



THE U.S. FOREIGN CORRUPT PRACTICES ACT AND DOING BUSINESS IN INDIA

Rina Pal and James Parkinson

Why are American companies in India? The biggest reason is the high potential of the Indian market and economy. Although the gross domestic product of the U.S. is expected to grow 2.9% for 2011, the economy of India is expected to grow at 8.4%, according to the International Monetary Fund. While the Indian economy offers immense promise for American companies, there are also particular risk factors associated with doing business in India, and extra caution must be taken to not fall afoul of the U.S. Foreign Corrupt Practices Act ("FCPA"), which prohibits bribery of non-U.S. officials.

There is a history of corruption in all levels of government in India, and excessive bureaucracy and regulation, left from the days of the so-called License Raj, has left procedures that are complicated and lack transparency. It is often necessary to obtain approvals from several government officials to obtain one required permit or license. Underpaid civil servants yield broad discretionary power, and some deliberately stall administrative procedures to induce improper

payment. It is also customary in India to give gifts to business contacts and government officials during Diwali and other religious festivals and Indian government officials often solicit donations from businesses for charitable organizations. These need to be scrutinized carefully in light of FCPA guidelines. In this article, we describe the elements of the FCPA, with a particular focus on doing business in India.

I. OVERVIEW OF FCPA ENFORCEMENT ACTIVITY IN INDIA

Passed in 1977, the FCPA made the United States the first country to prohibit transnational bribery. At the time, most countries criminalized bribery of their own domestic officials, but until the FCPA was passed, no country barred bribery of another country's officials. Since 1977, dozens of other countries have joined the effort to limit public corruption by passing transnational anti-bribery statutes and by increasing enforcement of domestic anti-bribery laws.

continued on [page 5](#)

ABOUT THIS ISSUE

THE ANTI-CORRUPTION MOVEMENT IN INDIA AND THE UNITED STATES: UNDERSTANDING THE LANDSCAPE AND AVOIDING PROBLEMS

India and the United States share a common goal of fighting corruption, whether in the public or private sectors. Both countries have experienced too many instances of people taking advantage of their public or private positions to enrich themselves. From the U.S. and Indian perspectives, there are innumerable unfortunate examples available to illustrate this point. In response to these concerns, anti-corruption efforts in the U.S. and India are at an all-time high, as is coordination among the U.S., India, and many other countries fighting corruption.

In the U.S., the Foreign Corrupt Practices Act (“FCPA”) entered the legal landscape in 1977, prohibiting bribery of non-U.S. government officials. In the past 5 years, enforcement by U.S. authorities has sharply increased against both companies and individuals. As a result, compliance with the FCPA is now a top agenda item among corporate management and boards of directors, as well as the lawyers that support them. Companies are working diligently to understand their corruption risks and are taking steps to minimize the potential for liability due to an employee’s misconduct.

In India, the Prevention of Corruption Act was first enacted in 1947, prohibiting bribery of Indian government officials. While there have been a number of significant corruption scandals over the years in India, in recent months the anti-corruption sentiment among the Indian media and popular culture has raised the anti-corruption movement in India to another level. Indian papers report almost daily on developments in a series of official corruption investigations, including one far-reaching investigation involving the issuance of telecommunications licenses, which may have played a part in toppling at least one major political figure.

Given the intense media coverage around such high-profile cases, it would be tempting to focus entirely on corruption at the highest levels and involving large payments. But, as important as these dramatic corruption cases are, the vast majority of instances of corruption in India occur at a much different level. Many of the fundamental tasks necessary to function in India – from checking into a hospital or enrolling a child at school – too often require some form of payment to the individual making the decision about access to that resource. In a country with such inherent optimism and drive, corruption at this level hinders further growth.

In this issue of India Law News, the Section on International Law’s India Committee addresses a number of aspects of the anti-corruption landscape, as it pertains to U.S. and Indian advocates and counselors. First, Rina Pal of The George Washington University Law School and I address the U.S. Foreign Corrupt Practices Act, the original transnational anti-bribery law. We review the fundamental elements of the statute, describe the current state of U.S. enforcement activities, and close with some

CONTENTS

OVERVIEW

- 2 *About This Issue*
- 4 *Co-Chairs’ Column*



COMMITTEE NEWS

- 39 *Submission Requests*
- 40 *India Committee*



SPECIAL FOCUS

- 1 *U.S. FCPA and Doing Business in India*
- 12 *Prevention of Corruption Act: Closing the Structural Gaps*
- 18 *Developing an Anti-Corruption Compliance Program for India*
- 24 *Enacting Whistleblower Protection Legislation in India*
- 27 *United Kingdom’s New Bribery Statute*
- 29 *Call for India to Join the OECD Convention*
- 31 *Resources on Anti-Corruption Laws and Policies in India*
- 41 *Anti-Corruption Webinar Information*



FEATURED ARTICLES

- 34 *Highlights of Indian Tax Proposals*



CASE NOTES

- 36 *Compilation of Significant Recent Case Laws*

observations about the types of corruption U.S. companies and lawyers may face when operating in India.

Following the U.S. perspective, Anand Dayal describes the Indian anti-corruption regime, specifically, the Prevention of Corruption Act. Mr. Dayal's article addresses the elements of the statute, the current enforcement environment, and recent actions taken against Indian and non-Indian companies to illustrate the heightened level of investigative activity and attention being paid to corruption in India.

Next, Aaron Schildhaus, past president of the International Law Section, explains the ways companies operating in India structure their compliance programs to mitigate corruption risks. Companies have many practical compliance tools at their disposal to assess the risks associated with potential corruption, and to lower those risks.

Priyanka Sharma reviews the historical background of whistleblower laws and regulations in India, and provides an important update on proposals being evaluated now. The U.K. perspective always plays an important role in Indian law, and Poorvi Chothani gives an overview on the U.K.'s new Bribery Act.

Anupama Jha, president of Transparency International, India, advocates for India's accession to the United Nations' *Convention against Corruption*, and the Organization on Economic Cooperation and Development's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. Acceding to the UNCAC and the OECD Convention would mark an important milestone in India's role in the global economy. Ms. Jha articulates several compelling arguments why India should pass a transnational anti-corruption statute, addressing the potential that Indian companies operating internationally could contribute to the supply side of the bribery equation.

In addition to the anti-corruption articles featured in this issue of ILN, Arundhati Satkalmi provides ILN readers with a useful list of resources regarding corruption in India, now on the India Committee's website. Also included in this issue is an important update on the tax proposals contained within the Finance Bill, 2011, submitted by Aseem Chawla, Aurica Bhattacharya and Priyanka Duggal. The issue concludes with case notes prepared by Sean Kulkarni and Rina Shah.

Anti-corruption efforts by lawyers working in the United States and India, as well as the clients we serve, will continue to make a real impact on fighting corruption. We hope that you will find the anti-corruption focus of this issue of India Law News to be informative and helpful.

*James Parkinson, Guest Editor
BuckleySandler LLP
Washington D.C.*

Welcome to the India Committee!

James Parkinson has been gracious enough to act as guest editor for this issue of the India Law News devoted to the anti-corruption movement in India and the United States. This is an exceedingly difficult topic, and we want to extend our heartfelt gratitude to James and the other contributing authors, Rina Pal, Anand Dayal, Aaron Schildhaus, Priyanka Sharma, Poorvi Chothani, and Anupama Jha, for their valuable contributions. We also appreciate the efforts of Arundhati Satkalmi, who has provided a useful list of anti-corruption resources now provided on the India Committee's website; Aseem Chawla, Aurica Bhattacharya, and Priyanka Duggal, who have provided an important update on recent Indian tax proposals; and, Sean Kulkarni and Rina Shah, who have contributed the case notes for this issue.

The topic of corruption is very timely as one hears more anecdotal comments about the increased difficulties with corruption these days. This topic will also be the feature of our next webinar, ably organized by Rita Roy, which will be held toward to end of April 2011.

During our March steering group call, we decided our summer issue should be devoted to defense and military procurement, and we already have a strong interest in guest editing and contributing articles. If you have any ideas for topics for future issues, please let us know. We welcome ideas from all committee members and encourage you to participate in our committee activities in whatever way you can. We have enjoyed exceptionally strong interest from our members, and we want to thank you for that!

We hope that you will be able to join us during the ABA International Section's Spring meeting in Washington DC from April 6 - April 8. We will be having a committee business meeting on Friday morning and amongst other topics, we will be discussing the possibility of a delegation of U.S. lawyers visiting India. Again, we hope to see you in Washington in April, and keep giving us your great ideas on how to make this committee's activities responsive to your interests and needs!

Sincerely yours,

[Vandana Shroff](#) & [Erik Wulff](#)



EDITORIAL BOARD (2010-2011)

Editor-in-Chief

[Hon. Sanjay T. Tailor](#)
Circuit Court of Cook County, Illinois

Co-Editors

[Poorvi Chothani](#)
LawQuest, Mumbai, India

[Kavita Mohan](#)
Washington D.C.

[B. C. Thiruvengadam](#)
Thiru & Thiru, Bangalore, India

Desktop Publishing

LawQuest, Mumbai, India; [Shraddha Naik](#)

India Law News is published quarterly by the India Committee of the American Bar Association's Section of International Law, 740 15th Street, N.W., Washington, DC 20005. No part of this publication may be reproduced, stored in a retrieval system (except a copy may be stored for your limited personal use), or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the prior written permission of the publisher. To request permission, contact the [Co-Chairs](#) of the India Committee.

India Law News endeavors to provide information concerning current, important developments pertaining to law in India, Committee news, and other information of professional interest to its readers. Articles reflect the views of the individuals who prepared them and do not necessarily represent the position of the American Bar Association, the Section of International Law, the India Committee, or the editors of *India Law News*. Unless stated otherwise, views and opinions are those of the authors and not of the organizations with which they are affiliated. This newsletter is intended to provide only general information and should not be relied upon in the absence of advice from competent local counsel.

SUBMISSION DEADLINES

Fall Issue	September 1st
Winter Issue	December 15th
Spring Issue	February 15th
Summer Issue	June 1st

Potential authors should review the [Author Guidelines](#) and send manuscripts via email to the [Editorial Board](#).

© 2011 American Bar Association
All rights reserved
Produced by India Committee



THE U.S. FOREIGN CORRUPT PRACTICES ACT AND DOING BUSINESS IN INDIA

continued from [page 1](#)

In recent years, the number of FCPA enforcement actions pursued by U.S. authorities has increased dramatically, along with a corresponding rise in monetary penalties and the number of individuals going to prison for FCPA violations. In 2010, the average corporate fine associated with an FCPA enforcement action exceeded \$100 million. In 2009, four individuals were tried and convicted on FCPA-related charges, and dozens more currently await trial. These trends reflect the increasing focus of U.S. enforcement agencies on corrupt business practices by companies operating outside the U.S.

Many of these FCPA enforcement actions have involved government officials in India. For example, the former director of sales for a U.S. industrial valve manufacturing company pleaded guilty to a criminal charge in the U.S. for, among other conduct, paying bribes to an employee of the Maharashtra State Electricity Board in 2008. Additional enforcement actions include:

- In 2010, a U.S. offshore drilling company settled an enforcement action with both the Department of Justice and the Securities and Exchange Commission, according to a Complaint filed by the SEC, relating in part to payments made through a third party to customs officials in India.
- In 2008, a U.S. rail brake manufacturing company settled an enforcement action with both the Justice Department and the SEC, according to a Complaint filed by the SEC, relating to payments made by its Indian subsidiary to officials of the Indian Railway Board.
- In 2007, a U.S. supplier of heating and cooling equipment settled an enforcement action,

according to the SEC Complaint, relating to improper payments to officials of the Indian Navy to obtain orders for service on equipment the company sold to the Indian Navy.

- In 2007, a U.S. information technology firm settled an enforcement action, according to an SEC Cease and Desist Order, relating to improper payments made by its management consulting subsidiary to officials at two unidentified state-owned enterprises.
- In 2007, a U.S. chemical manufacturer settled an enforcement action, according to the SEC Complaint, relating to payments made by an Indian subsidiary to officials in the registration function of the Indian government.
- In 2007, a U.S. manufacturing conglomerate settled enforcement actions with both the Justice Department and the SEC, according to a Complaint filed by the SEC, relating to payments made to an un-named Indian government customer for the sale of gears and parts.
- In 2001, a U.S. oilfield services company settled an enforcement action related, according to the SEC Complaint, relating in part to payments made to the Indian Director General of Shipping.

Beyond these settled enforcement actions, a number of companies have publicly announced investigations involving improper payments in India obtained during an acquisition. For instance, in February 2011, Kraft Foods disclosed that it is investigating potential FCPA violations relating to a facility in India. Given these trends, multinational companies cannot afford to ignore the FCPA in their India operations.

II. ANTI-BRIBERY PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT

The FCPA contains two components – the anti-bribery provisions and the accounting provisions – each with different legal elements, different jurisdictional reach, and different facets to the enforcement program. The anti-bribery provisions of the FCPA are codified at 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. The accounting provisions are codified at 15 U.S.C § 78(m)(b). In this section, we describe the anti-bribery provisions of the FCPA.

1. ELEMENTS OF A VIOLATION

The anti-bribery provisions prohibit any offer, payment, promise, or authorization to pay money or anything of value to any foreign official, political party, or candidates for public office, intended to influence any act or decision in order to assist in obtaining or retaining business. “Anything of value” may include cash, gifts, travel, meals, and entertainment.

In addition, the FCPA proscribes payments made to third parties while “knowing” that a portion or all of the payments will be used by the third party as bribes to foreign officials. As described in greater detail below, the FCPA defines “knowledge” broadly, intending to capture instances where a person deliberately avoids knowledge of a third party’s bribe payment.

2. JURISDICTION OF THE ANTI-BRIBERY PROVISIONS

The anti-bribery provisions of the FCPA are broken into three separate sections, each containing different jurisdictional elements. First, the statute applies to “[e]very issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title.” Officers, directors, employees, or agents of issuers may also be subject to jurisdiction under the FCPA by virtue of their relationship with the issuer.

This applies both to issuers based inside and outside the U.S., including the many Indian companies listing shares on U.S. exchanges through the vehicle of

American Depository Receipts. At the moment, over a dozen Indian companies list shares on U.S. exchanges, and are therefore subject to jurisdiction under the FCPA. Many of the major recent FCPA enforcement actions have involved non-U.S. companies, confirming that this basis for jurisdiction is not theoretical. Importantly for U.S.-based issuers, the FCPA applies to any conduct, anywhere in the world: there does not need to be a U.S. territorial nexus.

Second, the anti-bribery provisions of the FCPA apply to so-called “domestic concerns,” an unusual term that applies to two categories of persons. The first category covers private companies organized under the laws of the U.S., or that have their principal place of business in the U.S. Officers, directors, employees, or agents of private U.S. companies may also be subject to jurisdiction under the FCPA by virtue of their relationship with the domestic concern, even if they are not themselves U.S. citizens. Natural persons who are citizens, nationals, or residents of the U.S. are also considered “domestic concerns.” As with U.S.-based issuers, the FCPA applies to domestic concerns for any conduct, anywhere in the world: there does not need to be a U.S. territorial nexus, nor does there need to be any use of the means or instrumentalities of interstate commerce.

Finally, the anti-bribery provisions reach certain corporate and natural persons that do not qualify as either issuers or domestic concerns. A key for this type of jurisdiction is whether conduct occurred “while in the territory of the United States.” Indian companies may find themselves subject to an enforcement action if there was some act in furtherance of the violation that took place within the territory of the U.S.

3. DEFINITION OF “FOREIGN OFFICIAL” AND INDIAN GOVERNMENT INVOLVEMENT IN THE ECONOMY

The FCPA defines a “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, 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.” Under this definition, a “foreign official” would clearly include a very significant number of officials in India, such as military officers in charge of procurement contracts or ministry-level officials.

Furthermore, because the definition reaches to “employees... of a foreign government... instrumentality,” the FCPA may extend to people not intuitively identified as government officials. Government-owned or government-controlled business or enterprises are an important and widespread feature of the Indian economy, and many FCPA enforcement actions involve state-owned enterprises. For example, there have been FCPA enforcement actions involving doctors employed by state-owned hospitals; officials at government-controlled airports; employees at government-owned steel mills; employees of one country’s national oil company; and, employees of a state-owned telecommunications company.

This is an uncertain and therefore risky area of the FCPA. The notion of who constitutes a government official should be carefully considered by companies doing business in India, and companies must focus on such factors as the level of share ownership, board composition, and other facts of the control exercised by the government over the company.

4. APPLICATION OF THE FCPA’S “FACILITATION PAYMENTS” EXCEPTION IN INDIA

An important challenge of doing business in India involves responding to solicitations of small-scale bribery for such basic government-provided services as telephone or power, medical services, or customs clearance. These solicitations are often to obtain a service for which one is already entitled. Indeed, a recent BribeLine report by the non-governmental organization Trace International observed that “[s]eventy-seven percent of reported bribe demands in India were related to the avoidance of harm, including securing the timely delivery of a service to which the reporter was already entitled (such as clearing customs or having a telephone line installed) and receiving payment for services already rendered...”

Bribes in India often are low value and high in frequency. A 2007 report on corruption by Transparency International India related to the trucking industry observed that “[t]rucks plying on road pays anywhere between Rs 211 and Rs 266 as bribe money per day depending upon the route.” The study observed:

[T]ruckers pay bribes at every stage of their operations, which starts with getting registration and fitness certificates, and for issuance and renewal of interstate and national permits. The reason for paying bribe, while on road, include plying overloaded trucks, traffic violations, parking at no-parking places or entering no- entry zone, and in the payment of toll and other taxes like octroi, sales tax etc.

According to the BribeLine Report, “cases of bribery demands in India over a 16 month period reveals that more than half of the reported bribe demands were for \$100 or less, and approximately 84% of the reported demands were for \$5,000 or less.” The report states:

The greatest sources of bribe demands, in order of descending frequency, were from national level government officials (33%), the police (30%), state/provincial officials and employees (16%), and city officials (10%). A further analysis of the specific Indian ministries requesting bribes at the national level shows that 13% of those demands originated from the national office of Customs and 9% each were from the national offices of Taxation and Water. Bribe demands were also reported being made from individuals affiliated with the Justice System, Visas & Immigration, Mines & Minerals, Construction, Defense, Energy, Foreign Affairs, Forestry, Health

Services, Information/Communication and Land.

The FCPA contains an exception for “any facilitating or expediting payment ... the purpose of which is to expedite or to secure the performance of a routine governmental action.” A “routine governmental action” is defined in the statute as “only an action which is ordinarily and commonly performed by a foreign official,” and a number of examples are offered, including:

obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country[.]

There is no monetary limit set in the statute, and U.S. enforcement authorities have made very clear that this exception will be narrowly construed when making an evaluation whether to institute an enforcement action.

Despite the superficial appeal of this exception, particularly in the context of frequent demands for small bribe payments for seemingly routine services, the line between “routine governmental action” and “assisting in obtaining or retaining business” can in practice be very difficult to define with certainty, creating real risks for those companies availing themselves of the statutory exception. Moreover, as explained elsewhere in this issue of the India Law News, Indian law does not contain an analogous exception for facilitating payments. Thus, what might be permitted under U.S. law could be barred under Indian law. Furthermore, under the soon-to-be-implemented UK Bribery Act, there is no analogous exception. Of particular note, in November, 2009 the Organization for Economic Co-operation and Development (OECD) announced a new recommendation at the OECD’s celebration of “International Anti-Corruption Day” and the Tenth

Anniversary of the “Entry into Force of the OECD Anti-Bribery Convention.” In its recommendation, the OECD sought to do away with the FCPA’s exception for facilitating payments.

Finally, U.S. enforcement authorities have made very clear that, where a permissible “facilitating payment” has been made, it must be clearly and accurately documented. Thus, for issuers, the books and records of the company must indicate how much was spent on facilitating payments, the name and position of the recipient, and there must be appropriate internal compliance controls to ensure that the payments indeed qualify for the exception. These are very challenging policies to apply with consistent discipline.

5. AFFIRMATIVE DEFENSES

The FCPA contains affirmative defenses for two types of conduct. First, if “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s [] country,” the affirmative defence applies. Importantly, the local law must be “written,” so that local practice, customary, or unwritten enforcement policies do not qualify. In a recent FCPA prosecution against investor Frederic Bourke, a U.S. federal trial court sharply limited the availability of this defence, so this defence offers only very limited protection under the FCPA.

The second affirmative defense is much more commonly used. Where “the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate,” the affirmative defense may apply. Any such expense must, though, be “directly related” to either “the promotion, demonstration, or explanation of products or services; or... the execution or performance of a contract with a foreign government or agency thereof.”

For companies electing to incur expenses on behalf of government officials, it is very important to develop appropriate compliance controls to ensure that these expenses are properly approved and documented. A

number of FCPA enforcement action have focused on travel, lodging and entertainment provided by U.S. companies to foreign officials, confirming the U.S. enforcement policy that such expenses must be appropriately controlled.

III. ACCOUNTING PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT

The FCPA's accounting provisions – *applicable only to issuers* – compliment the anti-bribery provisions by requiring issuers to maintain accounting accuracy and transparency, and to strengthen internal controls. As noted above, an “issuer” under the FCPA may be based in the U.S. or elsewhere, and over a dozen Indian companies list shares on U.S. exchanges. The accounting provisions therefore apply to each of these India-based issuers, as do the anti-bribery provisions described above.

The accounting provisions contain two subsections, termed the “books and records” and “internal controls” provisions. The “books and records” component of the FCPA requires all issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”

The “internal controls” provisions of the FCPA require issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- transactions are executed in accordance with management's general or specific authorization;
- transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- access to assets is permitted only in accordance with management's general or specific authorization; and
- the recorded accountability for assets is compared with the existing assets at reasonable

intervals and appropriate action is taken with respect to any differences.

IV. PENALTIES FOR COMPANIES AND INDIVIDUALS

Corporations and individuals who violate the FCPA face significant sanctions. The average corporate monetary sanction in 2010 exceeded \$100 million, and many individuals are in prison right now as a result of FCPA convictions or guilty pleas. Dozens more individuals await trial or sentencing.

For corporations, criminal penalties may reach up to \$2 million for each violation of the anti-bribery provisions and criminal fines of up to \$25 million for issuers that violate the accounting provision. Corporations found liable for either criminal or civil FCPA violations may have to disgorge proceeds associated with improper payments; may be subject to suspension and debarment actions limiting business opportunities with the U.S. government; and, may be subject to oversight for a period of time by an independent compliance monitor, which reports to the DOJ.

For individuals, conviction of an anti-bribery violation may result in up to five years in prison and up to \$250,000 in fines per violation. For accounting violations, criminal penalties for individuals are up to \$5 million and 20 years imprisonment. The FCPA prohibits companies from paying any fines levied against individuals, either directly or indirectly. The government may also levy equitable remedies on individuals, such as an injunction that bars them from serving as a director or officer.

V. MANAGING THE RISKS OF LIABILITY FOR THE CONDUCT OF OTHERS: CONSULTANTS, AGENTS AND OTHER THIRD PARTY INTERMEDIARIES

Companies doing business in India frequently enlist third parties such as agents, distributors and consultants, to identify business opportunities, obtain market intelligence, and interact with government agencies for such routine matters as tax, customs and lobbying.

The FCPA risks associated with using these kinds of intermediaries are acute, as the FCPA prohibits doing indirectly that which would be prohibited if done directly. The statute addresses this in two ways. First, the anti-bribery provision prohibits payments to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official...” This means that anyone subject to the FCPA is barred from using a third party intermediary, *knowing* that the third party will make an improper payment.

Second, the FCPA contains a definition of “knowledge” intended to address circumstances where a person might shield themselves from knowledge by quipping “I don’t want to know.” The FCPA provides, in part, that “[w]hen knowledge of a particular circumstance is required knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” Thus, payments to third parties made while “knowing” that all or part of the payment will be received either directly or indirectly by a foreign official, render such payments illegal. When faced with the decision whether to obtain information confirming or refuting that a payment will be made, one takes a great risk in remaining “willfully blind” or “deliberately ignorant” to the information simply in order to circumvent FCPA liability.

Today, the majority of FCPA enforcement cases brought by the DOJ and the SEC involve the use of third party intermediaries. To manage the risks that the conduct of another party will create FCPA liability, companies have become much more vigilant about the intermediaries they hire, and managing those intermediaries to eliminate corruption risks. There are many helpful lists of “red flag” questions to ask before entering into an intermediary relationship, including:

- Whether the agent is related to or has a close relationship with a public official.
- Requests for false invoices or invoices with inadequate support for charges.

- Fees exceeding normal market rates.
- Whether the third party will sign an FCPA compliance certification.
- Unusual methods of payment, such as outside of India or to another third party.
- Lack of credentials or experience.

VI. MERGERS, ACQUISITIONS AND JOINT VENTURES

Mergers, acquisitions and joint ventures serve as important instruments for companies entering the Indian market, and these commercial activities are likely to continue or increase in frequency. Under the FCPA, however, a merger or acquisition may not extinguish liability for past unlawful conduct by the acquired company, according to a DOJ Opinion Procedure Release, and joint ventures present significant compliance risks.

FCPA prosecutions stemming from mergers, acquisitions, and joint ventures are increasingly common, but there are ways to mitigate risks presented by M&A. Companies contemplating mergers and acquisitions in India and elsewhere will be well-served to conduct FCPA-specific due diligence to evaluate and address any potential FCPA problems before the deal closes. Basic strategies to finalize deals in order to minimize FCPA liability are essential, including a comprehensive, risk-based diligence process; reviewing relevant financial and accounting records and key employee emails; interviewing employees; assessing the corruption level in the Indian target’s industry; identifying the target’s business involving government officials and agencies; reviewing government contracts, licenses, registrations and other permissions to do business; reviewing the company’s use of third party intermediaries, including agents, representatives, distributors, consultants, lobbyists and others; reviewing relevant third party agreements for appropriate anti-corruption language; evaluating the target’s anti-corruption policies and procedures; requesting information concerning any prior anti-corruption problems and investigations; including FCPA compliance and resolution of FCPA issues as conditions to closing; where appropriate, voluntarily

disclosing to the Justice Department and SEC any past illicit activities before closing; cooperating with any U.S. government investigation; and remediating illicit activities by terminating relationships with employees and third party intermediaries, entering into new contracts, and conducting effective compliance training.

VII. COMPLIANCE POLICIES AND PROCEDURES

Compliance with U.S. and Indian anti-corruption laws poses crucial challenges for companies doing business in India, but companies can seek to minimize anti-corruption liability by creating, implementing, and enforcing a robust compliance program. A structured compliance program acts both to educate employees about prohibited conduct and to deter misconduct at an early stage. U.S. enforcement authorities have made clear that companies with effective corporate compliance policies will receive credit for those programs during settlement negotiations or charging decisions, and that those without effective policies may receive harsher punishments. The SEC and the Justice Department have each announced that the quality of a company's compliance policies will be considered in determining penalties for businesses violating U.S. law. In several cases, the penalties imposed by U.S. enforcement authorities reflected, in part, their view that the company's compliance program was inadequate.

VIII. CONCLUSIONS

Corruption presents serious legal and commercial risks in many countries, including India. These corruption risks present daily challenges to companies and executives working in India, and to counsel advising clients on how to operate successfully in India. Although India's anti-corruption laws may have been under-enforced in the past, the Indian government has recently taken a strong public stand against corruption. This has been more than rhetoric, as the number of high-profile corruption investigations has increased, and there are vigorous calls for additional investigations. Companies operating in India cannot escape scrutiny given the breadth and reach of the U.S. FCPA, and the stringency of the Indian law.

Rina Pal is the Director of India Studies at The George Washington Law School. She may be reached at rpal@law.gwu.edu.

James Parkinson is a partner at BuckleySandler LLP, in the Washington, D.C. and Los Angeles offices. He may be reached at jparkinson@bucklesandler.com.



THE PREVENTION OF CORRUPTION ACT: CLOSING THE STRUCTURAL GAPS THAT HINDER ITS ENFORCEMENT

Anand S. Dayal

The centerpiece domestic legislation for curbing corruption in India is the Prevention of Corruption Act, 1988 (“PC Act”). It has been hailed as being among the most comprehensive anti-corruption statutes in the world, and is in many respects significantly broader in scope than the Foreign Corrupt Practices Act of the United States. However, as India’s lead anti-corruption enforcement agency, the Central Vigilance Commission, noted in its proposed National Anti Corruption Strategy: “gaps remain between the statutes, policies and their actual implementation, which has led to limited success...”

This article describes key features of the PC Act and allied anti-corruption legislation, and explores gaps and inadequacies in the legal framework that hinder effective anti-corruption enforcement in India. We begin with an overview of the legal regime addressing corruption in India.

ANTI-CORRUPTION STATUTES AND ENFORCEMENT AGENCIES

The anti-corruption offenses and related enforcement regime in India is comprised of the following enactments:

- Prevention of Corruption Act, 1988 applicable throughout India;
- *Lokayukta* Acts passed by various states and applicable within such states;
- Central Vigilance Commission Act, 2003 establishing the Central Vigilance Commission (“CVC”) to inquire into offenses alleged under the PC Act;

- Delhi Special Police Establishment Act, 1946 (“DSPE Act”) governing the Investigation and Anti-Corruption Division of the Central Bureau of Investigation.

In addition, the “Whistleblower Resolution” of the Government of India, which protects against retaliation any person who brings to the attention of the CVC allegations of corruption or misuse of office and the “Integrity Pacts,” which are required in connection with public procurement, have an anti-corruption focus. The Integrity Pact is an agreement between the procuring government agency and each bidder that neither side will pay, offer, demand or accept bribes, or collude with competitors to obtain the contract, that bidders will disclose all commissions paid in connection with the contract, and that sanctions will apply if violations occur. The CVC has urged all government organizations and public sector undertakings to adopt the Integrity Pact. The vast majority of central government undertakings have done so.

PREVENTION OF CORRUPTION ACT, 1988

The PC Act prohibits the (a) the acceptance of a bribe or any other gratification by a “public servant” and (b) possession by a public servant of assets “disproportion to his known sources of income.” The term “public servant” is extraordinarily broad in scope and brings within its sweep any person who holds an office by virtue of which such person is required to perform any public duty. It is significantly broader in scope than the concept of a “foreign official” in the US Foreign Corrupt Practices Act; “public duty” is expansively defined and there is no requirement that

the person performing the public duty be acting on behalf of the government.

The anti-bribery provisions are contained in Section 7 and 11 of the PC Act. They prohibit a public servant from accepting gratification other than legal remuneration in respect of an official act (Section 7); and accepting any valuable thing without consideration from persons concerned in proceedings or business transacted by such public servant (Section 11). There is no *de minimis* or other exception (such as for facilitating payments) in the PC Act. Regardless of amount or circumstances, all bribery is prohibited.

In addition to the anti-bribery provisions, Section 13 of the PC Act defines the offence of “criminal misconduct”, which includes, *inter alia*, the abuse of office by a public servant and the possession by a public servant of assets disproportionate to his known sources of income. Prosecutions of criminal misconduct under Section 13 of the PC Act are commonly referred to as “disproportionate assets” cases.

The PC Act does not expressly punish an offer or payment of a bribe, except to a limited extent. Section 12 of the PC Act deals with abetment, and could be used to punish the bribe giver. In addition, Sections 8 and 9 of the PC Act prohibit the acceptance of any gratification by corrupt or illegal means to influence a public servant.

The PC Act, which has an entirely domestic focus, does not prohibit the bribery of foreign public officials, although the PC Act does extend to and applies “to all citizens of India outside India.” Its extra-territoriality is therefore limited to non-resident citizens of India who engage in conduct prohibited under the PC Act.

With respect to the trial of accused persons, Section 3 of the PC Act authorizes the government to appoint special judges as may be required to try offenses punishable under the PC Act. It is contemplated that special judges would specialize in and be dedicated to

trying anti-corruption cases, with the object of disposing of such cases within one year.

LOKAYUKTA ACTS AND RULES

The *Lokayukta* Acts are anti-corruption laws enacted by individual states. These laws supplement the PC Act, and typically provide for the appointment and functions of a *lokayukta* (ombudsman) for the investigation of administrative actions taken by or on behalf of the state governments in certain cases. The *lokayukta* is appointed by the governor of the state to investigate allegations that a public servant:

- (i) has abused his position to obtain any gain or favour to himself or to any other person, or to cause undue harm or hardship to any other person;
- (ii) was actuated in the discharge of his functions by improper or corrupt motive and thereby caused loss to the state or any member or section of the public; or,
- (iii) is guilty of corruption, or lack of integrity in his capacity as such public servant.

See section 2(b), Andhra Pradesh *Lokayukta* And *Upa-Lokayukta* Act, 1983.

CENTRAL VIGILANCE COMMISSION

The Central Vigilance Commission was established for the purpose of inquiring into and investigating offenses alleged to have been committed under the PC Act by certain categories of public servants of the central government, corporations established by or under any central act, government companies, and societies and local authorities owned or controlled by the central government.

The CVC was established in 1964 by an administrative order of the government pursuant to the recommendation of the Santhanam Committee on the prevention of corruption. Being an administrative agency of the government, the CVC as initially constituted was largely ineffective in curbing

corruption, particularly at higher levels of government. The CVC was upgraded and accorded statutory status in accordance with directions given by the Supreme Court of India in the landmark case of *Vineet Narain v. Union of India*, S. Ct. (1997), initially by an ordinance (executive order) in 1998, and then by enactment of the Central Vigilance Commission Act, 2003.

CENTRAL BUREAU OF INVESTIGATION

The Central Bureau of Investigation (“CBI”) is the lead criminal investigative and prosecutorial agency of the Government of India. It was established in 1963. The CBI is the successor organization to the Delhi Special Police Establishment (“DSPE”), but with an enlarged charter of functions. Bribery and similar offenses, previously contained in the Indian Penal Code, were earlier investigated and prosecuted by the DSPE. Later, the DSPE was made one of the six divisions of the CBI, namely the Investigation and Anti-Corruption Division (“CBI/DSPE”).

The CVC has a quasi gate-keeper and supervisory role vis-à-vis the investigation and prosecution by the CBI/DSPE of offenses alleged under the PC Act. Superintendence of the CBI/DSPE vests with the CVC insofar as it relates to the investigation of offenses alleged to have been committed under the PC Act. The CVC can give directions to the CBI/DSPE in discharging this responsibility. See section 4 of the DSPE Act and section 8 of the CVC Act, in relation to investigations under the PC Act.

The CVC, however, has very limited influence over how the investigation and prosecution is conducted by the CBI, and whether charges are ultimately brought against the accused. Although the CVC may give directions to the CBI/DSPE for purposes of discharging the responsibilities provided in the DSPE Act, the CVC cannot require the CBI/DSPE to investigate or dispose of any case in any particular manner. The CVC may only review the progress of an investigation conducted by the CBI/DSPE into offenses alleged to have been committed under the PC Act, and it may review application pending with the competent authorities for

sanction of prosecution under the said Act. See Central Bureau of Investigation, *CBI (Crime) Manual*, Chapter 2 (2005). The requirement for a sanction for prosecution is explained later in this article.

GAPS IN LEGAL FRAMEWORK AND ENFORCEMENT

The anti-corruption legal regime in India suffers from structural gaps and flaws that hinder its enforcement. Some of the more significant ones are described below.

LIMITED CVC JURISDICTION

Although CVC is the main anti-corruption agency, its jurisdiction is narrowly limited in two ways. First, the CVC has jurisdiction only over employees of the central government or entities established, owned, or controlled by it. It has no jurisdiction over employees of the state government or its entities or, perhaps more importantly, those holding elective office or contesting elections or political parties and their office bearers, in each case, whether at the central or state level. Second, even within its limited jurisdiction, the CVC can investigate only those persons holding a rank below a Joint Secretary in the Government of India. The DSPE Act, as amended, prohibits the CBI/DSPE from conducting any inquiry or investigation into any offense alleged under the PC Act except with the prior approval of the Central Government, where such allegation relates to a person of the rank of Joint Secretary and above. This effectively excludes from investigation all high level bureaucrats in government ministries and departments and the top management of public sector enterprises. In effect, the CVC has jurisdiction only of central government employees below the Joint Secretary level; it cannot act upon allegations of political corruption or corruption at the state level.

At the state level, there is no uniformity in the organization structures of the state anti-corruption agencies. Although some states, particularly Karnataka and Orissa (where the state agencies have been given

absolute (independent) powers of inquiry) have fared better, most state agencies lack independence and are susceptible to executive and political influence. In general most state agencies are plagued with operational difficulties, such as shortage of staff, excessive turn-over, lack of proper incentives and inadequate budgets. See Central Vigilance Commission, *National Anti-Corruption Strategy* (Final draft circulated for comment September 2010) (“Draft NACS”).

REQUIREMENT OF PRIOR SANCTION

In order to prosecute a public servant for alleged offenses under the PC Act, it is necessary to obtain the prior sanction (approval) of the central government or state government in the case of central and state government employees (as applicable) and, in the case of any other person, the authority competent to remove the accused from office. Section 19(1), PC Act. In addition, as mentioned earlier, the CBI/DSPE can investigate a person at or above the rank of Joint Secretary only with the prior approval of the central government.

The prior sanction is meant as a safeguard against frivolous and vexatious prosecutions against innocent persons. “The object underlying Section 19 [of the PC Act] is to ensure that a public servant does not suffer harassment on false, frivolous, concocted or unsubstantiated allegations.” *State of Himachal Pradesh v. Nishant Sareen, S. Ct. (2010)*. Similarly, in an earlier decision, the Supreme Court of India observed that “[s]anction is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent, but not a shield for the guilty.”

Furthermore, the courts have not intervened in reviewing whether a sanction should or should not have been granted, except if it is manifest that the sanctioning authority has not applied its mind. It is “well settled that the Superior Courts cannot direct the sanctioning authority either to grant sanction or not to do so,” but can only remand for reconsideration. *State of Punjab vs. Bhatti, S.Ct. (2009)*.

The requirement of obtaining prior sanction has been a serious impediment to prosecute offences under the PC Act. The CVC has observed that past experience has shown that these provisions have often resulted in long delays due to: (a) inordinate delays in according sanction; (b) the provision being used to shield public servants though a wrong has been committed (usually to protect colleagues since the sanctioning authority is normally a senior officer of the accused officer); and (c) the sanction accorded being challenged at the trial stage and cases being discharged on the basis that the sanctioning authority had not applied its mind while according sanction.

NO WHISTLEBLOWER STATUTE

Throughout the world, anti-fraud and corruption efforts have relied heavily on insiders to provide information on wrong doing. To encourage such disclosure, the protection of insiders who come forward is essential. Accordingly, both the United States and England have enacted specific legislation providing comprehensive protection and other incentives to such persons.

In India, however, there is no statutory protection given to persons who come forward with information. Under the PC Act, whistleblowers and witnesses have only very limited protection. Sections 5 and 24 of the PC Act provide limited protection to whistleblowers, but only against prosecution under the PC Act. They do not protect the whistleblowers against other consequences, such as retaliation by the wrongdoer or their associates.

The need for special legislation protecting whistleblowers has been recognized by the Law Commission of India, which in its 179th Report in 2001 recommended the enactment of a bill titled “The Public Interest Disclosure (Protection of Informers) Bill.” However no such legislation has been passed, although a bill was introduced in the *Lok Sabha* (Lower House of Parliament) in September 2010. At the present time, limited protection is available by way of an administrative notification. See Central Vigilance

Commission, *Government of India Resolution on Public Interest Disclosure and Protection of Informer*, Office Order No. 33/5/2004 dated 17 May 2004. However, on many occasions, this protection is rejected on technical grounds, as pointed out in the Draft NACS. Also, the CVC order cited above applies only to person within the CVC's jurisdiction, and is therefore limited to central government actors and does not extend to state governments or politicians.

ASSET RECOVERY LARGELY IGNORED

Anti-corruption enforcement in India has focused primarily on the crime, the criminal, and the conviction, thus relegating asset recovery to a secondary or minor role. Asset recovery is the process used to recover property acquired through corrupt means by the state, victims of corruption, or duly designated third parties. It comprises a mechanism for criminal forfeiture as well as non-conviction based forfeiture and civil proceedings. Non-conviction based forfeiture, referred to as "civil forfeiture" or "*in rem* forfeiture" in some jurisdictions, is a legal proceeding against the asset itself and not against a person.

The PC Act provides for confiscation and forfeiture of the assets of a public servant or the proceeds of corruption only after the public servant is convicted of the relevant offense under the PC Act. It lacks provisions allowing for non-conviction based forfeiture and for civil forfeiture, the need for which was articulated by the Supreme Court in *Delhi Development Authority vs. Skipper Construction Co.*, AIR 1996 SC 2005:

[A] law providing for forfeiture of properties acquired by holders of public office (including the office/posts in the public sector corporations) by indulging in corrupt and illegal acts and deals, is a crying necessity in the present state of our society. The law must extend not only to – as does SAFEMA [Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976] – properties acquired in the name of the holder of such office but also to properties held in the names of his spouse, children or other relatives and associates. Once it is

proved that the holder of such office has indulged in corrupt acts, all such properties should be attached forthwith. The law should place the burden of proving that the attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals upon the holder of that property as does SAFEMA whose validity has already been upheld by this Court in the aforesaid decision of the larger Constitution Bench. Such a law has become an absolute necessity, if the canker of corruption is not to prove the death-knell of this nation. According to several perceptive observers, indeed, it has already reached near-fatal dimensions. It is for the Parliament to act in this matter, if they really mean business.

Taking a cue from the Supreme Court's impassioned plea, the Law Commission in its 166th Report (February 4, 1999) recommended passage of the Corrupt Public Servants (Forfeiture of Property) Bill. No meaningful steps have been taken towards passage of this legislation, primarily due to a lack of political leadership and the influence of vested interests.

DELAYS IN PROSECUTION

The time taken for prosecution of corruption cases is a major bane of the Indian system, according to the CVC. The CVC has noted "that past experience has shown that in many cases, there are inordinate delays in prosecution of public servants against whom complaints have been made." Delays in the preliminary stages of an investigation can lead to difficulties in gathering evidence, which ultimately hamper efforts to obtain a conviction. Also delays can increase the possibility of reprisals, as pointed out by the Law Commission in its 166th Report.

Besides delays in conducting the investigation, the trial and disposal of corruption cases often takes years, during which time the accused and key witnesses often have retired from service and some have died. Despite provision in the PC Act for special judges, there is a substantial backlog of cases due to the non-establishment of special courts in some states and

special judges being entrusted with general cases other than of corruption.

NO SUPPLY SIDE CULPABILITY

As previously noted, the PC Act does not expressly seek to punish the paying of a bribe, except to a limited extent. Traditionally, the payer of a bribe has been viewed in India as a victim, and therefore not culpable or criminally liable. This is of course plausible where a bribe is paid to meet an extortionist demand by a public official to provide something to which the payer is otherwise entitled. This is less plausible in the case of "grand corruption," where the payer seeks to influence government decisions in its favor.

Given the lack of meaningful supplier-side culpability, purely domestic actors face little exposure to criminal liability if they pay bribes or use undue influence. By contrast, companies that operate on a global level and are subject to transnational anti-corruption enforcement regimes face severe sanctions for such conduct.

STRENGTHENING THE RULE OF LAW

Closing the gaps in the anti-corruption legal regime and stepping up enforcement are the obvious first steps in any roadmap for combating corruption. The functioning of anti-corruption laws is however dependent upon a larger more expansive framework of laws and the institutions that interpret and apply them. It presupposes adherence to the rule of law. Time and again, this supposition has not been borne out by experience, and even the best laid plans have been thwarted and subverted often from within the governing establishment itself. Ultimately, if meaningful progress is to be made for curbing completion, particularly in high places, it cannot be achieved without strengthening the rule of law.

Anand S. Dayal is a partner with Koura & Company, Advocates and Barrister, based in New Delhi, India. Anand is admitted to the bar both in India and the US (NY and DC). He is chairman of the Anti-Corruption Committee of the American Chamber of Commerce in India. Anand can be contacted at dayala@vsnl.com or adayal@kouraco.com.



DEVELOPING AN ANTI-CORRUPTION COMPLIANCE PROGRAM SUITABLE FOR INDIA AND THE FCPA

Aaron Schildhaus

India's companies are increasingly global. With their international growth, they are coming into frequent contact with the anti-corruption legislation of other countries, and particularly the Foreign Corrupt Practices Act ("FCPA") of the United States. Because U.S. companies must comply with the FCPA in their dealings outside the U.S., they are insisting that their Indian subsidiaries, affiliates, agents and partners provide them with assurances that they do not and will not run afoul of the FCPA provisions in their own operations.

Many countries have anti-corruption legislation on their books, and new legislation is being implemented in the U.K. and in other Indian trading partner countries. However, the FCPA has emerged as the "gold standard" for anti-corruption laws, not only in terms of enforcement, but also in the amount of "gold" it is generating for the U.S. Treasury in terms of fines.

The accelerating number of investigations, prosecutions, settlements and convictions in the U.S. has created a sense of urgency in corporate boardrooms and officers' suites in the U.S., and in countries where business relationships with U.S. entities are important. Moreover, with the entry of the U.K. anti-bribery law, a bandwagon effect may cause many other countries to reevaluate the costs to them of permissive attitudes towards corruption. These costs are measured in two ways: (1) lost opportunities for their companies that may not pass the anti-corruption litmus tests and that contribute to their countries' reputations as "at risk" for investment; and (2) lost revenues from guilty corporate entities and their officers, who could be a source for large fines.

It is helpful to review the background of the FCPA, which was enacted into law in the United States in 1977 and criminalizes "corrupt payments" by U.S. persons to foreign government officials. Aimed at modifying

the behavior of U.S. businesses outside the United States, the FCPA recognized that corruption is a major impediment to economic growth, particularly in developing countries, where bribery and "kickbacks" often are sewn into the fabric of everyday life. In those countries, which critically need economic development, corruption diverts scarce financial resources into the pockets of corrupt government officials and their cronies. And eventually, investment flows into those countries are seriously reduced – foreign investors find more secure environments in which to invest.

Although the FCPA was not welcomed in its early years by many U.S. businesses trying to compete in international markets, the criminalization of such behavior and the rapidly increasing enforcement thereof, has forced corporations and their management to take the matter very seriously – to the point where today any company that is not taking active steps to comply with this legislation is at risk. In the years since passage of the FCPA, the U.S. Government has worked successfully to assist in the drafting and ratification of international anti-corruption conventions by the Organization of American States, the Organization for Economic Cooperation and Development, the Council of Europe, and ultimately the United Nations.

Since 1977, a number of criminal actions have been taken by the Securities and Exchange Commission ("SEC") and by the U.S. Justice Department ("Justice") against companies and individuals violating various provisions of the Act. In the past decade particularly, investigations and prosecutions have increased significantly. Various factors underlie this acceleration, including the growing use of electronic communications and the availability, easy transfer, and duplication of data across the internet; thus providing more opportunities to secure evidence. Scandals such

as Enron and Worldcom, and the passage of Sarbanes-Oxley forced additional transparency and accountability on the acts of corporate officials and helped change how corporations fulfilled their ethical responsibilities. More internal due diligence became the rule, and more cooperation, not only among U.S. Government agencies, but with foreign prosecutors, as well, were additional factors leading to what is now a virtual explosion in the number of FCPA investigations taking place. Another effect of this is that many regulators in many countries are beginning to take note of the successes of U.S. prosecutors and the ramifications thereof.

In 2005, there were five FCPA assessments of fines and penalties, totalling approximately \$15 million; in 2009, 52 companies were found liable and were penalized well over \$1 billion. The latest case, *U.S. v. Panalpina, Inc.*, No. 4:10-cr-765 (S. D. Tex. 2010), prosecuted seven corporate entities, only one of which was a U.S. entity, and assessed \$257 million in fines. Investigation into Panalpina started in 2006. Investigations are generally lengthy, serious and comprehensive, and more activity in this area can be expected.

INDIAN LAW FIRMS HAVE AN INCREASING INTEREST AND ACTIVE INVOLVEMENT IN FCPA MATTERS IN A NUMBER OF WAYS:

- In some cases, Indian law firms are being asked to conduct, or assist in the conduct of due diligence investigations initiated by U.S. corporations and their lawyers relative to the existing (and past) practices of Indian subsidiaries and affiliates that might violate FCPA provisions.
- Indian law firms are being asked by their Indian clients to assist them with their responses to existing and proposed contractual provisions of agreements between U.S. and Indian entities that require compliance with the FCPA, and/or to advise them relative to due diligence investigations, the outcomes of which will affect whether a deal will go through, and whether the terms of the transaction may be drastically affected.

- Indian law firms are being asked by U.S. law firms and corporations to assist them with compliance with Indian anti-corruption legislation.

A major concern on the part of Indian law firms is how to counsel their clients in light of the exponential increase in U.S. prosecutions and the fact that today, in the board-rooms of most U.S. companies, there is a real fear that any FCPA transgression will result in substantial and possibly crippling fines for their companies coupled with fines and imprisonment for the officers and employees who actively or tacitly may have participated in making prohibited payments. Another factor to consider is the extent to which adverse publicity in the U.S., or inquiries by U.S. regulators to their Indian counterparts, may put Indian companies at risk.

The reality today is that U.S. businesses overwhelmingly are unlikely to go forward on any deal with an Indian partner that cannot or will not certify that it is now or will be FCPA compliant. The situation is worse if the U.S. party uncovers hard evidence that corrupt acts have occurred and which might represent a pattern of corruption, actionable under the statute. In addition to the FCPA, other federal laws relating to conspiracy, record-keeping, money-laundering, etc., may be applicable, and all are used by federal prosecutors to pursue violators of the FCPA. Clearly, prosecutors have a broad and deep set of tools, all of which they are using. They are using those tools, avidly pursuing all leads, and benefitting from their close relationships with prosecutors in other countries with whom they share a lot of information and close cooperation. FCPA investigations may be initiated by the U.S. Government whenever it feels there is likelihood of corruption. They obtain their information through a variety of means; whistleblowers, competitors, news reports, or otherwise; however, an increasing number of investigations grow out of information directly obtained from violators who self-report in the hope of minimizing their penalties and damages.

Fear in the corporate boardroom is leading many U.S. companies to cooperate fully with investigations

by the SEC and Justice in order to earn “credits” against the consequences if corruption is uncovered. One of the concerns expressed in India is the extent to which Indian law firms need to be concerned about the erosion or waiver of privileged communications between themselves and their clients. A U.S. party’s fear of punishment may lead it to decide to provide everything – all documentation, data, results of internal investigations and communications, etc. – to U.S. prosecutors in order to minimize their own criminal consequences, including reduction of fines, deferred prosecutions, and other attempts at plea-bargaining. U.S. prosecutors are avidly and successfully pursuing violators, but have shown a willingness to show some leniency where the U.S. violator self-reports and particularly where it shows complete cooperation, not hiding anything.

Should a potential deal come under suspicion, or should a due diligence investigation disclose suspicious circumstances, the U.S. party is required to resolve it if it wishes to avoid liability for criminal violations.

It is not easy for U.S. enforcement officials to travel to India to launch investigations or to pursue evidence collection outside the U.S.; nonetheless, it is possible, and it is done. Therefore, in assisting a U.S. law firm with the gathering of evidence and testimony locally in India, the Indian law firm needs to be very clear with, and on behalf of, whom it is gathering evidence. Its client will almost always be the U.S. entity initiating the request for assistance, and not any of its officers or employees. To that extent, it is essential that Indian counsel advise its interviewees that it is acting on behalf of the corporate client and that disclosures will be shared with the lawyers of the corporation. It might be advisable for the individual being interviewed to seek his/her own independent counsel.

Suspensions of FCPA violations need to be followed through by counsel. In looking at proposed transactions, counsel must deepen its due diligence and get all the facts possible wherever there are any “red flags.” Red flags include any of the following:

- request for payment in cash;
- request for payments in a third country, or to a third party;
- history of having requested payment be made to a third, unrelated party;
- direct/indirect family relationship with a government official;
- history of asking for false invoices or other false documentation;
- refusal of person in question to agree in writing to comply with FCPA or other laws;
- prospective activities in country with reputation for corruption and bribery;
- previous convictions or charges against a payee for violation of local or foreign laws or regulations relating to the award of government contracts;
- inadequately explained breakup of association with one or more foreign companies;
- relationship problems with other foreign companies;
- heavy reliance on political/government contacts rather than focusing on the time and effort required to win the contract;
- expressed preference to keeping representation secret;
- other suspicious conduct on the part of the representative that would raise questions in the eyes of a prudent person.

Whenever there is a red flag, a deep and detailed investigation and complete resolution of all concerns/questions is required; otherwise, the company should refuse to enter into any agreement with the representative. Detailed investigation may include retention of an outside investigative firm or counsel, interviewing the principals of the foreign representative, and other independent research and discussions in-country.

CONTRACTUAL PROVISIONS FOR FCPA COMPLIANCE

Viewed from the perspective of compliant U.S. companies, all agreements with international distributors or representatives must highlight the importance of FCPA compliance. Every potential representative should be advised that there can be no agreement, and that no payments or advances can be made or given for any services rendered, until an agreement containing sufficient contractual provisions is completed and executed by both sides. Ideally, the client company should discuss the FCPA (and other laws and company's policies) as early as possible in the evaluation and negotiation process. In any event, no payment should be made to the representative until preliminary due diligence has been satisfactory, no red flags exist, and the representative has warranted its compliance and commitment to continue compliance.

Each representative/distributor/joint venture party must agree to abide by the provisions of the FCPA. Compliance provisions should be explicitly set forth in the Agency/Representative/Joint Venture/other relevant agreement. Because company agents have implicit authority to bind the company legally, the contractual provisions for agents and representatives must be more comprehensive and stringent than in agreements with distributors.

The following requirements are recommended:

- Agreement that company will be given reasonable access to books and records;
- Periodic audit rights;
- Provision that any information relating to a suspected violation may be disclosed to government agencies, e.g., the Justice, or to other entities that may have a legitimate need to know;
- Rights to immediate termination of the agreement upon a good faith belief that the agent/representative/partner has violated the FCPA or caused client risk of an FCPA violation;

- Agent/representative/partner warranty that it/they have obtained an opinion letter from local counsel acknowledging that the terms of the agreement do not violate any local laws;
- Payment of travel, entertainment, and other expenses, including charitable contributions or payments to third persons of any type require advance written approval by management or in-house counsel;
- Certification by agents/distributors/partners that they are not official representatives of the government of the country in which the transaction is to take place, and that no payments to them will be transferred to a foreign official, political party or official thereof, or a political candidate;
- Obligation to notify as soon as possible if there is any material change in their ownership structure;
- Certification that they understand and agree to comply with the terms of the FCPA and other applicable laws as specified in client's written compliance procedures;
- Obligation to report immediately any information received that may indicate that an FCPA violation or an improper payment has been made;
- Requirement to certify on an annual basis that party has no knowledge of any FCPA violations;
- No assignment or subcontracting of rights or obligations to third parties; and
- Right to terminate immediately upon any breach of such provisions.

CORPORATE POLICY

The first step in the design is the company's adoption of a publically stated, and very clear corporate policy that it will conduct its business honestly and without making any corrupt payments. The company should cite the existing law in India, and also make reference to laws in other countries, stating

that it will adopt the highest standard of conduct prescribed by the laws in the countries of actual or prospective operation. Where the company has relationships with foreign agents, representatives, consultants and other business partners, the policy should state how such relationships will be structured and implemented. The policy must be enunciated and publically supported by its management, starting with the CEO on down.

OFFICERS, DIRECTORS, MANAGERS

The corporate policy must be effectively communicated and updated on a regular basis to all employees and business partners. The CEO must make it clear to all that s/he endorses the policy completely and that any discovered violation will result in the dismissal of employees or the termination of any business relationships where the related party has been found to have engaged in corruption.

CERTIFICATION AND EDUCATION

Business partners and existing and prospective employees at all levels must be willing to certify that they will not engage in any corrupt conduct and that they accept the consequences if they transgress this commitment. One of the key elements to an effective compliance program is education. To that end, updated materials must be generated and presented to employees in a live and effective manner on a regular basis. The educational process must require all persons to attend and to provide adequate proof that they understand that which is being taught to them.

The manner of presentation should include relevant documents, including a copy of the FCPA and recent decisions/opinions that may have particular resonance for the industry or the structure of the corporate client. Included should be lectures and workshops, documentation, videos, on-line materials and live, interactive discussions (Q&A's). Potential scenarios should be explored and discussed and questions and active discussion should be encouraged. The provisions of the applicable laws and fact patterns of recent cases should be included. "Red flags" should be described, and all should be encouraged to consult a corporate checklist of questions and concerns that

apply to their own company and its operations. In the event of any questions, employees should be taught to discuss with their supervisors and/or with specially designated anti-corruption management personnel, as well as with specialized counsel, where appropriate. The in-house procedures for investigations and for dealing with possible violations of policy should be thoroughly discussed, and the types of detailed reports that will be required must also be reviewed.

DUE DILIGENCE FOR PAST ACTIVITIES

Difficult issues arise in the implementation of compliance programs where there is a history of corrupt payments and the employees and/or managers or others are asked to disclose them. In order to protect their jobs or contracts, non-disclosure is often the approach they take. Whistleblowing protections and actual corporate history must be openly discussed with special counsel in order to best deal with such compromising situations. Anonymous means, such as telephone hotlines and suggestion boxes, should be in place, so that employees or others (whistleblowers) may inform top management of violations without fear of retribution.

DUE DILIGENCE FOR FUTURE ACTIVITIES

Due diligence for prospective activities presents less of a problem if those in the corporate hierarchy are prepared to deal with red flag situations and work with counsel to avoid transgressing any of the laws with which they must comply.

CONCLUSION

The on-going enforcement success of the FCPA vis-à-vis U.S. companies is expected to be followed by the U.K. in very short order. Its financial success may cause other countries to substantially increase their own prosecutorial activities against corruption. Indian counsel have interest in understanding the FCPA and in counseling their clients about FCPA enforcement, which includes the design and implementation of dynamic (and individually tailored) compliance programs for Indian clients that have existing or potential U.S. or U.K. business links.

Anti-corruption is here to stay, and for clients operating in India, their lawyers should initiate discussions with them “the sooner the better.” Their lawyers should urge them to examine closely their Indian and global operations in the light of FCPA, and should propose the design and implementation of proper compliance programs in order to satisfy the U.S. and U.K. entities with which they are, or may be linked.

Aaron Schildhaus is an international corporate and business lawyer representing entities world-wide, specializing in FCPA and anti-corruption compliance globally. He was Chair of the Section of International Law of the American Bar from 2008-2009, and currently is Senior Advisor, to the ABA International Anti-Corruption Committee and to the India Committee. More information can be found on his webpage: <http://www.schildhaus.com>.



ENACTING WHISTLEBLOWER PROTECTION LEGISLATION IN INDIA

Priyanka Sharma

It is often said that no culture is immune from corruption. Unfortunately, there may be individuals in all societies who might improperly leverage their positions of authority, demanding financial or personal favors in order to do work they are supposed to do by virtue of their authority. Irrespective of the degree of coercion involved, the fact remains that bribery fosters a culture of impunity and rampant corruption undermines the functioning of public institutions. The ripple effect of this culture is then felt in many aspects of both public and private life.

Whistle-blowing or the act of exposing wrongdoing, fraud or corrupt practices in an organization or situation, has been seen as one of the few strong measures to combat corruption. The social censure that such whistle-blowing entails for the wrongdoer seemingly operates as a check or deterrent for future improper conduct. A whistleblower can be a person who works for the government and reports misconduct within the government or it can be an employee of a private company reporting corrupt practices within the company.

India still does not yet have legislation to protect whistleblowers. By exposing corruption among their superiors, whistleblowers face the possibility of direct or indirect punishment. This could be retaliation, including termination, lack of advancement and promotion, and even a threat to the whistleblower's safety or life.

PROPOSALS & PAST EFFORTS

Harassment and victimization of whistleblowers in India, especially by superiors in their own organizations, have led to calls for laws to protect

whistleblowers. At the request of the then Central Vigilance Commissioner, Mr. N. Vittal, in August 1999, the Law Commission of India prepared a report on "Public Interest Disclosure Bill" [179th Report of the Law Commission of India]. A draft Public Interest Disclosure (Protection of Informers) Bill, 2002 was then circulated in January 2003. There was no further progress on the matter until November 2003, when Mr. Satyendra Dubey was murdered after exposing corrupt practices prevalent in the National Highways Authority of India ("NHAI"). The incident led to widespread media outrage and impetus for the enactment of a whistleblowers bill.

In May 2004, the Government of India passed a Resolution on Public Interest Disclosure & Protection of Informers and authorized the Central Vigilance Commission ("CVC") as the 'Designated Authority' to receive written complaints for disclosure of any allegation of corruption or misuse of office and to recommend appropriate action. The CVC then issued a Public Notice (through an Office Order) stating that its jurisdiction would be restricted to any employee of the Central Government or to any corporation established by or under a Central Act, government companies, and societies or local authorities owned or controlled by the Central Government. Consequently, personnel employed by the State Governments and activities of the State Governments or its Corporations would not come under the purview of the CVC. It also stated that the CVC would have the responsibility of keeping the identity of the complainant secret.

CURRENT PROPOSAL

The Office Order and the Public Notice are still in force. In 2006, however, the draft Public Interest

Disclosure Bill was updated and renamed The Whistleblowers (Protection in Public Interest Disclosures) Bill, 2006. It was introduced in the Rajya Sabha (Upper House of the Parliament of India) on March 3, 2006.

The Bill has undergone several changes over the last few years based on public comment. The latest version of the Bill, named The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010 ("Bill"), was introduced in the Lok Sabha (House of the People), Parliament of India on August 26, 2010. The Bill is yet to be notified as a statute.

A BRIEF SUMMARY OF THE BILL

The purpose of the Bill is (a) to establish a mechanism to receive complaints alleging corruption or willful misuse of power or willful misuse of discretion against any public servant; (b) to inquire / cause an inquiry into such disclosure; (c) to provide adequate safeguards against victimization of the person making such complaint.

The Bill defines "Public Interest Disclosure" as a complaint made by any person relating to: (a) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988; (b) willful misuse of power or willful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable gain accrues to a public servant; and (c) an attempt to commit or commission of a criminal offences by a public servant. The term "public servant" has been defined in the Bill as any employee of the Central or State Governments, or any corporations established by or under any Central/State Act, any government companies, societies or local authorities owned or controlled by the Central/State Governments, and such other categories of employees as may be notified by the Central/State Governments from time to time.

The Bill envisages that any public servant or any other person including any non-governmental

organization may make a public interest disclosure before the Competent Authority. The Competent Authority, in relation to any public servant employed with the Central Government or any Central Government Authority, is the Central Vigilance Commission or any such authority that the Central Government specifies by way of a Notification. In the case of State Government employees, the Competent Authority is the State Vigilance Commissioner or any other authority as specified by the State Government by way of a Notification.

Further, the Bill also makes it necessary that any disclosure made under the Act is made in good faith and the person making the disclosure is required to make a personal declaration stating that he/she has reasonable belief that the information disclosed by him/her and the allegation contained therein is substantially true. Furthermore, in order for action to be taken on a public interest disclosure, it is necessary that the identity of the complainant/public servant is included in the complaint.

After ascertaining from the complainant/public servant whether he/she was the person or public servant who made the complaint, the Competent Authority shall conceal the identity of the complainant unless the complainant has himself/herself revealed his/her identity to any other office or authority while making the disclosure in the complaint or otherwise. Thereafter, an inquiry into the disclosure shall be made by the Competent Authority.

For the purposes of an inquiry under the Act, the Competent Authority has been granted the powers of a civil court (while trying a suit) in respect of the following matters:

- Summoning and enforcing the attendance of any person and examining him/her under oath;
- Requiring the discovery and production of any document;
- Receiving evidence by affidavits;
- Requisitioning any public record from any court/office;

- Issuing commissions for the examination of witnesses or documents;
- Such other matters as may be prescribed.

Proceedings before the Competent Authority shall be deemed to be judicial proceedings. While exercising powers of a Civil Court, the Competent Authority must ensure that the identity of the complainant is not revealed or compromised. Importantly, the Bill mandates that the Central Government shall ensure that no person/public servant who makes a disclosure under the Act is victimized by initiation of any proceeding or otherwise on the ground that such person/public servant has made a disclosure or rendered assistance in an inquiry under the Bill. If any person is victimized or is likely to be victimized, he/she may file an application to the Competent Authority seeking redress in the matter. The Competent Authority may then issue suitable directions for protection of such person. Such directions can be issued to the concerned public servant, or public authority, and any other government authority, including the police.

If officials required to aid an inquiry into the public interest disclosure upon the request of the Competent Authority obstruct the inquiry by delaying the furnishing of a report on the matter which is requested for by the Competent Authority, such official(s) shall, as per the provisions of the Bill, be liable to pay a penalty up to Rupees Two Hundred and Fifty for each day of delay. However, the total amount of the penalty shall not exceed Rupees Fifty Thousand.

Disclosing the identity of a complainant negligently or in bad faith is punishable with imprisonment for a term up to three years and a fine up to Rupees Fifty Thousand. Making a negligent, incorrect, false, or misleading disclosure is punishable with imprisonment for a term which may extend up to three years and also to fine which may extend up to Rupees Fifty Thousand.

CONCLUSION

While the Bill is a big leap forward in relation to protection of whistleblowers in India, there are still some ambiguities. For instance, while the Bill proposes to protect the identities of those who make a public interest disclosure, protection to such complainants is proposed to be provided only after a complaint or a query is filed under the Right to Information Act, 2005, in which the complainant/applicant must disclose his/her identity. Such protection may not only be too late but also insufficient, since the risk of information leaks may be high. While it is commendable that the Bill requires suitable action to be taken by the Competent Authority to prevent a complainant from being victimized, it does not expand on what this suitable action shall consist of or address the consequences of inaction. There also aren't many robust provisions to deal with the issue of accountability of the Competent Authority in the process of conducting an inquiry. In most cases, the chosen Competent Authority of the CVC is the Central Bureau of Investigation, which may not be independent from the body under inquiry itself – the Government. There is therefore the need to provide for more autonomy and objectivity in the process if meaningful protection to whistleblowers is the ultimate goal. Hopefully, such loopholes will be plugged before the Bill is finally notified as a statute.

Priyanka Sharma is a partner with Dua Associates in Delhi, India. She has been a member of the Bar Council of Delhi since August 2001 and can be contacted at priyanka@duaassociates.com.



THE UNITED KINGDOM'S NEW BRIBERY STATUTE

Poorvi Chothani

The United Kingdom's Bribery Act, 2010 ("Act"), seeks to reform its existing criminal laws to ostensibly provide a new, modern and comprehensive scheme to prosecute bribery. The Act is, among other things, expected to:

- provide a more effective legal framework to combat bribery in the public and private sectors;
- replace the fragmented and complex offences at common law and in anti-corruption statutes;
- create two general offences - (a) offering, promising or providing an advantage, and (b) requesting, agreeing to receive, or accepting an advantage;
- create a discrete offence of bribery of a foreign public official; and
- create a new offence of failure by a commercial organization to prevent a bribe from being paid for or on its behalf.

An organization charged with failing to prevent a bribe may assert as a defense that it had implemented adequate procedures to prevent bribery.

The Act, which represents the culmination of several decades of reports and draft bills, received Royal assent on 8 April 2010. It was originally set to become effective from April 2010, but that was postponed to April 2011, and then again to May 2011, as a result of concerted lobbying and criticism from business groups, including the Confederation for British Industry.

The legislation attracted a significant amount of controversy because the Act provided a defense for bribes paid by security and law enforcement agencies. However, this defense now applies only to the intelligence services and armed forces. Business

groups in the U.K. also expressed concern that the new law would place them at a competitive disadvantage to U.S. companies because the ban on "facilitation payments" is more stringent than the provisions of the U.S. Foreign Corrupt Practices Act ("FCPA"). Political parties also objected that the bill was rushed through Parliament before the elections, preventing them from examining the practical aspects of the bill in detail.

Under the Act, an individual found guilty of a crime, tried as a summary offence may be imprisoned for up to 12 months and fined up to £5,000. A person found guilty on indictment may be imprisoned for 10 years and subject to an unlimited fine. If a commercial organization fails to prevent bribery it may be punished with an unlimited fine. In addition, property may be confiscated under the Proceeds of Crime Act, 2002, in certain circumstances. A director of a company found to have violated the Act may be disqualified under the Company Directors Disqualification Act, 1986.

One of the most significant features of this Act is that it has an almost universal jurisdiction, enabling enforcement authorities to prosecute any individual or company with links to the U.K., regardless of where the crime occurred. A corporation is guilty of an offence where an act promising, offering, or giving an advantage to a foreign public official is committed anywhere in the world by someone performing services on the corporation's behalf in any capacity intending to obtain business or a business advantage for the corporation. Further, a corporation is guilty even if the offending activity is carried out through an intermediary.

Counsel advising Indian companies acquiring businesses overseas should take note - many Indian companies are familiar with the FCPA, but the U.K. law

provides for more serious criminal penalties. All Indian businesses that operate or otherwise conduct business in the U.K. need to comply with this new law because of its extraterritorial reach; indeed, its express purpose is to “deal effectively with bribery at home and abroad.” Moreover, bribery need not have been approved or financed by a U.K. entity, or its branch or subsidiary. The Act also applies to a non-U.K. company if it has an office or conducts business in the U.K. and mere presence in the U.K. will be sufficient to establish jurisdiction. For example, if an Indian company has a U.K. branch or subsidiary, and the Indian company engages in bribery in any country, the Indian company’s U.K. branch or subsidiary can be prosecuted in the U.K.

The Act requires the Secretary of State to publish guidelines to help organizations establish adequate anti-bribery measures. The government has published the guidelines on establishing “adequate procedures,”.

Poorvi Chothani is the founder and managing partner of LawQuest, a law firm in Mumbai, India, and a Vice Chair of the India Committee. She is admitted to the New York State Bar and is a registered solicitor in England and Wales. Poorvi has been practicing law in India since 1984 and is admitted to the Bar Council of Maharashtra and Goa. She can be reached at info@lawquestinternational.com.



A CALL FOR INDIA TO JOIN THE OECD CONVENTION ON COMBATING BRIBERY AND UN CONVENTION AGAINST CORRUPTION

Anupama Jha

India has been rocked by a series of corruption scandals in the recent past. The loan bribery case, the telecom license row, and the commonwealth games corruption scandal, are just a few of the bribery schemes that have embarrassed the ruling party, rattled economic markets, and shocked the public conscience. Then there is the story about the Indian Ambassador in Washington who wrote to the Indian Prime Minister about how some American companies paid huge kickbacks to government officials in India, either to procure contracts or expedite registrations. A common thread in all these cases is the involvement of the private sector. It has become so pervasive that the general public has started blaming the policy of economic liberalisation for the rising corruption in the country. Politicians are hand in glove with private sector companies in order to maximise their chances of being re-elected. The pay to play scheme is well known – companies bribe politicians with campaign cash, who in turn award the firms government contracts.

The Prevention of Corruption Act (“PCA”) does not expressly punish corrupt acts of private parties, except to a limited extent under Section 9, which addresses persons who accept gratification to influence a public servant in the conduct of an official act, and Section 12, which addresses persons who abet bribery. However, there is no direct provision prohibiting a private person from offering a bribe or engaging in other corrupt practices. This is especially significant in cases of “collusive corruption,” where the private person may offer a bribe and the public servant may actually reject the bribe. The PCA also does not contain any provision to address cases where Indian citizens engage in corrupt activities with a foreign public official. These are a few of the shortcomings in the law that must be

corrected to bring India’s anti-corruption laws in line with international standards. To add to the problem, there are inordinate delays in the prosecution of public servants against whom complaints have been made.

The U.S. Foreign Corrupt Practices Act (“FCPA”), on the other hand, prohibits the payment of bribes to foreign officials for the purpose of obtaining or retaining business. Recently, however, the U.S. Chamber of Commerce advocated loosening the rein on subsidiaries of multinational companies, saying, “A parent company’s control of the corporate actions of a foreign subsidiary should not expose the company to liability . . . where it neither directed, authorized, nor even knew about improper payments.” At a time when multi-national companies often have thousands of subsidiaries worldwide, the U.S. Chamber’s position will subject the law to much ridicule.

Transparency International has always maintained that clean business is good business. There are several examples around the world illustrating why poor business ethics costs investors and stakeholders dearly. No doubt, corruption adds to the cost of doing business. We find multinationals operating in developing countries encourage corruption, and thereby undermine development and deepen poverty. This may eventually lead to markets in emerging economies on which companies from the West so heavily rely to collapse.

Supply side corruption by transnational companies translates to economic, political, social, and cultural divide among people, and has far reaching negative consequences. The Maoist insurgency in India, which has grown recently and covers 40,000 square kilometres across Central and Eastern India, is just one example of what corrupt practices by companies can do. Money

that could be spent on developing the social infrastructure, eradicating poverty and empowering the poor (who could be the next potential market for multinationals) goes into the hands of few individuals making them richer and increasing the rich-poor divide. Corruption of this sort also disadvantages domestic firms and distorts decision making in favour of projects that benefit few rather than many. Transnational corruption normally happens on a grander scale compared to domestic corruption, making it a substantial obstacle to development or security of the country. When funds from the domestic budget or foreign aid get diverted as corruption proceeds in foreign banks, the country is deprived of the multiplier effect of the productive expenditure.

The Organization for Economic Co-operation and Development's ("OECD") Anti-Bribery Convention and the United Nations Convention against Corruption ("UNCAC") are compelling companies to develop new

anti-bribery policies and review existing ones. India is not a member of OECD but was granted "observer" status in 2006. India has not ratified UNCAC. It's time for India to become a member of the OECD convention and ratify UNCAC. These conventions would provide India with mutual legal assistance, and allow it to trace, freeze and confiscate assets. The central goal of UNCAC is to promote international cooperation in the fight against corruption. If India ratifies UNCAC, it will assume obligations but will also be afforded many valuable opportunities for affecting cooperation to combat corruption. The OECD convention, although not legally binding, provides a consensus among the 28 member countries for a uniformed approach to fight corruption and creates a strong platform for cooperation.

Anupama Jha is Executive Director of Transparency International, India and may be contacted at anupama.jha@gmail.com.



RESOURCES ON ANTI-CORRUPTION LAWS AND POLICIES IN INDIA

Arundhati Satkalmi

- **Digest on anti-corruption laws;** book by *Sandeep Bhalla*; 2010.
- **Is transparency an effective anti-corruption strategy? Evidence from a field experiment in India;** article by *Leonid Peisakhin; Paul Pinto* in *Regulation & Governance*, 4, no. 3 (2010): 261-280.
- **Shah Commission report lost and regained;** book by *Era Sezhiyan*, India. Shah Commission; 2010.
- **Prevention of corruption act;** book by *Ashok Dhamija*; 2009.
- **Corruption, rule of law and human rights in India;** DVD by *C Raj Kumar*; Indiana University, Bloomington. *Michael Maurer*, School of Law.; *O.P. Jindal* Global Law School; 2009.
- **Challenges and Opportunities for the Obama Administration in Central Asia;** eBook by *Stephen J Blank*; ARMY WAR COLL STRATEGIC STUDIES INST CARLISLE BARRACKS PA.; June 2009.
- **Malik's commentary on the Prevention of Corruption Act, 1988 (Act No. 49 of 1988): with certain allied acts related to the Prevention of Corruption Act alongwith various states lokayukta acts and rules;** book by *M A Malik, Advocate.*; 2008.
- **Bihar, a museum of lawlessness & casteism : an eye opener for administrators, advocates, doctors, educationists, law makers, and breakers & hon'ble courts etc.;** book by *Dinesh Kumar*; 2007.
- **Prevention of Corruption Act:** a detailed commentary with the help of case-law discussion of the Supreme Court and various High Courts on the Prevention of Corruption Act, 1988, Prevention of Corruption Act, 1947, Delhi Special Police Establishment Act, 1946, Criminal Law Amendment Ordinance, 1944, Criminal Law (Amendment) Act, 1952, Anti-Corruption Laws (Amendment) Act, 1964, Anti-Corruption Laws (Amendment) Act, 1967, Jammu & Kashmir Prevention of Corruption Act, 2006 (Smtv), Law relating to Accomplices, Specimen Pre-trap and Post-trap Panchnamas and other useful material related to the subject; book by *Ashok Dhamija*; 2007.
- **Reform forward : constitution and law, judiciary and police, secularism and social justice, religion and polity;** book by *G Ramachandhra Reddy*; 2007.
- **Corruption in India;** book by *R K Gupta*; H D Bist; 2007.
- **Commentary on anti-corruption laws with exhaustive commentaries on the Prevention of Corruption Act, 1988;** book by *D R Kaarthikeyan*; 2006.
- **50 burning problems of the nation & their solutions;** book by *H C Arora*; 2006.
- **The state of human rights in eleven asian nations: 2006;** book by *Asian Human Rights Commission*; 2006.
- **Contemporary Operations: Reflections on and of Empire;** eBook by *Jonathan B Bailey*; Institute For

Defense Analyses Alexandria Va, Joint Advanced Warfighting Program.; Oct 2006.

- **Commentary on Prevention of Corruption Act : a treatise on anti-corruption laws;** book by *A S Ramachandra Rao*; 2004.
- **Seth & Capoor's Commentaries on prevention of corruption act : with a treatise on anti corruption laws and special emphasis on Delhi Special Police Establishment Act, 1946;** book by *A B Srivastava; Syed Haider Shaukat Abidi; H D Seth; H L Capoor*; 2003.
- **Grievance of citizens displaced due to collusion of executive during protection of judiciary;** book by *Mohan Singh*; 2003.
- **A treatise on anti-corruption laws in India : with exhaustive commentaries on the Prevention of Corruption Act, 1988;** book by *P V Ramakrishna; P V K Ramana Prasad*; 2003.
- **Vigilance manual;** book by *Andhra Pradesh Vigilance Commission.; Dr. MCR HRD Institute of Andhra Pradesh.*; 2003.
- **The citizen and judicial reforms under Indian polity;** book by *Subhash C Kashyap*; Centre for Policy Research (New Delhi, India); 2003.
- **A treatise on anti-corruption laws in India: containing the Prevention of Corruption Act, 1988, the Delhi Special Police Establishment Act, 1946, the Criminal Law Amendment Ordinance, 1944, offenses of conspiracy, attempt and abetment punishable under the Indian penal code; useful appendices containing other allied acts and the Central Vigilance Commission Ordinance, 1999;** book by *P V Ramakrishna, P V K Ramana Prasad*; 2002.
- **Indian police and nexus crimes;** book by *James Vadackumchery*; 2002.
- **Police enforcement crimes and injustices;** book by *James Vadackumchery*; 2001.

- **Digest on anti-corruption law;** book by *Sandeep Bhalla*; 2001.
- **One hundred sixty first report on central vigilance commission and allied bodies;** book by *Law Commission of India*; 2001.
- **Democracy in danger: criminality and corruption in Lok Sabha elections;** book by *Tushar Kanti Saha*; 2000.
- **A study of anti-corruption laws in India : with exhaustive commentary on the Prevention of Corruption Act, 1988, alongwith the Delhi Special Police Establishment Act, 1946, the Criminal Law Amendment Ordinance, 1944, the Indian Penal Code (abetment, conspiracy and attempt) and appendices containing other allied acts, glossary of foreign words and phrases, subject index;** book by *R C Goel, advocate.; S Ramakrishna*; 2000.
- **Anti-corruption agencies of the Government of India: their mandate and charter of duties;** book by *Pradeep K Siddharth; P Singh; Anil H Ramteke*; India. Bureau of Police Research & Development.; 2001.
- **Anti-corruption agencies of Government of India : their mandate and charter of duties;** book by *Pradeep K Siddharth; Anil H Ramteke*; India. Bureau of Police Research & Development.; 2000.
- **Seth and Capoor's commentaries on Prevention of Corruption Act : with treatise on anti corruption laws : an analytical, critical, and exhaustive commentary;** book by *Syed Haider Shaukat Abidi; H D Seth; H L Capoor*; 2000.
- **A study of anti-corruption laws in India with exhaustive commentary on the Prevention of Corruption Act, 1988;** book by *R C Goel, advocate.; S Ramakrishna*; 2000.
- **A guide to anti corruption laws;** book by *S D Agarwala; Hanuman Prasad Gupta; Shalini Kumar*, 1999.

- **Departmental enquiries against government servants : alongwith rules (as amended), with special emphasis on CCS/CCA rules; book by Ejaz Ahmad, 1998.**
- **The Judiciary in India : determinants of its independence and impartiality. by Mamta Kachwaha; Centre for the Independence of Judges and Lawyers (CIJL).; Interdisciplinary Research Program on Root Causes of Human Rights Violations (PIOOM).;1998.**
- **A study of anti corruption laws in India : with exhaustive commentary on the Prevention of Corruption Act, 1988 : alongwith : the Delhi Special Police Establishment Act, 1946, the Criminal Law Amendment Ordinance, 1944, the Indian Penal Code (with reference to abetment, conspiracy and attempt), and appendices containing other allied acts, glossary of foreign words and phrases & subject index; book by R C Gobel; S Ramakrishna; 1998.**
- **R.B.Sethi and R.L.Anand's The Prevention of Corruption Act, 1988 and accomplice; book by R B Sethi; R L Anand; Prafulla C Pant; 1997.**
- **P.V. Ramakrishna's a treatise on anti-corruption laws in India : with exhaustive commentaries on the Prevention of Corruption Act, 1988, the Delhi Special Police Establishment Act, 1946, the Criminal Law Amendment Ordinance, 1944, offences of conspiracy, attempt and abetment punishable under the Indian penal code; and useful appendices containing other allied acts; book by P V Ramakrishna; I V Ratna Rao; 1995.**
- **Social order in India, 1948-1988; book by Srikanta Ghosh; Law Research Institute, Calcutta; 1990.**
- **Naked exposures : white collar crimes, Indian political scene; book by Janak Raj Jai; 1987.**
- **A treatise on anti-corruption laws in India; book by P V Ramakrishna; 1981.**
- **Emergency : a war on corruption; book by M Halayya; 1975.**
- **Law relating to bribery and corruption amongst public servants : being exhaustive, analytical, and upto date commentary on the Prevention of corruption act, 1947, offences by or relating to public servants regarding taking gratification, criminal breach of trust, criminal conspiracy, attempt or abetment of these offences punishable under the Indian penal code, the Criminal law (amendment) act, 1952, and the relevant sections of the code of criminal procedure; book by A S Bhatnagar; 1974.**
- **Law relating to bribery and corruption in India; book by Sunil Kumar Ghosh; 1971.**
- **Laws relating to bribery and corruption in India; book by Srikanta Ghosh; 1971.**
- **The law relating to corruption & corrupt practices in India; book by J P Bhatnagar; 1966.**
- **The Prevention of Corruption Act, 1947, as modified up to the 1st July, 1962.; by India, National government publication; 1963.**
- **The Prevention of Corruption Act, 1947, as modified up to the 1st January, 1960; book by India, National government publication; 1960.**
- **The Prevention of Corruption Act, 1947, as modified up to the 1st April, 1957; book, a National government publication; 1957.**

Arundhati Satkalmi is Senior Research Librarian, Rittenberg Law Library, St. John's University, New York and may be contacted by e-mail at satkalma@stjohns.edu.



HIGHLIGHTS OF INDIAN TAX PROPOSALS IN FINANCE BILL, 2011

Aseem Chawla, Aurica Bhattacharya, and Priyanka Duggal

On February 28, 2011, India's Finance Minister, the Honorable Pranab Mukherjee, unveiled the Finance Bill, 2011, which would make a number of significant changes in Indian tax law. The changes proposed in the Finance Bill, 2011 also aim in facilitating the introduction of the planned Direct Taxes Code ("DTC") and the Goods & Service Tax ("GST").

The DTC proposes to introduce a modern and lucid direct tax legislation scheme aligned with internationally accepted best practices. In addition, the proposed GST represents an ambitious plan to subsume most indirect tax legislation, including but not limited to the central excise, service tax, and value added tax.

DIRECT TAX PROPOSALS

With respect to direct taxes, the Bill proposes a marginal increase in the basic exemption limit for individual taxpayers. While the rate of surcharge would be reduced from 7.5% to 5%, the proposed increase in the minimum alternate tax from 18% to 18.5% could hurt industries, particularly those eligible for tax holiday incentives. The Bill also extends the applicability of minimum alternate tax to include hitherto exempt special economic zone developers and units. Furthermore, special economic zone developers would be subject to a tax at the rate of 15% on dividends distributed to their shareholders.

The Bill also seeks to introduce an alternate minimum tax on limited liability partnerships. The proposal to tax foreign dividends received by an Indian company from a subsidiary of the foreign company at an incentivised rate of 15% over the

present corporate tax rate would encourage outbound investments.

The Bill also introduces a number of administrative and substantive measures to counter tax abuse and reduce tax avoidance, such as extending the transfer pricing regime to transactions by residents with parties located in notified offshore jurisdictions. It also proposes to mandate the filing of annual information by the liaison offices of foreign entities in India.

INDIRECT TAX PROPOSALS

The Bill has made an effort to streamline the provisions of all indirect tax laws by eliminating various exemptions and aligning duty structures, in order to increase taxation of goods and services. The ultimate objective is a smooth transition to GST. Since the proposed GST envisages a single rate of tax for all indirect tax laws, provisions have been introduced to align duty structures of various laws. For example, the concessional excise duty rates and central sales tax rates have been fixed at 5%. Currently, the Value Added Tax ("VAT")/sales tax on many goods in most states is also 5%. Basic customs, excise and service tax rates remain at 10%. 130 items that were hitherto exempt are now taxable under the excise tax at the rate of 1%.

One of the most important changes made under the service tax laws is the introduction of "point of taxation rules," which would change the basis of tax collection from receipt basis to accrual basis, consistent with the existing provisions of excise and sales tax laws.

The service tax net has also been expanded with the introduction of new taxable services, such as

services rendered by restaurants serving alcohol and short term accommodation provided by hotels. In addition, the scope of many services has been expanded, including healthcare, legal, air travel, and life insurance. Of note, the scope of legal services that are taxable has been considerably expanded.

In a nutshell, the Finance Minister has reaffirmed his commitment to introduce the Direct Taxes Code and the Goods & Service Tax, which, if passed, would bring an unprecedented change in the fiscal policy regime. The proposals seek to further simplify and improve voluntary tax compliance and at the same

time, deter tax evasion and take serious measures in situations where unethical practices have been followed. For the moment, the big bang tax reforms are being eagerly awaited.

Mr. Aseem Chawla is the practice leader, and Ms. Aurica Bhattacharya and Ms. Priyanka Duggal are associates with the tax practice group at Amarchand & Mangaldas & Suresh A. Shroff & Co in New Delhi. They can be contacted at aseem.chawla@amarchand.com, aurica.bhattacharya@amarchand.com, and priyanka.duggal@amarchand.com.

Sean Kulkarni
Rina Shah

Supreme Court of India Recognizes Permissibility of “Passive Euthanasia” in Landmark Right to Die Case

On March 7, 2011, the Supreme Court of India dismissed a “right to die” petition brought by a surrogate of Aruna Shanbaug, whose tragic confrontation with an attacker in 1973 left the petitioner in a persistent vegetative state (“PVS”) in a Mumbai hospital where she continues to remain on life support. *Aruna Ramchandra Shanbaug v. Union of India & Ors.*, (2011) INSC 222. Under limited circumstances, however, the Court acknowledged that Indian law may permit the withdrawal of life-sustaining care and treatment from a patient that is unable to consent to such a withdrawal.

The petition before the Court, raised on behalf of Shanbaug by the Indian writer and public interest advocate Pinky Virani, alleged that Shanbaug’s right to live under Article 21 of the Constitution included a corollary right to die. The Court disagreed, stating that the right to live necessarily includes a fundamental right to live with human dignity, but the contours of Article 21 fall short of encompassing a right to die. As a result, the Court acknowledged that the petition could have been dismissed summarily on the basis that the petitioner failed to demonstrate a violation of a fundamental right, as required by Article 32 of the Constitution. “In view of the importance of the issues involved,” however, the Court chose to examine and opine on the merits of the case.

Following an emotional and harrowing description of the circumstances of the 1973 attack and a detailed medical summary regarding Shanbaug’s condition, the Court certified the following principal legal issues for review:

- (1) Whether the withholding or withdrawal of life-sustaining therapies from a PVS-afflicted patient would be “permissible or ‘not unlawful;’”
- (2) Whether a patient’s conscious and voluntary wish to reject life-sustaining treatments in the

event of a future PVS affliction should be respected;

- (3) In the event a patient has not previously expressed such a wish, whether the request of a family member or next of kin to withhold or withdraw life-sustaining treatments from a PVS-afflicted patient should be respected; and
- (4) Whether the KEM Hospital staff in Mumbai (respondents in the case and petitioner’s principal caretakers), a third party advocate such as Ms. Virani, or some other party possessed the requisite authority to determine Shanbaug’s best wishes, where Shanbaug’s parents were deceased and she had been abandoned by her extended family following the 1973 assault.

Addressing the issues in turn, the Court first recognized that a competent adult may indeed choose not to consent to life-saving treatment, either through the form of a living will or through an appointed surrogate. In the present case, however, the Court had no record of Shanbaug’s particular wishes with respect to life-sustaining treatment.

To address the permissibility of withdrawing life-sustaining medical care, the Court consulted an extensive range of decisions from other countries, including the United States, the United Kingdom, Belgium, Switzerland, the Netherlands, Austria, Italy, Germany and Canada. Drawing from euthanasia-related laws and practices in these jurisdictions, the Court distinguished “active” euthanasia, such as the administration of a lethal injection or physician-assisted suicide, from “passive” euthanasia, in which proactive, life-sustaining treatments are withdrawn, thereby rendering a PVS-afflicted patient unable to survive in circumstances where an otherwise able individual could do so.

In *Shanbaug*, the Court broke significant ground by recognizing a family member or next of kin’s ability to choose passive euthanasia for a PVS-afflicted patient, subject in all cases to the Supreme Court’s approval in accordance with Article 226 of the Constitution. The

Court acknowledged Parliament's proper role in crafting or amending India's euthanasia law, but until such time as Parliament chooses to act, *Shanbaug* will serve as binding law.

Having recognized Shanbaug's right to receive passive euthanasia at the request of an appropriate surrogate, the Court proceeded to deny the specific petition filed by Ms. Virani and decree that Shanbaug would continue to receive life-sustaining treatment at KEM Hospital. The Court reached its conclusion after determining that the KEM Hospital staff had demonstrated sufficient devotion and care to the sustainment of Shanbaug's livelihood over the course of her ailment, such that the hospital staff, rather than the petitioner's surrogate, had effectively become Shanbaug's next of kin for purposes of determining her options for end of life care. As the KEM medical staff expressed a wish for Shanbaug to remain in their company and care, Ms. Virani's petition was dismissed.

<http://www.supremecourtofindia.nic.in/outtoday/wr1152009.pdf>



State Bank of India Immune from Fraud Claim Under Foreign Sovereign Immunities Act ("FSIA")

On April 21, 2009, Rajiv Gosain filed a fraud claim against the New York and Mumbai branches of State Bank of India ("SBI") in connection with a series of commercial and contractual disputes with SBI and the liquidation by SBI in India of TechInvest India Private Ltd. ("TechInvest"), Gosain's majority-owned industrial laminates company. The U.S. District Court for the Southern District of New York dismissed the fraud claim on FSIA grounds, and the United States Court of Appeals for the Second Circuit affirmed. *Gosain v. State Bank of India, New York Branch, et al.*, 2011 U.S. App. LEXIS 1641 (2d Cir. 2011).

Gosain alleged that SBI and its officers engaged in a multiyear scheme of misrepresentation that substantially harmed Gosain's business activities in both India and the United States. According to Gosain, in 1991, SBI reneged on its contractual obligation to release him from a personal guaranty he provided in connection with an SBI loan to a New Jersey

corporation from which Gosain had resigned as an officer and director. When SBI sought to obtain a default judgment against Gosain in a New York State Court, Gosain claimed that SBI used a false address to effectuate service on him. When SBI sought to have its New York State default judgment recognized by an Indian court in 1997, Gosain claimed that SBI allegedly misinformed the Indian court that he was an Indian citizen residing in India rather than a U.S. citizen residing in the United States.

By 1999, Gosain had inherited a 74% common stock interest in TechInvest from his father in India. In connection with the share transfer, Gosain offered to replace his father's personal guaranty on SBI's existing loan to the company with his own personal guaranty. Rather than accept his guaranty, Gosain alleged that SBI withdrew its financial support for TechInvest, froze the company's bank accounts, and refused to allow TechInvest to seek alternative financing, thereby forcing the company into involuntary restructuring. After valuing TechInvest's assets at approximately US\$ 1.6 million, SBI and the restructuring trustee auctioned off the company's assets for the equivalent of US\$ 90,000 (a 95% discount from valuation price). Gosain alleged that a co-defendant had bribed a local SBI branch manager prior to the auction and obtained title to TechInvest's land holdings shortly after conspiring with SBI to rig the auction to generate the low sale price.

SBI moved to dismiss Gosain's complaint, asserting immunity as an agency or instrumentality of a foreign sovereign. Conceding that SBI is eligible for FSIA protection as a majority-owned entity of the Indian Government, Gosain pursued his fraud claim under an exception to the FSIA's immunity protection for actions based upon an act outside the United States in connection with commercial activity of the foreign state that causes a direct effect inside the United States.

The District Court found that SBI's role as a secured creditor for TechInvest was sufficient to satisfy the commercial activity exception for FSIA purposes. However, the District Court dismissed Gosain's claim on the basis that SBI's allegedly tortious commercial activity in India did not have a legally sufficient "direct" or "immediate" consequence or effect inside the United States. While the alleged auction-rigging scheme caused a substantial devaluation of Gosain's interest in TechInvest, the potential proceeds of the

auction had in fact been deemed ineligible for repatriation to the United States pursuant to Indian regulatory requirements. The Second Circuit stated that even if SBI had been specifically obligated to remit any surplus funds to Gosain inside the United States, the fact that the auction failed to yield any such proceeds signified that SBI had not necessarily breached an agreement to pay particular funds into a U.S. account. As a result, although each legally significant act alleged in Gosain's complaint occurred outside the United States, he did not allege that such acts had a direct or immediate effect on SBI's actions inside the United States for purposes of invoking the FSIA exception.

Supreme Court of India Grants Injunction in Favor of Publisher of "Eenadu" Newspaper on its Trademark Infringement Claim Against Manufacturer of "Eenadu" Branded Incense Sticks

On appeal from the High Court of Andhra Pradesh, the Supreme Court of India has reinstated a trial court's injunction against the manufacture and sale of incense sticks (*agarbathis*) bearing a proprietor's "Eenadu" brand label. *T.V. Venogopal v. Ushodaya Enterprises Ltd. & Anr.* (2011 INSC 211). The case represented a partial victory for Eenadu Margadarshi Group ("EMG"), a well-known Andhra Pradesh media and publishing company, because EMG had sought to enjoin distribution of the incense sticks throughout India, not just within Andhra Pradesh as ordered by the Hyderabad City Judge and affirmed by the Supreme Court. EMG had filed its trademark infringement claim under the Trade & Merchandise Marks Act, 1958, later superseded by the Trade Marks Act, 1999.

The Court found the label Eenadu — which means "today" or "daily" in Telegu — had become synonymous in Andhra Pradesh with the daily "Eenadu" newspaper and "Eenadu" television channel (popularly known as "ETV"), each published or broadcast, respectively, by EMG. As a result, the Court determined that appellant, a Bangalore-based sole proprietor who had registered an "Eenadu" trademark for his incense business in 1993, impermissibly used the profitable brand name that EMG had carefully built amongst television and media consumers in Andhra Pradesh.

Writing for the Court, Justice Dalveer Bhandari provided a lengthy and detailed overview of influential trademark infringement decisions in India, the United

Kingdom and the United States involving a range of multinational automotive and household consumer brands. The case featured a broad discussion of the concepts of consumer "confusion" and brand "dilution" that might result from a business owner's efforts to adapt or replicate a well-established global or regional brand for purposes of promoting his or her own products in a distinctive line of business (e.g., "Honda" pressure cookers or "Benz" undergarments).

The Court recognized that "eenadu's" generic, everyday meaning ("today" in Telegu, or "this land" in Kannada, Malayalam and Tamil) could serve to distinguish the brand name from corporate labels such as "Volvo" or "Harrod's" that tend to occupy a single, unambiguous meaning in the minds of consumers. Indeed, the Court acknowledged that "eenadu" was a plausible descriptive label for appellant's product because the incense sticks were designed for use by devotees performing daily puja offerings. "Eenadu" had in fact been used in the marketplace to describe everyday products such as "eenadu turmeric" or "eenadu tobacco", or popular culture staples such as the "Eenadu Feature Film" or the well-known Kannada song of "Eenadu Kannada, Eeneeru Kannada" (This Day is Kannada; This Water is Kannada).

EMG, however, introduced evidence that appellant had attempted to register the name "Eenadu" for additional classes of goods which the appellant had no apparent capability of producing, and had adopted the very same artistic script and font for the "Eenadu" label as used by EMG in its brand logo. The Court also noted as indicative the 90% decrease in profits suffered by appellant following imposition of the trial court's injunction. On review of such evidence, the Court determined that appellant's marketing scheme "was calculated to lead purchasers to believe that its agarbathies are in fact products of the newspaper company...[i]n such a situation, it is the bounden duty of the court not only to protect the goodwill and reputation of the Andhra company but also to protect the interest of the consumers. The consumers have to be saved from such fraudulent and deceitful conduct."

<http://judis.nic.in/supremecourt/imgs.aspx>



An Update on 2G Spectrum Licensing Proceedings before the Supreme Court of India

Justices G.S. Singhvi and A.K. Ganguly of the Supreme Court of India have been closely monitoring developments in the central government's ongoing investigation into the 2G spectrum licensing scandal that continue to roil India's political system since reports of the telecommunications scandal surfaced last November.

Upon reviewing a status report from the Central Bureau of Investigation (CBI) and the Enforcement Directorate (ED), Justices Singhvi and Ganguly confirmed that there "seem[ed] to be a violation of several laws", including documentary and procedural violations in the public tender process for the licenses, apparently conducted primarily by Andimuthu Raja, former cabinet minister for communication and information technology.

A report submitted by the Comptroller and Auditor General (CAG) estimated the Indian government lost Rs. 176,379 crore (approximately US\$ 40 billion) in 2008 when the government issued the 2G licenses on a "first come, first served" basis to national telecom firms at substantially undervalued rates. The CBI is investigating whether some or all of the 122 licenses issued on January 11, 2008 were distributed to select firms that had been tipped off as to a series of unexpected and last-minute changes to the licensing tender process rules that resulted in the exclusion of a number of competitive, high-value bids. Firms which successfully received licenses are alleged to have

immediately resold the licenses at substantially higher rates to foreign telecom firms that desired to expand their respective market shares in the world's second largest market for mobile subscribers.

The scandal came before the Supreme Court by a private complaint for prosecution of Raja filed by Janata Party head Subramanian Swamy under § 190 of the Criminal Procedure Code. In his March 17, 2011 testimony, ED Senior Counsel K.K. Venugopal reported to the Supreme Court that large-scale violations of the Foreign Exchange Management Act and the Prevention of Money Laundering Act had taken place during the license allocation process. The recent joint CBI/ED status report is believed to have suggested that the scheme involved illegal money transfers spread over a number of foreign jurisdictions with cooperation by several foreign-owned banks.

The Central Bureau of Investigation (CBI) has told the Supreme Court that it will file chargesheets against former cabinet minister Raja and what it described as two unnamed "beneficiary" companies. The Supreme Court has indicated that a Special Court should be set up in order to try the various parties accused of taking part in the 2G licensing scheme. (Sources: United News of India; Legal India; Deccan Chronicle).

Case notes written by Sean G. Kulkarni, except for the Shanbaug euthanasia case, which was written by Rina Shah. Sean may be reached at sean.g.kulkarni@gmail.com, and Rina may be reached at rinashah85@gmail.com.

SUBMISSION REQUESTS

Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee's jurisdiction. These submissions are then compiled as respective committee's *Year-in-Review* articles and typically published in the Spring Issue of the Section's award-winning quarterly scholarly journal, *The International Lawyer*. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee's Year-in-Review by emailing the [Co-Chairs](#) and requesting submission guidelines.

India Law News

India Law News is looking for articles and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Summer 2011 issue of *India Law News* will carry a special focus on defense and military procurement. Please read the Author Guidelines available on the [India Committee website](#). Note that, *India Law News* does not publish any footnotes, bibliographies or lengthy citations. Submissions will be accepted and published at the sole discretion of the [Editorial Board](#).

INDIA COMMITTEE

The [India Committee](#) is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-US relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the US, as well as other countries, in an effort to support the global Rule of Law.

BECOME A MEMBER!

Membership in the India Committee is free to all members of ABA International. If you are not an ABA International member, you may become one by signing up on the [ABA website](#). We encourage active participation in the Committee's activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the [Co-Chairs](#). You may also participate by volunteering for any of the Committee's projects, including editing a future issue of the *India Law News*.

Membership in the India Committee will enable you to participate in an online "members only" listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

UPCOMING EVENTS

Section of International Law 2011 Spring Meeting

April 5, 2011 – April 9, 2011

Location: Hyatt Regency Washington on Capitol Hill, Washington D.C.

Format: Live/ In-person

Anti-Corruption – Perspectives on Legal Implications for India

April 28, 2011

Format: Teleconference

Top Ten Tips on Doing Business in India

May 2011

Format: Webinar

LEADERSHIP (2010-2011)

Senior Advisor

Aaron Schildhaus

Law Offices of Aaron Schildhaus, Washington, DC

Co-Chairs

Vandana C. Shroff

Amarchand & Mangaldas & Suresh A. Shroff & Co., Mumbai, India

Erik B. Wulff

DLA Piper, Washington, DC

Vice Chairs

Douglas Ochs Adler

Vedder Price, Washington, DC

Ajay Bahl

AZB & Partners, Delhi

Poorvi Chothani

LawQuest, Mumbai, India

Anand Desai

DSK Legal, Mumbai

Vishal Gandhi

Gandhi & Associates, Mumbai

Professor Jayanth K. Krishnan

Indiana University, Maurer School of Law

Rita Roy

Toronto

Jyoti Sagar

J Sagar & Associates, Mumbai

Priti Suri

Priti Suri & Associates, New Delhi, India

Shihkil Suri

Crowell & Moring, Washington DC

Gene Theroux

Baker & McKenzie, Washington DC

Hon. Sanjay T. Tailor

Circuit Court of Cook County, Illinois

Ajay Verma

Ajay Verma & Associates, Delhi





ABA Section of International Law
Your Gateway to International Practice

THE INDIA COMMITTEE PRESENTS:

Anti-Corruption - Perspectives on Legal Implications for India

Co-sponsored by: ABA Anti-corruption Committee

In Co-operation with: North American South Asian Bar Association,
George Washington University Law School

Fighting corruption in India is entering a new phase. In recent months, Indian newspapers are filled with reports and analyses of alleged acts of bribery participated in by Indian government officials. In recent decades, fighting corruption has become a global priority. Much of the impetus in the increased attention results from US leadership fighting supply-side bribery and corruption due to the US' fast-growing prosecution of violations of its Foreign Corrupt Practices Act. Fuelled by a number of international conventions and increased enforcement in the member states of the OECD and by more transparency in international transactions, the United Kingdom has now passed its own Anti-bribery ACT. The subject is one of great concern to Indian practitioners and to international counsel for entities doing business in India. The influence of the FCPA and the experience of knowledgeable practitioners in the area will be explored in this special teleconference. A panel of experts will discuss the application of US and UK laws to Indian transactions and will also review the current Indian legislation relative thereto and how international businesses can best comply with all laws touching this area.

Speakers:

Bharat Vasani, General Counsel of Tata Sons (Mumbai, India)

Navita Srikant, Lead Forensic Specialist, World Bank (India)

Jamie Parkinson, BuckleySandler, LLP (Washington, DC, U.S.A)

Moderator: Aaron Schildhaus, Law Offices of Aaron Schildhaus (Washington, DC, U.S.A)

Date: April 28, 2011 @ 10am – 11:30am EST/ 8:30pm – 10pm IST