Mr. Prasan Kumar PANI
Special Public Prosecutor
Vigilance Department, Orissa, India

Indonesia

Mr. Muhamad AMARI
Head of Sub-Directorate
Attorney General's Office
Jl. Sultan Hasanuddin no. 1, Jakarta Selatan, Indonesia

Indonesia *(continued)*

Mr. Muhamad Rahman RITZA
Inspectorate General, Ministry of Finance
Human Resources Department
Jl. Drive Wahidin no. 1, Jakarta Pusat,
Indonesia

Kazakhstan

Mr. Askhat MUKATOV
Senior Prosecutor, General Prosecutor Office
Department for the Control of Legality of Activity of State Bodies
Office 506
73a Seyfullin Str.
Astana 473000, Kazakhstan

Mr. Daulet SHANTAYEV
Head of Division of Courts and Institutions of Justice
State Legal Department, Presidential Administration
Office 306a
11 Beibitshilik Str.
Astana 473000, Kazakhstan

Kyrgyz Republic

Mr. Asan KANGELDIEV
Prosecutor
General Prosecutor Office
Orozbekova 72
720300 Bishkek, Kyrgyz Republic

Malaysia

Mr. Ratha Kirushnan AL K. RAJARETNAM
Head of General Investigation Branch
Anti-Corruption Agency Malaysia
7th Floor, Block D, Parcel D
Federal Government Administrative Centre
62505 Puttrajaya, Malaysia

Mr. Ahmad BIN MANDUS
Deputy Director of Investigation Division
Anti-Corruption Agency Malaysia
7th Floor, Block D, Parcel D
Federal Government Administrative Centre
62505 Puttrajaya, Malaysia

Mongolia

Mr. Tsegmid ARVINBUUDAI
Senior Inspector of the Administration Department
National Police Agency of Mongolia
Sambuu Street 18
Ulaanbaator City, Mongolia

Ms. Ulambayar ERDENETUYA
Supervision Prosecutor
Strategic Planning and Foreign Affairs Department
The State General Prosecutor's Office
Chingeltei district, Banga toiruu 15/1
Ulaanbaator 210646, Mongolia

Nepal

Mr. Binod Kumar GAUTAM
Investigation Officer (Law)
Commission for the Investigation of Abuse of Authority (CIAA)
Babar Mahal, Kathmandu, Nepal

Mr. Gobinda Bahadur SHRESTHA
Investigation Officer (Technical)
Commission for the Investigation of Abuse of Authority (CIAA)
Babar Mahal, Kathmandu, Nepal

Papua New Guinea

Mr. Thomas ELUH
Director of Police Prosecutions
Police
c/o Police Headquarters
P.O. Box 85
Konedobu, Papua New Guinea

Mr. Chronox MANEK
Public Prosecutor of Papua New Guinea
Office of the Public Prosecutor
Department of Justice
P.O. Box 662
Waigani NCD, Papua New Guinea

Philippines

Mr. Humphrey T. MONTEROSO
Director of the Prosecution Bureau
Office of the Special Prosecutor
Office of the Ombudsman
5th Floor, Sandiganbayan Centennial Building
Commonwealth Avenue, Diliman
Quezon City, Philippines

Mr. Cornelio L. SOMIDO
Special Prosecution Officer
Office of the Special Prosecutor
Office of the Ombudsman
5th Floor, Sandiganbayan Centennial Building
Commonwealth Avenue, Diliman
Quezon City, Philippines

Vanuatu

Mr. Noel AMKORI
Inspector
Vanuatu Police Force
PMB 014
Port Vila, Vanuatu

Mr. Eric CSIBA
Senior Legal Officer and Acting Public
Prosecutor
Public Prosecutors Office
PMB 035
Port Vila, Vanuatu

Experts

Mr. Bernard BERTOSSA
Former Attorney General
GenevaSwitzerland

Mr. John DEMPSY-BRENCH
Detective Chief Inspector
National Crime Squad
United Kingdom

Mrs. Eva JOLY
Former Investigative Magistrate in France
Special Counsellor to the Norwegian Government
Ministry of Justice and the Police
Norway

Mr. S.K. SHARMA
Director of Prosecution
Central Bureau for Investigation
India

ADB/OECD Secretariat

Ms. Gretta FENNER
Manager, Anti-Corruption Initiative for Asia-Pacific
Anti-Corruption Division
Organisation for Economic Co-operation and Development (OECD)
2, rue André Pascal
F-75016 Paris, France

ADB/OECD Secretariat *(continued)*

Mr. Jak JABES
Director Governance and Regional Cooperation Division
Regional and Sustainable Development Department
Asian Development Bank (ADB)
P.O. Box 789
0980 Manila, Philippines

Mrs. Enery QUIÑONES
Head, Anti-Corruption Division
Organization for Economic Co-operation and Development (OECD)
2, rue André Pascal
F-75016 Paris, France

Observers

Mr. Sam COOPER
Regional Anti-Corruption Advisor
American Bar Association Asia Law Initiative
Kenan Institute Offices
Queen Sirikit National Convention Center
2nd Floor, Zone D, Room 201/2
60, New Ratchadapisek Road
Klongtoey, Bangkok 10110, Thailand

Mrs. Helle KLEM
Assistant Director General
Department for Legal Affairs
Ministry of Foreign Affairs
P.O. Box 8114 Dep.
0032 Oslo, Norway

Appendix 2. Program

DAY 1	
Opening	
10.00–10.30 (plenary)	**Welcoming remarks** Mr. U.S. Mishra, IPS, Special Director, Central Bureau of Investigation **Inaugural Address** Shri Bhure Lal, Secretary (Coordination and Public Grievances), Cabinet Secretariat, Government of India **Introduction** Mr. Jak Jabes (ADB) and Mrs. Enery Quinones (OECD) Introduction roundtable

Theme 1: Prosecution standards

The independence of public prosecutors is of crucial importance in order for them to prosecute without obstruction. Many factors may, however, interfere in, or influence, the decision to launch criminal proceedings: considerations of national economic interest, the potential effect of a proceeding on relations with another state, or the identity of the natural or legal person possibly involved in the case.

Consequently, it is important to define rules and standards that allow prosecutors, in the exercise of their power to prosecute, to be free from this type of influence or interference. Participants are therefore invited to discuss and compare the standards and policies governing their work and the types of obstacles that might challenge their independence and effective prosecution of corruption cases.

DAY 1 *(continued)*		
General prosecution standards		
10.30–11.30 (plenary)	**Key presentation** Mrs. Eva Joly Former Investigative Magistrate, France **Comments** Mr. S.K. Sharma, Director of Prosecution, CBI, India **Discussion and Questions**	The first session will discuss a number of key issues of which prosecutors should be particularly aware to avoid, to the extent possible, being unduly influenced in the exercise of their function and thus ensure independent and efficient prosecution of corruption and bribery. The need for, and the content of, clear and concise prosecution policies and guidelines to ensure credibility of procedures and consistency of treatment will also be addressed.
Prosecution standards in the context of decisions to charge public officials or persons with strong economic or political influence		
11.45–13.00 (plenary)	**Key presentation** Mrs. Eva Joly **Comments** Mr. S.K. Sharma **Discussion and Questions**	Prosecution for corruption and bribery may present particularly acute concerns in cases where the prosecuted person has strong political or economic influence, such as a senior public official or a high-level executive manager. Senior public officials may have access to means of influencing the prosecutor, whether directly, for instance by removing the prosecutor, or indirectly, by affecting the prosecutor's work environment. Persons from the corporate sector who have important economic influence may also have access to means of influencing a prosecutor such as their network of contacts in the public administration or privileged access to the media. This

DAY 1 *(continued)*		
		session will focus on procedures and possible prosecutorial approaches when a public official or a person with strong economic influence is the subject of an investigation and prosecution of bribery.
Case Study 1		
14.00–14.15 (plenary)	**Presentation of case study** Mrs. Eva Joly	Presentation of the main features of the case study by the expert who prepared the study.
14.15–15.45 (focus groups)	**Case study work** in three focus groups	
16.15–17.30 (plenary)	**Report to the plenary**	

DAY 2
Theme 2: Cooperation between law enforcement agencies
Well-functioning relations between the different law enforcement agencies involved in prosecuting corruption are key to obtaining sufficient evidence and information and to effectively prosecuting such offenses. Particular attention should in this context be paid to the interaction between prosecutors and police services where sometimes-lengthy procedures for requests by prosecution services for police intervention can impede the efficiency of enforcement and might provoke the disappearance of valuable evidence. Good working relations between police and prosecution services become particularly important in light of the complex nature of corruption offenses. In some cases it might become necessary, in order to effectively prosecute corruption, to look at other offenses such as money laundering, accounting offences, or tax fraud. Therefore, well-functioning cooperation with specialized services, such as financial intelligence units, is a key element in the effective prosecution of corruption. A second element in this context relates to communications and referrals from public administration. This exchange of information often opposes reporting requirements, which determine when officials in the public administration may refer information to police or prosecutors, to the need for safeguards against referring otherwise privileged or confidential information.

Cooperation between prosecution and police services		
09.00–10.30 (plenary)	**Key presentation** Mr. John Dempsy-Brench National Crime Squad, United Kingdom **Comments** Mr. S.K. Sharma **Discussion and Questions**	To establish good working relations between prosecution and police services, some countries have opted to attach specialized police cells directly to prosecution services, while others address this issue by establishing simplified procedures regulating the relation between prosecutors and police services or by establishing centralized anti-corruption agencies. Depending on the institutional and cultural environment,

DAY 2 *(continued)*		
		both systems can be efficient, since they establish clear and concise rules defining the procedures for cooperation between the involved actors.
Communications and referrals from public administration		
11.00–12.30 (plenary)	**Key presentation** Mr. S.K. Sharma **Comments** Mr. Bernard Bertossa, Former Attorney General of Geneva, Switzerland **Discussion and Questions**	Reporting obligations for public servants, combined with measures to protect their job and personal security, can be a useful tool in achieving efficient information sharing and making all public authorities, in particular those working in sensitive areas, aware of the need to inform the police and the prosecution services of possible cases of corruption coming to their knowledge in the exercise of their functions. However, this obligation might conflict in certain cases with the duty of confidentiality that applies to certain positions. For such cases, clear rules can help find a compromise between these two conflicting responsibilities.
Case Study 2		
14.00–14.15 (plenary)	**Presentation of case study** Mr. John Dempsy-Brench	Presentation of the main features of the case study by the expert who prepared the study.

DAY 2 *(continued)*		
14.15–15.45 (focus groups)	**Case study work** in three focus groups	
16.15–17.30 (plenary)	**Report to the plenary**	

DAY 3
Theme 3: Mechanisms for gathering evidence abroad
Whereas borders do not create barriers for criminals, they do present obstacles to authorities that are prosecuting offenses. Criminals often have access to enhanced methods of travel and communication, through which they can flee from detection and prosecution and conceal the evidence of and profits from their crimes. As criminals continue to perfect their techniques and are quick to take advantage of national boundaries to shield themselves from justice, law enforcement authorities throughout the world must unite to combat this common threat and be provided with a system of principles and procedures that allows them to operate efficiently in a world where transnational crime is growing.

Formal systems for providing and obtaining legal assistance		
09.00–10.30 (plenary)	**Key presentation** Mr. Bernard Bertossa **Comments** Mr. S.K. Sharma **Discussion and questions**	The first half of this plenary session will discuss the varying principles that apply to the provision of mutual legal assistance. In particular, structures that currently seem to impede appropriate and efficient provision of MLA, and remedies against these possible impediments, will be discussed.
Informal networking		
11.00–12.30 (plenary)	**Key presentation** Mr. Bernard Bertossa **Comments** Mrs. Eva Joly **Discussion and questions**	One of these remedies, to be further discussed in this second half, are informal networks of contacts, which can facilitate cooperation between relevant authorities in different countries in the region and thus facilitate the efficient provision of necessary mutual legal assistance.

DAY 3 *(continued)*		
Case Study 3		
14.00–14.15 (plenary)	**Presentation of case study** Mr. Bernard Bertossa	Presentation of the main features of the case study by the expert who prepared the study.
14.15–15.45 (focus groups)	**Case study work** in three focus groups	
16.15–17.30 (plenary)	**Report to the plenary**	
Follow-up and conclusions		
17.30–18.00 (plenary)	Mr. Jak Jabes (ADB) and Mrs. Enery Quiñones (OECD)	The final session will aim to summarize the main findings of the discussions, presentations, and case study work during the seminar. Furthermore, the Secretariat will propose a format for a seminar report to facilitate reporting back to local authorities and staff by the participants. Participants are also invited to suggest a possible follow-up to this seminar on the national, subregional, or regional level.