

 **ORF SPECIAL REPORT**

NOVEMBER 2017



Combating Corporate Corruption in India through Deferred Prosecution Agreements

Percival Billimoria, Vivan Marwaha and Jhoomar Mehta

The Coal Scam has been one of India's biggest corruption cases in recent years. / Photo: Adam Cohn/Flickr/CC BY-NC-ND 2.0

ABSTRACT

Corruption has plagued India's political and corporate landscape since Independence. In the United Kingdom (UK), Deferred Prosecution Agreements (DPAs) have proved to be an effective measure in combating corporate corruption. In the context of parallels between British and Indian laws, this report seeks to analyse the feasibility of applying a DPA system in India. It examines DPAs and

Observer Research Foundation (ORF) is a public policy think-tank that aims to influence formulation of policies for building a strong and prosperous India. ORF pursues these goals by providing informed and productive inputs, in-depth research, and stimulating discussions.



To know more about
ORF scan this code

ISBN 978-93-87407-15-2

© 2017 Observer Research Foundation. All rights reserved. No part of this publication may be reproduced, copied, archived, retained or transmitted through print, speech or electronic media without prior written approval from ORF.

their potential in India, and highlights the challenges in implementing a national DPA system.

INTRODUCTION

In India, serious financial crime—involving bribery, corruption, tax fraud, market manipulation, insider trading or money laundering—is a complex offence, arduous and time-consuming to establish, and equally gruelling to prosecute. This is further exacerbated if one or more of the co-accused are international corporations, which makes the process of gathering evidence a transnational and daunting task. Given the enormity of these challenges and a heavily burdened judicial system and public prosecutor’s office, corporate corruption in India usually stays under the radar until a major newspaper occasionally breaks a story of a multi-million-dollar scam.

This report builds on the insights shared during a discussion hosted by the Observer Research Foundation (ORF) in October 2017, where former UK Attorney General Lord Peter Goldsmith delivered a talk, “Tackling Corruption: What Democracies Can Learn From Each Other.” In his introductory remarks, Sunjoy Joshi, ORF Chairman, highlighted the widespread public concern in India about corruption. When India liberalised its economy more than 25 years ago, many believed that the end of the “Licence Raj” would reduce, if not eliminate, private and political corruption. However, while there has been a perceptible reduction in crony capitalism, corruption at the lower levels of the bureaucracy continues to haunt and define India’s political landscape. The 2011 agitations, led by Anna Hazare, demonstrated the desire of the Indian people to end public corruption in the country.

Having served as the chief prosecutor for the UK as Attorney General, Lord Peter Goldsmith is no stranger to corruption in its many forms. In his remarks, he concentrated on corruption in business, specifically by highlighting the established success—and great potential—for Deferred Prosecution Agreements (DPAs). As the UK reaches its second anniversary of introducing DPAs, Lord Goldsmith outlined the achievements made under the DPA system, which include a faster judicial process, the settlement of high-profile corporate corruption cases and the restoration of public trust in the judicial system.

The traditional criminal law system in India provides little incentive for companies to voluntarily approach authorities and disclose improper conduct. In the UK, the DPA system has increased public confidence in the judicial process, acted as a sufficient deterrent to reduce corporate crime, and substantially amplified transparency in corporate adjudication. It is time for India to begin considering a national DPA system. Corporate crime is a significant problem in India, and if the country wants to successfully end corruption—whether in the public or private domain—DPAs are a significant step towards this goal.

DEFERRED PROSECUTION AGREEMENTS: WHAT AND WHY

In the UK, a DPA is an agreement reached between a prosecutor and a corporation, adjudicated under the supervision of a court-appointed judge. The agreement suspends a prosecution for a defined period, provided the organisation meets certain specified conditions.¹ DPAs are applicable to fraud, bribery and other corporate crimes. DPAs only apply to organisations and never individuals.

DPAs require the corporate actor to make reparations against the criminal offences executed by them, without causing the impairment of a conviction. This essentially means that corporations, after enacting corrective measures and paying fines and reparations, can continue operating without a criminal conviction against them. DPAs are administered under the supervision of a judge, who must be convinced that the DPA is “in the interests of justice” and that the terms are “fair, reasonable and proportionate.”² DPAs offer an alternative to tedious, expensive trials and are transparent and open to public scrutiny.

The goal of the DPA system is to encourage companies to willingly report cases of financial crimes, increase compliance with established norms and create an environment of cooperation with investigations. The evidence obtained from the company may be used to prosecute the individuals involved. The corporation, on the other hand, must bear the financial penalties. Since corporations cannot be incarcerated, the reparations and other financial consequences put them in the same position as they would have been if they had been found guilty after a long and expensive trial.

The conditions of the DPA would typically include an agreement to implement internal controls to ensure that the corporation acts in a socially responsible manner. In the United States (US), DPAs are a well-established medium of settling allegations of financial crimes. Authorities such as the Department of Justice and the Securities and Exchange Commission are endowed with the tools they need to enforce and oversee the terms of the agreement. Conversely, in the UK, each decision needs to be green-lighted by an independent judge, who ensures that the decision serves the public interest and meets the requirements of justice.

The DPA system is also being introduced in France. The country has recently adopted an anti-corruption legislation, enabling corporate bodies to enter into settlements with the state. The law is meant to improve France’s track record on prosecuting bribery cases. Australia, meanwhile, launched in early 2016 a consultation paper discussing the introduction of DPAs in the country, which received overwhelming support.

CORRUPTION IN INDIA

Corruption represses growth, hampers development, creates monetary inequalities and affects the downtrodden of society the most. Unfortunately,

India's recent economic successes have been unable to reduce the systemic corruption amongst the country's corporate, bureaucratic and political class. According to a survey conducted by Transparency International in March 2017, among 16 other countries of Asia Pacific, India took the first place for having the highest bribery rate: a stark 69 percent.³

Perhaps most importantly, corruption in India has established great uncertainty in the business and investment atmosphere. Foreign companies conducting business in India regard corruption as a key hindrance against obtaining appropriate permits and in bidding for government procurement contracts. According to the two reports published by United Nations Office on Drugs and Crimes (UNODC), corruption in private sector has experienced a visible escalation.⁴ UNODC concluded that even though there is an existence of multiple laws in India to check corruption, "India has no specific legislation addressing corruption in the private sector."⁵

MAKING DPAs WORK IN INDIA

The Indian judicial process is notoriously long drawn and complicated. The average pendency of a case before one of India's 21 high courts is three years, six years before subordinate courts, and a staggering 13 years if a case reaches the Supreme Court.⁶ Given the enormous backlog of cases in the country's overworked judicial system, with almost 3 crore cases in the docket, DPAs will help reduce the burden on prosecutors and judges by making it possible to effectively prosecute the individuals concerned while ensuring that the corporate body, too, pays the same fine had it been successfully prosecuted.

Of particular concern is the fact that even after a long trial, convictions are very rare, exacerbated by the difficulty in collecting evidence, which might not be available in India. This is despite the frequent use of treaties calling for cooperation with international authorities, which India has signed with several countries. Given the public antipathy to public and private corruption, implementing DPAs can significantly restore public faith in the system, and prosecute companies and individuals engaged in nefarious practices by ensuring that the corporations who are charged with breaking the law pay a heavy fine (including the disgorgement of profits) and agree to certain terms and conditions. This is preferable to the status quo, where trials last long and have low conviction rates. For a DPA system to work in India, it will need to address the following factors:

1. A national DPA system must be established, which applies to all serious financial crimes.⁷
2. This national DPA system must be available to all companies and incorporated entities.

- a. In his remarks at ORF's event, "Tackling Corruption: What Democracies Can Learn From Each Other," former UK Attorney General Lord Peter Goldsmith emphasised that any DPA system must only be available to companies, not individuals. This would ensure that the actual masterminds of the crime—individual employees or directors—are still held liable and will not be able to commit offences at other organisations.⁸
3. DPAs must be within the purview of the judicial system, not outside of it. If a DPA is proposed between a defendant and prosecutor, it must be subject to close judicial scrutiny.⁹
 - a. DPAs regulated by the judicial system will ensure that they are fair and in the interest of the larger public. If they do not satisfy adequate requirements for the public good, adjudicators must reject them in favour of a better deal or prosecution.
4. Therefore, transparency must become a fundamental tenet of the DPA system. DPAs must be "subject to clear transparency and all court judgments, agreed statements of facts, and the agreement itself should be published except where a court is satisfied that exceptional circumstances exist that warrant on-publication."¹⁰
 - a. While discussions between the prosecutors and defendants should remain confidential, if the terms are ultimately accepted by a court, they should be published for everyone to view.
5. Any DPA should cover a broad range of terms, including:
 - a. Monetary fines;
 - b. The disgorgement of profit earned through illegal means;
 - c. Reparations to victims or third parties;
 - d. The establishment of an independent monitor to supervise the future performance of any enhanced compliance regime by the defendant;
 - e. The handing over of all evidence available to enable the authorities to prosecute the individuals; and
 - f. Terms that clearly outline the consequences of similar conduct in future.¹¹

POTENTIAL SUCCESSES

The magnitude and impact of corruption in India—whether public or private—cannot be overstated. For the government to satisfy the ever-increasing clamour to eradicate corruption, it needs to start small. DPAs are a significant and important step towards eliminating corporate corruption.

For a long period after Independence, corporations in India were not held liable for criminal offences because of the *mens rea* requirement.¹² Prosecutors had to

prove that defendants intended to commit a criminal offence to award a conviction. However, laws on corporate crime evolved, and it is now possible to hold corporations responsible for wrongdoing. The next evolution in the process should be the introduction of DPAs, given the immense potential they offer in combating corporate corruption.

A DPA system will make Indian businesses more accountable for serious corporate crime by expanding the tools and methods available to investigators and prosecutors.¹³ It will provide a more effective and efficient path to hold offending companies responsible without the time, price and uncertainty of a criminal trial. This is forecasted to increase the “amount of corporate crime that agencies are able to detect and pursue, both directly through the use of DPAs and by freeing up resources to focus on the most serious forms of offending.”¹⁴

If implemented, DPAs should be made public. Such documentation will highlight the corrective measures the corporation has adopted. DPAs bring corporate crime into the public eye and restore public faith in the judicial system. Since corporations would pay a large settlement in addition to reparations and admitting wrongdoing, DPAs demonstrate that no one—and no entity—is above the law. Given that a DPA enables the authorities to vigorously pursue prosecution against the individuals concerned, the DPA system promises to enhance prosecution privileges against those actually responsible for the crime. Corporations are conglomerations and entities of individuals, and those responsible will still have to face the long arm of the law.


A DPA scheme will also accomplish the dual goals of punishing corporations for misconduct while also providing redress to those affected.¹⁵ Given the expansive terms and conditions of DPAs, companies will be required to take corrective measures, such as providing compensation to victims and third parties, disgorging unlawful profits and establishing improved compliance programmes. This will help universalise compliance and usher in a new era of ethical conduct in corporate culture across India.

Criminal convictions inflict a wide range of significant consequences and negative externalities on third parties and other individuals involved with a company, such as employees and shareholders, even if they did not engage in the misconduct.¹⁶ A DPA helps avoid inflicting this unnecessary damage on innocent third parties and allows the corporations to continue to do business, by enabling companies (who admit to the facts of the case and make evidence of wrongdoing available) to avoid the risk of bankruptcy and closure, which would be the consequence of a conviction. This is a compelling ‘carrot’ in the ‘carrot-and-stick’ approach fundamental to the DPA scheme. The risk of oblivion is eliminated while ensuring that the corporate not only takes responsibility but also suffers the same penal action as would follow a formal conviction.

The Ministry of Defence (MoD) recently formulated guidelines on blacklisting of companies who may be investigated for, or charged with, corrupt practices. While recognising that the law may take its own course, the MoD guidelines envisage a situation where a corporation may agree to a significant (though unspecified) quantum of penalties if it were to be able to continue doing business with India. What motivated these guidelines was the need to ensure that the country's defence preparedness is not compromised because firms with necessary technology and capabilities are eliminated from the bidding process, resulting in diminished competition for RFPs in the defence space or the self-denial of high technology, which may be proprietary to the blacklisted supplier. However, the blacklisting guidelines could also be a step in the direction of a DPA framework with its wider logic and benefits. If these guidelines are implemented, the DPA framework should only be a short, albeit more formalised, step away.

CONCLUSION

Lord Goldsmith passionately endorsed the introduction of DPAs in India, and with good reason. The UK model provides India with a solid roadmap to implement DPAs. In the US system, several supervisory authorities wield the power to negotiate DPAs, often creating competing goals and inter-agency conflicts. Given the widespread bureaucratic corruption in India, such a system would not be successful. Conversely, the UK model requires a judge to green-light any potential DPA, making it more apt to the Indian context, given the country's independent judiciary. India's judicial system is independent, free and fair, and ideal for the introduction of DPAs. On multiple occasions, it has demonstrated its ability to act fast on matters of great national interest. A new DPA system, therefore, must be well-planned to build on the strengths of the current judicial process.

This report has underlined the challenges India faces with public and private corruption. The Indian public has repeatedly voted for anti-corruption figures in recent elections, demonstrating its desire to end the widespread graft in the country's bureaucracy and corporate offices. DPAs are a crucial and important first step towards combating corporate corruption. 

ABOUT THE AUTHORS

Percival Billimoria is a Partner at Cyril Amarchand Mangaldas.

Vivan Marwaha and **Jhoomar Mehta** are Researchers at Observer Research Foundation, Delhi.

ENDNOTES

1. “Deferred Prosecution Agreements,” Serious Fraud Office, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.
2. Ibid.
3. “Corruption in Asia Pacific: What 20,000+ People Told Us,” *Transparency International*, 7 March 2017, https://www.transparency.org/news/feature/corruption_in_asia_pacific_what_20000_people_told_us.
4. “India: Countering Corruption in the Private Sector: A Shared Responsibility,” United Nations Office of Drugs and Crime, <https://www.unodc.org/southasia/frontpage/2013/may/india-countering-corruption-in-the-private-sector-a-shared-responsibility.html>.
5. Ibid.
6. Harish Narasappa, “The Long, Expensive Road to Justice,” *India Today*, 27 April 2016, <http://indiatoday.intoday.in/story/judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice/1/652784.html>.
7. Robert R. Wyld, “Should India Adopt DPAs?” *Legal Era Online*, 19 December 2016, <http://www.legaleraonline.com/articles/should-india-adopt-dpas>.
8. Vivan Marwaha, “Tackling Corruption: What Democracies Can Learn From Each Other,” *Observer Research Foundation*, 10 October 2017, <http://www.orfonline.org/research/tackling-corruption-democracies-can-learn-from-each-other/>.
9. Robert R. Wyld, “Should India Adopt DPAs?” *Legal Era Online*, 19 December 2016, <http://www.legaleraonline.com/articles/should-india-adopt-dpas>.
10. Ibid.
11. Ibid.
12. Bishwajit Dubey, “Criminal Liability of Corporate Officials in India,” *Legally India*, 19 April 2017, <http://www.legallyindia.com/views/entry/criminal-liability-of-corporate-officials-in-india>.
13. “Proposed Model for a Deferred Prosecution Agreement Scheme in Australia,” Australian Government Attorney-General's Department, 1 May 2017, <https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx>.
14. Ibid.
15. Ibid.
16. Elisa Solomon, “Targeting Corruption in India: How India Can Bolster its Domestic Anticorruption Efforts Using Principles of the FCPA and the UK Bribery Act,” University of Pennsylvania Law School Library, 23 February 2014, 948, <https://www.law.upenn.edu/live/files/2902-solomon34upajintl9012013>.



Ideas • Forums • Leadership • Impact

20, Rouse Avenue Institutional Area, New Delhi - 110 002, INDIA
Ph. : +91-11-43520020, 30220020. Fax : +91-11-43520003, 23210773
E-mail: contactus@orfonline.org
Website: www.orfonline.org