

**TARGETING CORRUPTION IN INDIA:
HOW INDIA CAN BOLSTER ITS DOMESTIC
ANTICORRUPTION EFFORTS USING PRINCIPLES OF THE
FCPA AND THE U.K. BRIBERY ACT**

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“Thieves at home must hang; but he that puts into his
overgorged and bloated purse, the wealth of Indian
provinces, escapes.”¹
-William Cowper

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¹ William Cowper, *THE POEMS OF WILLIAM COWPER: VOLUME II: 1782-1785*, 135 (John D. Baird and Charles Ryskamp eds., Clarendon Press 1995) (1785).

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1. INTRODUCTION

The Government of India has faced fierce public pressure to combat corruption since the explosion of various high-profile corruption scandals during 2010. Activists and some national legislatures are pushing for legislation that they hope will improve enforcement and impose penalties on public officials and individuals convicted of corruption offenses. In response to a massive public campaign against corruption erupting during 2010, the Indian Parliament introduced draft anticorruption legislation that would establish an independent ombudsman to enforce anticorruption statutes.

While supporters claim that the proposed legislation will increase the effectiveness of investigations and prosecutions of public officials involved in corruption scandals, the legislation will likely be inadequate in effectively fighting corruption. Proposed legislation does not modify the existing substantive law pertaining to the supply of bribes, which emphasizes penalties for public

officers who accept or demand bribes and provides that a bribe-giver is punishable only for abetting a bribe-taker's acceptance of a bribe.² Additionally, the proposed legislation does not modify the enforcement procedures available in India's current anticorruption regime but maintains a status quo in emphasizing criminal prosecution rather than introducing enforcement mechanisms that encourage private sector participation, such as settlement procedures and ongoing monitoring. As a result, the proposed legislation is likely to be ineffective in combatting corruption in India on a wide scale.

Recent anticorruption efforts in India are taking place at a time of increasing global attention to combatting corruption. During 2011, Russia passed legislation criminalizing foreign bribery and imposing monetary sanctions on companies and individuals who bribe foreign public officials, and during 2012, the country ratified the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention.³ In May 2011, China criminalized bribery of foreign government officials and officials of public international organizations.⁴ During 2010, the United Kingdom passed its first modern anticorruption statute, the U.K. Bribery Act.⁵ In August 2013, Brazil passed a civil enforcement law that compliments existing criminal anticorruption laws by imposing strict liability on foreign and domestic corporations that bribe public officials and prohibiting bid-rigging in connection with public procurement projects.⁶ In recent years, the United States has significantly increased its enforcement of the Foreign Corrupt Practices Acts (FCPA), a statute penalizing the bribery of foreign government officials, and pursued increasingly serious

² A "bribe-giver" or briber is an individual or entity "who offers a bribe." BLACK'S LAW DICTIONARY 217 (9th ed. 2009). A "bribe-taker" or bribee is an individual or entity who "receives a bribe." *Id.*

³ See *OECD Welcomes Russia Introducing Law to Make Foreign Bribery a Crime*, OECD (May 5, 2011), http://www.oecd.org/document/36/0,3746,en_21571361_44315115_47769508_1_1_1_1,00.html (announcing Russia's new anti-bribery legislation).

⁴ See Criminal Law of the People's Republic of China (promulgated by National People's Congress, Mar. 14, 1997, effective Oct. 1, 1997) art. 385 (establishing criminal liability for taking official bribes); *id.* at art. 389 (criminalizing the offering of bribes to officials); *id.* at art. 164 (providing criminal penalties for giving property to a foreign public official or an official of an international public organization for the purposes of "seeking illegitimate benefit").

⁵ See generally, Bribery Act, 2010, c. 23 (Eng.) [hereinafter, Bribery Act].

⁶ See generally, Lei No. 12.846, de 1 de Agosto de 2013 (Braz.), available at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

penalties for violations.⁷ Notably, these five statutes, unlike the proposed legislation in India, penalize the supply of corruption as a principal criminal offense.

Non-governmental organizations have also advocated targeting the supply of corruption. Transparency International points out that corruption involves both a giver and a taker, and therefore “advocates strong measures to curb bribery’s supply side, including the criminalisation of . . . bribery . . . as well as its demand side, including disclosure of assets for public officials and adoption of codes of conduct.”⁸

To support the proposition that anticorruption efforts in India should focus on the supply as well as the demand side of corruption and embrace a balance of cooperative as well as criminal enforcement measures, this Comment will undertake a comparison of the Bribery Act and the FCPA. This Comment will consider what India may borrow from these supply-oriented statutes and their enforcement, while focusing on bribery as a

⁷ See The Foreign Corrupt Practices Act of 1988, Pub. L. No. 95-213, Title I, Dec. 19, 1977, 91 Stat. 1494 (codified as scattered provisions of 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78ff) [hereinafter FCPA]; Lanny A. Breuer, Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice, Address at the 26th National Conference on the Foreign Corrupt Practices Act, Washington, D.C., Nov. 8, 2011, [hereinafter Breuer speech], <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html> (noting increasing penalties in FCPA criminal trials); Press Release, U.S. Dep’t of Justice, Department of Justice Secures More than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), available at <http://www.justice.gov/opa/pr/2011/January/11-crm-085.html> (remarking that FCPA enforcement led to \$1 billion in penalties during FY 2010, the largest amount in the FCPA’s history); Joseph Palazzolo & Samuel Rubinfeld, *U.S. Probes Oracle Dealings*, WALL ST. J., Aug. 31, 2011, <http://online.wsj.com/article/SB10001424053111903352704576540841634820096.html#ixzz1b3lQ2qmQ> (“Penalties have increased geometrically, with criminal fines in fiscal 2009 and 2010 combined totaling nearly \$2 billion, up from about \$11 million in 2004.”). During 2010, the government entered into five of the ten largest settlements in FCPA history. See also *A Tale of Two Laws, America’s Anti-Corruption Law Deters Foreign Investment. Britain’s Is Smarter*, ECONOMIST, Sept. 17, 2011, <http://www.economist.com/node/21529103> [hereinafter *A Tale of Two Laws*] (describing a \$400M fine against BAE Systems, a British defense contractor, and a \$365M fine against ENI, an Italian oil firm). During 2010, a U.S. court imposed the longest FCPA prison sentence in the act’s history—eighty-seven months, including sixty months for conspiracy to violate the FCPA and twenty-seven months for making false statements to federal agents. See generally Press Release, U.S. Dep’t of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>.

⁸ *Corruption Perceptions Index 2006*, TRANSPARENCY INT’L, Nov. 5, 2006, http://archive.transparency.org/news_room/in_focus/2006/cpi_2006.

subset of corruption.⁹ In making these recommendations, this Comment will emphasize similarities between the FCPA and the Bribery Act, as well as a number of differences. For example, the FCPA exempts facilitation payments and certain bona fide corporate expenditures while the Bribery Act contains neither defense. U.S. law imposes strict vicarious liability on a company for violations by its employees, but it also provides guidance that company programs designed to prevent violations should result in sentence reductions. On the other hand, the Bribery Act penalizes a company that fails to prevent employees from bribing on its behalf, yet it allows a *complete* defense if the company had adequate procedures to prevent such violations. This article will explore these and other differences in the context of Indian anticorruption efforts.

This Comment will also emphasize that, to develop a successful anticorruption regime, India should embrace strict enforcement mechanisms, including criminal prosecution and fines, as well as business-friendly policies, such as cooperative agreements with businesses and recognition of reasonable defenses. Moreover, this Comment will emphasize how a balance between these objectives has been central to successful FCPA enforcement.¹⁰

Section 1 of this Comment describes the various public and private costs of corruption and its impact on India. Section 2 relates past and current anticorruption efforts in India and the limitations of these efforts' demand-oriented approach. Section 3 discusses principal offenses under the FCPA and the Bribery Act and recommends what principle anti-bribery offenses and corresponding defenses India should adopt in future anticorruption efforts. Section 4 considers the FCPA's accounting requirements and recommends that India adopt similar requirements as part of its anticorruption regime. Section 5 describes the methods for enforcing the FCPA and the Bribery Act and provides recommendations for similar mechanisms to facilitate

⁹ A bribe is a "price, reward, gift or favor bestowed or promised with a view to pervert the judgment of or influence the action of a person in a position of trust." See BLACK'S LAW DICTIONARY (9th ed. 2009). Corruption is more broadly defined as "[d]epravity, perversion, or taint; an impairment of integrity, virtue, or moral principle; esp., the impairment of a public official's duties by bribery." *Id.*

¹⁰ See generally Philip B. Heyman [sic], *Justice Outlines Priorities in Prosecuting Violations of Foreign Corrupt Practices Act*, AM. BANKER, Nov. 21, 1979, at 4 (reproducing an early statement by a DOJ official describing the agency's intention to enforce the statute strictly and to provide businesses with useful advice and information).

Indian anticorruption efforts while considering the country's potential compliance with the OECD Anti-Bribery Convention¹¹ and the U.N. Convention Against Corruption.¹² Section 6 considers some of the likely institutional dynamics of future anticorruption regimes in India. Section 7 provides a brief summary and concluding remarks.

1.1. *Political and Social Costs of Corruption*

Corruption poses public costs, political and economic, as well as private costs to individuals and businesses.¹³ A number of studies and scholars have clearly demonstrated the political costs of corruption.¹⁴ According to Philip M. Nichols, corruption "degrades bureaucratic decision-making and popular support for change."¹⁵ Nichols explains that corruption poses at least three types of political risks: harm to the relationship between electors and representatives, economic distortion, and public distrust of the government.¹⁶ Similarly, Yale University's Susan Rose-Ackerman

¹¹ Organization for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, art. 1, cl. 1. (1998) [hereinafter OECD Anti-Bribery Convention] (requiring parties to establish a criminal offense for any person who, either directly or through intermediaries, intentionally offers, promises, or gives any advantage, to a foreign official to induce the official to "act or refrain from acting . . . to obtain or retain business or other improper advantage in the conduct of international business").

¹² U.N. Convention Against Corruption, G.A. Res. 58/4, U.N. Doc.A/RES/58/4, annex (Oct. 31, 2003) [hereinafter U.N. Anticorruption Convention] (requiring parties to take measures to prevent and criminalize corruption).

¹³ See Andrew White, *The Paradox of Corruption As Antithesis to Economic Development: Does Corruption Undermine Economic Development in Indonesia and China and Why Are the Experiences Different in Each Country?*, 8 ASIAN-PAC. L. & POL'Y J. 1, 2 (2006) (finding that while corruption was an impediment to growth in Indonesia, it functioned as a useful state tool in China, and ultimately concluding that "the extent to which corruption is antithetical to economic development ultimately depends upon context"); Johann Graf Lambsdorff, *How Corruption Affects Productivity*, 56 KYKLOS 457, 457-68 (2003) (using empirical evidence to demonstrate corruption's adverse impact on foreign direct investment and capital inflows and link corruption to lower productivity). Details of a fuller discussion on the precise impact of public corruption are beyond the scope of this Comment.

¹⁴ See generally Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307 (2004); see also Christopher J. Anderson & Yuliya V. Tverdova, *Corruption, Political Allegiances, and Attitudes Toward Government in Contemporary Democracies*, 47 AM. J. POL. SCIENCE 91, 93 (2003) (describing the negative impact of corruption on views of government).

¹⁵ Nichols, *Corruption as an Assurance Problem*, *supra* note 14, at 1307.

¹⁶ See Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 86 (2011) (detailing the effects of corruption in the

points out that corruption undermines government legitimacy, especially of democratic governments, because “[c]itizens may come to believe that the government is simply for sale to the highest bidder.”¹⁷

Corruption also increases a government’s costs in providing public services,¹⁸ encourages government officials to misallocate spending to industries that offer bribes, and distorts the public role of government employees.¹⁹ Furthermore, corruption may shift growth to the informal sector and decrease tax revenues by increasing the costs of creating and maintaining businesses in the formal sector.²⁰ Additionally, by reducing efficiency in the administration of public goods and services, corruption disproportionately harms citizens of lower economic strata who most heavily depend on public goods.²¹ In some cases, corruption

U.S. legislature in the context of campaign finance regulation). *But see* Jonathan Parry, *The ‘Crisis of Corruption’ and ‘The Idea of India’: A Worm’s Eye View in MORALS OF LEGITIMACY: BETWEEN AGENCY AND SYSTEM* (Italo Pardo ed., 2000) (arguing that the corruption crisis in India is not a symptom of state weakness but rather a sign of the state’s reach and public acceptance of bureaucratic norms).

¹⁷ Susan Rose-Ackerman, *The Political Economy of Corruption*, in *CORRUPTION AND THE GLOBAL ECONOMY* 31, 45 (Kimberly Ann Elliott ed., 1997). The current majority party in India’s Parliament, the Congress Party, performed rather poorly in the 2012 elections and political analysts contributed this to the party’s failures in combatting corruption. *See* Rama Lakshmi, *India State Election Results Are a Blow to Ruling Congress Party*, WASH. POST., Mar. 6, 2012, http://articles.washingtonpost.com/2012-03-06/world/35449160_1_congress-party-rahul-gandhi-nehru-gandhi (attributing election results, in part, to nationwide anger against government corruption).

¹⁸ *See* Thomas Fox, *FCPA Compliance and FCPA Enforcement: A Look Ahead to 2009 and Beyond*, CORP. COMPLIANCE INSIGHTS, May 19, 2009, www.corporatecomplianceinsights.com/2009/fcpa-compliance-fcpa-enforcement-obama-mcnulty-ashcroft-comments-on-foreign-corrupt-practices-act/ (“It is painfully obvious that corruption stifles development – it siphons off scarce resources that could improve infrastructure, bolster education systems, and strengthen public health”) (quoting then-Senator Barack Obama’s 2006 speech at the University of Nairobi).

¹⁹ *See* Selçuk Akçay, *Corruption and Human Development*, 26 CATO J. 29, 30 (2006) (noting that corruption “hinders economic growth and distorts the allocation of resources”).

²⁰ *See* Nabamita Dutta et al., *Informal Sector and Corruption: An Empirical Investigation for India* 3–4 (Inst. for the Study of Labor Discussion Paper No. 5579, 2011), <http://ftp.iza.org/dp5579.pdf> (describing how the relatively inexpensive informal business sector offers opportunities to avoid taxes and evade regulations).

²¹ *See generally*, DEEPA NARAYAN ET AL., VOICES OF THE POOR: CAN ANYONE HEAR US? (2000) (relating the effects of corrupt governments on the poor); Leonid Peisakhin, *Transparency and Corruption: Evidence from India*, 55 I.L. & ECON. 129, 130 (2012) (“[I]n highly stratified and corrupt societies, the least well-off, that is, those who are most in need of government assistance, are often completely powerless against government officials”); Press Release, Transparency Int’l U.K., Leading

may present an absolute obstacle to individuals from obtaining essentials, such as education and utilities.²²

1.2. *Economic Costs of Corruption*

Corruption is generally disruptive to economic growth—one U.S. government official explains, “[C]orruption and economic prosperity are incompatible”²³ Corruption can deter domestic and foreign investment²⁴ by undermining the legitimacy of markets²⁵ and disturbing capital flows.²⁶ One International

NGOs Warn Against Withholding Aid From High-risk Countries (Oct. 20, 2011), http://www.transparency.org/news/pressrelease/20111020_high-risk_countries (“The poorest of the poor already suffer disproportionately from the bribery and corruption which is often entrenched in the high-risk countries”); Pratap Bhanu Mehta, *How India Stumbled: Can New Delhi Get Its Groove Back?*, 91 FOREIGN AFFAIRS 64, 68 (Jul/Aug 2012) (“[S]pending on the social sector, including health care and education, has risen from 13.4 percent of the total budget in 2007 to 18.5 percent today[,] [b]ut due to inefficiencies and corruption, much of that money never reaches the targeted beneficiaries.”).

²² One study on corruption in rural India found that government hospitals and electrical services were among the most corrupt among basic public services. See Transparency Int’l India & Centre for Media Studies, *India Corruption Study 2005 Summary Report 7–8* (June 2005), <http://www.transparency.org/content/download/637/3856>. Corruption in these industries may be particularly pernicious to individuals who are first seeking electrical connection or healthcare services for which they cannot afford to pay privately. See also Media Release, CIET International, *Corruption: The Invisible Price-tag On Education*, (Oct. 12, 1999), http://www.ciet.org/_documents/200622318486.doc (describing how corruption prevents students from attending primary school).

²³ See John D. Negroponte, U.S. Permanent Representative to the United Nations, Statement in the U.N. General Assembly (Oct. 31, 2003), <http://2001-2009.state.gov/p/io/rls/rm/2003/25858.htm> (arguing in support of the adoption of the U.N. Convention Against Corruption).

²⁴ See Quan V. Le & Meenakshi Rishi, *Corruption and Capital Flight: An Empirical Assessment*, 20 INT’L ECON.J. 523, 534 (Dec. 2006) (concluding that corruption significantly increases capital flight); Paulo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681, 683 (Aug. 1995) (“[C]orruption lowers private investment, thereby reducing economic growth, even in subsamples of countries in which bureaucratic regulations are very cumbersome.”); Paulo Mauro, *The Effects of Corruption on Growth, Investment, & Government Expenditure* (Int’l Monetary Fund Working Paper No. 96/98, Sept. 1996), <http://ssrn.com/abstract=882994> (presenting results on the effects of corruption on growth and investment); Vito Tanzi & Hamid R. Davoodi, *Corruption, Public Investment, and Growth*, (Int’l Monetary Fund Working Paper No. 97/139, Oct. 1997), <http://ssrn.com/abstract=882701> (determining that corruption reduces productivity). See also Alberto Ades & Rafael Di Tella, *The New Economics of Corruption: A Survey and Some New Results*, 45 POL. STUDIES 496, 499–501 (1997) (evaluating Mauro’s research on how corruption adversely affects investment regardless of “red tape”).

²⁵ See M. Habib & L. Zurawicki, *Country-Level Investments and the Effect of Corruption: Some Empirical Evidence*, 10 INT’L BUS.R. 687 (2001) (providing empirical evidence that investors are less likely to invest in a foreign market they perceive as corrupt); The World Bank, *Corruption and Development*, PREMNotes No. 4, 1–2

Monetary Fund (IMF) official once demonstrated a “negative association between corruption and investment, as well as growth, [which] is significant in both a statistical and an economic sense.”²⁷

Corruption also creates a number of tangible costs to businesses including higher transaction and compliance costs,²⁸ capital flow disruptions resulting in reduced (legitimate) market liquidity,²⁹ and the creation of legal uncertainty, particularly in the enforcement of contracts.³⁰ Bribing public officials, either directly or through agents, may also expose companies to criminal liability under the FCPA, the Bribery Act, and a growing number of applicable foreign statutes. Moreover, corruption distorts private competition by encouraging companies to bribe government officials because their competitors may be doing so.³¹ Smaller businesses may be particularly affected by these market distortions because they often lack power to yield influence in business transactions.³² Additionally, potential reputational costs for involvement in corruption are also notable given that “in today’s globalised environment, reputation is an increasingly important asset that only the foolish and most reckless managers won’t

(May 1998) (“[B]ribers can also purchase monopoly rights to markets—as, for example, in the energy sectors in some transition economies, where unprecedented amounts of grease payments buttress gigantic monopolistic structures.”).

²⁶ See Johann Graf Lambsdorff, *How Corruption Affects Persistent Capital Flows*, 4 *ECON. GOV.* 229, 229–30 (2003) (commenting on corruption’s impact on capital flows).

²⁷ Mauro, *Corruption and Growth*, *supra* note 24, at 705 (“[T]here is evidence that bureaucratic efficiency actually causes high investment and growth.”)

²⁸ See Nichols, *Corruption as an Assurance Problem*, *supra* note 14, at 1321–26 (describing transactional and compliance costs); Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, *N.Y. TIMES*, Dec. 20, 2008, <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=all> (reporting one Siemens official’s oversight of an annual bribery budget of about \$40–50M USD).

²⁹ See generally Lambsdorff, *How Corruption Affects Persistent Capital Flows*, *supra* note 26, at 229–30.

³⁰ See Nichols, *Corruption as an Assurance Problem*, *supra* note 14, at 1321–26.

³¹ See Philip M. Nichols, *Multiple Communities and Controlling Corruption*, 88 *J. BUS. ETHICS*, 805, 805–06 (2009) (pointing out the “paradox” of corruption in that companies are encouraged to bribe because they do not know whether competitors are engaging in bribery even though companies could all reduce costs by not bribing).

³² See *When a Bribe is Merely Facilitating Business*, *ECONOMIST* (June 11, 2011), <http://www.economist.com/blogs/blighty/2011/06/anti-bribery-laws> (“[S]mall companies may be even more vulnerable to corruption since they often do not have the connections to bypass individual officials.”)

protect.”³³ Given these costs, one news article noted that it “is difficult to think of a significant international organisation not looking at corruption.”³⁴ Notably, these costs indicate that members of the business community, either domestic or foreign, may support government efforts to combat the supply of corruption in India.

1.3. *Corruption in India*

The ways in which the political, economic, and business costs of corruption have played out in India indicate the importance of effective anticorruption legislation in that country. In a recent decision, the Indian Supreme Court stated, “Corruption devalues human rights, chokes development[,] and undermines justice, liberty, equality, fraternity which are the core values in our preambular vision.”³⁵ Mahatma Gandhi is credited with saying, “Corruption and hypocrisy ought not to be inevitable products of democracy, as they undoubtedly are today.”³⁶ These statements are indicative of India’s long-standing, but often unsuccessful, struggle to combat corruption. Transparency International ranked India 94th out of 174 countries in the organization’s 2012 Corruption Perceptions Index.³⁷ Two Indian economists lament that corruption “rules over the country with its stranglehold in every aspect of the state and consequently in all aspects of life of citizens of the state.”³⁸ These economists estimate that bribery is most pervasive in transportation, real estate, welfare program administration, mining, licensing, and government procurement.³⁹

³³ Eric Gutierrez, *Why Business Should Care About Fighting Corruption*, Poverty Matters Blog, GUARDIAN (July 1, 2011), <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/01/bribery-act-business-should-fight-corruption>.

³⁴ Martin Wolf, *Corruption in the Spotlight*, FIN. TIMES, Sept. 16, 1997, at 23 (explaining that the IMF and World Bank closely scrutinize corruption).

³⁵ Dr. Subramanian Swamy v. Manmohan Singh, (2012), S. Ct., Civ. App. No. 1193 (2012) (India) (Ganguly, J.), ¶ 11 (recommending that government authorities resolve corruption complaints within four months and calling for legislation to this effect).

³⁶ ANIL DUTTA MISHRA, FUNDAMENTALS OF GANDHISM 140 (1995).

³⁷ See Corruption Perceptions Index 2012, TRANSPARENCY INT’L, <http://www.transparency.org/cpi2012/results> (last visited Jan. 29, 2013) (providing rankings and describing methodology used to create such rankings).

³⁸ BIBEK DEBROY & LAVEESH BHANDARI, CORRUPTION IN INDIA: THE DNA AND THE RNA 7 (2012).

³⁹ *Id.* at 4–5.

Foreign companies conducting business in India regard corruption as a widespread problem for obtaining appropriate permits and in bidding for government procurement contracts.⁴⁰ According to a KPMG survey of British enterprises and investors operating in India, concerns over corruption and weak governance have hindered investment in India.⁴¹ There are indications that U.S. investors view India as a “high risk business” environment where corruption “is a major concern.”⁴² U.S.-based companies have complained that restrictions under the FCPA placed them at a competitive disadvantage vis-à-vis local businesses, which are not subject to the FCPA.⁴³

Corruption in India has created substantial uncertainty in the business environment. For example, in connection with the Dabhol Power Project, at the time the largest foreign investment project ever undertaken in India, public opposition resulted in cancellation and renegotiation of contracts. Allegations arose that the Indian Ministry of Power awarded a power plant contract to an Enron-subsiary in a non-competitive procurement process because the company offered to provide kickbacks to government officials.⁴⁴ Although Enron was not formally charged with misconduct, the government cancelled and renegotiated the contracts after Enron had already invested hundreds of millions of dollars.⁴⁵ Foreign companies doing business in India made

⁴⁰ See Ashish S. Prasad & Violeta Balan, *Strategies for U.S. Companies to Mitigate Legal Risks From Doing Business in India*, 1587 PLI/Corp 9, 31 (2007)

(noting that corruption can create a problem for businesses in India and may result from “a government official demanding a special ‘fee’ for approval of necessary permits or from a business partner looking for a ‘sweetened’ bid”).

⁴¹ See KPMG, *Challenges Faced by British Business in India 3*, 2011, available at http://www.kpmg.com/IN/en/IssuesAndInsights/ThoughtLeadership/British_Business_India_2011.pdf.

⁴² Toral Patel, Comment, *Corrupt Practices in India: No Payoff*, 20 LOY. L.A. INT’L & COMP. L.J., 389, 403 n. 121 (1998) (quoting statements by a senior commercial officer with the U.S. Commercial Service, *American Investors Wary of India, Says U.S. Diplomat*, INDIA J., Sept. 13, 1996, at C4).

⁴³ See New York City Bar Assoc. Comm. on Int’l Bus. Transactions, *The FCPA and its Impact on International Business Transactions: Should Anything Be Done to Minimize the Consequences of the U.S.’s Unique Position on Combating Offshore Corruption?* 19, Dec. 2011, http://www2.nycbar.org/pdf/report/uploads/FCPA_ImpactonInternationalBusinessTransactions.pdf (concluding that a comparison between those companies subject to the FCPA and those that are not would likely indicate that compliance costs place U.S. companies “at a significant competitive disadvantage”).

⁴⁴ See Prasad & Balan, *supra* note 40, at 14–16 (noting allegations that claimed the winning bid was not competitive).

⁴⁵ Private plaintiffs brought twenty-six separate suits to stop the project although these cases were eventually dismissed. Public opposition to the project

statements suggesting that were renegotiations to fail, and Enron left without a contract, there would be repercussions for future investment in India.⁴⁶

More recently, in early 2012, the Supreme Court of India cancelled 122 2G licenses first granted in 2008 on a first-come, first-serve basis. The former telecom minister allegedly made a number of last minute changes to the rules governing the submission of bids and subsequently tipped off only a few firms, thus excluding a number of competitive bids that did not comply with the revised rules. The Supreme Court of India determined that the government granted the licenses in a "wholly arbitrary and unconstitutional" manner, at 2001 prices.⁴⁷ The cancellation will adversely affect businesses that purchased licenses from the tipped-off firms even where those firms had no knowledge of any impropriety. Additionally, Moody's Investors Service, Inc., the crediting agency, reported that cancellation of the telecom licenses would "add to the problems faced by Indian banks."⁴⁸ In a similar

continued following the negotiations although the project was completed in 1999. See generally Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 *FORDHAM INT'L L.J.* 1319, 1343-57 (2000).

⁴⁶ Richard P. Teisch & William A. Stoeber, *Enron in India—Lessons From a Renegotiation*, 35 *MID-ATLANTIC J. BUS.* 51, 59 (1999). The parties renegotiated the contract for terms less favorable to Enron. See John Elliot, *India's Slide Into Sleaze*, *ASIAN WALL ST. J.*, Nov. 13, 1995. The U.S. government did not bring charges because the government stated it had no reason to suspect that Enron had violated the FCPA. See Patel, *supra* note 42, at 405 (detailing how the ongoing conflicts between the Indian central and state governments contributed to a loss of investors' confidence in Indian investment opportunities).

⁴⁷ The verdict canceled licenses held by five companies including joint ventures of local and foreign companies. See Centre for Public Interest Litigation et al v. Union of India et al, Writ Petition (Civil) No. 423 of 2010, S.Ct. (India) (resolving a private complaint calling for prosecution of the former telecommunications minister). Firms that successfully received licenses are alleged to have immediately resold the licenses at substantially higher rates to foreign telecom firms. Reports have indicated the potentially adverse effects on business investments in India. See Vikas Bajaj, *Indian Court Cancels Contentious Wireless Licenses*, *N.Y.TIMES*, Feb. 2, 2012, http://www.nytimes.com/2012/02/03/business/global/india-supreme-court-cancels-2g-licenses.html?_r=0 ("The ruling could also wipe out investments in the Indian telecommunications industry that are worth billions of dollars.").

⁴⁸ Telecom Licenses Cancellation Not an Issue But Adds to Problems of Indian Banks, *MOODY'S INVESTORS SERVICE* (Feb. 27, 2012), http://www.moody.com/research/Moody-Telecom-licenses-cancellation-not-an-issue-but-adds-to--PR_238869. In January 2013, a number of businesses implicated by the Supreme Court's decision filed a curative petition, which requires a certification by a senior advocate attesting to a substantial legal issue in the plea for reconsideration of the Supreme Court's decision to cancel the licenses. The Supreme Court heard and denied a similar petition in April 2012. See Dhananjay Mahapatra, *15 Days On, 2G Scam Curative Not Decided*, *TIMES OF INDIA*, Jan. 26,

instance of retrospective government enforcement creating potential business uncertainty, the national government announced in May of 2012 that it might retroactively tax Vodafone's purchase of an Indian phone company, which could lead to billions of dollars in tax implications. Following the decision, "many fear that such arbitrary interventions will scare away foreign investment."⁴⁹ Given India's interests in attracting foreign investment, albeit while balancing other national objectives, policy-makers may find corruption's destabilizing effect on businesses particularly troubling.⁵⁰

Indian domestic investors have expressed similar concerns about a corrupt business environment in India. A 2011 KPMG survey among Indian corporate figures concluded, "[H]igh-level corruption and scams over the past two years are now threatening to derail the country's credibility, especially in the international arena, and the economic boom witnessed especially since liberalization."⁵¹ Domestic investors looking for a more stable business environment may direct their investments elsewhere as corruption undermines their confidence in the Indian economy.

2013, http://articles.timesofindia.indiatimes.com/2013-01-26/india/36563889_1_curative-petitions-review-petitions-etisalat-db-telecom-pvt (noting that the Supreme Court rejected reconsideration for all seven telecom companies that sought review in early 2012).

⁴⁹ Mehta, *supra* note 21.

⁵⁰ For example, during 2011, for the first time India began to allow one-hundred percent foreign-owned retailers to operate in India. See Margherita Stancati, *Retail FDI to Benefit Middlemen, Says Basu*, WALL. ST. J. BLOG (Dec. 16, 2011, 1:38 PM IST), <http://blogs.wsj.com/indiarealtime/2011/12/16/retail-fdi-to-benefit-middlemen-says-basu/> (stating that the move could help curb inflation in India). Public backlash to corruption scandals exacerbate investor fears. For example, an India-based major Volkswagen-Eicher joint venture moved to China following political instability related to corruption. See Patel, *supra* note 42, at 397.

⁵¹ Press Release, KPMG, KPMG Unveils Survey on Bribery and Corruption (Mar. 14, 2011), at 1-2, http://www.kpmg.com/IN/en/Press%20Release/Press_Release_Bribery_Corruption_Survey.pdf (describing that ninety-nine percent of respondents reported that corruption's biggest impact was the "tendency to skew the level playing field and attract organisations with lesser capability to execute projects"). Ninety percent of the survey's respondents felt that corruption adversely effected stock market performance by increasing volatility and fifty-one percent of respondents expressed fear that rising corruption may detract foreign investment. See KPMG, *Survey on Bribery and Corruption* 6-7, Jul. 7, 2011, [hereinafter KPMG survey], available at http://www.kpmg.com/IN/en/IssuesAndInsights/ArticlesPublications/Documents/KPMG_Bribery_Survey_Report_new.pdf. See also Pricewaterhouse Coopers, *Confronting Corruption: The Business Case for an Effective Anti-Corruption Programme*, Jan. 2008, at 2, available at http://www.pwc.com/en_TH/th/publications/assets/confronting_corruption_printers.pdf ("Sixty-five percent of [global business executives surveyed] believe a level playing field is crucial to their company's future business activities.")

2. ANTICORRUPTION EFFORTS IN INDIA

India's central government has engaged in an ongoing struggle against corruption particularly since the mid-1990s, when the country began to embrace economic liberalization following restrictive economic policies that characterized the period from independence until 1991.⁵² Amidst privatization, India's political atmosphere emphasized anticorruption efforts. Nonetheless, the years since then have demonstrated the country's difficulties in combatting corruption. For example, although the current opposition party, Bharatiya Janata Party (BJP), came to power in 1996 on a political platform emphasizing anticorruption efforts, the party was "dogged by corruption scandals throughout its term."⁵³

Government officials often solicit bribes to provide essential government services.⁵⁴ One recent study evaluating a twelve-month period found that fifty-four percent of Indian households paid a bribe to receive basic services.⁵⁵ Nonetheless, ongoing efforts have focused on the demand rather than the supply of bribes all while providing that if caught, all bribe-givers, even those from whom a government official solicited a bribe for a basic and essential service, may be subject to certain minimum penalties. Additionally, an emphasis on criminal sanctions alone prevents

⁵² The Industries Development and Regulation Act of 1951 required certain designated industries, constituting most of the manufacturing sector, to become subject to the central government's industrial requirements. The 1991 Statement of Industrial Policy eliminated this licensing regime except for in a small number of industries. See William Greene, *The Liberalization of India's Telecommunications Sector: Implications for Trade and Investment* 7-14 (U.S. Int'l Trade Comm'n Office of Economics, Working Paper No. 2004-09-B, 2004) (narrating the legal developments contributing to liberalization of the telecommunications industry); Philippe Aghion et al., *The Unequal Effects of Liberalization: Evidence from Dismantling the License Raj in India*, 98 AMER. ECON. REV. 1397, 1410 (2008) (discussing the impact of de-licensing across different Indian states). Some critics of the 2011 proposed anticorruption legislation have likened the creation of an independent ombudsman to monitor corruption to this restrictive economic regime often nicknamed, the "License Raj." See, e.g., Prashant Panday, *License Raj, Police Raj....Now Get Ready For the Draconian Lokpal Raj...*, TIMES OF INDIA, Dec. 13, 2011, <http://blogs.timesofindia.indiatimes.com/the-real-truth/entry/license-raj-police-raj-now-get-ready-for-the-draconian-lokpal-raj> (providing a scathing critique of the legislation by a CEO of a major Indian company).

⁵³ Ray Marcelo, *Corruption Scandals Take the Shine Off India's Economic Success Story*, FIN. TIMES, Dec. 23, 2003.

⁵⁴ BLACK'S LAW DICTIONARY 1520 (9th ed. 2009) (defining the solicitation of a bribe as "the crime of asking or enticing another to commit bribery").

⁵⁵ *Data and Methodology*, 2010/11 GLOBAL CORRUPTION BAROMETER, TRANSPARENCY INT'L (2010), available at http://files.transparency.org/content/download/398/1636/file/GCB20102011_FINAL_2_5_12_DH.xls.

Indian anticorruption authorities from engaging in a cooperative manner with private businesses.

2.1. *India's Attempts to Target the Demand-Side of Corruption*

There are a number of existing national statutes in India pertaining to combatting corruption. The Prevention of Corruption Act of 1988 (PCA)⁵⁶ prohibits a national or state public official,⁵⁷ including employees of companies with government ownership,⁵⁸ from accepting a gratuity,⁵⁹ other than legal remuneration for performing an official act.⁶⁰ The PCA prohibits officials from accepting anything of value without consideration from a person who transacts business or is concerned in official proceedings with the public servant.⁶¹ The Act also penalizes the perpetual acceptance of prohibited bribes and misappropriation of public funds, and potentially penalizes an official for possessing funds or property that are “disproportionate to his known sources of income” for which he cannot properly account.⁶²

The PCA does not explicitly criminalize the act of bribing a public official but permits penalizing a bribe-giver for abetting a public official's acceptance of a bribe.⁶³ The PCA also prohibits

⁵⁶ The Prevention of Corruption Act, No. 49 of 1988, PEN. CODE (India) § 7 [hereinafter PCA].

⁵⁷ The PCA broadly defines a public servant to include any person paid by the national government in commission of a public duty, in service or pay of local authorities, in service or pay of a corporation established by the central, provincial, or state government, or an authority or a body owned, controlled, or aided by the federal government. The PCA does not apply to political parties or candidates. *Id.* § 2(c).

⁵⁸ The PCA applies to government companies as defined by the Companies Act of 1956, § 617. *Id.* § 2(b), (c). For example, four executives of a subsidiary of the Life Insurance Company of India, a government company, were arrested in connection with a recent bribe-for-loan scandal. See Nupur Acharya, *A Ring-Side View: The Mortgage Bribery Arrests*, WALL ST. J. BLOG (Nov. 25, 2010), <http://blogs.wsj.com/indiarealtime/2010/11/25/a-ring-side-view-the-mortgage-bribery-arrests>.

⁵⁹ PCA §7(b) (including gratification beyond pecuniary benefits).

⁶⁰ *Id.* §7 (prohibiting the acceptance or attempts to obtain gratification in exchange for committing or forbearing to commit an official act, showing favor to a particular party, or rendering any service to any person).

⁶¹ *Id.* § 11 (making liable any public official who, “accept[s] or obtains . . . any valuable thing without consideration, or for a consideration . . . from [sic] any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted”).

⁶² *Id.* § 13(1)(e) (detailing the prohibition on public servants taking bribes).

⁶³ See PCA § 12 (penalizing “[w]hoever abets an offence punishable under [PCA] section 7 or section 11 whether or not that offence is committed in consequence of that abetment”). *But see* Anupama Jha, *A Call For India to Join the*

individuals from accepting any gratification to influence a public servant by corrupt or illegal means or by using personal influence.⁶⁴ The Supreme Court has approved use of the abetting provision to penalize providers of bribes as abettors of bribery offenses, even when the underlying offense is not committed.⁶⁵ Additionally, India passed an anti-laundering statute in 2003 that penalizes intentionally or knowingly becoming involved in an activity or process related to the proceeds of a crime, including a corruption related offense.⁶⁶

The Central Bureau of Investigation (CBI) is the principle government agency responsible for enforcing the PCA.⁶⁷ The Central Vigilance Commission (CVC) supervises and may direct CBI investigations of PCA offenses.⁶⁸ Although the CBI has charged private bribe-givers with abetting PCA offenses, a review of cases since the PCA's passage indicates that there are many more cases brought against public officials who accept bribes than there are cases against those who provide bribes.⁶⁹ Moreover, the

OECD Convention on Combating Bribery and UN Convention Against Corruption, INDIA L. NEWS (ABA Section of Int'l Law, India Comm.), Spring 2011, at 29 (discussing limitations of this abetment approach especially where the underlying offense is not committed).

⁶⁴ See *id.* §§ 7, 8 (prohibiting any individual from accepting or attempting to obtain gratification as motive or reward for illegally or corruptly inducing a public official to engage in or to forbear any official act, to show favor to a particular party, or to render any service to any person); *id.* § 9 (prohibiting any individual from accepting or attempting to obtain any gratification as motive or reward for using his/her personal influence to influence a public official).

⁶⁵ See, e.g., *Central Bureau of Investigation v. V.C. Shukla*, A.I.R. 1998 S.C. 1406, ¶¶ 56, 57 (India) (reasoning that bribe-givers could be held liable by reading PCA § 12 in conjunction with IPC § 107, which provides that an abettor can be penalized with the punishment of the underlying offense if he/she does anything at the time of or prior to the commission of the offense to "facilitate the commission" of the offense "and thereby facilitates the commission thereof"). See also IPC § 107 (providing that a party can abet a criminal offense by: (1) instigating a person to do the offense; (2) engaging in a conspiracy to commit an offense; or (3) by act or illegal omission, intentionally aiding the commission of the offense).

⁶⁶ See *The Prevention of Money Laundering Act of 2002*, No. 15 of 2003, § 3 (providing a minimum three year prison sentence and fine for a violation).

⁶⁷ See *Delhi Special Police Establishment Act of 1946 (DSPE Act)*, No. 25 of 1946 (establishing the CBI Anticorruption Division).

⁶⁸ See *id.* § 4 (describing the administrative structure of the police establishment); *Central Vigilance Commission (CVC) Act of 2003*, No. 45 of 2003, § 8 (India) (granting the CVC statutory authority).

⁶⁹ The author bases this determination on her own review of case law contained in Supreme Court and high court records and in commercial databases of Indian cases. See, e.g., MANUPATRA, <http://www.manupatrafast.in/> (last visited Apr. 10, 2013). A search of cases citing an abetment offense found only two hundred cases since the bill's inception, whereas a similar search for citations to provisions for primary offenses discovered well over one thousand cases.

PCA's categorization of bribe-giving as an abetting offense has, since the passage of the PCA, placed the criminality of providing a bribe into question.⁷⁰ In addition, news reports indicate a *clear* emphasis on penalizing principal offenders under the PCA—the public officials demanding or accepting bribes. As one news organization explains, “The [anticorruption] law has so far been focused on corruption among public servants, leaving the private sector out of the ambit”⁷¹

India's current anticorruption regime has been the subject of a number of criticisms. In particular, critics complain that enforcement agencies lack adequate power and resources and have failed to take action in a number of cases. Critics point out that CBI, which has roughly 10,000 cases pending trial, is under-resourced and directly subject to government control.⁷² The CBI director also cited inadequate resources an ongoing problem and called for “greater functional autonomy for the agency.”⁷³ A number of restrictions limit the CVC's and CBI's powers. The PCA requires the central government's sanction to penalize employees of the central government or entities established, owned, or controlled by it.⁷⁴ The Act also requires a state government's prior

Although this method is not an exact science, it strongly suggests that there are substantially more cases brought for principal offenses than abetting offenses.

⁷⁰ See, e.g., *State of Uttar Pradesh v. Udai Narayan*, (1999) Supp. (4) S.C.R. 255 (India) (rejecting a defendant's assertion that the CBI could not bring PCA charges against someone who was not a public servant).

⁷¹ *Private Sector Graft May Be Made Crime Too: PM*, INDIA CSR, Oct. 22, 2011, <http://www.indiacsr.in/en/?p=2822>.

⁷² See Interview by Ajay Vaishnav with Joginder Singh, Former Director of the CBI, *TIMES OF INDIA* (Jan. 11, 2012, 12:00AM IST), http://articles.timesofindia.indiatimes.com/2012-01-11/edit-page/30612267_1_cbi-case-cbi-director-central-bureau (supporting an independent CBI and complaining of the lengthy government sanction process and CBI's backlog).

⁷³ See Liz Mathew & Sahil Makkar, *PM Calls for Changes in Laws to Criminalize Private Sector Bribery*, *LIVEMINT.COM & WALL ST. J.*, Oct. 22, 2011, <http://www.livemint.com/2011/10/22003519/PM-calls-for-changes-in-laws-t.html?h=B> (announcing government plans to criminalize private sector bribery).

⁷⁴ See PCA § 19 (1)(a) (providing that “[n]o court shall take cognizance” of alleged PCA offenses without such sanction). The Supreme Court of India has said there is no judicial review of decisions to grant or not to grant sanction to conduct an investigation. Rather, a court can only remand for reconsideration. See *State of Punjab v. Bhatti*, (2009) 12 S.C.R. 790, ¶ 7 (India) (“It is . . . well settled that the Superior Courts cannot direct the sanctioning authority either to grant sanction or not to do so.”). See also *State of Himachal Pradesh v. Nishant Sareen*, A.I.R. 2011 S.C. 404, ¶ 8 (India) (“The object underlying Section 19 [of the PCA] is to ensure that a public servant does not suffer harassment on false, frivolous us, concocted or unsubstantiated allegations.”).

approval before investigation a state government employee.⁷⁵ Moreover, the PCA forbids police officers below a certain rank from investigating PCA violations without a judicial order.⁷⁶ The Act applies “to all citizens of India outside India,”⁷⁷ contains no exceptions for facilitation payments or corporate hospitality, and requires no minimum bribe amount to establish a violation.

Though the CVC is somewhat more autonomous than the CBI, the agency only has the power to make recommendations to the CBI and it is subject to the restraints summarized above.⁷⁸ In its proposed National Anticorruption Strategy, the CVC itself noted, “significant gaps still remain between the policy and practice.”⁷⁹ The CVC further wrote that, though existing anticorruption efforts are mostly punitive, “it is important that India shifts from this punitive approach to a more holistic preventive and participatory approach.”⁸⁰ Perhaps indicating a shift in CVC enforcement policies, the CVC has begun urging government agencies to enter into “Integrity Pacts” with procurement contract bidders in which parties promise not to pay, offer, demand, accept bribes, or collude with competitors to obtain a procurement contract.⁸¹

Activists also complain of the public’s inadequate role in anticorruption efforts, a lack of whistleblower protection, and the exacerbating effect of the backlog in Indian courts.⁸² Witnesses

⁷⁵ See PCA § 19 (1)(b)(requiring state sanction for penalty of an employee who is only removable with the sanction of that state government).

⁷⁶ See *id.* § 17 (requiring police officers to obtain a judicial warrant to conduct a PCA investigation)

⁷⁷ See *id.* § 1(2).

⁷⁸ See CVC Act of 2003, *supra* note 68, § 8(1) (“[T]he [CVC] shall not exercise powers in such a manner so as to require the . . . investigat[ion] or dispos[ition] of any case in a particular manner.”). Moreover, the CVC’s authority is limited to employees of the central government and government corporations. *Id.*

⁷⁹ CVC, DRAFT NATIONAL ANTI-CORRUPTION STRATEGY 6 (Sept. 20, 2010), available at <http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf>.

⁸⁰ *Id.*

⁸¹ See CVC, *The Integrity Pact*, available at <http://cvc.gov.in/vscvc/intpact.pdf> (last visited Apr. 10, 2013) (identifying integrity pacts as tools to help combat corruption in public contracting). See also Michael H. Wiehen, Member, Advisory Council, Transparency Int’l, *Transparency, Accountability and Integrity in Public Procurement: Instruments Developed, Lessons Learned* (Nov. 30, 2006), available at <http://www.oecd.org/dataoecd/22/54/37954020.pdf> (advocating similar integrity pacts); Draft Agenda, OECD, OECD Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement, at 17 (Oct. 6, 2004) (noting that Integrity Pacts have been used to reduce costs and corruption, particularly in Latin America).

⁸² See, e.g., Harpreet Oberoi, *Backlog of Cases in Indian Courts – The Way Out*, NAT’L BAR ASSOC. OF INDIA, <http://nationalbarindia.org/articles/4/backlog-of->

often feel intimidated from testifying,⁸³ and private individuals looking to enforce their rights often have only limited access to courts.⁸⁴ Although the PCA provides that a prosecutor may not use a bribe-giver's statement in a PCA proceeding against a public official as evidence of the bribe-giver's abetment, India lacks comprehensive whistleblower protections.⁸⁵ Nonetheless, there have been some efforts to increase transparency to permit private individuals to uncover corrupt practices. For example, the Indian Parliament passed the Right to Information Act of 2005, which provides individuals with a means of acquiring information pertaining to public procurement and contracts.⁸⁶ Additionally, the CVC has directed its local offices to prevent public officials from taking punitive actions against whistleblowers who report corruption activities, although the effect of this measure is unclear.⁸⁷

2.2. Pending Demand-Oriented Anticorruption Efforts

Corruption dominated the Indian political and public agendas during 2010 and 2011. The 2010 Commonwealth Games were

cases-in-indian-courts-the-way-out/ (last visited Apr. 10, 2013) (asserting that the elimination of corruption is essential to reducing the backlog in the courts).

⁸³ See Ray Marcelo, *Corruption Scandals Take the Shine Off India's Economic Success Story*, FIN. TIMES, Dec. 23, 2003 ("Witnesses are being threatened, then they don't support the prosecution's case, and the prosecution fails.") (quoting Justice Jeevan Reddy).

⁸⁴ In one evaluation, India ranked relatively well compared to countries in its income level in terms of a relatively open government, a functioning system of checks and balances, and an independent judiciary, but ranked relatively poorly in terms of its civil court system, police discrimination and abuses, and access to justice, "particularly in the areas of court congestion, enforcement, and delays in processing cases" See Mark David Agrast, et al., *THE WORLD JUSTICE PROJECT WORLD OF LAW INDEX 2011*, 30 (2011), available at http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2011_Report.pdf.

⁸⁵ PCA § 24 (providing that a person's statement made in a proceeding against a public official for alleged PCA violations that he/she agreed to offer a bribe may not be used to subject such person to abetment prosecution).

⁸⁶ See generally Right to Information Act, No. 22 of 2005, as amended up to Feb. 1, 2011; Leonid Peisakhin & Paul Pinto, *Is Transparency an Effective Anti-Corruption Strategy? Evidence from a Field Experiment in India*, 4 REG. & GOVERNANCE 261 (2010). For a discussion of retaliation against private citizens who attempted to use the law, see Jason Burke, *Dying for Data: The Indian Activist Killed for Asking Too Many Questions*, GUARDIAN, Dec. 27, 2010, <http://www.guardian.co.uk/world/2010/dec/27/india-rti-activists-deaths>.

⁸⁷ See CVC, *Government of India Resolution on Public Interest Disclosure and Protection of Informer*, Office Order No. 33/5/2004, at para. 2(ii) (May 17, 2004) ("The [Central Vigilance Office] is to ensure that no punitive action is taken . . . against any person on perceived reasons/suspicion of being 'whistle blower.'").

fraught with allegations of corruption, which led to highly publicized government probes into corruption allegations.⁸⁸ In March 2011, several activists began actively requesting a number of government investigations into CBI inaction.⁸⁹ By October 2011, Prime Minister Singh announced that the government was considering changes to its bribery laws.⁹⁰ Following the central government's announcement of proposed anticorruption legislation, it entered into negotiations with activists who proposed the creation of a national, politically independent ombudsman with investigatory powers to launch corruption investigations and prosecutions.⁹¹

After massive protests and a highly publicized fast by a prominent anticorruption activist, the central government introduced a compromise bill.⁹² The compromise bill would establish an ombudsman, or Lokpal, to serve as the primary prosecution wing in response to anticorruption complaints,⁹³ with

⁸⁸ See J. Balaji, *Centre Orders Probe Into CWG Issues*, HINDU, Oct. 15, 2010, <http://www.thehindu.com/news/national/article832511.ece> (ordering a government investigation into allegations of corruption and bribery in government expenditures for the Commonwealth games).

⁸⁹ For example, the organization wrote a letter to Prime Minister Manmohan Singh and the Haryana Chief Minister requesting a CBI investigation into "irregularities in the forest department" based on findings of a central government-established inquiry committee. Although the committee reported strong evidence of corruption against various officials, the state government did not request a CBI investigation. See *Top Activists for CBI Probe in Whistleblower Case*, TIMES OF INDIA, Mar. 22, 2011, http://articles.timesofindia.indiatimes.com/2011-03-22/india/29173809_1_cbi-inquiry-cbi-probe-social-activists.

⁹⁰ See Prime Minister Manmohan Singh, Address at the Biennial Conference of CBI and State Anti-Corruption Bureau (Oct. 21, 2011), http://pmindia.nic.in/content_print.php?nodeid=1073&nodetype=2 ("[W]e have introduced a Bill . . . to make bribery of foreign public officials an offence . . . [and] . . . are considering changes in our laws to criminalize private sector bribery.").

⁹¹ Critics note that an ombudsman may also be prone to corruption. See, e.g., *Ex-CVC Opposes Anna's Formula, Advocates 2T Mantra*, INDIAN EXPRESS, Sept. 9, 2011, <http://www.indianexpress.com/news/excvc-opposes-annas-formula-advocates-2t/844255/> (quoting a former CVC commissioner who described the Lokpal as "a gargantuan institution" and quipped, "Ultimately who will ensure all officials under Lokpal are not corrupt?").

⁹² See *Victory for Anna, Parliament Adopts 'Sense of House' on Lokpal Bill*, TIMES OF INDIA, Aug. 27, 2011, <http://timesofindia.indiatimes.com/india/Victory-for-Anna-Parliament-adopts-sense-of-House-on-Lokpal-Bill/articleshow/9761344.cms> (describing the negotiations between Anna Hazare, a leading anticorruption activist, and the central government).

⁹³ The Lokpal and Lokayuktas Bill, 2011, No. 134-C of 2011, § 12 [hereinafter Lokpal Bill]. The Act also calls for the establishment of similar ombudsman offices, or Lokayuktas, on the state level. *Id.* § 64. Some states already have similar institutions. See, e.g., *About Us, Office of the Lokayukta*, GOV'T OF DELHI,

jurisdiction over the Prime Minister, national ministers, and members of Parliament.⁹⁴ The bill would impose timeliness standards by requiring the Lokpal members⁹⁵ to complete investigations and subsequent trials within one year, creating a total maximum processing time of two years.⁹⁶ The bill would also provide whistleblower protections, establish a public grievance process, and require the ombudsman to publish a list of received and ongoing cases each year.⁹⁷ While the lower parliamentary house passed the compromise bill during the final week of 2011, the upper house adjourned their final session of 2011 without voting on the bill.⁹⁸ As of this writing, the Lokpal Bill remains pending in India's upper parliamentary house.⁹⁹ The lower parliamentary house also passed a whistleblower protection bill, although the bill has since been tabled in the upper house of parliament.¹⁰⁰

http://delhi.gov.in/wps/wcm/connect/doi_lokayukta/Lokayukta/Home/About+Us (last visited Apr. 10, 2013) (describing the Delhi's Lokayukta function to "inquire into the allegations against Public Functionaries" in Delhi).

⁹⁴ *Id.* §§ 2, 3, 14. The Act would bar the Lokpal from investigations into complaints against the Prime Minister pertaining to international relations, external and internal security, public order, and atomic energy and space, unless three-quarters of the full Lokpal voted in favor of the investigation. *Id.* § 14 (1)(a).

⁹⁵ The President would appoint members of the Lokpal after obtaining the recommendations of a Selection Committee consisting of the Prime Minister, the Speaker of the House of the People, the Leader of Opposition in the House of the People, the Chief Justice of the Supreme Court or another justice he/she nominates, and another "eminent jurist" nominated by the President. *Id.* § 4(1). The Cabinet Secretary and Election Commission would supervise the Lokpal. For a critique of the Lokpal, including that members of the body are not elected, but appointed for a five-year period, and that the impeachment process is "tedious," see Panday, *supra* note 52. *But see* Lokpal Bill, *supra* note 93, § 37-38 (providing a mechanism for receiving complaints against Lokpal members that involves the President).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See Jim Yardley, *Bill to Create Anticorruption Agency Stalls in India*, N. Y. TIMES, Dec. 29, 2011, http://www.nytimes.com/2011/12/30/world/asia/anticorruption-bill-stalls-in-adjourning-india-parliament.html?_r=1&scp=1&sq=india%20corruption&st=cse (describing the deliberations in Parliament).

⁹⁹ Sandeep Dikshit, *Lokpal Bill Hits Fresh Road Block*, HINDU, May 21, 2012, <http://www.thehindu.com/news/national/lokpal-bill-hits-fresh-road-block/article3442748.ece>. See generally *Lokpal Bill: Govt Version vs Civil Society Version*, TIMES OF INDIA, Apr. 7, 2011, <http://timesofindia.indiatimes.com/articleshow/7892134.cms> (comparing proposed versions of the Lokpal Bill).

¹⁰⁰ See The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010, No. 97 of 2010 (establishing a mechanism to register

2.3. *Limitations of India's Approach to Combatting Corruption*

The pending Lokpal Bill may or may not encourage effective enforcement of the PCA—nonetheless, it fails to address two central shortcomings of India's current anticorruption regime. First, the proposed legislation will not change Indian anticorruption laws' emphasis on penalizing government officials—not on dissuading individuals and corporations from providing bribes. Second, the legislation will not alter India's current emphasis on criminal prosecution over cooperative agreements with private parties.

Because India's current and proposed anticorruption laws do not recognize bribe-giving as a principal offense, there are formal limitations on how the government can effectively target the supply of bribery. For example, penalizing the supply of corruption as an abetting offense potentially limits corporate liability under the PCA. For instance, while a bribe-giver may be penalized as an abettor or for accepting gratification to influence a public servant in the conduct of an official act, it is not clear to what degree a business organization on whose behalf the abettor is acting can be penalized under the PCA. For example, in 2012, allegations arose that an equipment lobbyist offered a bribe of nearly three million U.S. dollars, on behalf of Tatra, a private Czech company, to the Army Chief General to secure the army's purchase of substandard specialized military vehicles. Although CBI is investigating the government officials' roles, it is unclear whether CBI can or will bring charges against Tatra as the indirect source behind the offered bribes.¹⁰¹ This instance demonstrates the limits of corporate liability under the PCA as a mechanism to target companies involved in bribing public officials.

Targeting the demand for bribes without also penalizing supply also creates a free-rider problem. If corporations and individuals are not subject to penalties for providing bribes, it behooves them to continue bribing because they are unsure if other

complaints of corruption against a public official and providing safeguards for whistleblowers). The central government also proposed a right to services bill that would impose penalties on government officials for failure to deliver certain public services. *See generally* The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of Their Grievances Bill, No. 131 of 2011; *Grievance Redress Bill to Complement Lokpal Bill*, HINDU, Nov. 3, 2011, <http://www.thehindu.com/news/national/article2592661.ece>.

¹⁰¹ Vinay Kumar, *Army Chief Names Tejinder in His Complaint to CBI*, THE HINDU, Mar. 31, 2012, <http://www.thehindu.com/news/national/article3265907.ece> (describing a complaint to CBI concerning the government official involved).

companies are using bribes.¹⁰² Furthermore, this emphasis on demand rather than supply fails to recognize that the private sector is often a source of unsolicited bribes. In a 2011, KPMG survey of business practitioners in India, sixty-eight percent of respondents reported a belief that in many cases, individuals in the private sector *initiated* bribe-giving. Moreover, a majority of respondents felt that the proposed Lokpal legislation would have no impact on the level of corruption in India.¹⁰³ However, the survey indicated that a majority of corporate respondents were supportive of legislation that would penalize the providers of bribes.¹⁰⁴ Adoption of domestic statutes that penalize providers of bribes will help to deter corruption and to level the playing field between companies that choose to engage in corruption and those that do not. Domestic legislation targeting the supply of corruption will help ameliorate fears amongst some companies that strict enforcement of the FCPA, the Bribery Act, and other foreign legislation makes conducting business in India too risky.

Additionally, the PCA only provides for criminal prosecution, which limits the enforcement mechanisms available under India's anticorruption regime. The PCA provides no method of civil enforcement of the sort available to the U.S. Securities Exchange Commission (SEC) under the FCPA. Additionally, India's anticorruption regime makes no use of settlement arrangements of the sort that the United States has predominantly relied upon in enforcing the FCPA and that evidence suggests the United Kingdom will utilize in enforcing the Bribery Act.

3. PROHIBITIONS ON BRIBERY

3.1. *Anti-bribery Offenses, Exceptions, and Defenses under the FCPA*

The Foreign Corrupt Practices Act (FCPA) is a U.S. statute that restricts bribery of foreign officials, even extraterritorially, and requires affected corporations to maintain books and records that accurately and fairly reflect corporate transactions. The U.S. Congress passed the FCPA following a number of corruption scandals during the 1970s.¹⁰⁵ Since then, and particularly in recent

¹⁰² See *supra* note 31 and accompanying text.

¹⁰³ KPMG, *supra* note 51 at 8, 12-14 (surveying respondents about the influence of bribery on conducting business in India).

¹⁰⁴ *Id.* at 15.

¹⁰⁵ The U.S. Congress unanimously passed the FCPA in 1977 following prosecutions for illegal use of corporate funds arising out of the Watergate scandal. See Criminal Division of DOJ & Enforcement Division of the SEC, A

years, the United States has aggressively prosecuted international bribery.¹⁰⁶

The FCPA makes it a criminal offense to give or offer anything of value to a foreign official,¹⁰⁷ foreign political party, official, or candidate “to assist in obtaining or retaining business . . . or directing business to, any person.”¹⁰⁸ This anti-bribery offense pertains to individuals and various corporate actors.¹⁰⁹ The Act covers not only direct actions of a company or its employees, but also indirect payments made through third parties with knowledge that the recipient will use all or any portion of the payment to bribe

Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 14, 2010), at 3, <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter FCPA Resource Guide]. See also S. REP. NO. 95-114, at 4 (1977) (Comm. Rep.) (finding that corporate bribery “is fundamentally destructive” to the basic principal that “[i]n our free market system it is basic that the sale of products should take place on the basis of price, quality and service.”); H.R. REP. NO. 95-640, at 4-5 (1977) (reporting that such bribes “erode[d] public confidence in the integrity of the free market system[,]” “embarrass[ed] friendly governments, [and] lower[ed] the esteem for the United States among the citizens of foreign nations”).

¹⁰⁶ Although there are some indications that FCPA prosecutions were down in 2012, the number that year still exceeded prosecutions in any year prior to 2008. See GIBSON DUNN, 2012 YEAR-END FCPA UPDATE 1 (2013), available at <http://www.gibsondunn.com/publications/pages/2012YearEndFCPAUpdate.aspx> (noting that the drop in prosecutions is likely a result in resource management but not a prediction of future decreases in enforcement).

¹⁰⁷ 15 U.S.C. § 78dd-1. “Foreign official” includes government employees, including elected or appointed officials, and of the military as well an “instrumentality thereof.” *Id.* at (a)(1)(B). See *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (holding that the U.S. government could not prosecute foreign officials for conspiring to violate the FCPA). The DOJ and the SEC have construed “instrumentalities” to encompass state-owned enterprises and federal district courts have affirmed these designations. See generally “State-Owned Enterprises” Under the FCPA, NEWSLETTER (Steptoe and Johnson LLP, Washington, D.C.), June 3, 2011, at 1, available at <http://www.steptoel.com/publications-newsletter-209.html> (discussing the FCPA’s application to state-owned enterprises).

¹⁰⁸ 15 U.S.C. § 78dd-1(a)(1)(B). The DOJ has interpreted “obtaining or retaining business” beyond the scope of a mere award or renewal of contract for government business. See generally FCPA Resource Guide, *supra* note 105, at 12.

¹⁰⁹ Including any U.S. citizen, national, or resident and any corporation and other business entity organized under the laws of the United States or with its principal place of business in the United States. The FCPA bribery offense also covers any foreign corporation listed on any U.S. stock exchange or that is required to file reports under the Securities and Exchange Act of 1934. See 15 U.S.C. § 78dd-1(a). The bribery offense also pertains to individuals acting on behalf of such companies or individuals, such as company officers, directors, employees, agents, or stockholders. See *id.*; Rina Pal & James Parkinson, *The U.S. Foreign Corrupt Practices Act and Doing Business in India*, 2 INDIA L. NEWS (Am. Bar Ass’n Section of Int’l Law, Washington D.C.), Spring 2011, at 5.

foreign officials.¹¹⁰ Courts have confirmed the supply-oriented perspective of the FCPA by holding that it does not pertain to the recipient of a bribe.¹¹¹ Penalties, either civil or criminal, under the FCPA focus on the purpose of a payment and intent of the briber, rather than the amount of the bribe.¹¹² Under U.S. law and the theory of *respondeat superior*, a corporation may be liable for employee actions in violation of the FCPA, even if the company did not sanction the actions in question, so long as the employee acted within the apparent scope of his or her employment.¹¹³

The FCPA does not prohibit 'facilitation' payments, or the payment, gift, offer, or promise of payments intended to expedite or secure the performance of a routine and nondiscretionary government action.¹¹⁴ A routine governmental action does not include the award or continuance of business with a particular party.¹¹⁵ The FCPA also provides two affirmative defenses. The first pertains to where the alleged bribe "was lawful under the written laws and regulations of the foreign official's . . . country."¹¹⁶

¹¹⁰ 15 U.S.C. § 78dd-1(a)(3) ("[A]ny 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 . . ."). When required, the knowledge of a particular circumstance requirement "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." See 15 U.S.C. § 78dd-1(f)(2)(B). See also Patel, *supra* note 42 (stating that cases have imputed knowledge where an entity was willfully blind to misconduct or consciously avoided examining red flags). A company merging or acquiring another company may inherit liability under for past violations of the FCPA and so companies are likely to conduct FCPA-related due diligence before acquiring or merging with another company. See Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80 (1992).

¹¹¹ See generally *Castle*, 925 F.2d. 831. The DOJ has charged certain foreign official recipients of bribes with related crimes including money laundering. See, e.g., Press Release, DOJ Office of Public Affairs, Two Florida Executives, One Florida Intermediary and Two Former Haitian Government Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme (Dec. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-crm-1307.html>

¹¹² FCPA Resource Guide, *supra* note 105, at 15.

¹¹³ *Id.* at 27.

¹¹⁴ International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. § 78dd-3(b). The Act defines a routine government action as one "which is ordinarily and commonly performed by a foreign official" and gives several concrete examples of what constitutes a routine government action, including providing police protection, postage services, scheduling needed inspections, obtaining necessary permits, and processing governmental papers such as visas. 15 U.S.C. § 78dd-3(f)(3)(a).

¹¹⁵ See 15 U.S.C. § 78dd-3.

¹¹⁶ 15 U.S.C. § 78dd-3(c)(1). In 2005, the DOJ reported that it was unaware of any instances or Opinion Releases that explicitly addressed this defense. See U.S. Dep't of Justice, Response of the U.S.: Questions Concerning Phase 2, §4.1(e)

The second defense is available when the alleged bribe “was a reasonable and bona fide expenditure, such as travel and lodging expenses,” incurred on behalf of the foreign official.¹¹⁷

3.2. *Anti-bribery Offenses and Defenses under the Bribery Act*

Unlike the FCPA, which only covers the supply of bribes to foreign officials, the Bribery Act consolidates the United Kingdom’s prohibitions on both domestic and foreign bribery into one statute. Like the FCPA, the Bribery Act penalizes the supply of bribes to foreign officials. The United Kingdom enacted the Bribery Act in April 2010, consolidating and amending existing anti-bribery laws “from a patchwork of common law to comprehensive legislation.”¹¹⁸ The Act forbids a person,¹¹⁹ either directly or through a third party,¹²⁰ from bribing¹²¹ a foreign public

(responding to an OECD report evaluating U.S. anticorruption efforts). The OECD Convention also mirrors the FCPA exceptions for payments made in jurisdictions where such payments are legal. See *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, Nov. 21, 1997, at 8 [hereinafter OECD Convention Commentaries] (outlining these exceptions).

¹¹⁷ See 15 U.S.C. § 78dd-3(c)(2)(A), (B) (describing that the *bona fide* expense must 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 government agency]”).

¹¹⁸ Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 420 (2011). Pressure to adopt amended legislation began in 2007, after the SFO dropped an investigation into alleged bribes that BAE Systems paid in connection to a £43 billion arms deal between the British government, Saudi Arabia, and BAE Systems. Subsequently, the House of Lords held that the SFO was entitled to drop its investigation due to concerns about resulting risks to British security should Saudi Arabia withhold intelligence. See generally *BAE and the Saudi Arms Deal: Timid Justice*, THE ECONOMIST, July 31, 2008, <http://www.economist.com/node/11848360>. Explanatory notes accompanying the Bribery Act indicate that the British Parliament intend for the offense of bribing a foreign official to follow closely the OECD requirements. See generally Ministry of Justice, Explanatory Notes Relating to Bribery Act 2010 (c. 23), ¶ 34, THE NATIONAL ARCHIVES, available at <http://www.legislation.gov.uk/ukpga/2010/23/notes/contents> [hereinafter Bribery Act Explanatory Notes].

¹¹⁹ See Bribery Act § 16 (“This Act applies to individuals in the public service of the Crown as it applies to other individuals.”)

¹²⁰ See Bribery Act § 6(3)(a) (establishing that use of a third party would not diminish liability).

¹²¹ See *id.* (defining a bribe as the offer, promise, or giving of any financial or other advantage).

official¹²² with the intention¹²³ of influencing the official in his or her official capacity¹²⁴ in order to obtain or retain business or an advantage in the conduct of business.¹²⁵

Like the FCPA, the Bribery Act applies extra-territorially.¹²⁶ A corporate entity and certain corporate officers¹²⁷ can be held criminally liable if the offense was committed with the officer's consent or connivance and if the organization was incorporated, formed, or carries on business in the United Kingdom.¹²⁸ The Bribery Act also penalizes the failure of commercial organizations to prevent acts of bribery by an associated person.¹²⁹

¹²² See Bribery Act § 6(5) (including an elected or appointed individual who holds a legislative, administrative, or judicial position and exercises a public function on behalf of a foreign country or public international organization).

¹²³ Explanatory notes accompanying the Act indicate that an individual must *intend* to influence a foreign public official in his/her official functions, whether or not the official has the authority to use the position in that way, and the offending individual must intend to obtain or retain business or an advantage in conducting business. See Bribery Act Explanatory Notes, *supra* note 118, 44–45.

¹²⁴ See Bribery Act § 6(4) (including an omission to exercise those functions, and any use of the official's position, even outside of the official's authority).

¹²⁵ See *id.* § 6(1), (2) (describing the briber's necessary intention).

¹²⁶ The Act applies where any act or omission that forms part of the offence takes place in the United Kingdom or where conduct that violates the Act occurs outside of the United Kingdom and the person or entity has a close connection with the country. See *id.* §§ 12(1), (2); 14(4)(a)–(i) (defining a close connection). A number of observers have noted this broad scope. See, e.g., Michelle Duncan, Palmina Fava & Samantha Kakat, *A Comparison of the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act*, STAY CURRENT CLIENT ALERTS (Paul Hastings LLP, New York, N.Y.), Oct. 2010 at 1, available at <http://www.paulhastings.com/assets/publications/1750.pdf> (noting that the broad scope of the Act "creates several areas of uncertainty").

¹²⁷ See Bribery Act, § 14(4) (defining a senior official).

¹²⁸ See *id.* §§ 12(5), 14. Following a summary conviction, a defendant may be sentenced to imprisoned for up to twelve months and/or fined up to a statutory maximum. For a conviction following an indictment, a defendant may be imprisoned for up to ten years and/or fined an unlimited amount. *Id.* § 11(1); Bribery Act Explanatory Notes, *supra* note 118, para. 56. A corporation or partnership found liable under the act is punishable by an unlimited fine. *Id.*

¹²⁹ See Bribery Act § 7(1). So long as the commercial organization has a close connection to the United Kingdom, it does not matter if the failure occurs elsewhere. *Id.* § 12(5). The Act specifies that a "person associated" is a person who perform services on behalf of the organization, including an employee, agent, or a subsidiary, and in consideration of all the relevant circumstances. *Id.* § 8. A commercial organization is defined as (1) a body incorporated under U.K. law; (b) any other corporate body which carries on a business, or part of a business, in the United Kingdom; (c) a partnership formed under U.K. law; (d) any other partnership which engages in a business, in whole or in part, in the United Kingdom. *Id.* § 7(5). Violations of the failure to prevent a bribery offense are punishable with an unlimited fine. *Id.* § 11(3).

The Bribery Act offers a number of defenses. Like the FCPA, the Bribery Act does not apply if the domestic law to which the foreign official is subject does not prohibit the foreign official from being influenced by the offer, promise, or gift.¹³⁰ Unlike the FCPA, the Bribery Act offers corporations with a form of a compliance defense. The statute provides a defense for the failure to prevent offense where the organization had “in place adequate procedures designed to prevent persons associated” with it from engaging in such conduct.¹³¹ The organization must demonstrate that it effectively administered and publicized its procedures, the procedures were adequately designed to prevent bribery, and the wrongdoer was a junior employee.¹³² Therefore, to insulate themselves from liability, companies now “have to play anticorruption roles too.”¹³³ The Bribery Act instructs enforcing authorities to publish guidance on what amounts to adequate procedures.¹³⁴ That guidance indicates that the agencies will apply a “common sense approach” in enforcing the failure to prevent offenses and sets out six principles with which they will evaluate compliance procedures.¹³⁵

The British Parliament rejected facilitation payment or corporate hospitality exceptions,¹³⁶ but instead deferred these issues to the discretion of prosecutors who are instructed to take

¹³⁰ See *id.* § 6(3)(b) (stating that for the purposes of the Bribery Act, a bribe occurs only where the foreign official is not permitted by applicable law to be influenced by the offer, promise, or gift).

¹³¹ *Id.* § 7(2).

¹³² *Id.*

¹³³ Eric Gutierrez, *Why Business Should Care About Fighting Corruption*, Poverty Matters Blog, THE GUARDIAN (July 1, 2011), <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/01/bribery-act-business-should-fight-corruption> (explaining the effect of the failure to prevent offense on businesses).

¹³⁴ See Bribery Act § 9.

¹³⁵ See Ministry of Justice, *The Bribery Act 2010 Guidance 20–31* (March 2011), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [hereinafter Justice Bribery Act Guidance] (establishing the following six principles: (1) proportionate procedures; (2) top-level commitment; (3) risk assessment; (4) due diligence; (5) communication (including training); and (6) monitoring and review).

¹³⁶ See Letter from Lord Tunnicliffe, Gov't Spokesperson for the Ministry of Justice, to Lord Henley, House of Lords (Jan. 14, 2010) (responding to the introduction of a failed amendment to include such an exception in the Bribery Act). The letter explains, “[C]orporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages” and the law must be able to penalize these uses. See *id.*

action “in the most appropriate cases.”¹³⁷ The U.K. government issued guidance intending to “shed a lot of light on some of the issues concerning facilitation payments and hospitality”¹³⁸ Additionally, the guidance related the public interest factors that prosecutors will consider in deciding whether to prosecute a given case.¹³⁹ The guidance also notes that a company’s voluntary notification to authorities of a facilitation payment because of the company’s proactive self-reporting procedures is likely to reduce penalties.¹⁴⁰

According to the Serious Fraud Office (SFO), an agency primarily responsible for enforcing the Bribery Act, a single incident will not necessarily indicate that a company has inadequate procedures. The SFO explains that the statute does not intend “to penalise ethically run companies that encounter an isolated incident of bribery.”¹⁴¹ Nonetheless, there are indications that that the United Kingdom will enforce the Bribery Act in cases of nominal facilitation or hospitality payments. For example, government-issued guidance indicates that facilitation payments

¹³⁷ See NICK KOCHAN & ROBIN GOODYEAR, CORRUPTION: THE NEW CORPORATE CHALLENGE 148 (2011) (describing various official statements concerning the choice of whether or not to prosecute facilitation payments and corporate hospitality under the Bribery Act).

¹³⁸ Richard Alderman, Dir. of the SFO, Speech, Hosted by McGrigors, Feb. 9, 2011, <http://web.archive.org/web/20110305211614/http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/the-bribery-act-2010---the-sfo's-approach-and-international-compliance.aspx>

¹³⁹ See *id.* The SFO Guidance cites a number of considerations favoring prosecution including the length of a likely sentence, premeditation, facilitation of more serious offenses, and abuses of positions of authority. See U.K. SFO & Crown Prosecution Service, Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, at 7, http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf [hereinafter SFO Bribery Act Guidance] (listing considerations). The guidance also notes factors tending against prosecution, including a single small payment likely to result in only nominal penalties, a resulting harm that is minor or the result of an accident, and a “a genuinely proactive approach involving self-reporting and remedial action.” *Id.* See also Code for Crown Prosecutors, Jan. 2013, <http://www.cps.gov.uk/publications/docs/code2013english.pdf> (explaining that after prosecutors determine the sufficiency of evidence, they consider the public interest factors in favor of or against prosecution).

¹⁴⁰ The SFO Director recognized that banning facilitation payments might not be practical, especially for small firms, but explained that the Bribery Act sets aspirational goals of moving towards “zero tolerance” over time. The SFO Director also encouraged companies to engage with the SFO because the office is less likely to prosecute offenses if a company has committed to an eventual zero-tolerance policy. See Alderman Speech, *supra* note 138.

¹⁴¹ SFO Bribery Act Guidance, *supra* note 139, at 3.

paid as a standard way of conducting business may actually indicate premeditation and suggest that prosecution is appropriate.¹⁴²

3.3. Recommended Anti-Bribery Offenses in India

3.3.1. Principle Offenses

Given the limitations of India's demand-oriented approach, as discussed in Section 2.3 above, the country's anticorruption efforts would likely benefit from an amendment to the PCA making bribe-giving a primary offense. Furthermore, India's Parliament should amend the PCA to address some form of supervisor liability. Both the U.S. and the U.K. statutes impose some form of strict liability on a corporation for a bribe given by its employee or agent. The United States accomplishes this aim through *respondeat superior* liability and the United Kingdom accomplishes this through its failure to prevent bribery offense, as discussed in previous sections. Like these statutes, the Indian statute should impose liability on corporations for actions taken by employees and agents. Supporting this point, one observer noted, "Nothing has increased the impact of the [FCPA] on corporations more than *respondeat superior*."¹⁴³

Though *respondeat superior* is not without its critics, including some form of superior liability in India's anticorruption efforts is essential to prevent corporate officers from evading liability while lower employees face penalties. The Indian Penal Code already recognizes that a "person" in the criminal law context may include business entities.¹⁴⁴ Some statutes provide specific statutory provisions of vicarious liability for corporate officers where such officers have knowledge of wrongdoing or fail to act with due

¹⁴² See *id.* at 9 (describing premeditation as a factor favoring prosecution).

¹⁴³ Richard L. Cassin, *Justice for Corporate Defendants?*, FCPA BLOG (June 10, 2008, 3:28 AM), <http://www.fcpablog.com/blog/tag/respondeatsuperior?currentPage=7>. Some critics of supervisor liability point out that a senior executive of a company "may be no more culpable for corruption at lower levels of a company than a minister is for corruption at lower levels of his ministry." *Corporate Corruption*, LITEMINT.COM & WALL STREET J. (Oct. 22, 2011, 1:28 AM), <http://www.livemint.com/2011/10/22012814/Quick-Edit--Corporate-corrupt.html?d=1> (announcing the Prime Minister's intention to criminalize corporate bribe-giving and the intended effect on businesses).

¹⁴⁴ See IPC § 11 ("[P]erson' includes any Company or Association or body of persons, whether incorporated or not."). See generally V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. R. 1477 (1996) (exploring the rationale and justifications for imposing criminal liability on corporations).

diligence.¹⁴⁵ The Supreme Court of India has adopted a limiting stance for vicarious liability by clarifying,

In order to trigger corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the ego, the center of the corporate personality, the vital organ of the body corporate, the alter ego of the employer corporation or its directing mind.¹⁴⁶

Nonetheless, imposing a broader notion of vicarious liability on companies, one that potentially penalizes companies for all employee actions, not just those of central company officials, will help provide companies with the appropriate incentives to discourage employees from engaging in corrupt business practices.

Additionally, imposing corporate criminal liability makes a company's anticorruption efforts into an issue of corporate governance, and therefore, a matter of private law. For instance, a company that incurs corporate liability may face shareholder litigation alleging a company's corporate governance failures.¹⁴⁷ Shareholders become interested in ensuring that a company does not resort to bribery because of the associated reputational and

¹⁴⁵ See, e.g. The Negotiable Instruments Act, No. 26 of 1881, § 141 (India) (providing that persons in certain positions may be held liable for a company's violations of that act). In evaluating one such statutory provision, the Supreme Court of India recently held that an officer may only be held vicariously liable where the company is actually charged with committing a crime. See *Aneeta Hada v. M/S Godfather Travels & Tours*, S.Ct., Crim. App. No. 838 of 2008 (India) (describing that a company officer with responsibility for the conduct of the company may be liable under the Negotiable Instruments Act § 141 only where the company is an offending party and where the person does not prove that the violation was committed without his/her knowledge or that he/she exercised due diligence to prevent the violation).

¹⁴⁶ *Assistant Commissioner, Assessment- II, Bangalore and Ors. v. Velliappa Textiles Ltd. and Ors.*, A.I.R. (1) 2004 S.C. 86, ¶ 2 (India) (reasoning that because a corporation cannot be imprisoned, laws that mandatorily impose imprisonment cannot apply to corporations).

¹⁴⁷ See Frances Meadows, *Corporate Governance and Corruption/Corporate Governance et Corruption*, 5 INT'L L.F. D. INT'L 97, 97 (2003) (describing how corporate liability transforms anticorruption efforts into a matter of private law); *Cases and Review Releases Relating to Bribes to Foreign Officials*, FCPA DIGEST (Shearman & Sterling LLP, New York, N.Y.), Jan. 2013, at xiii, http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf ("The year saw a slew of private litigation related to FCPA investigations and enforcement . . . most were the usual derivative and securities class action lawsuits that follow FCPA disclosures")

business costs of corporate liability. As a result, a strong notion of corporate vicarious liability adds a body of private enforcers to an anticorruption regime.

3.3.2. *Proposed Defenses and Exceptions to Supply-Oriented Anticorruption Offenses in India*

The incentives offered by *respondeat superior* are similar to those encouraged by the Bribery Act's failure to prevent offense. Under the theory of *respondeat superior*, a corporation cannot evade FCPA liability entirely by demonstrating that it had a compliance program.¹⁴⁸ Yet, unlike the FCPA, the Bribery Act offers a defense for companies that implement "Adequate Procedures" to prevent bribery. Even in the United States, a company's compliance efforts may result in a reduced sentence.¹⁴⁹ Moreover, U.S. prosecutors are also encouraged to consider such compliance programs as well as voluntary disclosures and a corporation's past history in determining whether to charge a corporation.¹⁵⁰

Although the U.S. Department of Justice (DOJ) has opposed amendments to introduce a compliance defense,¹⁵¹ critics have pointed out that penalizing a company regardless of compliance programs does "not adequately reward companies for sincere (and

¹⁴⁸ See U.S. Sentencing Guidelines Manual § 8B2.1, pts. a, b, and c (2012) (detailing the meaning and purpose of an effective compliance and ethics program).

¹⁴⁹ The U.S. Sentencing Guidelines consider a pre-existing "reasonably designed, implemented, and enforced" compliance program which should lead a corporation to "exercise due diligence to prevent and detect criminal conduct." *Id.* Moreover, a failure to "prevent or detect" a violation of the FCPA is not itself determinative of the program's effectiveness" although the sentencing guidelines advise that evidence of the effectiveness of a program should be considered. *Id.*

¹⁵⁰ See U.S. Attorney Manual §§ 9-28.500 (2008) ("[I]t may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee."); Memorandum from Deputy Attorney General Larry D. Thompson on the Principles of Federal Prosecution of Business Organizations to the Heads of DOJ Components and U.S. Attorneys (Jan. 20, 2003), http://justice.gov/dag/ctf/corporate_guidelines.htm (providing general principles for federal prosecution of corporations).

¹⁵¹ See Joe Palazzolo, *U.S. Chamber Of Commerce Presses for Changes to FCPA*, WALL ST. J. BLOG (Oct. 27, 2010, 10:45 AM), <http://blogs.wsj.com/corruption-currents/2010/10/27/us-chamber-of-commerce-presses-for-changes-to-fcpa/> (describing proposed amendments). The DOJ declared that it had "no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool . . ." See Assistant Breuer speech, *supra* note 7.

expensive) efforts to stop the unwanted misbehavior of their employees.”¹⁵² Some practitioners have noted that, “This defense recognizes—in a way that the U.S. adherence to the *respondet superior* doctrine does not—that robust compliance by companies should insulate the company from criminal liability.”¹⁵³ The adequate procedures defense has led some observers to determine that the U.S. statute is more likely to deter foreign investment than its British counterpart.¹⁵⁴

Inclusion of an adequate procedures defense in Indian legislation may offer an added bonus of encouraging companies to monitor employees through adequate procedures and utilize corporate governance as a means of combatting corruption. Additionally, a corporate compliance defense may actually bolster anticorruption efforts by encouraging companies to adopt compliance programs because doing so may reduce a company’s potential liability under Indian anticorruption laws, but also under potential corporate governance liability through shareholder litigation. For example, in the OECD’s 2002 investigation of the United States, it recognized both criminal prosecution as well as the role of corporate compliance programs in bolstering U.S. anticorruption efforts.¹⁵⁵ The OECD’s report noted, “[C]orporate compliance programs are the single most important measure

¹⁵² Interview by Mike Koehler with Joseph Covington, Former Chief of the Multinational Fraud Branch of DOJ (Oct. 4, 2011), <http://www.fcprofessor.com/former-doj-fcpa-chief-supports-fcpa-compliance-defense> (outlining arguments in favor of an FCPA compliance defense). See also Mike Koehler, *Revisiting A Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 617 (2012) (“[C]urrent FCPA enforcement environment thus does not adequately recognize a company’s good-faith commitment to FCPA compliance and does not provide good corporate citizens a sufficient return on their compliance investments.”)

¹⁵³ See *Anti-Corruption Mid-Year Review*, GLOBAL ANTI-CORRUPTION E-ALERT (Covington & Burlington LLP, Washington, D.C.), July 2011, at 1, available at <http://www.cov.com/files/Publication/01a3d761-b8ca-421f-9932-b0fef03c4219/Presentation/PublicationAttachment/68ac553e-2122-49fa-b270-b38b69ff5215/Anti-Corruption%20Mid-Year%20Review%20-%20Beijing.pdf> (last accessed Feb. 1, 2013) [hereinafter Covington Mid-Year Review].

¹⁵⁴ See *A Tale of Two Laws*, *supra* note 7.

¹⁵⁵ OECD, REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 6 (2002), available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/1962084.pdf> (asserting that the combined effect of the FCPA, government enforcement, U.S. business practices, and a specialized bar of attorneys involved in anticorruption work contribute to the maturity of the U.S. anticorruption legal system).

contributing to prevention and deterrence.”¹⁵⁶ Nonetheless, if India were to adopt this type of defense, it must involve actual investigations of business procedures and involve questions such as whether or not the business trained its employees. Otherwise, an adequate procedures defense might become a vehicle for undermining liability.

Adoption of a facilitations payment exception would similarly help India enforce its anticorruption efforts strategically. Facilitation payments receive varying treatment in national legislation and transnational conventions. Both the OECD Anti-Bribery Convention and FCPA expressly exempt facilitation payments,¹⁵⁷ while the Bribery Act explicitly rejects such an exception.¹⁵⁸ The PCA contains no facilitation payments exception, and so an individual who pays a very small bribe to receive an essential service, such as water, in response to a demand from a public official may potentially face a minimum prison sentence under Section 12.¹⁵⁹

Yet corruption is so pervasive in India that many individuals report needing to bribe government officials to obtain routine government services. A 2009 study reported that seventy-seven percent of reported bribes during its reporting period were “extortionate demands,” or demands relating things to which the reporter was entitled, such as the timely delivery of a service to

¹⁵⁶ *Id.* at 17.

¹⁵⁷ See OECD Convention Commentaries, *supra* note 116, at 15 (“Small ‘facilitation’ payments do not constitute payments made “to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence.”). Nonetheless, beginning in 2009, the OECD announced a new recommendation stating that countries should undertake periodic reviews to effectively combat facilitation payments, encourage companies to prohibit or discourage use of such payments, and that all such payments need to be accurately accounted for in company’s books and records. The OECD contextualized its recommendation “in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law.” OECD Working Grp. on Bribery in Int’l Bus. Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in Int’l Business Transactions*, OECD, Nov. 26, 2009, available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

¹⁵⁸ It is notable that U.S. law governing domestic bribery does not exempt facilitation payments. See generally 18 U.S.C. § 201 (2006). Moreover, the OECD explains that most countries make facilitation payments paid domestically illegal and notes that it “does not seem a practical or effective complementary action” to have foreign countries impose criminal penalties for these payments. See OECD Convention Commentaries, *supra* note 116, at 15.

¹⁵⁹ Violating public officials or abettors can be fined and and/or incarcerated for up to five years, and for at least six months. See PCA § 7.

which the reporter was entitled and receiving owed payments.¹⁶⁰ Studies indicate that payments demanded are often small and frequent, particularly in industries such as trucking which require frequent interaction with government officials.¹⁶¹ Frustrations about such demands are rampant. For example, during 2011, two farmers in a Northern Indian village dumped bags of snakes in a local tax office to protest officials' alleged withholding of tax records while attempting to extort bribes.¹⁶² In fact, the focus on public officials, rather than the suppliers of bribes, in the current public campaign against corruption may be a response to the public's frustration with these extortions.¹⁶³ Penalizing individuals who require the services for which a government official demands a bribe may be unfair given that individuals often have no true choice but to pay these bribes. A facilitation payment exception may help to address this reality and encourage reports of soliciting public officials.

Given Indian public officials' common solicitation of bribes, failing to provide a facilitation defense may create a gap between the de facto law and its realistic enforcement.¹⁶⁴ While modifying the Indian anticorruption regime, Indian policy-makers should recognize this reality faced by individuals and businesses operating in India. Recognizing this issue, India's Chief Economic

¹⁶⁰ *Business Registry for Int'l Bribery & Extortion (Bribeline) India Report, 2009*, TRACE Int'l [hereinafter TRACE Report 2009] (covering a survey of ninety-six self-reports of demands for bribery in India between July 2007 and October 2008).

¹⁶¹ See *id.* at 5 (stating that during the sixteen month period covered, bribe demands were predominantly for small dollar amounts and a vast majority were initiated by government officials). See also *Corruption in Trucking Operations in India*, TRANSPARENCY INT'L INDIA (Feb. 2007), http://www.transparencyindia.org/resource/survey_study/Corruption%20in%20Trucking%20Operations%20in%20India.pdf ("[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.").

¹⁶² Jason Burke & Manoj Kumar, *India Corruption Protesters Dump Snakes in Busy Tax Office*, GUARDIAN U.K., Nov. 30, 2011, <http://www.guardian.co.uk/world/2011/nov/30/india-corruption-protest-snakes-tax-office?newsfeed=true> (describing the incident as an example of anticorruption protests occurring in northern India).

¹⁶³ See Kingshuk Nag, *How IAS Officers Can Let Off Their Colleagues, Officially*, TIMES OF INDIA BLOG (Mar. 20, 2012, 10:38 AM IST), <http://blogs.timesofindia.indiatimes.com/masala-noodles/entry/how-ias-officers-can-let-off-their-colleagues-officially> (expressing frustration at government officials' ongoing manipulation of the anticorruption regime).

¹⁶⁴ Tripti Lahiri, *Paid a Bribe in India? Vent Here*, WALL ST. J. BLOG (Nov. 15, 2010, 10:13 AM), <http://blogs.wsj.com/indiarealtime/2010/11/15/paid-a-bribe-in-india-vent-here/> (describing a website created on which individuals can report when a government official demands a bribe).

Advisor has argued that an individual who makes a “harassment bribe,” similar to a facilitation payment under the FCPA, should not be liable under the PCA because a public official may be deterred from soliciting these small bribes out of a concern that the individual could report the official to anticorruption authorities.¹⁶⁵ Additionally, facilitation payments for routine government actions only result in providing a service to which the bribe-giver is actually entitled.¹⁶⁶ Furthermore, because facilitation payments are generally demanded by a government and not initiated by the private party, penalizing the official and not the private party may help to eliminate these payments.¹⁶⁷

India could take steps to ensure that a facilitation payment exception does not subsume the purpose of the PCA. For instance, legislation could set a maximum amount for such payments. India could consider adopting legislation or agency-issued rules that make disclosure mandatory or at least require companies to keep accounting records of such payments, like those required under the FCPA, as discussed in the next section.

¹⁶⁵ Kaushik Basu, Chief Economic Adviser, Ministry of Finance, Government of India, *Why, for a Class of Bribes, the Act of Giving a Bribe Should Be Treated as Legal*, at 3, 10 (Mar. 2011), http://www.kaushikbasu.org/Act_Giving_Bribe_Legal.pdf (suggesting that to discourage individuals from falsely accusing or blackmailing government officials, individuals who engage in such conduct should be penalized). Basu argues that the amount paid in a harassment payment should be returned to its provider. *See id.* at 7. Basu also claims that even in the context of non-harassment payments, “the punishment meted out to the bribe taker should be substantially greater on the giver” so as to facilitate greater cooperation by the bribe-giver with an investigation and because the “primary moral responsibility . . . rests on the shoulder of the bribe taker.” *Id.* at 8. Both of these conclusions are ones that the author disagrees with. Additionally, as Basu himself points out, many bribe-givers may be dissuaded from reporting demands for bribes because they will consider reputational costs of cooperating with officials on future business dealings with other government officials. *See id.* at 9. Infosys founder Narayana Murthy stated that Basu’s suggestions may dissuade government officials from demanding bribes, bribe-givers will likely remain hesitant to report government officials due to reputational concerns. *See* Sagarika Ghose, *Make Bribing Legal: Narayana Murthy*, CNN-IBN, <http://ibnlive.in.com/news/make-bribe-giving-legal-narayana-murthy/169040-3.html> (last visited Mar. 28, 2013) (describing how a businessperson may gain a reputation as a ‘squealer’ and shunned from future business transactions).

¹⁶⁶ *See* Phil Nichols, *Who Allows Facilitating Payments?*, 14 AGORA WITHOUT FRONTIERS 303, 307 (2009) (explaining that it may make sense to treat facilitation payments differently than other bribes because the former causes “degradation of the process” whereas the latter results in “the inducement of decisions that should not have been made.”).

¹⁶⁷ Basu, *supra* note 165, at 3 (claiming that immunizing bribe-givers will reduce bribery because it will encourage them to report bribe recipients).

4. ACCOUNTING AND REPORTING REQUIREMENTS

4.1. *The Accounting Requirements of the FCPA*

The FCPA requires covered corporations to maintain books and records that accurately and fairly reflect its transactions and to make corresponding annual reports.¹⁶⁸ The FCPA also requires corporations to devise and maintain an adequate system of internal accounting controls intended to provide reasonable assurances that it maintains books and records in accordance with generally accepted accounting principles and which properly control and account for all corporate assets.¹⁶⁹ Companies may also be required to report on total amounts paid to government officials.¹⁷⁰ Since the passage of the Sarbanes-Oxley Act in 2002,¹⁷¹ reports indicate the United States has begun to enforce the accounting and records offense more robustly.¹⁷²

¹⁶⁸ See 15 U.S.C. § 78m(a) (reporting and record keeping obligations). The accounting and reporting provisions apply only to companies with securities registered under the Securities Exchange Act of 1934 and foreign subsidiaries if the U.S. company holds more than fifty percent voting power. See 15 U.S.C. § 78m(b) (providing details on the form of the report and required information).

¹⁶⁹ See 15 U.S.C. § 78m (reporting and record keeping obligations).

¹⁷⁰ See Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 1502, 1504, 15 U.S.C. § 78m(q)(2)(A) (2010) (requiring all U.S. and foreign companies registered with the SEC to report publicly how much they pay governments for the purpose of the commercial development of oil, natural gas, and minerals).

¹⁷¹ The Act holds certain officers of certain companies personally “responsible for establishing and maintaining internal controls” which are “designed . . . to ensure that material information relating to the company and its consolidated subsidiaries is made known.” Public Company Accounting Reform and Investor Protection (“Sarbanes-Oxley”) Act § 302 (a)(4), 15 U.S.C. § 7241(a)(4) (2002) (requiring the officers to evaluate “the effectiveness of the company’s internal controls as of a date within ninety days prior to the report.”). See also *id.* § 18 U.S.C. § 1350 (providing criminal penalties and/or a fine for a company’s CEO’s or CFO’s knowing or intentional certification of a financial statement that does not “fairly present[], in all material respects, the financial condition and results of operations of the issuer.”).

¹⁷² See generally Joseph P. Covington et al, *FCPA Enforcement in a Sarbanes-Oxley World*, 20 CORP. COUNS. (2005), available at http://jenner.com/system/assets/assets/1126/original/LJN_Corporate_Counsel_or_August2005.pdf?1317315365 (detailing an emphasis on corporate liability in a post-Sarbanes-Oxley environment); Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 444 (2009). For violations of the books and records requirement, a criminal penalty can be imposed only when an individual knowingly circumvented, failed to implement, or falsified required records. 15 U.S.C. § 78m(2)(b)(5). For a critique of this requirement, see Joan T.A. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453, 454 (2009) (“[T]he emphasis has fallen squarely on the letter-of-the-law compliance side of the equation by focusing on internal prevention and self-reporting, rather than spirit-of-the-law ethics.”).

Additionally, the "SEC now impose[s] continuing reporting requirements of some kind as a condition of nearly all FCPA settlements."¹⁷³ The books and records requirements are unique requirements in an anticorruption statute considered important to the success of the FCPA. According to an OECD review of the FCPA, accounting and reporting requirements are helpful in verifying companies' compliance with internal anticorruption programs.¹⁷⁴ The OECD also praised the new accounting standards in the Sarbanes-Oxley Act of 2002 and the whistleblower provisions of the Dodd-Frank financial regulation reform law.¹⁷⁵

The United States has historically linked anticorruption efforts to proper accounting. Prior to the passage of the FCPA, the United States penalized companies bribing foreign officials abroad under the Bank Secrecy Act, which required accurate reporting of funds brought in and out of the United States.¹⁷⁶ In connection to this

¹⁷³ See Gibson Dunn, *supra* note 106, at 6.

¹⁷⁴ See OECD WORKING GRP. ON BRIBERY IN INT'L BUS. TRANSACTIONS, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS (2010) ("Vigorous enforcement and record penalties, alongside increased private sector engagement, has encouraged the establishment of robust compliance program[s] and measures, particularly in large companies, which are verified by the accounting and auditing profession and monitored by senior management.").

¹⁷⁵ OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES ¶ 107 (2010), available at <http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf> (noting that "heightened concern" captured in Sarbanes-Oxley requires issuers to evaluate the sufficiency of controls during past years which "has had a very positive impact on . . . corporate controls . . . and thereby the prevention and detection of foreign bribery"). The Dodd-Frank Act provides whistleblowers with a percentage of any penalties assessed in connection with resulting FCPA cases involving public companies in cases where enforcement actions include monetary sanctions collected above \$1 million and a whistleblower has made a qualifying report to the SEC. See generally Securities Whistleblower Incentives and Protection, 15 U.S.C. § 78u-6 (2010); SEC Implementation of the Whistleblower Provisions of § 21F of the Securities Exchange Act of 1934, 17 C.F.R. § 240.21F-10 (2011) (issuing a final rule implementing those provisions of the SEC). Some critics have noted that this may result in a poor incentive structure whereby employees are prematurely encouraged to report companies rather than giving companies the opportunity to self-correct. See, e.g., Interview with Mark Mendelsohn, Former Director DOJ Foreign Bribery Unit (Sept. 10, 2010), printed in *On the Rise of FCPA Enforcement*, 24 CORP. CRIME REP. 35, available at <http://www.corporatecrimereporter.com/mendelsohn091010.htm> (providing a summary of Mendelsohn's remarks).

¹⁷⁶ Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 188 (1994). See also The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970,

statute, in 1974, the SEC adopted an amnesty-like approach through a “voluntary disclosure program” that allowed issuers to self-investigate illegal foreign payments, adopt a policy of stopping these payments, and file a corresponding report with the SEC or suffer harsher penalties later.¹⁷⁷ This voluntary disclosure program helped the United States to discover widespread slush funds and helped encourage the passage of the FCPA.¹⁷⁸ Additionally, although the Bribery Act does not impose accounting requirements, there are a number of substantively similar accounting and reporting requirements under U.K. law.¹⁷⁹

Indications from other countries also support the effectiveness of strict accounting requirements as part of anticorruption efforts. One recent study examining Chinese firms’ entertainment and travel costs concluded that firms with stricter internal auditing rules spend less money bribing government officials.¹⁸⁰ Additionally, booking and accounting requirements offer evidentiary benefits. According to one scholar, the accounting and internal controls provisions are “one of the most effective weapons regulators possess in enforcing the FCPA,” making it “much easier for regulators to prove their case.”¹⁸¹

31 U.S.C. §§ 5311–30 (2006); Notice of Plea and Plea Agreement, *United States v. Textron, Inc.*, No. 07-CV-01505 (D.D.C. July 10, 1979).

¹⁷⁷ Kathleen A. Lacey et al., *Assessing the Deterrent Effect of the Sarbanes-Oxley Act’s Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT’L L. 397, 416 (2005). See also Senate Comm. on Banking, Hous., & Urban Affairs, 94th Cong., Rep. of the SEC on Questionable and Illegal Corporate Payments and Practices 6–7 (Comm. Print 1976) (discussing the voluntary disclosure program).

¹⁷⁸ See generally Lacey, *supra* note 177, at 416–17.

¹⁷⁹ See generally Companies Act, 1985, § 221 (Eng.) (“Every company shall [keep] . . . accounting records . . . [that] . . . shall be sufficient to show and explain the company’s transactions.”). For example, BAE entered into a plea agreement in which it admitted that it failed to keep adequate accounting records, in violation of Section 221, concerning the company’s 2002 sale of military technology to Tanzania. See Settlement Agreement Between the Serious Fraud Office and BAE Systems PLC, Feb. 2010, <http://www.sfo.gov.uk/media/133535/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf>.

¹⁸⁰ Yuhua Wang, *Who Bribes Authoritarian Rulers and Why? Evidence From China*, (University of Pennsylvania Department of Political Science, Working Paper) (on file with author).

¹⁸¹ Thomas F. McInerney, *The Regulation of Bribery in the United States*, 73 REVUE INTERNATIONALE DE DROIT PÉNAL 81, 87–88 (2002).

4.2. *The Benefits of Instituting Accounting Requirements as a part of Indian Anticorruption Efforts*

Under current Indian law, the Companies Act requires companies to keep accounting records that provide a “true and fair view” of the financial status of the company and detail its transactions.¹⁸² Nonetheless, these accounting requirements are entirely separate from any provision in Indian law pertaining to corruption and are not subject to CBI enforcement or enforcement by the proposed ombudsman body if the Lokpal Bill should pass. Additionally, because the PCA authorizes the government to appoint special judges for corruption cases, these accounting requirements may be enforced in courts separately from corruption offenses.¹⁸³ In fact, Indian law explicitly provides that “even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness, fix a liability upon a person.”¹⁸⁴ In a case alleging abetment of a PCA offense against private parties in which the defendants’ accounting records reflected bribe payments, the Indian Supreme Court specifically concluded that accounting books were insufficient evidence to charge an abettor with liability under the PCA where CBI did not charge the officials with violating the PCA.¹⁸⁵

If India adopted accounting procedures as part of its anticorruption efforts, it could facilitate transparency, improve the effectiveness of anticorruption legislation, and facilitate the effectiveness of private sector compliance programs. Introducing accounting requirements as part of an Indian anticorruption

¹⁸² The Companies Act, 1956, No. 1 of 1956, INDIA CODE (1993), vol. 2 § 209 (1), (3)(a), available at <http://indiacode.nic.in> (requiring companies to keep “proper books of account” reflecting funds received and expended, sales and purchases of goods, and all assets and liabilities of a company that provide a “true and fair view of the state of affairs of the company”). The Company Act provides that certain company officers may be imprisoned or fined for violating the offense. See generally *id.* § 209 (5), (6).

¹⁸³ See PCA § 3. Although the PCA does permit an officer conducting a corruption investigation to inspect banking records where they relate to a person under investigation for violating the PCA. See *id.* § 18.

¹⁸⁴ Central Bureau of Investigation v. V.C. Shukla, A.I.R. 1998 S.C. 1406, ¶ 44 (India). See also Indian Evidence Act, 1872, No. 1 of 1872, § 34 as amended by the Act 21 of 2000, § 92 and Schedule II (stating that records “regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire” but such records “shall not alone be sufficient evidence to charge any person with liability”).

¹⁸⁵ V.C. Shukla, 1998 S.C. 1406 ¶ 55-58 (India) (holding that prosecutors could not use accounting books to show the defendants aided in the commission of a PCA offense).

regime may help ensure that businesses carefully record any facilitation or harassment payments. Stringent accounting requirements combined with a defense for facilitation payments will also encourage companies to report costs, including facilitation payments, truthfully and will facilitate the monitoring of these facilitation payments while preventing abuse of this exception. For example, a company can only avail itself of the FCPA exception if it clearly documents facilitation payments to ensure that the payments qualify for the exception.¹⁸⁶ Moreover, accounting requirements provide a relatively objective mechanism by which a country can monitor corruption without using inspectors who themselves may be prone to corruption.¹⁸⁷

Accounting and booking requirements also link anticorruption efforts to other challenges faced in India such as tax evasion and asset recovery.¹⁸⁸ Under the current regime in India, asset recovery is only possible where a defendant is convicted of criminal charges.¹⁸⁹ The Supreme Court of India has expressed concern for the existing limitations on asset recovery.¹⁹⁰ Additionally,

¹⁸⁶ See Pal & Parkinson, *supra* note 109, at 8.

¹⁸⁷ See, e.g., Hongbin Cai et al., *Eat, Drink, Firms, Government: An Investigation of Corruption from Entertainment and Travel Costs of Chinese Firms*, 54 J. L. & ECON. 55, 56 (2011) (using accounting books of Chinese firms to study unusually high expenses in entertainment and travel costs of Chinese firms). See also Benjamin Olken, *Corruption and the Costs of Redistribution: Micro Evidence from Indonesia*, 90 J. PUBLIC ECON 853 (2006) (using various objective measures, such as the quantity of public grants to schools, to measure corruption in Indonesia); Marianne Bertrand, et al., *Obtaining a Driving License in India: An Experimental Approach to Studying Corruption*, 122 Q. J. ECON. 1639 (2007) (using "detailed survey data and experimental evidence" to study corruption in India).

¹⁸⁸ The Washington D.C.-based Global Financial Integrity estimates that only 27.8 percent of India's illicit assets are held domestically indicating "the desire to amass wealth illegally without attracting government attention." The organization estimated that between 1948 and 2008 India lost a total of \$213 billion in illicit financial flows. See Dev Kar, *The Drivers and Dynamics of Illicit Financial Flows from India: 1948-2008*, GLOBAL FIN. INTEGRITY, (2010), http://www.gfintegrity.org/storage/gfip/documents/reports/india/gfi_india.pdf. The report also noted that corruption is one of the main drivers of illicit cash flows. See *id.* at 1, 51.

¹⁸⁹ The PCA 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 PCA.

¹⁹⁰ See *Delhi Development Authority v. Skipper Construction Co.*, A.I.R. 1996 S.C. 2005 (India). The Supreme Court explained, "[A] law providing for forfeiture of properties acquired by holders of 'public office' . . . by indulging in corrupt and illegal acts and deals, is a crying necessity in the present state of our society." *Id.* ¶ 31. Although noting that it was up to the Parliament to act on the issue, the Court called such a law "an absolute necessity, if the canker of corruption is not to prove the death knell of this nation." *Id.*

adopting accounting requirements will aid India's compliance with the U.N. Convention Against Corruption's emphasis on asset recovery and proper records as a major element of anticorruption efforts.¹⁹¹ Moreover, the U.N. Convention requires states to disallow the tax deductibility of expenses that constitute bribes, a step facilitated by clear and specific records.¹⁹²

5. ENFORCEMENT AND RESOLUTION OF VIOLATIONS

5.1. Resolution and Settlement of FCPA Violations

Various characteristics of FCPA enforcement have been particularly useful to its successes in balancing criminal enforcement with voluntary business compliance. Two U.S. agencies are responsible for enforcing the FCPA—the SEC can pursue civil penalties and the U.S. Department of Justice (DOJ) can pursue both civil and criminal penalties.¹⁹³ The agencies can, and often do, bring parallel enforcement actions.

Although the FCPA provides for both civil and/or criminal penalties, in reality, extra-judicial mechanisms are the U.S. government's primary means of enforcing the FCPA. For example, parties may seek advisory opinions to ensure their behavior complies with the FCPA.¹⁹⁴ These procedures enable covered parties "to obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the anti-bribery provisions" of the FCPA.¹⁹⁵ This allows

¹⁹¹ See generally U.N. Convention Against Corruption, art. 12 (2)(f) ("Ensuring that private enterprises . . . have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements . . . are subject to appropriate auditing and certification procedures."); *id.* at art. 51 (stating that asset recovery is a "fundamental principle" of the Convention).

¹⁹² *Id.* at art. 12(4). The Convention requires parties to take actions to prevent the establishment of off-record accounts, inadequately identified transactions, and intentional destruction of bookkeeping documents. See also *id.* at art. 12(3).

¹⁹³ The agencies appear to bring roughly the same number of prosecutions each year although in some years, the DOJ has brought more prosecutions. See Gibson Dunn, *supra* note 106, at 2 (providing a graphic display of the agency's enforcement actions).

¹⁹⁴ See 28 C.F.R. 80. The DOJ describes these opinion procedures on its website: <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Nov. 23, 2011). Copies of previously issued opinions are also available on this site.

¹⁹⁵ 28 C.F.R. § 80.1. The FCPA directed the U.S. Attorney General to "establish a procedure to provide responses to specific inquiries by issuers

firms and individuals to work closely with government officials to ensure compliance with FCPA requirements by obtaining official advice on the legality of specific behavior. As the U.S. Federal Sentencing Guidelines provide, “employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”¹⁹⁶

The DOJ has historically preferred settlement procedures as a way of resolving alleged FCPA violations such that FCPA litigation is extremely uncommon.¹⁹⁷ Since the FCPA came into law, the U.S. government has enforced the statute with an underlying notion that “[t]he most efficient means of implementing the [FCPA] is voluntary compliance by the American business community.”¹⁹⁸ For example, a deferred prosecution agreement (DPA) is a tool used by the DOJ and the SEC in which the prosecutor agrees with the company to hold off on prosecuting the illegal activity while the company revises its practices.¹⁹⁹ Such agreements generally include payment of restitution to victims, cooperation with a government investigation, and implementation of remedial controls and a compliance program intended to help prevent future violations.²⁰⁰ If the company abides by the agreement, DOJ may in exchange dismiss the case.²⁰¹ The DOJ may also permit

concerning conformance of their conduct with the [DOJ]’s present enforcement policy” 15 U.S.C. § 78dd-1(d)(1).

¹⁹⁶ U.S. Sentencing Guidelines Manual, *supra* note 148, pt. b(5)(c). Additionally, courts may consider efforts to comply with DOJ advisory opinions in the event of judicial resolution of any future violations. *See id.* at pt. b(5)(c) (providing that compliance efforts should be considered during sentencing in FCPA related offenses).

¹⁹⁷ *See* Shearman & Sterling FCPA DIGEST, *supra* note 147, at xiii (“Litigation is rare in FCPA enforcement actions”)

¹⁹⁸ Heyman, *supra* note 10, at 6 (asserting that while adopting an anti-bribery policy would not insulate a company from investigation or prosecution where “serious controls are lacking,” a good faith effort to monitor for violations would affect DOJ policy towards that company). For a general discussion of the importance of voluntary business compliance in enforcing the FCPA, see generally, Philip Urofsky et al., *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don’t Break What Isn’t Broken – The Fallacies of Reform*, 73 OHIO ST. L.J. 1145 (2012).

¹⁹⁹ FCPA Resource Guide, *supra* note 105, at 74.

²⁰⁰ *Id.*

²⁰¹ Under the terms of one DPA, a company agreed to implement enhanced compliance policies and procedures, engage an independent corporate monitor, and cooperate with the investigation through voluntary disclosure and review of its improper payments. In exchange, the DOJ agreed to defer prosecution for three years and to dismiss the criminal information if the company abided by the terms of the agreement. *See, e.g.*, Deferred Prosecution Agreement, United States

parties to enter into non-prosecution agreements (NPA)²⁰² and plea bargains as a way of efficiently resolving FCPA allegations.²⁰³

The SEC has followed the DOJ's direction in favoring settlements and entered into its first DPA in May 2011.²⁰⁴ The SEC also uses a number of non-criminal enforcement mechanisms including fines, disgorgement of illegally obtained gains, prejudgment interest, non-prosecution agreements, and an injunction or cease and desist order prohibiting current and future violations.²⁰⁵ In 2010, the SEC established a new FCPA unit specifically tasked with devising methods of more proactive FCPA enforcement.²⁰⁶

Settlements are a forward-looking solution because they encourage private sector cooperation. These settlements offer a way of "winding down . . . dodgy deals" and restructuring company practices to improve transparency and accountability.²⁰⁷

v. AGA Med. Corp., No. 08-CR-172-JMR (D. Minn. June 3, 2008) (resolving an investigation of alleged improper payments to Chinese officials).

²⁰² See FCPA Resource Guide, *supra* note 105, at 75 (defining a non-prosecution agreement as one in which the DOJ "maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct," but unlike a DPA, the agreement is not filed with a court).

²⁰³ See, e.g., Press Release, DOJ, Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act (Sept. 24, 2012), <http://www.justice.gov/opa/pr/2012/September/12-crm-1149.html> (reporting on a plea bargain in which Tyco International Ltd. and a subsidiary pleaded guilty to bribing officials and agreed to pay more than \$26M to resolve charges brought by the SEC and DOJ that the parties falsified books and records and made illegal payments to government officials).

²⁰⁴ See Christopher R. Conte & Lucinda A. Low, *Racing to a Locked Door? SEC Issues Final Whistleblower Bounty Rule and Announces First Deferred Prosecution Agreement, Revealing Competing Incentives for Corporate Self Reporting*, STEPTOE & JOHNSON LLP (June 7, 2011), <http://www.stepto.com/publications-newsletter-206.html> (involving allegations that a company bribed Uzbek government officials in connection with a bid to supply oil and gas pipelines in which the company agreed to pay \$5.4M in disgorgement and prejudgment interest to the SEC). The SEC agreement was paired with a \$3.5M criminal penalty and non-prosecution agreement with the DOJ. *Id.* See generally Philip Urofsky et al, *A New Tool and a Twist? The SEC's First Deferred Prosecution Agreement and a Novel Punitive Measure*, SHEARMAN & STERLING LLP (May 24, 2011), <http://www.shearman.com/a-new-tool-and-a-twist-the-secs-first-deferred-prosecution-agreement-and-a-novel-punitive-measure-05-24-2011/>.

²⁰⁵ See FCPA Resource Guide, *supra* note 105, at 76-77.

²⁰⁶ See Press Release, SEC, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), <http://www.sec.gov/news/press/2010/2010-5.htm>.

²⁰⁷ Eric Engle, *I Get by with a Little Help from My Friends? Understanding the U.K. Anti-Bribery Statute, by Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1174 (2010) (internal quotation marks omitted).

Before either the DOJ or the SEC agrees to a settlement, each agency conducts a broader investigation over a defending company's operations – this practice can potentially create ongoing cooperative effort between investigators and companies.²⁰⁸ Furthermore, DPAs, plea bargains, and other cooperative agreements help the United States to preserve scarce prosecutorial resources and to prevent disruption of commerce.

Nonetheless, the FCPA “settlement regime” is not without its critics. The emphasis on settlement agreements provides FCPA enforcers with substantial discretion and a relative lack of judicial oversight. As one article remarks, “Bribery cases against companies settle. That’s a fact. If you want to know where the line between legitimate business expense and bribe falls, good luck finding it.”²⁰⁹ Although courts must approve settlement agreements, there are indications that judicial oversight over such procedures is limited.²¹⁰ Additionally, the use of settlements may contribute to a lack of case law to interpret FCPA.

In response to private sector concerns that prohibitions of the FCPA and their enforcement are vague, the DOJ and the SEC recently released guidelines that they suggest will alleviate these concerns.²¹¹ It is too soon to tell whether these guidelines will or will not help establish clearer rules. Additionally, in recent years, the DOJ began to provide copies of all settlement agreements on its website, a move that may resolve some concerns pertaining to

²⁰⁸ In its last audit of U.S. anticorruption practices, the OECD praised U.S. enforcement of the FCPA but noted some criticism that the U.S. may not adequately consider private sector views in determining enforcement policy. Nonetheless, the OECD acknowledged that settlement agreements and a refrain from criminal prosecution indicate considerable coordination by U.S. government agencies with the private sector. See Samuel Rubinfeld, *OECD Praises US Anti-Bribery Enforcement, Recommends More Private Sector Input*, WALL ST. J. BLOG (Oct. 20, 2010, 11:16 AM), <http://blogs.wsj.com/corruption-currents/2010/10/20/oecd-praises-us-anti-bribery-enforcement-recommends-more-private-sector-input/>.

²⁰⁹ Joe Palazzolo, *New FCPA Guidance...Coming Right Up!*, WALL ST. J. L. BLOG (Nov. 8, 2011, 4:44 PM), <http://blogs.wsj.com/law/2011/11/08/new-fcpa-guidance-coming-right-up/>.

²¹⁰ See, e.g., Shearman & Sterling, *supra* note 197, at xiii (noting a concern that the SEC's use of deferred prosecution agreements will shield SEC enforcement actions from judicial scrutiny).

²¹¹ See FCPA Resource Guide, *supra* note 105; see also Breuer Speech, *supra* note 7 (explaining the government's intention for the guide is to serve as “a useful and transparent aid”).

transparency and consistency.²¹² Moreover, the large number of open FCPA cases resulting from voluntary disclosures by companies demonstrates that despite some complaints from the business community relating to the FCPA, the relationship between U.S. enforcers and the business community is somewhat cooperative.²¹³

Although settlements are used to resolve a majority of cases, a survey of FCPA cases between 2005 and 2011 suggested that FCPA cases are most likely to result in criminal charges where a defendant had knowledge of or who was involved with the bribe scheme and if the amounts were relatively large.²¹⁴ Although the United States embraces vicarious liability of a company and its officers for behavior of its employees and agents, the survey suggests that cases are most often actively pursued only against individual corporate affiliates “who either suspected impropriety but failed to investigate or in the worst cases, knew and actually actively participated in the misconduct.”²¹⁵

5.2. Resolution and Settlement of Bribery Act Violations

Although the Bribery Act is too recent to evaluate how British authorities will enforce it, various guidance reports provide some indication. There are two U.K. agencies involved in enforcing the Bribery Act: the Serious Fraud Office (SFO)²¹⁶ and the U.K.

²¹² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009) [hereinafter GAO REPORT].

²¹³ *But see* Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act* (NYU Sch. Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-35, Law & Econ. Research Paper Series, Working Paper No. 12-15, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487 (finding no evidence that voluntary disclosure of FCPA violations resulted in lesser penalties).

²¹⁴ M. Scott Peeler, *A Study of Individual Liability Under the Foreign Corrupt Practices Act: A Review of Government-Filed Civil and Criminal FCPA Cases Against Individuals*, CHADBOURNE COMPLIANCE Q. SPECIAL REP. (Chadbourne & Park LLP, New York, N.Y.), Oct. 2011, at 4, http://www.usubc.org/site/files/Compliance_Quarterly_Special_Report_2011.pdf.

²¹⁵ *Id.* at 1-2 (surveying sixty-one individuals charged criminally or civilly charged with violating the FCPA—fifty-three of whom were senior corporate officials or owners, and eight of whom were not directly involved with the alleged corrupt act but were third-party agents). Only two cases involved indirect knowledge, where the defendant was not directly told of the offensive conduct, but evidence indicated that he/she was aware of circumstances that would lead a reasonable person to suspect impropriety, and the government only sought civil charges in those cases. *See id.* at 4-5.

²¹⁶ *See What We Do and Who We Work With*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/about-us/what-we-do-and-who-we-work-with.aspx>

Ministry of Justice. The offices issued guidance reports “to set out the Directors’ approach to prosecutorial decision-making in respect of offences under the Act.”²¹⁷ That guidance indicates that U.K. enforcement authorities plan to enforce the statute so as “to balance corporate responsibility for ensuring ethical conduct in the modern international business environment with the public interest in prosecuting where appropriate.”²¹⁸

There are also indications that the United Kingdom will rely on alternative enforcement procedures such as deferred prosecution agreements the way the DOJ and the SEC have in enforcing the FCPA. During 2012, the U.K. Ministry of Justice announced that it would introduce DPA agreements in England and Wales through legislation that is currently pending in the British Parliament.²¹⁹ In implementing the Bribery Act, Scotland has instituted an amnesty program under which parties can, within twenty-four months of the act’s implementation, self-report violations in exchange for criminal amnesty.²²⁰

Additionally, prior to the enactment of the Bribery Act, the United Kingdom seemed to be moving towards settlement agreements as a method to resolve anticorruption allegations. For example, in July 2009, the SFO issued guidance encouraging companies dealing with overseas corruption to self-report in exchange for receiving a plea bargain settlement and avoiding a criminal penalty.²²¹ Also in 2009, the U.K. Financial Services

(last visited Apr. 12, 2013) (announcing the SFO as the U.K. government agency specifically tasked with “reducing fraud and corruption” and “maintaining confidence in the UK’s business and financial institutions”).

²¹⁷ SFO Bribery Act Guidance, *supra* note 139, at 2.

²¹⁸ *Id.* at 3.

²¹⁹ See Gibson Dunn, *supra* note 106, at 23 (describing Schedule 16 of the *Crime and Courts Bill*, which includes a provision calling for the Ministry of Justice to issue procedural guidance on DPAs).

²²⁰ See Gibson Dunn, *supra* note 106, at 24. Already, one Scottish case involves a £5.6M civil recovery against a drilling company after it “admitted that it had benefited from corrupt payments made in connection with a contract entered into by one of its overseas subsidiaries and an overseas oil and gas company.” *Id.* at 22. See also Stephen A. Fraser, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. 1009, 1010-11 (2012), available at <http://www.texaslrev.com/90-texas-l-rev-1009/> (proposing a similar amnesty program for the United States).

²²¹ See John P. Rupp et al, *Voluntary Disclosure and the Problems of Plea Bargaining* in SERIOUS ECONOMIC CRIME 162, 163 (2011), available at <http://www.seriouseconomiccrime.com/ebooks/Serious-Economic-Crime.pdf>.

Nevertheless, it is questionable whether the SFO has the authority to pursue such agreements. See *id.* (“The difficulty for the SFO is that it does not currently have

Authority (FSA) agreed to reduce a fine by thirty percent for a company that made suspicious payments to businesses and individuals in foreign countries but cooperated with the investigation.²²² In 2008, the FSA settled a case involving bribery allegations in a contract to recreate the Alexandria Library in Egypt while claiming that the settlement allowed the SFO to penalize the company while “avoiding the extensive cost to the public purse of lengthy court proceedings.”²²³

What is common to both FCPA and Bribery Act enforcement is a balance between criminal enforcement, civil fines, and alternative settlement procedures, such as deferred prosecution agreements, designed to encourage business cooperation. Nonetheless, both U.S. and U.K. authorities have embraced criminal penalties when necessary. These multiple avenues of enforcement help avoid over-criminalization and ensure a working relationship with businesses.

5.3. *Recommendations for Enforcement Mechanisms and Settlement Procedures in India*

India would benefit from embracing alternative prosecution methods to avoid over-criminalization and encourage useful coordination with the private sector. Under the PCA, criminal charges and fines are the dominant means of enforcing anticorruption laws. Nonetheless, criminal charges impose various externalities and potentially significant consequences on third parties and individuals involved with a company, including employees and shareholders, who did not engage in the violating behavior. In some instances, enforcing authorities may determine that the severe consequences of criminal prosecution are not worth the costs such prosecution might impose. In supporting the use of non-prosecution and deferred prosecution agreements, the DOJ has stated that such tools reflect the idea that the “collateral consequences” of white-collar crime prosecutions “may be unjustified where a corporation fully cooperates with the

the statutory power to impose fines or to enter into a [deferred prosecution] arrangement.”)

²²² Michael Peel & Andrea Felsted, *Insurers Face Bribery Crackdown After £5.25M Aon Fine*, FIN. TIMES (Jan. 8 2009, 8:45 PM), <http://www.ft.com/cms/s/0/73159894-ddc4-11dd-87dc-000077b07658.html#axzz1bkKemrTk>.

²²³ David Leigh & Rob Evans, *Balfour Beatty Agrees to Pay £2.25M Over Allegations of Bribery In Egypt*, GUARDIAN, Oct. 6, 2008, at 28, available at <http://www.guardian.co.uk/business/2008/oct/07/balfourbeatty.egypt>.

government's investigation, appropriately disciplines culpable individuals," and makes restitution to victims.²²⁴

Additionally, there are various indications that alternative settlement procedures enhance the effectiveness of U.S. anticorruption efforts. Concerning non-prosecution and deferred prosecution agreements, the OECD has stated that it is "quite clear that the use of these agreements is one of the reasons for the impressive FCPA enforcement record in the U.S."²²⁵ DOJ advisory opinion procedures also encourage private sector cooperation. As such, the impetus behind this procedure is similar to the idea behind current PCA provisions that prevent the use of statements of a bribe-giver against a corrupt public official in an enforcement action against the bribe-giver.²²⁶ Yet unlike the current PCA provisions, statements given in conjunction with the DOJ's formalized opinion procedures discourage future bribery because they eliminate a potential defense that a company or individual believed certain violating behavior to be legal.

Civil enforcement and alternative prosecution agreements also have the benefit of providing a diverse set of enforcers. The activist supported Lokpal Bill has become popular on a platform critical of CBI's lack of independence and supportive of a public role in anticorruption efforts. Alternative enforcement procedures through multiple agencies, like FCPA enforcement through DOJ and SEC actions, helps create multiple avenues of anticorruption enforcement and helps facilitate an ongoing monitoring relationship with businesses. One question that follows the suggestions of this Comment will be the role of the judiciary in reviewing such agreements.²²⁷ Nonetheless, because settlement

²²⁴ Letter from Edward N. Siskel, Assoc. Deputy Gen. Counsel, U.S. Dep't of Justice, to Eileen Larence, Dir. of Homeland Sec. & Justice, U.S. Gov't Accountability Office (Dec. 15, 2009), in GAO REPORT, *supra* note 212, at 37.

²²⁵ PHASE 3, *supra* note 174, ¶ 54 (noting that not all the deterrent effects of settlement agreements have been quantified).

²²⁶ PCA § 24 ("[A] statement made by a person in any proceeding against a public servant . . . that he offered or agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant, shall not subject such person to a prosecution under section 12."). *But see* Bhupinder Singh Patel v. Central Bureau of Investigation, (2008) 2008 Crim. L.J. (Delhi H.C.) 4396 (May 30, 2008) (holding that this exemption is only applicable where the bribe-giver establishes that he/she gave the bribe unwillingly and only to help gain evidence against the public employee).

²²⁷ In the United States, the Speedy Trial Act, 18 U.S.C. § 3161, allows judges to approve deferred prosecution agreements pursuant to a written agreement between the government and a defendant, although government reports indicate

agreements need not require extensive judicial intervention, settlement mechanisms may also help deal with resource restrictions in India's courts and prevent corruption cases from becoming stuck in the backlog in Indian courts. Alternative prosecution agreements may also decrease concentrations of power by moving corruption enforcement away from the exclusive jurisdiction of the judiciary by permitting extra-judicial enforcement as well.²²⁸ Indian enforcement authorities could use settlement agreements to facilitate asset recovery from public officials and impose fines from bribing private parties, even without bringing criminal charges. Under current or proposed Indian law, there is no law allowing for non-conviction based forfeiture, of the sort under FCPA non-prosecution or deferred prosecution agreements.

Using settlement agreements to enforce anticorruption regimes creates risks as well. There is some concern that the availability of such agreements will result in the government bringing more cases than it would otherwise, including cases in which it would likely be unable to prove a violation of the law.²²⁹ Settlement agreements also pose a concern that an entire area of law may develop with a lack of judicial review because such review over settlement agreements is limited. Like the United States and the United Kingdom, India is a common law country, and it will suffer from any detriment to the development of an FCPA judicial body of law resulting from the use of settlements. Relying on ideas similar to those that support an independent Lokpal body, India might address this concern by establishing some sort of independent oversight body that would approve of cases. Alternatively, Indian courts may play a more active oversight role over settlement agreements than U.S. courts play in FCPA enforcement. In fact, there are indications that U.K. enforcement authorities intend to address shortcomings of DPA and other settlement agreements by

that neither government nor private parties find judicial review in this context to be particularly useful. GAO REPORT, *supra* note 212, at 25–28.

²²⁸ The Indian judiciary has also been subject to a number of corruption-related criticisms. A 2005 study of the lower judiciary (excluding judges of the Supreme Court and state High Courts) covered 14,405 rural respondents spread across twenty Indian states and found that forty-seven percent of respondents had direct experience with bribing the judiciary and eighty-one percent believed the judiciary was corrupt. See India Corruption Study 2005, *supra* note 22, at 6.

²²⁹ A former director of the DOJ's FCPA unit admitted, "[I]f the Department only had the option of bringing a criminal case or declining to bring a case, you would certainly bring fewer cases." Mike Koehler, *Report Cards*, FCPAPROFESSOR, June 30, 2011, <http://fcpaprofessor.blogspot.com/2011/06/report-cards.html>.

adopting more judicial oversight.²³⁰ Additionally, Indian enforcement authorities may consider tracking implementation of settlement agreements through some sort of performance measures.²³¹

5.4. *Facilitating Coordination of India's Anticorruption Efforts with Foreign and International Efforts*

A robust domestic anticorruption program will complement enforcement of the FCPA and Bribery Act, as well as other foreign statutes, in India. Additionally, if India effectively enforces its anticorruption regime against parties otherwise covered by these foreign statutes,²³² foreign governments may choose to forego enforcement, mitigating some of the concerns pertaining to the extraterritoriality of the FCPA and Bribery Act.²³³

²³⁰ See Attorney Gen. for Eng. & Wales Dominic Grieve, Address before the Cambridge International Symposium on Economic Crime: Responsibility for Risk: Staying on the Right Side of the Law (Sept. 5, 2011), <https://www.gov.uk/government/speeches/current-government-policy-on-economic-crime> ("A crucial question for any comparable UK process would be the degree of judicial oversight and the mechanism for achieving that. However, if the UK can learn from the US experience and avoid some of the pitfalls the Americans have encountered then deferred prosecution agreements may offer a new way for the UK to deal with corporate crime in appropriate cases.").

²³¹ The U.S. Government Accountability Office (GAO) evaluated NPA and DPA agreements and concluded that the DOJ should use measurable performance indicators to determine their effectiveness. For example, the agency suggested that one measure could be whether the company repeats the criminal behavior after its agreement or whether the company successfully implements the terms of the agreement. See generally GAO REPORT, *supra* note 212.

²³² For example, the FCPA also covers Indian companies listing shares on U.S. exchanges, even if the conduct has no territorial nexus to the United States. See 15 U.S.C. § 78dd-1(a) (2013) (prohibiting any issuer who registers U.S. securities from bribing any foreign official).

²³³ See Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 433 (1999) (claiming that the extraterritorial reach of the FCPA is an "undeniable source of transnational tension and strife" that risks "[p]otential host country resentment of extraterritorially applied legislation"). This risk may be even greater if the Bribery Act is enforced up to its limits of those "closely connected" to the United Kingdom, a jurisdiction likely broader than that of the FCPA. There is some debate over the effects of foreign-looking statutes such as the FCPA and the Bribery Act on developing economies. Compare Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 371-74 (2010) (arguing that measures meant to deter bribery abroad also deter foreign investment), and Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT'L L. 169, 172 (2006) ("[B]ribery of public officials abroad is, for the most part, harmful to the citizens of the particular country. The literature on corruption appears to have defeated the notion that bribery is efficient or desirable, and regime change in certain corrupt countries has helped debunk that myth as well.").

There have been a number of FCPA enforcement actions for bribery of both state and national government officials in India.²³⁴ Additionally, there have been a number of instances where companies have publicly announced internal investigations relating to potential FCPA violations in India.²³⁵ Lastly, both American and/or British prosecutors may charge certain Indian companies for violations of the FCPA or the Bribery Act, respectively, where those companies meet certain jurisdictional requirements under those statutes.

To be effective, India's war against corruption must also rely on domestic legislation to dissuade multinational and domestic businesses from using bribery as a means of conducting business. Noting that foreign-reaching statutes such as the FCPA and the Bribery Act represent "a welcome development that can complement and reward efforts within host countries, especially to combat grand corruption by multinational businesses," Susan Rose-Ackerman stressed the need for domestic legislation.²³⁶ Ackerman opined that these international measures hold "little real bite as hard law," because "these effects can only complement, not substitute for, domestic reform."²³⁷

Coordination between government bodies enforcing the Bribery Act, the FCPA, and other foreign statutes will continue to ensure that India is not alone in combating the supply of corruption in India.²³⁸ For instance, the OECD Anti-Bribery

²³⁴ See Rina Pal & James Parkinson, *supra* note 109, at 5 (describing a number of FCPA enforcement actions involving government officials in India); Paula Anderson, *Indian Bribery & Corruption Exposed*, INT'L FINANCIAL L. REV., Apr. 24, 2013, <http://www.iflr.com/Article/3196287/Indian-bribery-and-corruption-exposed.html> (same).

²³⁵ See *id.* at 5 ("[A] number of companies have publicly announced investigations involving improper payments in India obtained during an acquisition").

²³⁶ Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L.J. ONLINE 125, 139 (2010), <http://yalelawjournal.org/2010/11/10/rose-ackerman.html>.

²³⁷ *Id.* Moreover, the OECD Anti-Bribery Convention demonstrates a preference for individual countries to work within their own legal systems and encourages coordination through peer review programs. See Meadows, *supra* note 147, at 98 (discussing the OECD's use of the "principle of functional equivalence" to ensure compliance).

²³⁸ The United States and United Kingdom already coordinate their enforcement efforts. In one case, the SFO obtained a civil recovery order rather than criminal prosecution because it concluded that double jeopardy prevented criminal prosecution in the United Kingdom as the company had already entered into a DPA with the DOJ. In another case, the SEC settled charges that BAE bribed Tanzanian officials in an agreement requiring the company to pay fines and plead guilty to criminal charges for making false

Convention encourages ratifying states to exchange information and coordinate enforcement.²³⁹ Agencies enforcing the FCPA have also expressed a desire to work with more countries locally to improve effectiveness.²⁴⁰ Additionally, as discussed throughout this Comment, revised domestic legislation would also harmonize India with international anticorruption commitments found in the OECD Anti-Bribery Convention²⁴¹ and the U.N. Anticorruption Convention.²⁴²

statements in regulatory filings and undertakings in both the United States and the United Kingdom. See Covington Mid-Year Review, *supra* note 153, at 3.

²³⁹ See OECD Anti-Bribery Convention, *supra* note 11, art. 9(1) (obligating state parties “to the fullest extent possible under its laws and relevant treaties and arrangements, [to] provide prompt and effective legal assistance to another Party”). Countries can also agree to formal coordination of anticorruption efforts with OECD countries. Additionally, the United States employs less formal agreements while seeking cooperation in FCPA enforcement with non-OECD Convention ratifying countries. See, e.g., Memorandum of Understanding Between the U.S. SEC and the Securities and Exchange Board of India Regarding Cooperation, Consultation and the Provision of Technical Assistance, Exchange Act Release No. IS-1124, 66 SEC Docket 1863, para. 4, Mar. 6, 1998, available at http://www.sec.gov/about/offices/oia/oia_bilateral/india.pdf (establishing the authorities’ intent to cooperate and consult one another on enforcing securities laws related to the offer, sale, and purchase of securities and securities fraud). The SEC also has MOUs to obtain evidence from overseas with regulators in Germany, Portugal, Singapore, and Japan. See Michael D. Mann & William P. Barry, *Developments in the Internationalization of Securities Enforcement*, 39 INT’L LAW. 667, 674–80 (2005) (discussing the SEC’s use of MOUs to establish cooperative relationships in securities enforcement with other countries).

²⁴⁰ U.S. Assistant Attorney General Lanny A. Breuer explained: “We need strong partners across the globe who are equally committed to that fight and who have the capacity to carry through on that commitment.” Breuer speech, *supra* note 7 (expressing the U.S. Assistant Attorney General’s eagerness to cooperate with other countries). The United States and India signed an MOU agreement in 1998 to “provide each other assistance in obtaining information and evidence to facilitate the enforcement of their respective laws relating to securities matters.” See SEC. & EXCH. BD. OF INDIA (SEBI), ANNUAL REPORT 1998 (1998), available at <http://www.sebi.gov.in/annualreport/9798/ar979831.html> (noting the first such agreement signed between SEBI and another securities regulator).

²⁴¹ Although India is not a member of the OECD, the OECD adopted a 2007 resolution to strengthen its cooperation with India. See *OECD Council Resolution on Enlargement and Enhanced Engagement*, OECD (May 16, 2007), available at <http://www.oecd.org/brazil/oecdouncilresolutiononenlargementandenhancedengagement.htm> (detailing OECD efforts to strengthen cooperation with India and other countries through enhanced engagement programs aimed at possible membership). Since December 2009, India has participated in the OECD’s Working Group on Bribery meetings as an ad hoc observer and committed to more active engagement with the working group in the G20 Anti-Corruption Action Plan. See generally *OECD WORKING GRP. ON BRIBERY*, 2011 ANNUAL REP. 27 (2012), available at <http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2011.pdf>; *G20 Anti-Corruption Action Plan*, G20 CIVIL, <http://www.g20civil.com/documents/G20-Anti-corruption-annex3.pdf> (last visited Mar. 13, 2013). Various advocates support India joining the OECD. See, e.g., Jha, *supra* note 63, at 30 (asserting, “It’s time for India” to join the OECD

6. INSTITUTIONAL DYNAMICS OF INDIAN ANTICORRUPTION ENFORCEMENT

It is unclear whether the Lokpal Bill will pass in India. As a result, it is difficult to project what body might be responsible for enforcing the substantive law recommendations provided in this Comment. If a Lokpal is not established, and the CVC and CBI do not more rigorously enforce anticorruption efforts, it is likely that the Supreme Court of India will begin to engage in its own anticorruption efforts more proactively. In the past, the Supreme Court has at times restrained its direct involvement in anticorruption efforts.²⁴³ Nonetheless, the Court's decisions in recent years indicate that it may begin to take a more active stance in Indian anticorruption efforts. In December 2010, the Chief Justice issued an order to the Indian High Courts and district courts ordering them to "fast track" all PCA cases.²⁴⁴ One month after Parliament failed to pass the Lokpal Bill, the Supreme Court considered a case in the "2G Scam" and lamented that the PCA lacks a deadline by which the government must deny or grant sanction for a corruption investigation. The Supreme Court asserted that this deficiency often resulted in the protection of the guilty and "virtually armed the sanctioning authority with unbridled power."²⁴⁵ Additionally, the Supreme Court recommended that Parliament adopt a law setting a time limit by

Convention Against Corruption). According to the OECD legal director, the organization has set up a program to encourage membership among emerging economies. See Rebecca Lowe, *OECD Legal Director Discusses Financial Crisis and Corruption*, INT'L BAR ASS'N (Oct. 13, 2011), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=1CEC5AED-0218-4FA1-BAE4-A4E6FE731365> (describing the Enhanced Engagement Programme).

²⁴² India signed the U.N. Convention in 2005 and ratified the treaty in May 2011. See *India Ratifies U.N. Convention Against Corruption*, TIMES OF INDIA, May 13, 2011, http://articles.timesofindia.indiatimes.com/2011-05-13/india/29539746_1_convention-fight-corruption-assets (announcing India's ratification of the Convention).

²⁴³ For example, in response to a complaint alleging that CBI was shielding high-level politicians from its investigations of corruption allegations in the 2010 Commonwealth Games, the Court refused a request to monitor the CBI inquiry. See *SC Refuses to Monitor CBI Probe into CWG Scam*, FIRSTPOST, Sept. 16, 2011, <http://www.firstpost.com/fwire/sc-refuses-to-monitor-cbi-probe-into-cwg-scam-85905.html> (reporting that the Indian Supreme Court would not interfere with the ongoing problem).

²⁴⁴ See A.I.S. Cheema, Secretary General, S. Ct. of India, Dec. 13, 2010 (India), available at <http://supremecourtindia.nic.in/circular/guidelines/cjnote13122010.pdf> (ordering high prioritization of all PCA cases).

²⁴⁵ See *Dr. Subramanian Swamy v. Manmohan Singh*, (2012), S. Ct., Civ. App. No. 1193 (2012) (India).

which the Indian government must deny or sanction investigation and prosecution under the PCA.²⁴⁶ The Court also imposed a deadline for the government to respond to CBI's investigation requests, after which, silence now constitutes the government's sanction of the request.²⁴⁷ The Court's 2012 decision in the "2G Scam" may be an indication of its willingness to pursue judicial involvement in anticorruption efforts where the executive and legislature fail to take action.

The Indian judiciary may also seek external pressures to take a central seat in combating corruption. Given the popular backlash against corruption, civil society organizations and activists will likely seek enforcement of anticorruption statutes through the courts using public interest litigation (PIL). PIL in India provides plaintiffs with more liberal rules of standing and procedure and permits courts to impose a wider range of remedies than traditional litigation.²⁴⁸ The Indian Constitution provides a number of bases for PIL in the corruption context.²⁴⁹ For example, Article 32 of the Constitution provides individuals with the right of direct appeal to the Supreme Court for enforcement of certain fundamental rights²⁵⁰ and grants the Court the power to issue a number of remedies for the enforcement of these rights.²⁵¹ The Constitution also includes policies that are intended to direct

²⁴⁶ See *id.* (recommending a government response to corruption complaints within four months and asking Parliament to pass legislation to this effect).

²⁴⁷ See *id.* Although it is unclear to what degree this deadline is binding, or merely recommended.

²⁴⁸ See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 498, 506 (1989) (providing two examples of a remedial strategy, including one case in which a court allowed a chemical plant to reopen after a gas leak only if the plant followed certain safety conditions and agreed to inspections).

²⁴⁹ See, e.g., INDIA CONST. arts. 14–25, 32 (bestowing fundamental rights such as the right to equality, the right to equal employment opportunities, and the right to religious freedom). Article 39 provides "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good" and "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment." *Id.* at art. 39 (b), (c).

²⁵⁰ Part III of the Indian Constitution defines these fundamental rights. See INDIA CONST., arts. 12–35.

²⁵¹ See *id.* at art. 32(1) (providing remedies for the enforcement of fundamental rights); *id.* at art. 32(2) (describing the Supreme Court's power to issue certain remedies). The Supreme Court's powers on such issues include "directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate. . . ." *Id.* at art. 32(2). See also *id.* at art. 226 (granting power to the Indian state High Courts to issue certain writs, notwithstanding provisions of Article 32).

actions of the Indian state, including directives to reduce inequality and distribute societal resources to benefit the common good.²⁵²

India's unique tradition of PIL, as fostered by these constitutional provisions, has traditionally been limited to matters of "[s]tate repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements."²⁵³ Nonetheless, despite some criticism, the judiciary has indicated that it is willing to use PIL remedies more broadly where the executive has failed to take action although legislative acts and the Constitution have not been properly implemented.²⁵⁴ This trend in judicial activism is particularly pertinent to the anticorruption context because, in a 2012 decision, the Supreme Court recognized a "fundamental right" to bring corruption challenges.²⁵⁵ Moreover, the Supreme Court held that the PCA is a social legislation and that courts should liberally construe the statute to advance its objectives.²⁵⁶ Given the likelihood of judicial intervention even if India fails to modify its current anticorruption regime and the wide range of remedies available to the Supreme Court in PIL, some of the recommendations of this Comment may be useful even if India is unsuccessful in amending the PCA.

²⁵² INDIA CONST., arts. 36–51 (constituting Part IV of the Constitution entitled "Directive Principles of State Policy"). The Indian Parliament is required to apply the principles in passing laws, and although the principles are not enforceable in court, there is some suggestion that the principles may guide decisions in public interest litigation. See, e.g., P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 568 (1985) (discussing the Directive Principles of the Indian Constitution as mandating the legislature and executive to protect social justice).

²⁵³ Bhagwati, *supra* note 250, at 569.

²⁵⁴ A former Indian Solicitor General claimed that in recent years, judicial intervention through PIL decision-making has moved away from its roots of "enforcing the rights of the disadvantaged or poor sections of the society but simply for correcting the actions or omissions of the executive or public officials or departments of government or public bodies." T. R. Andhyarujina, *Disturbing Trends in Judicial Activism*, THE HINDU, Aug. 6, 2012, <http://www.thehindu.com/opinion/lead/article3731471.ece?homepage=true>.

²⁵⁵ See Dr. Subramanian Swamy, *supra* note 245 (involving a sixteen-month delay from an application to prosecute the former telecom minister in the 2G scandal).

²⁵⁶ See *State of Madhya Pradesh v. Shri Ram Singh*, (2000) 1 S.C.R. 579 (India) (describing the PCA as "intended to make effective provision for the prevention of bribe [sic] and corruption rampant amongst the public servants").

7. CONCLUSION

In 2007, a Wharton Business School article foresaw that, as India began to play an increasing global role, India's multinational corporations might "act as a broom, sweeping corruption from the economic sphere," or else corruption "could end up being a significant brake on India's economic rise."²⁵⁷ Domestic anticorruption legislation may be the guide that helps private companies contribute to an anticorruption solution in India.

India's need for large procurement and licensing contracts, of the sort involved in the 2G licensing scandal, are only likely to increase in the future as the country continues to grow, its economy continues to liberalize, and it seeks to meet the ever-growing demand for infrastructure, such as roads and electricity.²⁵⁸ In this context, there is strong need for anticorruption measures targeting corrupt practices by bidding companies. These developments also enhance India's need to maintain a business environment that can attract capable businesses to engage in effective competition.

Reformed domestic legislation will make India attractive to both domestic and foreign investors because it will increase stability of the business environment. Moreover, reformed domestic legislation that targets supply will signal to companies that are subject to Bribery Act and FCPA regulations, and that often invest in expensive compliance programs to avoid litigation and liability, that Indian companies are operating in a similar environment so that foreign companies will not have impaired profitability.

A combination of stringent enforcement of the FCPA's bribery offense and accounting requirements and the United States' embrace of alternative enforcement procedures have contributed to the successes of the U.S. global anticorruption efforts. Thus far, the Bribery Act appears to be following suit by emphasizing supply-oriented anti-bribery offenses committed by corporate entities and by embracing settlement agreements. India may benefit from taking note of these countries' efforts by balancing strong

²⁵⁷ *In India, Will Corruption Slow Growth or Will Growth Slow Corruption?*, KNOWLEDGE @ WHARTON, Aug. 8, 2007, <http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4214>.

²⁵⁸ See James Fontanella-Khan, *India: Suspended Animation*, FIN. TIMES, Mar. 18, 2012, <http://www.ft.com/intl/cms/s/0/5e880566-6d08-11e1-a7c7-00144feab49a.html#axzz1phlYYRpO> (discussing the obvious need for more infrastructure across India).

anticorruption efforts with creating a stable and transparent environment for both foreign and domestic investments. Moreover, India can attempt to equalize the playing field for foreign and domestic companies by subjecting all competing companies to similar anticorruption penalties.

In adopting legislation that appropriately targets supply, India will want to balance its anticorruption efforts with ensuring that its legislation poses only reasonable burdens on businesses and individuals.²⁵⁹ A statute that takes appropriate and balanced steps in anticorruption efforts will also prevent a gap from developing between the letter and enforcement of the law. For example, although the Bribery Act poses stricter de facto law than the FCPA, its provisions create a risk of under-enforcement. As an article from *The Economist* points out, "a commitment to stop paying in the future while turning a blind eye today may not only be self-defeating but risks also undermining the law."²⁶⁰

The final deterrence effect of any Indian anticorruption statute will depend on the country's ability and focused efforts to enforce the statute, in addition to any symbolic value that passing a supply-oriented anticorruption statute may have in encouraging compliance with the law.²⁶¹ India may also take efforts to encourage private parties' self-regulation by providing adequate information on appropriate private anticorruption measures and

²⁵⁹ There are risks associated with an over-broad anticorruption statute. For example, when India completely banned political donations during the 1980s, there was a substantial rise in political corruption in raising needed election funds. See generally Patel, *supra* note 42, at 398.

²⁶⁰ *When a Bribe Is Merely Facilitating Business*, *supra* note 32 (suggesting that anything less than a zero-tolerance policy for bribery would undermine enforcement of the Bribery Act).

²⁶¹ For example, Joseph Stiglitz recently described that certain economic reforms can have a certain symbolic value. See Interview with Joseph Stiglitz, *ECON. TIMES* (Oct. 17, 2012, 3:26 PM), <http://m.economictimes.com/opinion/interviews/ratings-agencies-unfair-to-india-give-little-weight-to-them-joseph-stiglitz-columbia-university/articleshow/16850116.cms> ("One should not overemphasize the importance of . . . reforms. They have a certain symbolic value to them."). For more discussion of the expressive function of law, see generally Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 *REV. L. & ECON.* 715 (2008); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021 (1996); Yuval Feldman, *The Expressive Function of the Law: Legality, Cost, Intrinsic Motivation and Consensus* (Bar Ilan Univ. Pub. Law Working Paper No. 1-04, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912989. Nonetheless, the symbolic value of laws depends on country and environment-specific circumstances and it is unclear what, if any, symbolic value a revised anticorruption law would have in India.

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by facilitating private initiatives to encourage compliance, such as the aforementioned integrity pacts in procurement contracts.

These concerns represent some of the various questions that will follow India's passage of amended anticorruption legislation. Although India will have to address a number of procedural, institutional, and substantive questions in implementing a modified anticorruption regime, the country would greatly benefit from establishing clear offenses for bribing public officials and developing flexible means of enforcement if it is to be successful in combatting large-scale corruption.