ANALYSIS OF ANTI- CORRUPTION AND BRIBERY LAWS IN INTERNATIONAL COMMERCIAL LAW – INDIA, UNITED KINDGDOM AND UNITED STATES OF AMERICA

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ABSTRACT

Anti-Corruption and Bribery Laws in the context of domestic, and international law is of great importance. These laws ensure practices of fair trade, and aim to curb practices involving 'under-the-table' passing of gifts and money. In the current globalized world, where business and corporate transactions are boundary-less, the importance of these laws become of great essence. Most countries have their own Anti-Corruption and Bribery laws and these laws are gaining recognition in international forums such as the United Nations as well. This paper will aim to produce a comparative analysis of the Anti-Corruption and Bribery Laws of India, United Kingdom and the United States of America in terms of their scope, jurisdiction, strict sanctions and punishments, potential parties concerned etc. This paper will aim to analyse whether strict Anti-Corruption Regulations deter acts of bribery in the international context. This paper will also to aim to analyse whether an extremely strict regulation governing Bribery acts as a deterrent, or makes it unreasonable to follow in its entirety. To understand how the Anti-Corruption and Bribery laws of United Kingdom, India and the United States of America are similar or different in terms of their strictness, an analysis of the legislations in the said countries regulating these practices must be done. This paper will also analyse two widely popular cases in the world of international commercial law, that will show the way in which Anti-Bribery and Corruption cases are decided and looked down upon.

PREVENTION OF CORRUPTION ACT 1988

The Indian legislation governing Bribery and Corruption is the Prevention of Corruption Act, 1988. Before the independence of India which was in 1947, the Indian Penal Code was the sole legislation for all offences which included 'Offences by Public Servants' as well.[i] There were merely five sections in the Indian Penal Code that gave a legal framework for the prosecution of public servants.[ii] The advent of large-scale corruption started in India only after the Second World War which led to a situation of shortages in resources, thereby resulting in corruption in public life.[iii] The aftermath of the Second World War was felt in India as it was a colony of the British. The first exclusive legislation, for offences pertaining to Bribery and Corruption was general, yet was important as it was one of the first legislations of independent India, which came to be known as the Prevention of Corruption Act, 1947. This Act did not extensively cover all facets to curb and penalise Bribery and Corruption altogether, yet it was more comprehensive than what was previously accounted for in the Indian Penal Code. For instance, in Section 5 of the Act, a new offence namely 'Criminal misconduct in discharge of official duty' was incorporated, in which public servants who habitually accept bribe, abuse their position, or fraudulently misappropriates property entrusted to him, in his capacity as a public servant shall be punishable with imprisonment for a term of one to seven years and shall be liable to pay a fine.[iv] It is important to note that the Prevention of Corruption Act, 1947 extended only to Public Servants and did not penalize bribe-givers or bribe-takers who weren't public servants. The definition of who was a public servant was defined under Section 21 of the Indian Penal Code which broadly included only government officials and officers. in 1988, a new Prevention of Corruption Act was passed and it encompassed the shortcomings of the 1947 act to a great extent. The 1988 Act included a broader definition of who is a Public Servant which included not only government employees, but also members of universities such as vice chancellors, professors, employees of scientific and cultural institutions, ex-public servants etc, in Section 2c of the Act. [v] Another important component added in the Act of 1988, in Section 2b, is that of 'Public Duty,' according to which the scope of the Act gets extended to those individuals that discharge duties in which the State, community at large have an interest.[vi] In interpreting the act in the case of *Inder Dyaldas v State of Bombay* it was held that it is not necessary that the act for which the bribe was given, be performed or completed.[vii] The mere representation by the public servant that it is in his power to do an act, is enough to attract the provisions of the Act of 1988. The Prevention of Corruption Act, 1988 has various limitations.

The Act does not include individuals that are not public servants.[viii] This means that private individuals, that may accept or give bribe, are left outside the scope of this act which doesn't account for an entire demographic of people. The second limitation is that it does not cover corporate or private bribery.[ix] This is a huge shortcoming of the Act as corporate bribery is something that must be governed strictly to ensure free and fair-trade practices. Also, when viewed from the lens of international commercial law, this Act can in no way, be regarded as a source of reference or authority in matters governing international bribery. The Act also excludes Foreign Public Officials and doesn't have any extra-territorial application.[x] When looked at these limitations, it is safe to say that the Prevention of Corruption Act, 1988 is one that has a limited scope and doesn't provide wide applicability so as to cover most if not all acts of corruption and bribery. In the Corruption Perceptions Index 2019, prepared by Transparency International, India ranked 80 out of 180 countries, which is a poor ranking.[xi] The lack of stringent punishments and sanctions, limited scope of the act may be the reason of such a poor global ranking.

FOREIGN CORRUPT PRACTICES ACT 1977

The Foreign Corrupt Practices Act of 1977 (FCPA) is the main legislation of the United States of America governing bribery and corruption. The FCPA is a strong legislation and can be said to be one of, if not the most stringent legislation governing bribery and corruption practices. The FCPA is a statute that views the offence of bribery with utmost stringent standards, the strict punishments and wide applicability is proof of the same. The FCPA's anti-bribery provisions apply to domestic concerns, Issuers and Certain person and Entities.[xii] These three classes of people are also inclusive of their directors, agents, shareholders and employees as well, conferring a wide applicability with respect to the persons governed under this Act. The FCPA prohibits U.S. persons, businesses and foreign public companies listed on the stock exchanges in the United States to indulge in bribery practices.[xiii] Certain foreign persons and businesses acting while in the territory of the United states, are also prohibited to indulge in any practice involving making corrupt payments to foreign officials to obtain or retain businesses.[xiv] The FCPA is a legislation, that has ensured that it incorporates and stays at par with the requirements of the Anti-Bribery Convention, and in 1998, it was amended in this regard in order to maintain international standards. Through this amendment, five landmark

changes were made that expanded the ambit of the FCPA, so as to include : (1) payments made to secure "any improper advantage"; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of "foreign official"; (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.[xv] Through this amendment, the extra-territorial application and the relevancy of the FCPA while governing international cross-border public and corporate bribery, has enhanced and has been included in the purview of the FCPA. Through this, it can be ascertained that the United States has made historical changes and has helped in the framing of a concrete international commercial law pertaining to bribery practices all across the world. The implementation framework of the FCPA is divided between two bodies namely, the Department of Justice for criminal aspects and the SEC for Civil aspects.[xvi] Such a mechanism shows how seriously bribery offences are taken by the United States and how they ensure the effective implementation of the FCPA. Another illustration of the FCPA's strict yet effective implementation is the International Corruption Unit of the Foreign Bureau of Investigation (FBI). The fact that there exists a separate unit of the FBI to regulate and govern cases of international commercial law, shows the futuristic approach of the United States to incorporate within the ambit of its legislation, international cases so as to bring the world closer together in its fight against bribery. The point that makes the FCPA stand out in comparison to the Anti-bribery legislations is its wide extra-territorial application in addition to its stringent local application. In order to truly understand the FCPA and its application, it is imperative to understand the requirements that attract it in the first place. For the FCPA to apply to a person or an entity, the act of completion or succeeding in the act of paying the bribe is not necessary. A promise, an offer or an authorization for paying such a bribe, with a corrupt intent is enough for the FCPA to attract.[xvii] The second component attracting the FCPA is that of the 'Business Purpose Test' which means; the prohibition of bribes in a manner such that unfair business advantages are produced in its furtherance.[xviii] These unfair business advantages include favourable tax treatments, unfair competitive edge among others. The third component attracting the FCPA is that the bribe-giver must act wilfully, which means that his act must be voluntary with a bad purpose.[xix] The fourth component is one that stands out due to its subjectivity of interpretation on a case to case basis. This component is that of ascertaining whether the promise, offer or the bribe given was something of value.[xx] Therefore, if a Rolex

is given to the foreign official, it would amount to something of value that can be traced to the corrupt intent and wouldn't construe as a bribe. However, if a mere scarf with the name of the organization such as O.P Jindal Global University is given as a courteous and thankful gesture to the Foreign Official, then this act would not be a bribe. Through this, the balance between reasonability and stringent standards of the FCPA can be seen. Extravagant and exorbitant gifts have the capacity to attract suspicion, but a mere courteous gesture is not regarded as a bribe. In understanding the extra-territorial and foreign applicability of the FCPA, it is important to know who is covered in the definition of a 'Foreign Official.' In the FCPA, a 'Foreign Official' is one that includes, "officers and employees of a foreign government or any department, agency or instrumentality or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[xxi] It is also important to note that the FCPA's provisions also get attracted if a server, application, email etc is used to facilitate the bribe, which was based out of the United States. Therefore, if Gmail is used to make the offer of bribe, then the person irrespective of where he is making the offer from, can be prosecuted on the grounds of the violation of FCPA. Through this, it is safe to say that the FCPA is a governing authority to all nations and international organizations to combat bribery and make it an offence as serious as the FCPA illustrates it to be.

BRIBERY ACT 2010

The UK Bribery Act of 2010 (Bribery Act) is the main legislation governing corporate bribery in the United Kingdom. This legislation, is one that is one of the most recent legislations governing bribery and it has incorporated international standards so as to cover bribery offences with utmost scrutiny. In a way, this Act, is stricter that the FCPA, which will be seen forthwith. In this Act, it is an offence to bribe another person[xxii], to be bribed[xxiii], bribing a foreign public official[xxiv], and failure of a relevant commercial organization to prevent bribery.[xxv] These are mentioned in Sections 1, 2, 3, 4, and 9 of the Act. Through these four categories of offences, it can be seen that the Act has a wide scope similar to the FCPA, but has a far greater applicability and ambit than the Prevention of Corruption Act of India. it is important to note that the Bribery Act, like the FCPA, doesn't require the offence to be complete. A mere offer, a promise, a request to accept bribe, in the offences above, is enough for the Bribery Act to apply. Section

7, i.e. the Failure of commercial organizations to prevent bribery, is an interesting section for two reasons. The first reason is that it specifically accounts for corporate bribery and secondly, it just doesn't cover the act of giving or receiving a bribe, but it places a greater onus and a strict tortious liability of the commercial organization to prevent such bribery. In order to understand this, the unique idea enumerated in the Bribery Act known as the 'Adequate Procedures' needs to be understood. 'Adequate Procedures' can be understood through Section 7 and Section 9 of the Act. Since Section 7 makes it an offence for commercial organization's failure to prevent bribery, it is given that if the commercial organization can prove that it had taken 'adequate procedures' in the form of policies, rules etc, then it shall not be held liable. According to Section 9, the Secretary of State is required to publish guidance about procedures that these organizations can put in place so as to prevent the offence under Section 7.[xxvi] Through this, a unique and heightened standard and onus is placed on commercial organizations to comply with guidelines and ensure its effective implementation and regulation, so as to prevent a liability under this Act. Six key principles namely, 1) Proportionate Procedures, 2) Top-level commitment, 3) Risk Assessment, 4) Due Diligence, 5) Communication and Training and 6) Monitoring and Review; are the basis of the 'Adequate Procedure' guidelines for the company.[xxvii] A company will also be liable, if its 'associated person' is involved in the offence of bribery in connection to the business itself.[xxviii] The Bribery Act 2010, has an extra-territorial application that covers companies of the United Kingdom doing business overseas, as well as foreign companies that have operations in the United Kingdom.[xxix]

It is important to understand that though the FCPA and the UK Bribery Act are compliant with the international bribery standards and conventions, they aren't necessarily identical in all respects. This means that though the anti-bribery policies of a particular company may be in conformity with the FCPA's standards. It doesn't mean that it will automatically amount to 'Adequate Procedures' under the UK Bribery Act.[xxx] On drawing a comparison between the FCPA and the Bribery Act, the following differences can be noted. The major difference I feel, is the element of 'intent.' In the UK Bribery Act, corrupt intention to bribe is not required in cases of bribery to a Foreign Public official whereas; in the FCPA intention is essential in associating a liability.[xxxi] The punishment and liability in the case of the UK Bribery Act is unlimited for companies, and the imprisonment is for ten years. However, the fine in FCPA is case specific and the imprisonment is up to five years.

The OECD Convention on Combating Bribery aims at combatting international commercial bribery, and has laid out certain offences, responsibilities etc.[xxxii] The United States of America and the United Kingdom, in their respective legislations have incorporated the mandates and requirements of this convention. India too has ratified this convention; however, the intent and the impact of this legislation is not seen through the meagre standards and lack of effective implementation and punishment for the offence of bribery.

THE JP MORGAN CASE STUDY

A case involving bribery in the international commercial law set up, is the famous case *of JP Morgan Chase & Co.* which was brought forth by The Securities and Exchange Commission.[xxxiii] In the given case, JP Morgan between the years 2006 and 2013 provided jobs and internships to the relatives and friends of key executives of its clients, prospective clients and foreign government officials in the Asia-Pacific region, in exchange of benefits from those officials that were requesting for such internships, to give JP Morgan any businesses pertaining to investments banking.[xxxiv] These 'foreign government officials' came under the purview of the FCPA. In fact, in the given case, JP Morgan's subsidiary in Asia created a client referral hiring program wherein, these new hires by virtue of the promise, which was separate different from the normal, more rigid process of hiring. In this period, two hundred interns and employees were hired at JP Morgan. Previously, JP Morgan and its subsidiaries also instituted Anti-Corruption Policies within their organization, wherein it was indicated that that it was improper to hire someone to win a business advantage.[xxxv] Yet their practices were contrary to their policies.

The reason for attracting the FCPA is quite interesting and explains to a great extent, the scope and variety of activities covered under the ambit of the FCPA. The reason that the Anti- Bribery provisions were attracted, was because the internships and employment of the individuals hired through referrals of the foreign public officials, were for a 'value' namely, the gaining and obtainment of business for the organization. In 2016, JP Morgan payed a fine of $264 Million, in lieu of their FCPA violations, as its Asian subsidiary was involved in a 'systematic bribery scheme' through its referral system hiring programme.[xxxvi] This also shows that the parent company can be held liable in the United States under the Anti-Bribery Provisions of the FCPA,

for the actions of its subsidiary, operating in a different continent and in a different jurisdiction; thereby indicative of the extra-territorial reach of the FCPA.

DIRECTOR OF THE SERIOUS FRAUD OFFICE V. AIRBUS SE

Another case, involving bribery in the set-up of international commercial law, is the case of *Director of The Serious Fraud Office V. Airbus Se.*[xxxvii] This case is unique as the Bribery acts of Airbus were investigated by authorities of three countries namely, United Kingdom, United States of America, and France who among themselves, divided the offences geographically and entered into a deferred prosecution agreement. According to this agreement, United Kingdom's Serious Fraud Office would investigate bribery offences of Airbus in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana; France would investigate bribery offences of Airbus in China, Columbia, Nepal, South Korea, the United Arab Emirates, Saudi Arabia (Arabsat), Taiwan and Russia; the United States of America would investigate its bribery offences in China.[xxxviii] Airbus is a manufacturer of aircrafts all across the world. Airbus SE is a company that has been registered in Netherlands. Airbus, having multiple subsidiaries in the world, has a subsidiary carrying out operations in the United Kingdom as well. the investigation was carried out by the respective authorities of the countries and in particular, through the investigation done by the United Kingdom it was found that the UK subsidiary of Arbus had multiple business partners in countries such as Malaysia, Indonesia, Taiwan and Indonesia, whose senior officials had indulged in acts of bribery.[xxxix] This attracted Section 7 of the Bribery Act 2010, as Airbus failed to prevent such bribery that occurred through its associated persons. Associated persons include foreign partnerships as well. Moreover, Airbus also didn't have bribery prevention policies that would amount to the 'Adequate Procedures' defence for Airbus under the Bribery Act 2010. Another interesting reason given by the court in this case, was that when the senior corporate directors and employees, including those who had to monitor the bribery compliance obligations, indulge in such corrupt practices, is a serious offence and such an offence, must be viewed at in the context of vulnerabilities of businesses operating in international markets.[xl] A record-breaking high fine was imposed on Airbus in the given case, which amounted to 3.5 Billion Pounds. This amount is the total amount that it had to pay across the three jurisdictions of United Kingdom, France and Unites States of America.

Through this case, the real working scheme of prosecuting offenders such as Airbus, across different jurisdictions is seen. How the three investing countries administered the offences taking place in foreign countries and not within their own borders, is an indication of the progress of international commercial law in governing, regulating, monitoring, and accruing liability in the offence of bribery. This case is also a landmark case in terms of the exorbitant financial settlement amount that Airbus had to pay. It shows that no matter how powerful, or widespread the reach of a company as large as Airbus is, when it comes to international corporate and public bribery, no one can evade the respective legislations and will be held accountable for indulging in such unfair and corrupt practices.

CONCLUSION

Through this paper, I have attempted to introduce the main legislations governing the offence of bribery in India, United Kingdom and the United States of America, all of which are common law countries, so as to view them through the same lens. Upon analysis, I have found that the Indian legislation i.e. the Prevention of Corruption Act 1988, is a legislation that is lacking in 1) defining the ambit of the offence of bribery 2) having extra-territorial reach and 3) effective implementation. With the absence of these three components, bribery is not considered an offence serious enough in India as opposed to other criminal offences.

United Kingdom's legislation i.e. The Bribery Act 2010, according to me, is a legislation that is effective, yet too stringent. I say this because of the non-requirement of the component of 'intention' while indulging in acts of bribery. I feel that intention also known as *mens rea* is an important component of associating criminality to any offence, including Bribery. I feel that such a component, makes the following of the Act extremely difficult for individuals and corporate entity. Being strict and stringent in curbing the acts of bribery is essential, but that doesn't amount to be being unreasonable and arbitrary. By excluding the pre-requisite of 'intention' in attributing criminality to certain kinds of Bribery, an unfettered discretion is given which has the capacity of being abused to a great extent.

The Foreign Corrupt Practices Act, i.e. the legislation of the United States, governing bribery is one which according to me, is the best legislation that can deter the act of bribery. I say this because though it is an extremely strict and stringent legislation, it does have extremely reasonable defences and a very subjective approach in looking at a particular act as amounting

to bribery or not. For instance, in ascertaining the 'value' of a gift given, several components such as its price, whether it has a company logo etc is looked at, which shows that all it prohibits is exorbitant and exclusive gifts. The fact that it is fully compliant with the Anti-Bribery Convention makes it an even more favourable legislation.

To conclude, I feel that though there has been an Anti-Bribery Convention on international platforms to which multiple nations and signatories, there must be a at least a certain degree of uniformity, in the legislations governing Bribery across countries that are at least members of the United Nations. I feel that if this happens, international corporate and public bribery can be viewed through a greater systematic matter and there would be no conflict on questions such as jurisdiction. A uniform system will also greatly impact the development and better codification of international commercial law. The recommended statute that should be uniformly applied or incorporated in local legislations of nations according to me, must be the Foreign Corrupt Practices Act, as it strikes the perfect balance between the seriousness of the offence of bribery, its wide ambit and broad yet reasonable interpretation.

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