

A critical comparative analysis of anti-bribery legislation in the BRICS countries

by
Liezl Munnik

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*Supervisors
Professor Gerhard Kemp
Professor Gavin Woods*

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Declaration

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Abstract

Recent years have proven to be quite progressive in terms of the development of anti-corruption legislation, especially with the promulgation of the United Kingdom Bribery Act, and the increased enforcement of the United States Foreign Corrupt Practices Act by US federal prosecutors.

Although the two mentioned Acts have largely overshadowed the anti-corruption developments in the BRICS (Federative Republic of Brazil, Russian Federation, Republic of India, People's Republic of China and the Republic of South Africa) countries, it to some extent raised the profile and initiated development.

The BRICS countries are a grouping of countries understood to be undergoing rapid transformation in their economic environments which often leads to significant corruption problems, hindering the economic growth that would further develop these countries into full force economic super powers. The apparent low impact of the anti-corruption legislation in these countries is concerning despite their commitment and implemented legislative initiatives.

This thesis will critically and comparatively evaluate the current legislation relating to anti-bribery in the various jurisdictions of the BRICS countries. The study aims to clarify the extent of the application of the anti-bribery legislation and in doing so develop a greater understanding of the anti-corruption environment of the BRICS countries.

It is necessary to first define the concept of BRICS. Thereafter it will be practicable to define the scope of the definition of corruption for purposes of this

evaluation and then evaluate the current state of Brazilian, Russian, Indian, Chinese and South African anti-corruption – more specifically bribery – law. Through this study I intend to elucidate and contextualise the many provisions in the BICS legislative environments.

The conclusion of this study will allow for parallels to be drawn between the anti-bribery legislation in the various BRICS countries, which will provide an opportunity to assess the effectiveness of the anti-bribery provisions in the various countries.

List of Abbreviations

AAY	Antyodaya Anna Yojana
AU	African Union
AUCL	Anti-Unfair Competition Law
BPI	Bribe Payers Index
BPL	Below Poverty Line
CBI	Central Bureau of Investigation
CPI	Corruption Perceptions Index
CPRF	Communist Party of the Russian Federation
CVC	Central Vigilance Commission
DPCI	Directorate for Priority Crime Investigations
DSO	Directorate of Special Operations
EU	European Union
FCPA	Foreign Corrupt Practices Act
FCRA	Foreign Contribution (Regulation) Act
FICA	Financial Intelligence Centre Act
FIRS	First Information Reports
GDP	Gross Domestic Product
HSRC	Human Science Research Council
IMF	International Monetary Fund
IPC	Indian Penal Code
MCCE	Movement to Combat Electoral Corruption
MFMA	Municipal Finance Management Act
MPs	Members of Parliament
NGO	Non-governmental Organisation

NPA	National Prosecuting Authority
OECD	Organisation for Economic Co-operation and Development
PCCAA	Prevention and Combating of Corrupt Activities Act
PDS	Public Distribution System
PFMA	Provincial Finance Management Act
PGO	Prosecutor General's Office
PIOs	Public Information Officers
PM	Prime-minister
PMLA	Prevention of Money Laundering Act
POCA	Prevention of Corruption Act
PPP	Purchasing Power Parity
PRC	People's Republic of China
RTIA	Right to Information Act
SADC	South African Development Community
SAIC	State Administration for Industry and Commerce
SIT	Special Investigation Team
UK	United Kingdom
UKBA	United Kingdom Bribery Act
UN	United Nations
UNCAC	United Nations Convention against Corruption
US	United States
USD	United States Dollars
USSR	Union of Soviet Socialist Republics
UTI	Unit Trust India
WOFEs	Wholly Owned Foreign Enterprises

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A critical comparative analysis of anti-bribery legislation in the BRICS countries

Can South African law benefit from a critical comparative analysis of anti-corruption (in particular anti-bribery) legislation in the other BRICS countries?

1 Introduction

1 1 Introducing the BRICS

The concept BRIC was first introduced by Jim O'Neill in 2001 to describe a group of economically emerging countries (the Federative Republic of Brazil {Brazil}, Russian Federation {Russia}, Republic of India {India}, and People's Republic of China {China}) who, on a purchasing power parity (commonly known as PPP) basis, contributed an aggregate of 23,3% to the world GDP in the year 2000. The Republic of South Africa formally joined this group in 2010,¹ with a combined nominal GDP of US \$13,7 trillion.²

It is estimated that by 2027 BRICs (excluding South Africa) countries will overtake

¹ SA info reporter "New era as South Africa joins BRICS" *SouthAfrican.info* (Accessed 2011-04-11) <http://www.southafrica.info/global/brics/brics-080411.htm#.UFGijLIgev0>; Wilson *Dreaming with BRICs: The Path to 2050* (Global Economics Paper No: 99) 2003.

² International Monetary Fund (2012) "Report for Selected Countries and Subjects" <http://www.imf.org/external/pubs/ft/weo/2012/01/weodata/weorept.aspx?sy=2010&ey=2017&scsm=1&ssd=1&sort=country&ds=.&br=1&c=223%2C924%2C922%2C199%2C534&s=NGDPD%2CNGDPDPC%2CPPPGDP%2CPPPPC&grp=0&a=&pr.x=89&pr.y=9> (Accessed on 2012-09-12).

the G7 countries.³ The BRICS are in a similar stage of economic development. This group represents a huge economic power shift from the developed G7 (French Republic, the Federal Republic of Germany, the Italian Republic, Japan, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Canada).

Therefore it is safe to deduct that these countries' economic wellbeing is of paramount importance to the economic development of the world.

As Vito Tanzi, the director of the International Monetary Fund's (IMF) Fiscal Affairs Department, argues, two factors may have had an impact on the perceived growth of awareness of corruption in recent years: the growth of international trade and business and the economic changes that have taken place in many countries and especially in the economies in transition (like the BRICS).⁴

The growth of international trade and business has created many situations in which the payment of bribes (often referred to as "commissions") may be highly beneficial to the companies that pay them by giving them access to profitable contracts over competitors.⁵ Large bribes have been reported to have been paid to get foreign contracts or to get privileged access to markets or to particular benefits such as tax incentives. *World Business* of March 4, 1996, reported that the bribes paid abroad by

³ Foroohar R "BRICs Overtake G7 By 2027" *Newsweek* (Accessed 2012-06-19) <http://www.newsweek.com/brics-overtake-g7-2027-76001>; Wilson *Dreaming with BRICs: The Path to 2050* (Global Economics Paper No: 99) 2003.

⁴ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

⁵ Baran "Corruption: The Turkish Challenge" 2000 *Journal for International Affairs* 127.

German companies had been estimated to exceed US\$3 billion a year.⁶ When the economic operators of some countries begin to pay bribes, they put pressure on those from other countries to do the same. The cost of not doing so is lost contracts.⁷

Among the economic changes that have taken place in recent years, privatisation has been most closely linked with corruption.⁸ There is no question that public or state enterprises have been a major source of corruption and especially of political corruption because they have occasionally been used to finance the activities of political parties and to provide jobs to the supporters of particular political groups.⁹

A comprehensive understanding of anti-bribery legislation of countries in the same stage of economic development as South Africa will contribute to a greater understanding of legislative ambiguities and positive legislative trends experienced in the BRICS. This understanding can then be used in the South African context and in turn further our economic development.

This study will start with a generic definition of corruption in order to describe the general phenomenon. This is not a legal-technical (legislative-specific) definition and is purely used in order to describe the phenomenon; not the elements of the crime in the respective jurisdictions:

“Corruption is the abuse of entrusted power for private gain. It hurts

⁶ Bray, J. (2007) *Facing up to Corruption: A Practical Business Guide*, Control Risks Group.

⁷ Bray, J. (2007) *Facing up to Corruption: A Practical Business Guide*, Control Risks Group.

⁸ Baran “Corruption: The Turkish Challenge” 2000 *Journal for International Affairs* 127.

⁹ Bannon *The Fight Against Corruption A World Bank Perspective* (1999) no page numbers given http://www.iadb.org/regions/re2/consultative_group/groups/transparency_workshop6.htm#1b (Accessed 2014-10-08).

everyone who depends on the integrity of people in a position of authority”.¹⁰

or

“In its most general form, corruption (from the Latin verb *rumpere*, meaning ‘to damage, break, violate something’) may be defined as an official’s use of his position for purposes of private advantage. The manifestations of corruption are innumerable. They include informal payments in the context of business-state relations (‘business’ corruption), the subornation by one commercial firm of officials employed by another (‘corporate’ corruption), the endless gifts and payments that consumers offer to public service authorities (‘everyday’ corruption), and the promotion of business interests through the secret provision of funds to party bosses (‘party’ corruption).”¹¹

Recently in the constitutional court of South Africa the court had the following to say about corruption:

“As the preamble to the recent South African legislation on corruption, the Prevention and Combating of Corrupt Activities Act 12 of 2004 recognises, corruption undermines the ‘institutions and values of democracy and ethical values and morality’ and jeopardises development and the rule of law. Corruption is therefore antithetical to the founding values of our constitutional order. Indeed, as this Court held in *South African Association of*

¹⁰ Transparency International (2013) “Corruption Perceptions Index” <http://cpi.transparency.org/cpi2011> (Accessed on 2012-03-16).

¹¹ Barsukova “Academic Debates and Russian Reality” 2009 *Russian Politics and Law* 8 - 27.

Personal Injury Lawyers v Heath and Others: Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.”¹²

Bribery constitutes a form of corruption, and will be the type of corruption focused on in this study. As all the BRICS countries to some extent have anti-bribery policies in place, the writer also decided to focus specifically on anti-bribery provisions for comparative purposes.

Bribery is an act of giving money or gift giving that alters the conduct of the recipient. Bribery constitutes a crime and is defined by *Black's Law Dictionary* as “the offering, giving, receiving or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty”.¹³

The specific definition of bribery will vary from jurisdiction to jurisdiction, but this will be indicated where necessary.

1 2 History and causes of corruption

Corruption is not a new phenomenon. The crime of corruption has plagued human societies since the earliest forms of social order evolved. The Code of Hammurabi

¹² *S v Shaik and Others* (CCT 86/07) [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (2) SACR 165 (CC); 2008 (8) BCLR 834 (CC) (29 May 2008).

¹³ Garner *Black's Law Dictionary* 9th ed (2009).

(2100 BC) and the Bible refer to this phenomenon (Deuteronomy 10:17; 16:19).¹⁴ Two thousand years ago, Kautilya, the prime minister of an Indian kingdom, had already written a book, *Arthashastra*, discussing it. Seven centuries ago, Dante also placed bribers in the deepest parts of hell, reflecting the medieval distaste for corrupt behaviour.¹⁵

As Susan Rose-Ackerman, professor of Jurisprudence and co-director of the *Centre for Law, Economics, and Public Policy* at Yale Law School, states:

“Widespread corruption is a symptom, not the disease itself.”¹⁶

Ackerman further states:

“The incidence and level of bribery [...] depends not just on potential gains from corruption but also on the riskiness of corrupt deals.”¹⁷

What causes corruption is therefore of paramount importance as causes could possibly be hampered when one legislates against it. In other words, make it more “risky” for the potential briber or bribe.¹⁸

¹⁴ Jonathan Burchell & John Milton *Principles of Criminal Law* 3ed (2005) 890.

¹⁵ Tavits, M. (2005) Causes of Corruption: Testing Competing Hypotheses, *Working paper*, Nuffield College.

¹⁶ Rose-Ackerman *The Political Economy of Corruption* 46 http://www.iie.com/publications/chapters_preview/12/2iie2334.pdf (Accessed 2014-11-03).

¹⁷ Rose-Ackerman *The Political Economy of Corruption* 46 http://www.iie.com/publications/chapters_preview/12/2iie2334.pdf (Accessed 2014-11-03).

¹⁸ Masiloane & Dintwe “Developing an anti-corruption strategy for the South African public sector” 2014 *Journal for Public Administration* 180 – 198.

As Messick and Kleinfeld state,¹⁹ an obvious first step is to ensure that laws are in place to deter corruption. Prevention is regarded as better than cure. According to the Department of Public Service and Administration Report, the costs of preventing corruption are far lower than investigating it, holding disciplinary inquiries, and taking cases to court. The World Bank Group further explains that anti-corruption laws work to deter corrupt actions, prosecute corruptors and resurrect a sense of justice.²⁰

It is for that reason that a comparative analysis of BRICS (who are in the same stages of economic development and therefore easier to compare) is needed, in order to identify positive legislative trends in each country who address these causes and that then could be applied in South Africa.

Tanzi²¹ argues that causes of corruption can be divided into direct causes and indirect causes.

1 2 1 Factors contributing directly to corruption

1 2 1 1 Regulations and authorisations

In many countries, and especially in developing countries, the role of the state is often carried out through the use of numerous rules or regulations. In these countries, licenses, permits and authorisations of various sorts are required to engage in many

¹⁹ Majila, Taylor & Raga "A comparative analysis of the implementation of anti-corruption legislation by anti-corruption agencies in the provinces of the Eastern and Northern Cape" *TD The Journal for Transdisciplinary Research in Southern Africa* (2014) 219 – 240.

²⁰ Majila, Taylor & Raga "A comparative analysis of the implementation of anti-corruption legislation by anti-corruption agencies in the provinces of the Eastern and Northern Cape" *TD The Journal for Transdisciplinary Research in Southern Africa* (2014) 219 – 240.

²¹ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

activities.²²

The existence of these regulations and authorisations gives a kind of monopoly power to the officials who must authorise or inspect the activities. These officials may refuse the authorisations or may simply sit on a decision for months or even years. Thus, they can use their public power to extract bribes from those who need the authorisations or permits. In India, for example, the expression "licence raj" referred to the individual who sold the permits needed to engage in many forms of economic activities.²³

The existence of these regulations generates the need for frequent contacts between citizens and bureaucrats. It also requires an enormous amount of time to be spent by the citizens in acquiring these permits and in dealing with public officials. This time that is taken away from managing the enterprises can be reduced through the payment of bribes.²⁴

1 2 1 2 Taxation

Taxes based on clear laws and not requiring contacts between taxpayers and tax inspectors are much less likely to lead to acts of corruption.²⁵ However, when the fol-

²² Tavits, M. (2005) Causes of Corruption: Testing Competing Hypotheses, *Working paper*, Nuffield College.

²³ Mauro, P. (1998) Corruption: Causes, Consequences and Agenda for Research, *IMF/World Bank Finance and Development*, March.

²⁴ Myint, U. (2000) Corruption: Causes, Consequences and Cures, *Asia-Pacific Development Journal*, 7(2).

²⁵ Myint, U. (2000) Corruption: Causes, Consequences and Cures, *Asia-Pacific Development Journal*, 7(2).

lowing situations arise, corruption is likely to be a major problem in tax and customs administrations:

1 2 1 2 1 The laws are difficult to understand and can be interpreted differently so that taxpayers need assistance in complying with them;

1 2 1 2 2 The payment of taxes requires frequent contacts between taxpayers and tax administrators;

1 2 1 2 3 The wages of the tax administrators are low;

1 2 1 2 4 Acts of corruption on the part of the tax administrators are ignored, not easily discovered, or when discovered, penalised only mildly;

1 2 1 2 5 The administrative procedures lack transparency and are not closely monitored within the tax or customs administrations;

1 2 1 2 6 Tax administrators have discretion over important decisions, such as those related to the provision of tax incentives, determination of tax liabilities, selection of audits, litigations, and so on; and

1 2 1 2 7 More broadly, the controls from the state (the principal) on the agents charged with carrying out its functions are weak.²⁶

1 2 1 3 Spending decisions

Corruption can also affect public expenditure when there is a lack of transparency and if effective institutional controls are the main factors leading to corruption.²⁷

²⁶ Mauro, P. (1998) Corruption: Causes, Consequences and Agenda for Research, *IMF/World Bank Finance and Development*, March.

²⁷ Swamy, A., Knack, S., Lee, Y. and Azfar, O. (2000) Gender and Corruption, *Working paper*, Williams College.

1 2 1 4 Provision for goods and services at below-market prices

In most countries, the government engages in the provision of goods, services, and resources at below-market prices – for example, foreign exchange, credit, electricity, water, public housing, some rationed goods, access to educational and health facilities, access to public land, and so on. Even access to some forms of pensions, such as those for disability, falls into this category because the individuals who get them, have paid less in contributions to the pension funds over time than the pension they get once their disability status is approved. Sometimes, because of limited supply, rationing or queuing becomes unavoidable. Excess demand is created and decisions have to be made to apportion the limited supply.²⁸ These decisions are often made by public employees. Those who want these goods (the users) would be willing to pay a bribe to get access (or a higher access) to what the government is providing. It is thus not surprising that in all the areas mentioned *supra*, cases of corruption have been reported.²⁹

1 2 1 5 Other discretionary decisions

Besides the areas mentioned *supra*, in many countries public officials can find themselves in positions where they have discretion over important decisions. In these situations, corruption, including high-level or political corruption, can play a major role.³⁰

1 2 2 Indirect causes of corruption

Besides the factors that promote corruption directly, as discussed in the previous

²⁸ Bray, J. (2007) *Facing up to Corruption: A Practical Business Guide*, Control Risks Group.

²⁹ Bray, J. (2007) *Facing up to Corruption: A Practical Business Guide*, Control Risks Group.

³⁰ Swamy, Knack, Lee and Azfar (2000) Gender and Corruption, *Working paper*, Williams College.

section, other factors can contribute to corruption indirectly. Some of these are discussed briefly in this section.

1 2 2 1 Quality of the bureaucracy

The quality of the bureaucracy varies greatly among countries. In some, public sector jobs give a lot of prestige and status, in others, much less so. Many factors contribute to that quality.

Absence of politically motivated hiring, patronage and nepotism, and clear rules on promotions and hiring, in addition to some of the factors discussed separately below, all contribute to the quality of a bureaucracy. The incentive structure plus tradition go a long way toward explaining why some bureaucracies are much less corrupt than others.³¹

1 2 2 2 Level of public sector wages

1 2 2 3 Penalty systems

Tanzi follows Nobel laureate economist Gary Becker's (1968)³² classic analysis of crime prevention, given the probability that the perpetrator of a crime would be caught that the penalty imposed, plays an important role in determining the probability that criminal or illegal acts would take place. In theory, all things being equal, corruption could be reduced by increasing the penalties on those who get caught. This analysis implies that the penalty structure existing in a country is an important factor

³¹ Bray (2007) *Facing up to Corruption: A Practical Business Guide*, Control Risks Group.

³² Becker "Crime and Punishment: An Economic Approach" 1968 *Journal of Political Economy* 169-217.

in determining the extent of corruption in that country.³³

1 2 2 4 Institutional controls

The other important ingredient in Gary Becker's analysis is the probability that those who commit crimes would be caught.³⁴ This leads to the role of institutional controls.

The existence of these controls reflects to a large extent the attitude of the political body toward this problem.³⁵ Generally, the most effective controls should be those that exist inside institutions.³⁶ This is really the first line of defence. Honest and effective supervisors, good auditing offices and clear rules on ethical behaviour should be able to discourage or discover corrupt activities. Good and transparent procedures should make it easier for these offices to exercise their controls.

1 2 2 5 Transparency of rules, laws, and processes

In many countries, the lack of transparency in rules, laws and processes creates a fertile ground for corruption. Rules are often confusing, the documents specifying these are not publicly available, and, at times the rules are changed without properly publicised announcements. Laws or regulations are written in a way that only trained

³³ Becker "Crime and Punishment: An Economic Approach" 1968 *Journal of Political Economy* 169-217.

³⁴ Becker "Crime and Punishment: An Economic Approach" 1968 *Journal of Political Economy* 169-217.

³⁵ Becker "Crime and Punishment: An Economic Approach" 1968 *Journal of Political Economy* 169-217.

³⁶ Woods *Anti-corruption Reader* (Unpublished, available on request) Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference*, Stellenbosch, South Africa.

lawyers can understand and are often conceptually opaque about important aspects, thus leaving grounds for different interpretations. Processes or procedures on policy matters and other actions, for example competitions for public projects, are equally opaque, so that at times it is difficult to understand or to determine the process that was followed before a decision was reached. This makes it difficult to determine whether corruption has played a role in some important decisions.³⁷

1 2 2 6 Example by leadership

A final contributing factor is the example provided by leadership. When the top political leaders do not provide the right example, either because they engage in acts of corruption or, as is more often the case, because they condone such acts on the part of relatives, friends, or political associates, it cannot be expected that the employees in the public administration will behave differently.³⁸

As previously stated, what causes corruption is of paramount importance as causes could possibly be hampered when one legislates against it. It is clear that all direct and indirect causes, as identified by Tanzi,³⁹ should be addressed when legislating in order to curb corruption.

³⁷ Bray (2007) *Facing up to Corruption: A Practical Business Guide*, Control Risks Group.

³⁸ Woods *Anti-corruption Reader* (Unpublished, available on request) Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference*, Stellenbosch, South Africa.

³⁹ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

1 3 Bribery specifically

Bribery is known to be one of the world's main areas of corruption. This is particularly true of its public sector component.⁴⁰ This is where many of the acts of both major and minor corruption take place. It is therefore important to discuss its characteristics in more detail. I have also chosen to compare anti-bribery legislation in the BRICS for comparative purposes and most of the BRICS have such legislation in place.

Bribes (or backhanders or kickbacks or facilitation fees) refer to the payments made by private agents, or sought by officials, in return for supplying favours such as government contracts, benefits, lower taxes, licences or legal outcomes. Officials in charge of purchasing are the most vulnerable when it comes to bribery.⁴¹

A study undertaken by the South African Public Service Commission in 2009 indicated that many public officials in South Africa believed that it was acceptable for them to receive gifts from suppliers. In fact 44% of those interviewed, believe they should be allowed to accept gifts under certain circumstances. The study once again highlighted the main question surrounding the giving of gifts to public officials by service providers: "When does a gift become a bribe?" Gifts can range from innocuous items such as calendars, diaries or a pen and get progressively bigger and approach the

⁴⁰ Woods *Anti-corruption Reader* (Unpublished, available on request) Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

⁴¹ Woods *Anti-corruption Reader* (Unpublished, available on request) Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

scale of a motorcar, an overseas trip or a substantial sum of money.⁴²

Bribes range from the petty corruption category, where a policeman is bribed not to issue a fine or make an arrest, where a customs official is bribed not to inspect an imported good, etcetera, to where a cabinet minister is bribed by an international arms manufacturer to accept their bid in a tender process.

While the use of bribes to obtain contracts can be initiated by either party, government officials in charge of purchasing are the most vulnerable. Bribery is a high risk activity, not only because there are chances of being caught, but also because circumstances can sometimes change and thus prevent the awarding of the business to the briber who has already paid the bribe – leaving the briber unable to use legal ways of claiming the return of the bribe monies.⁴³

⁴² Public Service Commission “Official Magazine of the Public Service Commission” 2009 issue <http://www.psc.gov.za/documents/2010/ReportOfCitizenFinalPrint%20.pdf>. (Accessed 2013-10-10).

⁴³ Woods *Anti-corruption Reader* (Unpublished, available on request) Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference*, Stellenbosch, South Africa.

2 Anti-bribery legislation in Brazil

2 1 Introduction to Brazil

Brazil has been subject to significant economic transformation over the past ten years resulting from a large-scale privatisation program, the stabilisation of the economy, and the strengthening of the banking system. Brazil's international reserves were therefore calculated at more than US\$350bn in 2011,⁴⁴ which sufficiently protected Brazil's economy in the financial crises in 2008 and more recently.⁴⁵

Brazil has a population of 193 million,⁴⁶ while the economically active population was estimated at 97,9 million in 2007,⁴⁷ with a US\$2,48 trillion GDP (world's seventh highest)⁴⁸ and 5,1% real growth (a measure of economic growth from one period to another expressed as a percentage and adjusted for inflation) in 2012.⁴⁹ Brazil's strong financial performance and consistent economic growth renders it an attractive market for multinational organisations.

As with all emerging markets Brazil's investment opportunities are immense, while

⁴⁴ Leahy "Brics' to debate possible Eurozone aid" *Beyond Brics* (2011-09-13).

⁴⁵ Barbosa "Viewpoint Brazil – steady growth for America's only Bric" *BBC News* (2011-01-12).

⁴⁶ IBGE "2011 Population Projection" http://www.ibge.gov.br/home/presidencia/noticias/noticia_impressao.php?id_noticia=1961 (Accessed on 2013-01-22).

⁴⁷ Fonseca et al "Introduction to Federative Republic of Brazil" 2010 *The Sloan Centre for aging and work*.

⁴⁸ World Bank "Gross Domestic Product, Brazil" https://www.google.co.za/publicdata/explore?ds=d5bncppjof8f9_&met_y=ny_gdp_mktp_cd&idim=country:BRA&dl=en&hl=en&q=brazil%20gdp (Accessed 2013-01-21).

⁴⁹ YCHARTS "Brazil Real GDP Growth" http://ycharts.com/indicators/brazil_real_gdp_growth (Accessed 2013-01-21).

the global perception of corruption is also a reality.⁵⁰ In Transparency International's Corruption Perceptions Index (TI's CPI) in 2014 (this index measures the perceived levels of public sector corruption in a country – a score of 0 indicates a highly “clean” {incorrupt state} and 10 indicates a highly corrupt state), Brazil scored a 4,3 – ranking it 69th of 175 countries. By comparison, Sweden scored an 8,7, the United States scored a 7,4 and China scored a 3,6.⁵¹ Brazil further scored 57,9, far below world averages, in the 2012 Index of Economic Freedom.⁵² The World Bank/IFC Enterprise Survey 2009 reports that nearly 70% of surveyed companies perceive corruption as a “major constraint” for doing business in Brazil.⁵³ The World Economic Forum Global Competitiveness Report 2010-2011 finds that corruption is among the most “problematic factors” relating to business constraints in Brazil, ranking below taxes, inadequate infrastructure, and government inefficiency.⁵⁴

The safe conclusion one can make is that corruption is a serious problem to this country and I find the following statement rings true:

“There has traditionally been a high tolerance in Brazil for bending rules or breaking laws. As such, a key part of the country's culture is the *jeito* or *jeitinho* – or ‘the little way’, meaning finding a way around red tape or legal

⁵⁰ Currie et al “Anti-corruption Compliance in Brazil: Top Ten Considerations” 2011 *Association of Corporate Counsel*.

⁵¹ “Transparency International (2014) “Corruption Perceptions Index” <http://cpi.transparency.org/cpi2014> (Accessed on 2015-06-30).

⁵² The Heritage Foundation “2012 Index of Economic Freedom” <http://www.heritage.org/index/>.

⁵³ The World Bank “IFC Enterprise Survey 2009” <http://www.enterprisesurveys.org/>.

⁵⁴ World Economic Forum “The Global Competitiveness Report 2010-2011” http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2010-11.pdf.

frustrations. While in its most innocuous sense the practice can mean circumventing nuisance bureaucracy or relying on a friend in government to facilitate or waive a necessary approval, it often evolves into practices that are more damaging to society such as taking benefits one is not entitled to or purchasing goods one knows to be stolen.”⁵⁵

2 2 Corruption culture

It is said that Brazil has transformed the venality of senior officials to an art form and, at least up until this time, its citizenry has generally turned a blind eye toward such transgressions.⁵⁶

A notorious example is that of Adhemar de Barros, the corrupt mayor and governor of São Paulo during the 1950s and 1960s.⁵⁷ Taking pride in skimming funds from public works projects he endorsed, he encouraged his backers to defend these unsavoury practices with the motto *rouba mas faz* (“he steals but he achieves”).⁵⁸

A few classic examples of unsavoury financial dealings by senior officials over the years will further define this aspect of Brazilian culture:

Fernando Collor was Brazil’s president from 1990 to 1992. He was an obscure governor of the state of Alagoas before gaining the presidency. Upon assuming power,

⁵⁵ Stocker “Anti-corruption Developments in the BRIC Countries: A MAPI Series” 2012 *MAPI* 1-70.

⁵⁶ International business attitudes to corruption, 2006, p. 5, Control Risks and Simmons & Simmons, available at <http://emergingmarkets.asia/emaif/images/stories/resources/International-Business-Attitudes-to-Corruption-%28Control-Risks-Group,-2006%29-English.pdf>.

⁵⁷ Gallant “The Art of Stealing” <http://www.brazzil.com/cvrmar97.htm> (Accessed 2015-07-01).

⁵⁸ Gallant “The Art of Stealing” <http://www.brazzil.com/cvrmar97.htm> (Accessed 2015-07-01).

he launched a series of extortions through an adviser with barely any attempt to be subtle or secretive (for example receiving direct payments in the form of cheques). Collor was later acquitted of ordinary criminal charges in his judicial trial before Brazil's Supreme Federal Tribunal, for lack of valid evidence. After the end of his period of disqualification, Collor was elected a senator of the Republic in the 2006 general elections and began his term in February 2007.⁵⁹

The *Mensalão* scandal (Portuguese: *Escândalo do Mensalão*), is considered possibly the “boldest, most scandalous case of corruption ever to have taken place in Brazil”,⁶⁰ and threatened to bring down the government of Luiz Inácio Lula da Silva in 2005. *Mensalão* is a neologism and variant of the word for "big monthly payment" (*salário mensal* or *mensalidade*).⁶¹

The scandal broke on June 6, 2005 when Brazilian Congressional Deputy Roberto Jefferson told the Brazilian newspaper *Folha de São Paulo* that the ruling Partido dos Trabalhadores (PT) had paid a number of congressional deputies 30 000 real (around US\$12 000 at the time) every month in order to vote for legislation favoured by the ruling party. The funds were said to originate from state-owned companies' advertising budgets, funnelled through an advertising agency owned by Marcos Valério.⁶²

⁵⁹ Info Please “Collor de Mello, Fernando” <http://www.infoplease.com/encyclopedia/people/collor-de-mello-fernando.html>.

⁶⁰ Critical Corporate Issues *Whatever happened to the workers party* 2012 <http://www.criticalcorp.-com.br/?lg=en> (Accessed 2014-11-01).

⁶¹ Critical Corporate Issues *Whatever happened to the workers party* 2012 <http://www.criticalcorp.-com.br/?lg=en> (Accessed 2014-11-01).

⁶² Folha de São Paulo <http://www1.folha.uol.com.br/internacional/en/> (Accessed 2014-11-01).

Many key advisers to President Lula resigned, while several deputies were faced with the choice of resignation or expulsion from congress, though the president himself went on to be re-elected in 2006. The scandal also sparked unproved charges of illegal campaign contributions from Cuba and the Revolutionary Armed Forces of Colombia and political connections to the assassination of Celso Daniel, mayor of the city of Santo André.⁶³

2 3 Anti-bribery legislation discussed specifically

2 3 1 The Penal Code⁶⁴ will be discussed first. This code proposes penalties for misconduct including embezzlement of public funds, public graft, acceptance of bribes, breach of public trust, offering of bribes and bribery in international dealings. The focus of this law is therefore on public bribery and the related conduct of Brazilian officials.

Article 332 states that “traffic of influence” entails:

“Requesting, requiring, charging, or obtaining, for oneself or to another person, advantage or promise of advantage in exchange for influencing an act carried out by a public official in the exercise of his/her functions.”⁶⁵

The penalty for this offence is imprisonment from two to five years, and a fine.

“Active bribery” is defined in Article 333 as:

⁶³ Critical Corporate Issues *Whatever happened to the workers party* 2012 <http://www.criticalcorp.-com.br/?lg=en> (Accessed 2014-11-01).

⁶⁴ 2848 of 1940.

⁶⁵ 2848 of 1940.

“Offering or promising an undue advantage to a public official to induce him/her to perform, omit, or delay an official act.”⁶⁶

The penalty for active bribery is imprisonment from two to twelve years, and a fine.

Article 337-B of the code defines “active bribery” in international dealings as:

“Promising, offering, or giving, directly or indirectly, any improper advantage to a foreign public official or to a third person, in order for him/her to put into practice, to omit, or to delay any official act relating to an international business transaction.”⁶⁷

The penalty for active bribery in international dealings is imprisonment from one to eight years, and a fine.

Traffic of Influence in an International Business Transaction (art. 337-C):

“Requesting, requiring, charging, or obtaining, for oneself or for another person, directly or indirectly, any advantage or promise of advantage in exchange for influencing an act carried out by a foreign public official in the exercise of his functions relating to an international business transaction.”⁶⁸

2 3 2 The code of conduct for high-ranking federal government officials in the rules

⁶⁶ 2848 of 1940.

⁶⁷ 2848 of 1940.

⁶⁸ 2848 of 1940.

applicable to government officials further states:⁶⁹

2 3 2 1 They cannot receive a salary or any other remuneration from a private source in violation of the law, or transport, lodging, or any other favours from individuals;

2 3 2 2 Their participation in seminars and conferences may be sponsored by the private sector provided that

- (i) It's a matter of their personal interest;
- (ii) The information on any financial compensation and/or payment of travel expenses made by private sponsor is duly disclosed; and
- (iii) The sponsor must have no interest in any decisions that can be made by the official.

2 3 2 3 Acceptance of gifts is authorised in only three cases:

- (i) If the gift has no financial value;
- (ii) If the value of the gift is less than BRL100 (USD58); or
- (iii) If the gift is a matter of protocol on the part of a foreign official and involves reciprocity.⁷⁰

2 3 3 Further, the code of ethics of BNDES (National Economic and Social Development Bank – owned by the Federal Government) regulates monies to the BNDES officials:

⁶⁹ Code of Conduct for High-ranking Federal Government Officials http://www.planalto.gov.br/ccivil_03/codigos/codi_conduta/cod_conduta.htm (Accessed 2014-11-01).

⁷⁰ Code of Conduct for High-ranking Federal Government Officials http://www.planalto.gov.br/ccivil_03/codigos/codi_conduta/cod_conduta.htm (Accessed 2014-11-01).

The BNDES officials are not allowed to receive any monies, gift, or advantage, including personal invitations for travel and other benefits, except where the invitation is made by a foreign official with reciprocity.

Acceptance of gifts is authorised only in the following cases:

- (i) If the gift has no financial value; or
- (ii) If the gift is distributed by the entity as courtesy, advertisement or promotion or in special events or in dates of celebration, as long as the financial value of the gift is BRL100 or less (USD58), considering the sum of the value of all gifts sent by one entity.

The penalties for contravention are a reprimand to the government official.

2 3 4 Official Misconduct Law is only relevant insofar one looks at section 9, which lists the following as acts of government impropriety involving illicit enrichment:

2 3 4 1 “To accept, either for oneself or someone else, monies, personal or real property, or any kind of direct or indirect economic advantage, in the form of a commission, %age, gratuity or gift from any party that has a direct or indirect interest that can be accomplished or furthered by an act or omission of the civil servant in performing his or her functions” (Article 9, I);⁷¹

2 3 4 2 “To accept any employ or commission or engage in consulting or advisory work for any natural person or legal entity that has an interest that can be achieved or furthered by an act or omission committed in the performance of a civil servant’s functions” (Article 9, VIII);⁷²

⁷¹ 8429 of 1992.

⁷² 8429 of 1992.

2 3 4 3 “To accept any economic advantages in exchange for arranging the use or investment of any public monies” (Article 9, IX). Likewise, under Article 11, “revealing or allowing any third party to gain access to information regarding any political or economic measure that can affect the price of a commodity, good or service, before that measure is officially announced, shall constitute government misconduct in violation of the principles of public administration” (Article 11, VII).⁷³

2 3 5 Law 12.846/13, known as the Anti-corruption Law (also known as the “clean companies act”)

Public bribery has been a criminal offence in Brazil since 1940; other corruption-related activities have similarly been criminalised since that time.⁷⁴

In what has been viewed as a major inadequacy in the country's anti-corruption law, however, only individuals and not entities can be held criminally liable for such conduct, as Brazil is a civil law country. Unlike common law jurisdictions, civil law systems generally do not apply criminal liability to legal (as opposed to natural) persons. Civil law typically considers corporations to be abstract intangible entities that have no capacity to meet the *mens rea* (intent) required to establish criminal responsibility. As such, even if a corporation (i.e. a legal person) is the ultimate beneficiary of a corrupt activity such as bribery, it cannot be held criminally liable in Brazil.

Corporations are subject to criminal prosecution or liability in Brazil only in the case of a few environmental crimes and antitrust violations – not corruption. In such latter cases, until the new law goes into effect, only the directors, management, employees

⁷³ 8429 of 1992.

⁷⁴ MAPI *Brazil enacts Long Pending Anti-Corruption Legislation* <https://www.mapi.net/research/publications/brazil-enacts-long-pending-anti-corruption-legislation> (Accessed on 2015-07-15).

or agents of a corporation can be held criminally liable for their actions on behalf of the corporation.⁷⁵

The “new” law is a major step in Brazil's ability to fight corruption. This development brought the country into compliance with the international agreements to which it is a signatory, including the Organisation of Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials (ratified by Brazil in 2000) and the UN Convention against Corruption (ratified in 2005).

This measure, while not creating any new criminal offences, embraces the established common-law concept of *respondeat superior*,⁷⁶ that is, it addresses corporate civil and administrative liability for illicit conduct identified in the statute (for example bribery, fraud in government procurement, bid rigging, fraud in contracts signed with public bodies, impairing public officers' investigative activities, and influencing or financing others to engage in illegal acts against the government) that is perpetrated by a company's representatives, either for the direct benefit of the corporation or for which the company receives a benefit.

The “new law” was passed by the Brazilian Chamber of Deputies (the lower house of the National Congress) on April 24, 2013; approved by the Senate on July 4, 2013; signed by president Dilma Rousseff on August 1, 2013; and published in the *Diário Oficial da União* (the official gazette of Brazil's federal government) on August 2,

⁷⁵ MAPI *Brazil enacts Long Pending Anti-Corruption Legislation* <https://www.mapi.net/research/publications/brazil-enacts-long-pending-anti-corruption-legislation> (Accessed on 2015-07-15).

⁷⁶ Business Anti-corruption Portal “Public Anti-corruption Initiatives” <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/brazil/initiatives/public-anti-corruption-initiatives/> (Accessed on 12-02-12).

2013. The act took effect on January 29, 2014, 180 days after that publication.⁷⁷

2 3 5 1 Specifics of the New Law⁷⁸

2 3 5 1 1 Proscribed Conduct

Under the new law, the bribery of domestic and foreign public officials is broadly defined to include promoting, offering, or giving, "directly or indirectly, an improper benefit to a public agent [...] or [...] a third party related to him."⁷⁹

Also prohibited is the financing, paying for, or otherwise sponsoring the offences identified in the law. Similarly proscribed is activity concealing such illegal activities.⁸⁰

The act covers skulduggery in the public procurement realm such as bid rigging, impeding or frustrating a due administrative process, committing fraud in the submission of a bid, or seeking to obtain any undue advantage.⁸¹

The law has broad extraterritorial reach, applying to any covered illicit activity involving Brazilian or foreign public bodies by Brazilian corporate entities, regardless of whether the offence is committed in Brazil or abroad. Additionally, it covers offences

⁷⁷ Business Anti-corruption Portal "Public Anti-corruption Initiatives" <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/brazil/initiatives/public-anti-corruption-initiatives/> (Accessed on 12-02-12).

⁷⁸ International Law Enforcement Reporter *Compliance in Brazil: Current and Future Perspective* <https://tfoxlaw.wordpress.com/2011/03/10/brazil-and-anti-corruption-legislation/> (Accessed on 2015-07-15).

⁷⁹ Law 12.846/13.

⁸⁰ International Law Enforcement Reporter *Compliance in Brazil: Current and Future Perspective* <https://tfoxlaw.wordpress.com/2011/03/10/brazil-and-anti-corruption-legislation/> (Accessed on 2015-07-15).

⁸¹ Law 12.846/13.

committed in Brazil by foreign companies operating there, by Brazilian subsidiaries of foreign companies, and by Brazilian agents or other authorised representatives acting on behalf of foreign companies.⁸²

For administrative or judicial sanctions to be applied to a legal entity under the law, it is not necessary that there be an underlying finding of criminal liability on the part of directors, officers, employees or agents of that entity. Moreover, prosecutors need not establish that the entity's directors, officers, employees, or agents acted with corrupt intent. The law provides that covered "legal persons shall be held strictly liable, administratively or civilly, for the injurious acts stipulated [therein] performed in their interest or benefit, exclusive or not."⁸³

It should be noted that the new Brazilian law does not include a facilitating payments exception (i.e. an exception for payments to government officials to secure performance of routine government non-discretionary actions). In this regard, the law is similar to the UK Bribery Act but unlike the US Foreign Corrupt Practices Act, two anti-corruption laws with broad extraterritorial implications.

2 3 5 1 2 Sanctions

Civil fines for violations of the new law can be steep, running to as much as 20% of the entity's gross revenue in the year prior to that in which the administrative pro-

⁸² Business Anti-corruption Portal "Public Anti-corruption Initiatives" <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/brazil/initiatives/public-anti-corruption-initiatives/> (Accessed on 12-02-12).

⁸³ Law 12.846/13.

ceeding was initiated.⁸⁴ Such fines are never to be "less than the benefit gained"⁸⁵ by the illicit activity if such amount can be established. If the prior year's gross billings cannot be calculated, fines may vary between R\$6 000 and R\$60 000,000 (approximately \$2 500-\$25 000 000). The higher amount, R\$60 000 000, does not appear to be a cap on the fine since other provisions of the law establish that "application of the penalties stipulated in this article does not exclude, in any case, the obligation to fully indemnify the damage caused."⁸⁶

Penalties in judicial proceedings could include a loss of assets, injunctions, debarment, partial suspension of an entity's activities, and even dissolution of the offending entity. Offenders could lose public "incentives, subsidies, subventions, donations, or loans from public bodies or entities and public financial institutions or those controlled by the public authorities [...] for a minimum period of [...] [one] year and a maximum of [...] [five] years."⁸⁷

2 3 5 1 3 Leniency

It is noteworthy that the new anti-corruption law provides for the mitigation of some sanctions if companies have effective compliance programs in place or if they self-disclose violations and cooperate with investigating authorities.⁸⁸

⁸⁴ Law 12.846/13.

⁸⁵ Law 12.846/13.

⁸⁶ Law 12.846/13.

⁸⁷ Law 12.846/13.

⁸⁸ International Law Enforcement Reporter *Compliance in Brazil: Current and Future Perspective* <https://foxlaw.wordpress.com/2011/03/10/brazil-and-anti-corruption-legislation/> (Accessed on 2015-07-15).

With regard to effective compliance programs, entities subject to the act may qualify for reduced sanctions if they have developed and implemented "internal mechanisms and procedures for integrity, audit, and incentives to report irregularities and the effective application of codes of ethics and conduct."⁸⁹

Concerning voluntary self-disclosure, the act provides strong incentives for engaging in such practices. An entity that reports misconduct before it comes to the attention of the authorities, cooperates with investigators (including naming others engaged in the violations, if applicable), and ceases the illicit activities before being ordered to do so, can qualify for significant leniency.⁹⁰ Such leniency provisions in the law can reduce applicable fines by up to two-thirds, and can also lead to reductions in other applicable sanctions.⁹¹

2 3 5 Access to Information Law:⁹²

The "Information Law"⁹³ changed the then legislative environment as follows:

Firstly, it legally obligated Brazil's federal, state, and municipal governments to publish information, including documents on government spending and administration. It will also apply to state-owned corporations and certain non-profit entities that receive

⁸⁹ Law 12.846/13.

⁹⁰ International Law Enforcement Reporter *Compliance in Brazil: Current and Future Perspective* <https://tfoxlaw.wordpress.com/2011/03/10/brazil-and-anti-corruption-legislation/> (Accessed on 2015-07-15).

⁹¹ Law 12.846/13.

⁹² Act 12.527 of 2011.

⁹³ Act 12.527 of 2011.

government funding.⁹⁴

Secondly, the law allowed anyone to request information from the government, which, in turn, will have to provide copies of the requested non-classified documents.⁹⁵

Finally, it set time limits for documents to remain classified.⁹⁶

Brazil was the 10th country in Latin America to pass such a freedom of information law.

While the legislation is broad in scope, it lacks clear provisions for its oversight; it specifies no authority to define its implementation, regulation, or enforcement. It is assumed that the Brazilian Controller General will oversee the law, but the statute itself is silent on such matters. It merely states that the president will appoint the oversight authority.

As it stands, the controller is only responsible for deciding appeals to denials of requests for information.

The procedural aspects of the law are straightforward. Officials will have ten days to respond to requests – a period that may be extended with an additional ten days provided the person making the request is informed of this in writing.⁹⁷ Officials are charged with helping people file requests, conveying improperly filed requests to the

⁹⁴ Act 12.527 of 2011.

⁹⁵ Act 12.527 of 2011.

⁹⁶ Act 12.527 of 2011.

⁹⁷ Act 12.527 of 2011.

appropriate entity, and informing requestors of their right to appeal denials (and denials require justification).⁹⁸

Fees can only be charged to cover photocopying and the legally defined “poor” are exempt from paying any costs. Independent of requests, the law will obligate government entities to actively publish a wide assortment of information.⁹⁹ Such mandatory transparency obligations include official contact details for all employees, as well as information about financial operations, spending, procurement contracts, and answers to frequently asked questions, amongst other details.¹⁰⁰

Significantly, the heads of all government entities are required to identify their “information officers” within 60 days of the law’s entry into force.¹⁰¹

2 3 7 *Ficha Limpa*¹⁰²

On February 16, 2012, the Brazilian Supreme Court upheld the constitutionality of an electoral law that was passed in 2010 by the country’s legislature and signed by then-president Lula. Late in 2011, the Supreme Court ruled that the law’s provisions would be properly applied for the first time for the October 2012 elections. The law in question is the so-called *Ficha Limpa* (“clean record”) law.¹⁰³

⁹⁸ Act 12.527 of 2011.

⁹⁹ Act 12.527 of 2011.

¹⁰⁰ Act 12.527 of 2011.

¹⁰¹ Act 12.527 of 2011.

¹⁰² Act 135 of 2010.

¹⁰³ Act 135 of 2010.

Its import is simple: candidates with criminal records (including bribery) will be ineligible to run for office.¹⁰⁴ At the time the law was passed, *The Economist* reported that about one-quarter of members of the lower house of congress faced criminal charges in the country's Supreme Court or were under investigation, as were 21 of 81 senators.¹⁰⁵ Some of these alleged wrongdoers had already been convicted in lower court.¹⁰⁶ Most of the charges related to violation of campaign finance laws or the pilfering of public funds. Prior existing laws allowed these politicians to be tried before the Supreme Court but cases typically lapsed before they were heard. Politicians who were impeached lost the right to run for office, but procedural gimmicks allowed individuals facing such a sanction to resign and stand for election again in the next cycle.

Specifically, *Ficha Limpa*¹⁰⁷ prevents politicians from running for election to local or federal office if they have been convicted of a crime by more than one judge. Similar treatment would bar the running of those whose resignations from office were, as determined by electoral tribunals, designed to avoid impeachment. The law also makes potential candidates ineligible for election for eight years after sentencing, stemming from the commission of an electoral crime (for example fraud, vote purchasing and falsification of public records, etcetera), money laundering, concealment of assets

¹⁰⁴ Act 135 of 2010.

¹⁰⁵ "Brazil's congress: Cleaning up: A campaign against corruption," *The Economist*, July 8, 2010, www.economist.com/node/16542611?story_id=16542611.

¹⁰⁶ "Brazil's congress: Cleaning up: A campaign against corruption," *The Economist*, July 8, 2010, www.economist.com/node/16542611?story_id=16542611.

¹⁰⁷ Act 135 of 2010.

and administrative misconduct, and other similar criminal activity.¹⁰⁸ Administrative misconduct is a broad enough term that it would bar candidates expelled from professional organisations, such as attorneys who have been disbarred.

What may be even more impressive than the breadth of this law is its genesis: its passage into law is evidence of the growing anti-corruption sentiment of the average Brazilian. Its roots can be traced back to an organisation known as the Movement to Combat Electoral Corruption (MCCE), an umbrella enterprise made up of some 43 concerned NGOs and other entities. Because few Brazilian elected officials wanted to sponsor anti-corruption legislation, the MCCE availed itself of a little-known and almost never used legislative vehicle known as the “popular initiative clause”.¹⁰⁹ It provides that a bill can be taken up in Congress if signatures from 1% of the population are obtained. *Ficha Limpa*¹¹⁰ is one of only four bills in Brazilian history to ever have been so introduced.¹¹¹

In April 2010, *Ficha Limpa*¹¹² arrived unsolicited at the Brazilian Chamber of Deputies in the form of a petition with 1,6 million signatures. Over time, an additional three million signatures were gathered online. As public clamour in favour of the proposed law grew, lawmakers in Brazil felt pressured to enact it since the people of Brazil has

¹⁰⁸ Act 135 of 2010.

¹⁰⁹ Brazil's congress: Cleaning up: A campaign against corruption,” *The Economist*, July 8, 2010, www.economist.com/node/16542611?story_id=16542611.

¹¹⁰ Act 135 of 2010.

¹¹¹ Brazil's congress: Cleaning up: A campaign against corruption,” *The Economist*, July 8, 2010, www.economist.com/node/16542611?story_id=16542611.

¹¹² Act 135 of 2010.

spoken and proved that they prefer their leaders to set a proper example to their followers.¹¹³

¹¹³ Brazil's congress: Cleaning up: A campaign against corruption," *The Economist*, July 8, 2010, www.economist.com/node/16542611?story_id=16542611.

3 Anti-bribery legislation in Russia

3 1 Introduction to Russia

As the world's largest country, the biggest supplier of natural gas and the second-largest oil producer, Russia embodies superlatives.¹¹⁴

Russia now takes 136th place out of 175 (tied with Lebanon and Iran) in the Corruption Perceptions Index published by *Transparency International*.¹¹⁵

According to some expert estimates, the market for corruption in the country exceeded US\$240 billion in 2006.¹¹⁶ The Russian think-tank, Indem Foundation, estimates that bribes accounted for 20% of Russia's GDP as of 2005.¹¹⁷ According to a poll conducted in early 2010, 15% of Russians reported to have paid a bribe in the past twelve months.¹¹⁸ According to Georgy Satarov, a former aide to Boris Yeltsin, the overall amount of bribes in the Russian economy during the last decade skyrocketed from US\$33 billion to more than US\$400 billion per year in Putin's govern-

¹¹⁴ Frommers "Introduction to Russia" <http://www.frommers.com/destinations/russia/255709> (Accessed 2014-11-01).

¹¹⁵ Transparency International (2014) "Corruption Perceptions Index" www.transparency.org (Accessed 2015-07-01).

¹¹⁶ Александр Буксман (27 January 2011). "Ни дать, ни взять Генпрокуратура начала новое наступление на коррумпированных чиновников". Rg.ru. Retrieved 14 May 2011.

¹¹⁷ Freeland "The Next Russian Revolution" 2011 <http://www.theatlantic.com/magazine/archive/2011/10/the-next-russian-revolution/308630/>.

¹¹⁸ Ninenko "Russia's Anti-corruption predicament" 2012 http://providus.lv/upload_file/Publikacijas/Valsts_kvalitate/Nr_15_internetam.pdf.

ment.¹¹⁹

According to TRACE International, a United States of America-based anti-corruption NGO, 41% of reported demands for bribes in Russia are from government officials and employees, and 50% are from the police or military.¹²⁰

Russia also finished last (22nd out of 22) in *Transparency International's* 2008 Bribe Payers Index (BPI), which ranks exporting countries on the likelihood of their exporting entities paying bribes abroad.¹²¹

3 2 Corruption culture

For a long time, the corruption of officials in Russia was legal: up to the 18th century, government officials had lived through *kormlenie* (кормления – "feedings" – i.e. resources provided by those interested in their area of business).¹²²

Since 1715, accepting a bribe in any form became a crime, as officials began to receive fixed salaries.¹²³ However, the number of officials under Peter the Great had increased so much that salaries came to be paid irregularly, and bribes, especially

¹¹⁹ Ninenko "Russia's Anti-corruption predicament" 2012 http://providus.lv/upload_file/Publikacijas/Valsts_kvalitate/Nr_15_internetam.pdf.

¹²⁰ US Department of State "2010 Human Rights Report: Russia" <http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154447.htm>.

¹²¹ Transparency International (2008) "Bribe Payers Index" <http://bpi.transparency.org/bpi2011/> (Accessed on 2012-03-16).

¹²² <https://tspace.library.utoronto.ca/citd/RussianHeritage/2.RM/SCMEDIA/2.L/KORM.html> (Accessed 2013-03-01).

¹²³ Letiche and Paškov *A History of Russian Economic Thought: Ninth through Eighteenth Centuries* 130-140.

for officials of lower rank, again became their main source of income.¹²⁴ Soon after the death of Peter, the system of *kormlenie* was restored and fixed salaries only returned with Catherine II.¹²⁵ The salaries of civil servants were paid in paper money, which in the beginning of the 19th century began to depreciate greatly in comparison with metallic money.¹²⁶ Insecurity within the bureaucracy again led to increased corruption.¹²⁷

In Soviet Russia, bribery was considered a counter-revolutionary activity, and the Criminal Code in 1922 made it punishable by death.¹²⁸

On November 20, 2009, the State Duma adopted a law on general principles of public service delivery and performance of public functions, which allows officials to make the citizens pay for public services and public functions. According to the authors of the law it is intended to make it easier for the citizens and organisations to

¹²⁴ Retish *Power, Control, and Criminal Activity: The Peasantry and the Soviet Revolutionary Tribunal in Viatka Province, 1918-1921* <http://www.units.muohio.edu/havighurstcenter/publications/documents/retish.pdf>.

¹²⁵ Retish *Power, Control, and Criminal Activity: The Peasantry and the Soviet Revolutionary Tribunal in Viatka Province, 1918-1921* <http://www.units.muohio.edu/havighurstcenter/publications/documents/retish.pdf>.

¹²⁶ Letiche and Paškov *A History of Russian Economic Thought: Ninth through Eighteenth Centuries* 130-140.

¹²⁷ Letiche and Paškov *A History of Russian Economic Thought: Ninth through Eighteenth Centuries* 130-140.

¹²⁸ Retish *Power, Control, and Criminal Activity: The Peasantry and the Soviet Revolutionary Tribunal in Viatka Province, 1918-1921* <http://www.units.muohio.edu/havighurstcenter/publications/documents/retish.pdf>.

have the public services delivered to them.¹²⁹ However, according to the Russian parliamentary opposition parties CPRF and LDPR, this effectively legalises corruption.¹³⁰

In “modern” Russia it is widely accepted that corruption is one of the main obstacles to the country's economic development.¹³¹ In 2006, the First Deputy of the Prosecutor General of Russia reported that according to some expert estimates, the market for corruption in the country exceeded US\$240 billion.¹³² According to Indem Foundation, this number is even larger: in the business sphere alone, corruption volume increased from US\$33 billion to US\$316 billion between 2001 and 2005 (not taking into account corruption on the levels of federal-level politicians and business elites).¹³³ The average bribe that Russian businessmen offer to civil servants increased from US\$10 000 to US\$136 000. More than half of the adult population has had direct experience in giving bribes.¹³⁴

The fact that there is legal basis permitting civil servants to illegally enrich themselves (in Russia, for example, there recently appeared a new term which measures how “bribe-permissive” each individual law is) through demanding bribes or through

¹²⁹ Retish *Power, Control, and Criminal Activity: The Peasantry and the Soviet Revolutionary Tribunal in Viatka Province, 1918-1921* <http://www.units.muohio.edu/havighurstcenter/publications/documents/retish.pdf>.

¹³⁰ http://en.goldenmap.com/Corruption_in_Russia (Accessed 2013-03-08).

¹³¹ Barsukova “Academic Debates and Russian Reality” 2009 *Russian Politics and Law* 8 - 27.

¹³² “Of Vadra's riches and Kejriwal's endless accusations IBN” <http://m.ibnlive.com/blogs/brijeshkalappa/2992/64030/of-vadras-riches-and-kejriwals-endless-accusations.html>.

¹³³ Honda-tech.com <http://honda-tech.com/showthread.php?p=47062700> (Accessed 2012-10-13).

¹³⁴ Honda-tech.com <http://honda-tech.com/showthread.php?p=47062700> (Accessed 2012-10-13).

illegal privatisation, or special privileges for civil servants, leads to a large difference between legal and illegal income for civil servants.¹³⁵

Income of civil servants has been growing. In 2005, their income increased by 44,1%. This by far exceeds average income growth for the rest of the population, which grew by 21,3%.¹³⁶ Comparing quality of life with official salary gives an idea of the level of illegal income. The poorest segments of society lose the most to corruption, because they have the least financial possibilities compared to wealthier citizens.¹³⁷

The Russian government recognises corruption as one of the most serious problems facing the country and has taken steps to counter it. Fighting corruption was a top agenda of previous Russian president, Dmitry Medvedev and current president Vladimir Putin.¹³⁸ An Anti-Corruption Council was established by Medvedev in 2008 to oversee Russia's anti-corruption campaign.¹³⁹ The central document guiding the effort is the National Anti-Corruption Strategy, introduced by Medvedev in 2010.¹⁴⁰

¹³⁵ Suhara "Corruption in Russia: A Historical Perspective"https://src-h.slav.hokudai.ac.jp/sympo/03september/pdf/M_Suhara.pdf (Accessed 2015-07-15).

¹³⁶ Sovok Research Blog http://the-russian-art.blogspot.com/2011_06_01_archive.html (Accessed 2012-10-13).

¹³⁷ Suhara "Corruption in Russia: A Historical Perspective"https://src-h.slav.hokudai.ac.jp/sympo/03september/pdf/M_Suhara.pdf (Accessed 2015-07-15).

¹³⁸ http://en.goldenmap.com/Corruption_in_Russia (Accessed 2013-03-08).

¹³⁹ Treisman, Daniel (2000), 'The Causes of Corruption: A Cross-National Study', *The Journal of Public Economics*, 76: 399-457.

¹⁴⁰ Treisman, Daniel (2000), 'The Causes of Corruption: A Cross-National Study', *The Journal of Public Economics*, 76: 399-457.

As alluded to previously, Russia is known for a laundry list of unethical business practices.¹⁴¹ Seventy plus years of socialist dictatorship and the uncertainty surrounding the shift from communism to capitalism in the early 1990s provided a fertile environment for corruption to flourish.¹⁴²

Global companies often cite corruption as a major obstacle to doing business in the country.¹⁴³

Problems typically identified include the inconsistent application of laws and regulations on a non-transparent basis and lax enforcement of laws and judicial decisions.¹⁴⁴

It is in the area of required licensing and permitting that the practice of bribing of government functionaries abounds.¹⁴⁵ This risk is particularly acute when dealing with regional and local authorities.¹⁴⁶

¹⁴¹ Shlapentokh, V (2003), 'Russia's Acquiescence to Corruption Makes the State Machine Inept', *Communist and Post-Communist Studies*, 36(2): 151-161.

¹⁴² Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

¹⁴³ Transparency International (2008) "Bribe Payers Index" <http://bpi.transparency.org/bpi2011/> (Accessed on 2012-03-16).

¹⁴⁴ Berman, H. J. (1963), *Justice in the U.S.S.R.: An Interpretation of Soviet Law*, Cambridge, MA: Harvard University Press.

¹⁴⁵ Potter, C. J. (2000), 'Payment, Gift or Bribe? Exploring the Boundaries in Pre-Petrine Russia', in Lovell, S., Ledeneva, A. V. and Rogachevskii, A., (eds.), *Bribery and Blat in Russia*, London: Macmillan Press Ltd.

¹⁴⁶ Potter, C. J. (2000), 'Payment, Gift or Bribe? Exploring the Boundaries in Pre-Petrine Russia', in Lovell, S., Ledeneva, A. V. and Rogachevskii, A., (eds.), *Bribery and Blat in Russia*, London: Macmillan Press Ltd.

Companies complain that the requirements for multiple, often arbitrary, inspections and red tape contributes to a high level of corruption.¹⁴⁷ These issues complicate efforts to acquire land, build facilities and conduct day-to-day operations. In terms of operations, government-mandated inspections of facilities could tempt companies to make payments to officials to avoid costly and sometimes seemingly baseless fees or penalties stemming from failed inspections.

Russia has numerous rules and regulations (for example special decrees of the former USSR's Council of Ministers) that have not been updated since the collapse of communism and appear to contradict subsequent federal laws like the Russian Civil Code.¹⁴⁸ This poses a problem for companies trying to sort out the maze of Russian legal codes and standards.

It is this complex, often contradictory, jumble of rules and regulations that provides a basis for officials' abuse in delaying approvals and issuing repeated inspection failures.¹⁴⁹ Required payments and fees can multiply, and withholding such payments and fees – even if corruption is suspected – could result in loss of utility service or

¹⁴⁷ Shlapentokh, V (2003), 'Russia's Acquiescence to Corruption Makes the State Machine Inept', *Communist and Post-Communist Studies*, 36(2): 151-161.

¹⁴⁸ Volkov, V. (2000), 'Patrimonialism versus Rational Bureaucracy: On the Historical Relativity of Corruption,' in Lovell, S. Ledeneva, A. V. and Rogachevskii, A. (eds.), *Bribery and Blat in Russia*, London: Macmillan Press Ltd.

¹⁴⁹ Volkov, V. (2000), 'Patrimonialism versus Rational Bureaucracy: On the Historical Relativity of Corruption,' in Lovell, S. Ledeneva, A. V. and Rogachevskii, A. (eds.), *Bribery and Blat in Russia*, London: Macmillan Press Ltd.

other business interruptions.¹⁵⁰

The public procurement arena in Russia remains one of the most corrupt business sectors.¹⁵¹ Under the current procurement system, some 26 000 federal entities place orders annually outside of a uniform framework.¹⁵² While the majority of state procurements are said to require a competitive bidding process, tenders too often follow an entirely closed process where full tender materials are available only to preferred bidders.¹⁵³

Last in this list of corrupt practices, which is by no means exhaustive, is a problem faced by those exporting goods to Russia. In 2008, then Prime Minister Viktor Zubkov charged Russia's Federal Customs Service of widespread corruption, stating that bribes and other illicit practices are endemic among customs officers on the country's western borders.¹⁵⁴

By way of example, he cited the holding of containers for days while officials seek bribes to secure their release. These bribes can often be funnelled through intermediaries such as customs brokers.¹⁵⁵

¹⁵⁰ Volkov, V. (2000), 'Patrimonialism versus Rational Bureaucracy: On the Historical Relativity of Corruption,' in Lovell, S. Ledeneva, A. V. and Rogachevskii, A. (eds.), *Bribery and Blat in Russia*, London: Macmillan Press Ltd.

¹⁵¹ Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

¹⁵² Treisman, Daniel (2000), 'The Causes of Corruption: A Cross-National Study', *The Journal of Public Economics*, 76: 399-457.

¹⁵³ Treisman, Daniel (2000), 'The Causes of Corruption: A Cross-National Study', *The Journal of Public Economics*, 76: 399-457.

¹⁵⁴ Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

¹⁵⁵ Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

All of these (and many other) examples of situations where corruption is all too prevalent, are set against a cultural backdrop where giving gifts and gratuities is an accepted, and even expected, form of conduct.¹⁵⁶ Such conduct has long been standard business practice in the country.¹⁵⁷ The Russian Civil Code contains a glaring contradiction concerning such practices with regards to government officials, allowing nominal gifts to these state and municipal representatives.¹⁵⁸

Anti-corruption legislation implemented in 2009 amended the code to increase the permissible value of these gifts from 500 roubles (approximately US\$17) to 3 000 roubles (approximately US\$100).¹⁵⁹ This statutory directive is in direct contrast to the prohibition against accepting gifts (of any value) placed on these officials by the laws governing their status. An exception to these latter laws is made for gifts to officials at recognised state functions, where such gifts are accepted on behalf of the state and considered to be state property.

In conclusion, it should be noted that there is a fine line between what is considered a permissible facilitation payment to a government functionary under the FCPA¹⁶⁰ to secure the performance of routine governmental actions (for example issuance of a permit, license, custom clearance, etcetera) and an impermissible bribe. To further

¹⁵⁶ Tumanov, V. A. (1993), 'Pravovoe nigelizm v istoriko-ideologicheskom rakurst,' Gosudarstvo i pravo, 8.

¹⁵⁷ Tumanov, V. A. (1993), 'Pravovoe nigelizm v istoriko-ideologicheskom rakurst,' Gosudarstvo i pravo, 8.

¹⁵⁸ Frederick Stocker (2011) "New Russian Law Joins a Cavalcade of Recent Anti-corruption Legislation".

¹⁵⁹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁶⁰ Foreign Corrupt Practices Act of 1977.

complicate matters, the UK Bribery Act¹⁶¹ specifically prohibits such facilitating payments. By way of example, the US government has been known to investigate a significant number of global companies for potential violations of the FCPA stemming from payments to foreign customs officials, including payments made through customs brokers.

Even if such payments are deemed to be of a “facilitating” nature within the purview of the FCPA’s bribery exception, US publicly traded companies must still ensure that the transactions are recorded properly under that statute’s books and records requirements and that proper accounting controls regarding such payments are in place.¹⁶² Clearly, such payments run afoul of the UK Bribery Act’s prohibitions. Whether they are prosecuted in the UK – assuming jurisdictional requirements are met – depends on such facts as the magnitude and frequency of the payments; whether the payments were premeditated; whether they involved an element of active corruption of an official; and if the company had an established policy for dealing with such solicitations.¹⁶³ One must remember that in addition to the strictures of US and UK law regarding these payments, the transgressions may now present issues with Russian laws. An US company with an UK sales office that bribes a Russian official to get business could hit the enforcement pain trifecta.¹⁶⁴

¹⁶¹ United Kingdom Bribery Act of 2010.

¹⁶² Foreign Corrupt Practices Act of 1977.

¹⁶³ United Kingdom Bribery Act of 2010.

¹⁶⁴ Frederick Stocker (2011) “New Russian Law Joins a Cavalcade of Recent Anti-corruption Legislation”.

3.3 Anti-bribery legislation in Russia specifically

Just prior to becoming President of the Russian Federation, Dmitry Medvedev was quoted as saying that corruption in his country was having a corrosive effect on civil society.¹⁶⁵ Soon after his election, he made it clear that tackling this problem was foremost on his agenda. In furtherance of that commitment, on July 31, 2008, president Medvedev adopted the National Plan for Counteraction to Corruption, which outlines numerous objectives for fighting corruption.¹⁶⁶

Enactment of anti-corruption legislation in Russia on January 10, 2009 was a direct consequence of that plan.

The first step toward effectuation of president Medvedev's National Plan for Counteraction to Corruption came in the form of amendments to existing, albeit less than stringent, anti-corruption laws on January 10, 2009 (i.e. the 2009 legislation).¹⁶⁷

These laws apply to Russian and foreign citizens.¹⁶⁸ Moreover, if the organisation, preparation, and performance of a corrupt offence is done on behalf or in the interest of a "juridical person" (eg a corporation), whether Russian or foreign, such juridical persons can be held responsible.¹⁶⁹

The general parameters of the 2009 legislation: The 2009 legislation consisted, in

¹⁶⁵ Stocker "Anti-corruption Developments in the BRIC Countries: A MAPI Series" 2012 *MAPI* 1-70.

¹⁶⁶ Frederick Stocker (2011) "New Russian Law Joins a Cavalcade of Recent Anti-corruption Legislation".

¹⁶⁷ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁶⁸ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁶⁹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

the main, of three interconnected federal laws¹⁷⁰, which collectively expand and revise Russia's Criminal, Civil, and Administrative Codes as relating to bribery and corruption of public officials.

The term "public officials" includes employees of commercial enterprises if the state owns 50% or more of the company. The anti-corruption legislation defines "corruption" as:

"(i) an abuse of an official position; the giving or receipt of a bribe;

Commercial bribery or other unlawful use by an individual of his/her capacity in contempt of the lawful interest of society and the state with the purpose of receiving a benefit in the form of money, valuables, other property or services of a monetary nature, (i.e. pecuniary gain), or other proprietary rights for himself or herself or third persons; or unlawful provision of such benefit to such a person or other individuals; and

(ii) a new administrative offence for the performance of the actions mentioned in (i) above in the name of, or on behalf of, a legal entity. Individuals who engage in proscribed activities, according to the 2009 legislation, may be punished with a fine of up to 1 million roubles (approximately US \$35 000), an amount equivalent to their income for up to three years, corrective labour for a term of one to six months, or imprisonment for a term of up to eight years."¹⁷¹

The penalty established for legal entities for such a violation is an administrative fine

¹⁷⁰ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁷¹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

in the amount of up to three times the value of the benefit conferred, but not less than 1 million roubles (approximately US\$35 000), as well as the seizure of transferred money, securities, property, etcetera.¹⁷² It should be noted however that under current president Vladimir Putin, some of these regulations have however been relaxed.¹⁷³

It is fair to say that the primary focus of the 2009 legislation is upon the activities of Russian government officials, not private individuals or corporations.¹⁷⁴ In this regard, a public official means a Russian citizen who holds a government service post, either federal or municipal within the civil, military or law enforcement service sectors that involves any professional activity.¹⁷⁵ Such activity must involve the execution of the powers of federal state bodies, including the constituent regions of the Russian Federation as established by the Russian Constitution and other relevant federal laws.¹⁷⁶ The definition does not include officials of other countries. For the purpose of the anti-corruption laws, the term “public officials” includes employees of commercial enterprises if the state owns 50% or more of the total share capital of the company.¹⁷⁷

State and municipal officials are required to disclose their assets, income, and out-

¹⁷² Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁷³ The Moscow Times “Putin Signs Law Reducing Penalties for Corruption” <http://www.themoscow-times.com/news/article/putin-signs-law-reducing-penalties-for-corruption/517212.html> (Accessed 2015-07-15).

¹⁷⁴ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁷⁵ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁷⁶ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁷⁷ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

standing financial obligations (as well as such information for their spouses and minor children).¹⁷⁸

The 2009 amendments set clear conflict of interest rules for all state and municipal servants. After leaving such government service, individuals are required to disclose that past service to any prospective employer if it took place within the previous two years.¹⁷⁹

The Russian law also provides absolute immunity from prosecution for disclosure of proscribed corruption. Such immunity being conferred is not subject to prosecutorial discretion. This concept is referred to as the “effective regret” provision of the Criminal Code.¹⁸⁰ For example, a person who makes a disclosure to the authorities out of spite because a promised bribe was not delivered is entitled to immunity from prosecution. It does not matter how much time has passed from the corrupt activity until the time of disclosure. The passing of the information to authorities, however, must be timely, which means that the disclosing individual must actually believe at the time of contemplated revelation, that law enforcement or prosecuting authorities have not been made aware, or know of, the violation at issue. It does not matter whether the authorities do indeed have actual knowledge of the violation as long as the person making the disclosure honestly believes that he/she is revealing a situation not previously known to authorities. Another possible mitigating factor that may absolve criminal liability for giving bribes, is when they are made under duress (i.e. extortion).

¹⁷⁸ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁷⁹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁸⁰ The Criminal Code of the Russian Federation <http://www.russian-criminal-code.com> (Accessed 2015-07-15).

Commentators have homed in on what many see as shortcomings of the 2009 legislation. Most notably, it did not criminalise the offering of a bribe – it only penalise completed bribes.¹⁸¹

This was a perceived problem because many enforcement actions begin when the honest target of a bribe reports that he/she has been approached with an offer.¹⁸²

Another point of criticism on these laws is that while targeting official corruption, the Russian judiciary is omitted in the description of covered government functionaries. Anecdotally, the Russian judiciary is known to be susceptible to bribes in return for lax enforcement of Russian law.¹⁸³

From the perspective of OECD (Organisation for Economic Co-operation and Development) Convention obligations, the major shortcoming of the 2009 legislation was that Russian criminal law did not prohibit the bribing of foreign government officials.¹⁸⁴

With passage of the amendments of the anti-corruption laws on May 4, 2011 (Federal Law No 97-FZ, “On inclusion of changes to the Criminal Code of Russian Federation and the Code of Administrative Offences in Connection with the Improvement of

¹⁸¹ Russian Regional Economic and Business Atlas Volume 2 *Strategic Investment and Business Atlas*.

¹⁸² Russian Regional Economic and Business Atlas Volume 2 *Strategic Investment and Business Atlas*.

¹⁸³ Russian Regional Economic and Business Atlas Volume 2 *Strategic Investment and Business Atlas*.

¹⁸⁴ Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (Accessed 2014-01-04).

Government Administration in the Area of Fighting Corruption”), Russia took another significant step toward fulfilling the commitment made by President Medvedev in his National Plan for Counteraction to Corruption and toward meeting a series of international obligations the country has assumed.

The 2011 legislation made three necessary changes to Russian law. Those changes included making it illegal to bribe foreign officials, increasing the statute of limitations for foreign bribery committed by legal entities, and significantly increasing the sanctions for both natural and legal persons for the offence of bribery.¹⁸⁵

As previously noted the prior Russian law required an actual transfer of money, securities or other items of value to a government official or to a manager of a commercial or non-profit enterprise in return for an improper benefit for the offence of bribery to be committed. The law covered only completed acts of bribery.

The 2011 legislation,¹⁸⁶ however, amended the Russian Administrative Code¹⁸⁷ to cover payments “promised or offered” on behalf of legal entities such as corporations. For commercial or official bribery, or offers or promises to bribe, made on behalf of or in the interest of companies, the Russian Administrative Code¹⁸⁸ does not offer an effective compliance program (as is the case with the defence “adequate procedures” to prevent bribery recognised in the UK Bribery Act¹⁸⁹), or a “facilitating

¹⁸⁵ Russian Regional Economic and Business Atlas Volume 2 *Strategic Investment and Business Atlas*.

¹⁸⁶ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁸⁷ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001.

¹⁸⁸ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001.

¹⁸⁹ Of 2010.

payments” exception (as is the case with the FCPA).¹⁹⁰

The 2011 legislation¹⁹¹ created a special statute of limitations for violation of the anti-corruption laws, raising the limitations from one year (the default for administrative violations) to six years from the date of violation.¹⁹²

As indicated earlier, the 2011 legislation¹⁹³ sought to bring Russian law into conformity with the OECD Convention on Combating Bribery of Foreign Public Officials by criminalising bribery of foreign government (non-Russian) officials or officials of international public organisations (consistent with both the FCPA and the UK Bribery Act¹⁹⁴) by Russian nationals.¹⁹⁵ The Russian administrative law has also been changed to make such payments made on behalf, or in the interest of, a legal entity (i.e. Russian companies) a punishable offence.¹⁹⁶

The Russian definition of “foreign official” mirrors the definition used in the OECD Convention.¹⁹⁷ As such, the new law applies to officials at foreign state-owned enter-

¹⁹⁰ Of 1977.

¹⁹¹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁹² Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁹³ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁹⁴ Of 2010.

¹⁹⁵ Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (Accessed 2014-01-04).

¹⁹⁶ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001.

¹⁹⁷ Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (Accessed 2014-01-04).

prises.¹⁹⁸ The new law established an offence (both criminal and administrative, respectively) for Russian nationals or legal entities for acting as an intermediary in the payment or receipt of a bribe, or promising or offering to engage in such a role. The 2011 legislation¹⁹⁹ also added further requirements to the “effective regret” provisions of the Criminal and Administrative codes²⁰⁰.

Immunity seekers must prove that either the bribe was the result of extortion (i.e. duress) or that they voluntarily notified prosecutors or law enforcement of the commission of the offence.²⁰¹ In addition to such voluntary disclosures, those seeking immunity must actively assist the relevant authorities in discovering and/or investigating the offence.²⁰² To date there is no clarification as to what such active assistance entails.

The 2011 changes to Russian anti-corruption law significantly up the ante for those who are found guilty of such transgressions. As mentioned before, prior to the 2011 amendments, criminal fines for bribery were capped at one million roubles (approximately US\$35 000). The new law imposes penalties of up to 100 times the amount of the bribe, up to 500 million roubles (approximately US\$17,5 million).²⁰³

Maximum prison terms for violations have also been increased from eight years to

¹⁹⁸ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

¹⁹⁹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²⁰⁰ Code. Of Administrative Offences. Of The Russian Federation. No. 195-Fz Of December 30, 2001

²⁰¹ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²⁰² Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²⁰³ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

twelve years for paying a bribe and from twelve years to fifteen years for receiving a bribe.²⁰⁴

Of particular note is the fact that these sanctions for foreign bribery apply both to foreign officials who take bribes as well as to Russian bribe-givers.

Sanctions under the Code of Administrative Offences have also been beefed up. Fines for bribery can be as high as 100 times the value of the bribe with no maximum ceiling.²⁰⁵ As intimated, prior to the amendments earlier in 2011, Russian law did not adjust fine calculations based on the magnitude of the bribe at issue. In all cases, the fine imposed was up to three times the value of the bribe, subject to a minimum amount of one million roubles (approximately US\$35 000).

The law sets forth a three-tiered standard for administrative fines based on the value of the bribe.²⁰⁶

For the first tier level – bribes of one million roubles (approximately US\$35 000) or less – the previous maximum sanction is maintained (i e up to three times the bribe value).

For the second tier of bribes – in the range of more than one million roubles to 20 million roubles (i e approximately more than US\$35 000 to US\$698 000) – the fine is up to 30 times the amount of the bribe with a minimum fine of 20 million roubles (ap-

²⁰⁴ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²⁰⁵ Code. Of Administrative Offences. Of The Russian Federation. No. 195-Fz Of December 30, 2001

²⁰⁶ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001 and Federal Laws No 273-FZ, 274-FZ and 280-FZ.

proximately US\$698 000).²⁰⁷

For the third and highest tier of bribes, the hammer is significantly more burdensome. For “very large” bribes greater than 20 million roubles, the penalty can be up to 100 times the value of the bribe with a minimum amount of 100 million roubles (approximately US\$3,5 million).²⁰⁸

While the new Russian anti-corruption law established an absolute maximum criminal penalty for individuals at the staggering amount of 500 million roubles (approximately US\$17,5 million), there is no comparable cap on the administrative fines that can be imposed on corporations, suggesting that the sky is the limit for such penalties. With no maximum cap on the highest tier of fines, one might reflect that fairly soon these penalties could amount to real money.²⁰⁹

In response to growing international efforts against corruption, the 2011 legislation²¹⁰ added a new chapter to the Russian Administrative Code²¹¹ authorising a process for obtaining evidence and requesting other legal assistance from foreign authorities to facilitate corruption investigations.

Undeniably, corruption has been pervasive from the top to the bottom of the Russian

²⁰⁷ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001 and Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²⁰⁸ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001 and Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²⁰⁹ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001 and Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²¹⁰ Federal Laws No 273-FZ, 274-FZ and 280-FZ.

²¹¹ Code of Administrative Offences of the Russian Federation No 195-Fz of December 30 2001.

bureaucracy and it is this same bureaucracy that runs the government's day-to-day operations. This will pose a significant hurdle for anti-corruption proponents to overcome.

4 Anti-bribery legislation in India

4 1 Introduction to India

Since the turn of the century, India has been recognised as one of the world's foremost emerging economies.²¹² Touted as a future global economic powerhouse, the nation has become a leader in the worldwide community in attracting foreign direct investment.²¹³ By virtually all accounts, its economy is poised for continued economic prosperity. One lingering threat to this promising potential, however, is corruption.²¹⁴

Transparency International ranked the country as the 85th most corrupt nation (out of 175) in its 2014 Corruption Perceptions Index.²¹⁵ The index gave India an integrity score of just 3,8 on a scale of 0 to 10, placing it in the same dubious league as Jamaica, Thailand and Peru.²¹⁶

²¹² ThirdWorldsPlanet.com "The Indian Economy" <http://www.thirdworldplanet.com/> (Accessed 2014-01-20).

²¹³ The India Site "A Brief History of Corruption in India" <http://www.theindiasite.com/a-brief-history-of-corruption-in-india/> (Accessed 2014-01-01).

²¹⁴ The Diplomat "India's Anti-corruption Crusades" <http://thediplomat.com/2011/06/indias-anti-corruption-crusades/> (Accessed 2014-01-20).

²¹⁵ Transparency International (2014) "Corruption Perception Index" <http://www.transparency.org/cpi2014>.

²¹⁶ Transparency International (2014) "Corruption Perception Index" <http://www.transparency.org/cpi2014>.

4 2 Corruption culture

“Merely shouting from the house tops that everybody is corrupt creates an atmosphere of corruption. People feel they are in a climate of corruption and they get corrupted themselves.”²¹⁷

These were the words of Jawaharlal Nehru, the first Prime Minister of India and a central figure in Indian politics for much of the 20th century, spoken shortly after India's independence from British rule.

The historical antecedents of India's corruption problems date back to British colonial rule in the so-called “British Raj” period, which began in 1858 when the ownership of the British East India Trading Company was transferred to Queen Victoria's government.²¹⁸

Popular resignation about the permanence of corruption is partly explained by the political purchase of “corruption” as an idea and a term. Accusations of corruption have historically been wielded as a political weapon – a means of tarnishing rivals in the right circumstances.²¹⁹

A governor-general position was created to rule the country, which was subdivided into districts. In effect, these districts were provincial governments controlled by commissioners and small executive and legislative bodies.

²¹⁷ The India Site “A Brief History of Corruption in India” <http://www.theindiasite.com/a-brief-history-of-corruption-in-india/> (Accessed 2014-01-01).

²¹⁸ Gould *Bureaucracy, Community and Influence: Society and the State in India, 1930-1960's* (2011).

²¹⁹ Gould *Bureaucracy, Community and Influence: Society and the State in India, 1930-1960's* (2011).

Native Indian citizens were excluded from the governing function. The system was marked by elitism and was non-participatory inasmuch as input from the populace was barred. Governance was characterised by secrecy – a trait that was perpetuated when the country gained its independence in 1947.²²⁰ This governing practice of embracing secrecy was embodied in the Official Secrets Act²²¹ which codified the effects of the British Raj and its elitist trappings and served to restrict the flow of information between government officials and the citizenry. While ostensibly designed to safeguard military and government secrets, the law was hijacked by corrupt officials to restrict the flow of information about illicit dealings to the public.

When India gained independence in the mid-20th century, the new political regime (known as the “License Raj”)²²² was marked by extreme governmental oversight, overregulation, and public ownership of national resources – policies susceptible to pervasive corruption and economic malaise.²²³

Doing business there came to be marked by complications stemming from red tape and confusion.²²⁴

The Indian government’s plethora of economic regulation and oversight had the effect of restricting competition and brought private industry initiatives to a standstill.

²²⁰ The India Site “A Brief History of Corruption in India” <http://www.theindiasite.com/a-brief-history-of-corruption-in-india/> (Accessed 2014-01-01).

²²¹ 19 of 1923.

²²² Chandra, Mukherjee & Mukherjee *India Since Independence* (2008).

²²³ The Economic Times “India is the most over-regulated country in the world” economictimes.india-times.com/ (Accessed 2014-02-01).

²²⁴ Aiyar *Accidental India: A History of the Nation's Passage through Crisis and Change* 2013.

With so much power wielded by the government, officials were emboldened to seek favours in return for performing their official duties.²²⁵ Bribing these officials became recognised as the most efficient way to conduct business in India.²²⁶

Over time, corruption became ingrained in the public psyche and accepted as a given in business dealings, involving practices deemed necessary to avoid administrative bottlenecks. With the opaqueness of India's governance system, these wrongdoings – while accepted as a part of daily life – have largely gone unreported.²²⁷

The country has witnessed an explosion of bureaucratic and administrative forms of corruption taking place at the implementation end of politics, where the public deals with a host of functionalities for day-to-day matters. Bureaucratic corruption pervades the Indian administrative system with widespread practices of bribery, nepotism and misuse of official positions and resources.²²⁸ At present, some 19,5 million people hold public office in India through central and state governments, quasi-central and quasi-state institutions and rural and urban local bodies spread over 200 000 locations and offices throughout the country.²²⁹ Since 90% of these officeholders are so-called Class III and IV employees, real power is concentrated in the hands of about two million public servants who regulate and control many aspects of the daily lives

²²⁵ Freedom Works "The Danger of Over-Regulation" www.freedomworks.org/content/danger-over-regulation (Accessed 2014-01-04).

²²⁶ Aiyar *Accidental India: A History of the Nation's Passage through Crisis and Change* 2013.

²²⁷ Freedom Works "The Danger of Over-Regulation" www.freedomworks.org/content/danger-over-regulation (Accessed 2014-01-04).

²²⁸ Aiyar *Accidental India: A History of the Nation's Passage through Crisis and Change* 2013.

²²⁹ Hansen *A Bottom-up Model of Electricity Reform for Developing Countries: A Case Study of Gujarat, India* (2008) 58.

of the vast population.²³⁰ This minority of civil servants has the potential to indulge in multiple forms of corruption on a scale that paints India as one of the most corrupt countries in the world.

In 1991, India began the process of economic liberalisation and has subsequently experienced rapid economic growth and a substantial increase in foreign direct investment.²³¹ A balance of payments crisis at that time opened the door to an International Monetary Fund program that led to the adoption of a major reform initiative that largely freed up the Indian economy from state control.

Generally reforms included an opening of the country to international trade and investment, deregulation, an industrial privatisation effort, tax reform and the implementation of measures to combat inflation.²³² Notwithstanding this liberalisation of the economy, corruption has persisted.²³³ In the country today, one still finds numerous instances of political and bureaucratic corruption, fraudulent public procurement practices and judicial corruption.²³⁴

High-ranking officials have been involved in major corruption scandals. Two of the well-known scandals include the 2002-2010 UP Food-grain scam and the 2001 stock

²³⁰ Stocker "Anti-corruption Developments in the BRIC Countries: A MAPI Series" 2012 *MAPI* 1-70.

²³¹ FAO Corporate document repository "The Phenomenal growth of China and India" <http://www.fao.org/docrep/009/ag087e/ag087e05.htm> (Accessed 2014-01-15).

²³² FAO Corporate document repository "The Phenomenal growth of China and India" <http://www.fao.org/docrep/009/ag087e/ag087e05.htm> (Accessed 2014-01-15).

²³³ "Transparency International (2014) "Corruption Perception Index" <http://www.transparency.org/cpi2014> (Accessed 2014-12-11).

²³⁴ "Transparency International (2014) "Corruption Perception Index" <http://www.transparency.org/cpi2014> (Accessed 2014-12-11).

market scam.

The Uttar Pradesh food-grain scam, also dubbed the “Mother of all scams”, took place between the years 2002 and 2010. Grain worth Rs35 000 crore (about US\$5 741 million), meant to be distributed via the Public Distribution System (PDS) to the poor under several schemes like Antyodaya Anna Yojana (AAY), Jawahar Rozgar Yojana and Midday Meal Scheme for Below Poverty Line (BPL) card holders, was diverted to the open market. Some of it was traced to the Nepal and Bangladesh borders, as in 2010 security forces seized Rs1,17 crore (about US\$191 929) worth of food-grains like paddy and pulses being smuggled to Nepal; another Rs60,62 lakh (about US\$99 442) worth of grains were confiscated on the Indo-Bangladesh border. The scam was first exposed in 2003 in Gonda district, during the distribution of food-grain meant for the Sampoorna Grameen Rozgar Yojana. After initially ordering an inquiry into the scam, Mulayam Singh withdrew it. The Special Investigation Team (SIT) set up by the Mulayam Singh Government in 2006 lodged over 5 000 First Information Reports (FIRs).²³⁵

In the 2001 Stock Market scam, stock market king Ketan Parekh used Unit Trust India (UTI), Calcutta Stock Exchange and his own index K-10 to swindle investors. When the scam was unearthed, it was reported that he had wiped off over Rs1 lakh crore (about US\$16 404 210 000) of investor's market capital.²³⁶

Concerning the general perception of the country's corruption troubles, a 2011

²³⁵ Niti Central “25 Corruption scandals that shamed India” <http://www.niticentral.com/2013/06/13/25-corruption-scandals-that-shamed-india-89069.html> (Accessed 2014-01-20).

²³⁶ Niti Central “25 Corruption scandals that shamed India” <http://www.niticentral.com/2013/06/13/25-corruption-scandals-that-shamed-india-89069.html> (Accessed 2014-01-20).

KPMG survey of leading Indian corporations painted a distressing picture of typical challenges they face because of corruption: 51% of survey respondents fear that rising corruption will make India less attractive for foreign investment; 68% believe that India can achieve more than the projected 9% of GDP growth if corruption is controlled; 68% believe that, in many cases, corruption is induced by the private sector; a majority feel that the corruption level in India will remain the same irrespective of new legislation; 84% believe that the Indian government has not been very effective in enforcing anti-bribery and corruption laws; 90% feel that corruption negatively impacts the performance of stock markets by increasing volatility, and prevents institutional investors from making long-term investments; and 99% feel that the biggest impact of corruption on business is the tendency to skew the level playing field and attract organisations with a lesser capability to execute projects.²³⁷

4 3 Anti-bribery legislation discussed specifically

With regards to existing anti-corruption laws, India is recognised as having an institutional framework in place that is largely designed to address the problem in public services. This framework is mainly based on colonial laws enacted while India was under British control.

4 3 1 Indian Penal Code

When it was enacted in 1860, the Indian Penal Code (IPC) incorporated corruption-related offences. The statute made it illegal for a public servant to accept a bribe, and defined “public servant” as “a government employee, officer in the military,

²³⁷ KPMG “Leading Indian Firms do not have a corporate responsibility strategy” <http://www.kpmg.com/IN/en/Press%20Release/CR-Survey-Aug-2011.pdf> (Accessed 2014-01-01).

member of the police, judge, officer of the Court of Justice, and any local authority established by an act of central or state government”.²³⁸

4 3 2 The Prevention of Corruption Act²³⁹

At present, the primary law in India dealing with corruption is the Prevention of Corruption Act (POCA), which came into force on September 9, 1988. It incorporated the earlier Prevention of Corruption Act²⁴⁰, the Criminal Law Amendment Act²⁴¹ and Sections 161 to 161-A of the Indian Penal Code (as amended)²⁴².

The POCA is fairly broad and encompassing, and its primary focus is the curbing of corruption within government agencies and by authorities. It widened the coverage of existing laws by increasing penalties and expanding the definition of “public servant”.

In addition to the categories of public servants identified in the IPC, the POCA includes within its purview any person in the service – or pay – of the government, or remunerated by the government by fees or commissions for the performance of any public duty. “Public duty” means a duty in the discharge of which the state, the public, or the community at large has an interest. The “state” includes a corporation established by or under a central, provisional or state act or an authority or a body owned, controlled or aided by the government or a government company defined

²³⁸ Indian Penal Code of 1860.

²³⁹ 1988.

²⁴⁰ 1947.

²⁴¹ 1952.

²⁴² 1860.

under Section 617 of the Companies Act²⁴³. Also specifically included as public servants under the POCA, are officeholders with cooperative societies, receiving financial aid from the government and employees of universities, the Union Public Service Commission and banks.

The POCA's Sections 7 and 11 prohibit the receipt of illegal gratification by public servants. Gratification is not limited to pecuniary gain or rewards estimable in monetary terms. If a public servant takes gratification other than his legal remuneration in respect of an official act or to influence public servants, he is liable to a minimum punishment of five years of imprisonment plus a fine. The POCA also penalises a public servant for taking gratification in return for influencing the public by illegal means and for exercising personal influence with a public servant.

Furthermore, the POCA penalises public servants for accepting something of value without paying for it, or paying inadequately for it, from a person with whom he is involved in a business transaction in his official capacity. These latter transgressions are punishable by imprisonment from six months to five years and a fine.

While the POCA's focus is on the bribe taker (i.e. the so-called "demand side" of a bribery transaction), the bribe payer may be charged under the law with the crime of abetment. In respect to the offences outlined *supra* (found in Sections 7 and 11 of the POCA), the payer of illegal gratification is liable as an abettor under Section 12 of the statute. Sections 107 to 116 of the IPC provide that "instigation" is considered a key element of abetment. As such, the POCA extends to anyone acting as a tout or intermediary in the proscribed corrupt act. The law is therefore applicable to private citizens who aid and abet in a public servant's corruption.

²⁴³ 1956.

The relevant consideration to take into account is the state of mind of the private party when he offers a bribe to a public servant. As soon as that private citizen approaches a public servant (i.e. the situation becomes “an instigation”) to receive an improper favour, an offence is committed under the POCA, regardless of whether that official accepts – or consents to accept – the bribe or whether he was in a position to act on the instigation.

It should be noted that it is necessary to obtain prior approval from the central or state government in order to prosecute a public servant under their employ. In the case of other officials, prior approval to prosecute must be given by the authority that has the power to remove the accused from office.²⁴⁴

The POCA applies to Indian citizens (including Indian citizens residing abroad) across the territory of India. It also applies to foreigners or aliens (i.e. “non-nationals”) abetting illegal transactions within the country’s borders.

Despite the fact that the POCA has established a legal framework to punish the corruption of public servants with fines and up to three years in prison, actual punishment for these offences rarely occurs. Not only are the laws frequently ignored by those perpetrating the corruption, but they are also ignored by those who are charged with the duty of penalising this conduct. The weaknesses of law enforcement in India, compounded with the lack of effort on the part of the criminal justice system, has resulted in weak enforcement of the POCA, which in turn has severely

²⁴⁴ University of Iowa College of Law Center for International Finance and Development “The Current State of India’s Anti-corruption Reform: The RTI and PCA” <http://blogs.law.uiowa.edu/ebook/content/uicifd-briefing-paper-no-7-current-state-indias-anti-corruption-reform-rti-and-pca> (Accessed 2014-01-20).

limited the POCA's ability to reduce political corruption.²⁴⁵

While the language of the POCA addresses the corruption of Indian public authorities, the Act is silent on the major problem of foreign corruption. That is, the POCA does not provide for the penalisation of corruption by Indian citizens or corporations in international business transactions, nor does it provide for punishment of foreign perpetrators of corruption.

In October of 2003, the United Nations (UN) General Assembly approved the first international treaty against corruption. The treaty, called the UN Convention against Corruption (UNCAC), requires countries first and foremost to be effective in preventing corruption. Beyond measures to prevent corruption, the treaty obligates countries to criminalise or consider criminalising not only basic bribery but also more complicated and subtle forms of corruption such as the laundering of the proceeds of corruption and concealment of corruption.²⁴⁶

An important component of the UN treaty is its call for international cooperation. The convention mandates that countries are to provide mutual legal assistance in the investigation and prosecution of offenders. India signed the UNCAC in December of 2005, but has not yet ratified the treaty. By signing but not ratifying the treaty, India is not legally bound to follow its terms. India has been encouraged to endorse and ratify the treaty to demonstrate its commitment to the fight against corruption, and to re-

²⁴⁵ University of Iowa College of Law Center for International Finance and Development "The Current State of India's Anti-corruption Reform: The RTI and PCA" <http://blogs.law.uiowa.edu/ebook/content/uicifd-briefing-paper-no-7-current-state-indias-anti-corruption-reform-rti-and-pca> (Accessed 2014-01-20).

²⁴⁶ United Nations Convention against Corruption http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Accessed 2014-01-20).

ceive the benefits of the treaty, namely the cooperation of other member states in recovering assets that were taken from India by corrupt means.²⁴⁷

Even before UNCAC, the UN General Assembly had adopted the UN Declaration against Corruption and Bribery in International Commercial Transactions. In this declaration, member states pledged to criminalise the corruption of foreign public officials. While the declaration is an invitation to member states to adopt the principles of the declaration rather than a mandate, the declaration does announce the UN's position that countries should criminalise conduct constituting corruption of foreign public officials.²⁴⁸

In 1997, the Organisation for OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The member states of the OECD Convention found that the lack of disincentives to foreign bribery was a serious international economic problem. Members of the OECD and signatories of the convention agreed to enact laws punishing the bribery of foreign officials. To date, India has no laws punishing the corrupt behaviour of Indian citizens abroad. According to the OECD, the implications of India and other economically important nations abstaining from participation in the convention is a diminution of the conven-

²⁴⁷ University of Iowa College of Law Center for International Finance and Development "The Current State of India's Anti-corruption Reform: The RTI and PCA" <http://blogs.law.uiowa.edu/ebook/content/uicifd-briefing-paper-no-7-current-state-indias-anti-corruption-reform-rti-and-pca> (Accessed 2014-01-20).

²⁴⁸ United Nations Declaration against Corruption and Bribery in International Commercial Transactions <http://www.un.org/documents/ga/res/51/a51r191.htm> (Accessed 2014-01-19).

tion's enforcement in other nation states.²⁴⁹

4 3 3 The Prevention of Money Laundering Act²⁵⁰

The Prevention of Money Laundering Act²⁵¹ (PMLA) forms the core of the legal framework in place in India to combat money laundering. The law and rules promulgated thereunder came into force on July 1, 2005. PMLA imposes obligations on banking companies, financial institutions and intermediaries to maintain a record of all transactions of a specified nature, verify the identity of clients, and furnish information to the Indian Financial Intelligence Unit.

The Act states that an offence of money laundering has been committed if a person or party to any process connected with the proceeds of crime represents such proceeds as untainted property.

“Proceeds of crime” is defined to mean any property obtained by a person as a result of criminal activity as related to specific offences listed in a Schedule to the PMLA. A person can be charged with a violation of this law only if he has been charged with perpetrating such an underlying offence. The penalty for committing a PMLA offence is a term of imprisonment between three and seven years plus a significant fine. The term of imprisonment can reach ten years if the person is convicted of the underlying offence of violating the Narcotic Drugs and Psychotropic Substances Act²⁵². The Ad-

²⁴⁹ Convention on Combating Bribery of Foreign Officials in International Business Transactions and Related Documents http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (Accessed 2014-01-04).

²⁵⁰ 2002.

²⁵¹ 2002.

²⁵² 1985.

judicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. Any Appellate Tribunal is authorised to hear appeals to orders of the Adjudicating Authority.

4 3 4 The Right to Information Act²⁵³

The Right to Information Act²⁵⁴ (RTIA) is a major legislative step in the Indian anti-corruption movement. This law, enacted in October of 2005, effectively reverses the Official Secrets Act²⁵⁵ by forcing public authorities to regularly self-report information about their dealings and also to provide specific information in a timely manner as requested by citizens. In addition to facilitating transparency in the duties of all public workers, the RTIA can reach private bodies to a limited degree.

4 3 4 1 Basics of the Act

With the enactment of the RTIA, citizens of India have a fundamental right to access information related to the functioning of their government. The essence of the RTIA is that it enables a citizen to examine, review and assess government actions and decisions to ensure obedience to public interest, integrity and justice. The Act also establishes the government's duty to provide that information. Public authorities must not only make access to this information easy and inexpensive, but must also frequently publish certain information without solicitation. The RTIA includes penalty provisions for authorities who refuse to release requested information and for those who do not provide it in a timely manner.

²⁵³ 2005.

²⁵⁴ 2005.

²⁵⁵ 1923.

4 3 4 2 Definitions

4 3 4 2 1 "Information"

As defined in the RTIA of 2005, the term "information" means any form of material, including records, documents, memos, emails, opinions, advices, press releases, contracts, papers, samples, logbooks, models, data material in any electronic form and information relating to any private body that can be reached by the public authority under any law in force at the time of the request. It is important to note that India's RTIA can reach private bodies to a limited extent, as it applies to all bodies, "owned, controlled or substantially financed directly or indirectly by funds provided by the [...] Government". Under this provision, if a private entity receives financial assistance or subsidies from the government, they may be obligated to provide information under the law. Furthermore, the public may access information "relating to any private body which can be accessed by a public authority under any other law for the time being in force". This means that if a public authority should have obtained information from a private body but has not, the public is entitled to have access to that information. For example, if a public official should have obtained a copy of a hazardous waste report from a private contractor, but for whatever reason has not yet received the copy, that information can be requested under the RTIA. In essence, the public authority's ability to access the document creates a constructive right of the citizen to access the document under the RTIA.

4 3 4 2 2 "Public Authority"

"Public authority" as defined in the Act means any institution of self-government established by any law, notification, or order made by the appropriate government (fed-

eral, state or local) and also covers "all bodies owned, controlled or substantially financed by the government and NGOs substantially financed directly or indirectly by the government". This definition of "public authority" is similar to the definition of "public official" included in the 1988 POCA.

Like the POCA definition, the definition of "public authority" in the RTIA is extensive, and is meant to include not only public officials in the strict sense of the word, but also government contractors, federally funded agencies and other organisations that are directly or indirectly financed by the government. This somewhat broad definition is meant to encompass a wide range of money handlers, as an attempt to prevent misappropriation of government funds and combat the widespread corruption epidemic.

4 3 4 3 Procedure of the Act

The RTIA is enforced in all Indian states (excluding the state of Jammu and Kashmir for reasons of political conflict and accession involving Pakistan) and at all levels of government, including central and state administrations and local bodies, as well as NGOs.

The RTIA calls for every public authority to appoint public information officers (PIOs) within one hundred days after its enactment. These PIOs should be appointed at each sub-divisional or sub-district level. The function of the PIO is to receive applications for information or appeals as allowed for under the RTIA. In essence, they are the custodians of the law. In this respect, the law provides a check on the public authorities by setting up an independent third party to serve as the intermediary between the citizen and the public authority.

The procedure of the RTIA begins when an Indian citizen makes a request to a PIO for access to information. A citizen does not have to give a reason for the inquiry. A citizen's request triggers the start of a thirty day time period in which a PIO must respond to the request. If the information is not supplied, the citizen has the right to appeal to a senior authority from the central or state PIO. If that appeal is denied, the citizen may make a second appeal to the Central Information Commission. The Act penalises officers who delay the procurement of information or default on their obligation to provide information not falling under any of the rules' exceptions.

4 3 4 4 Criticisms

While RTIA critics will admit that the act is a huge step toward greater transparency and accountability in India, the act has been criticised on several grounds.

4 3 4 4 1 Lack of publicity will render law useless

Critics of the law argue that because the act only provides private citizens with the right to obtain information, the law will not produce enough results to promote a change in the political culture. Critics suggest that corruption scandals will remain rampant because:

4 3 4 4 2 The RTIA allocates power to the average citizen and the average citizen lacks the time and resources to uncover corruption; and

4 3 4 4 3 Public authorities know and exploit the fact that individual private citizens have less power. The argument is that Indian citizens lack political clout and confidence in their own knowledge of the legal system and this inadequacy creates a rift of power and authority, with the citizen at a disadvantage. However, advocates of the RTIA point to the fact that NGOs can obtain information through private citizens and

use that information against public officials. If NGOs can use public officials as a conduit to obtain information on suspected corruption, the purpose of the act will be fulfilled.²⁵⁶

The RTIA was enacted in order to expose corruption. The intent of the legislators was not that all corruption issues would be solved by private citizen inquiries, but that with a culture of transparency and accountability, the risks associated with corrupt practices would become so great that corruption would not occur. The debate is whether the RTIA as it stands can fulfil its promise, given that the private citizen is at an disadvantage to the public official in both knowledge of the system and access to power.²⁵⁷

4 3 4 4 4 Too many exemptions

Even if the RTIA would otherwise scare politicians with the threat of the democratic process (i.e. citizens getting involved and promoting change), critics argue that overly-broad exemptions to the RTIA render the act ineffective in many instances. Critics point to several exemptions which contain vague language that under liberal interpretation provides a shield for public authorities against the RTIA's provisions. Some overly-vague exemptions include:

4 3 4 4 4 1 Section 8(1)(h): providing an exemption for information that would impede the process or investigation of offenders;

²⁵⁶ University of Iowa College of Law Center for International Finance and Development "The Current State of India's Anti-corruption Reform: The RTI and PCA" <http://blogs.law.uiowa.edu/ebook/content/uicifd-briefing-paper-no-7-current-state-indias-anti-corruption-reform-rti-and-pca> (Accessed 2014-01-20).

²⁵⁷ Xindex "India: Right to information and privacy 'two sides of the same coin'" <http://www.indexon-censorship.org/2013/09/indias-right-information-act-colliding-privacy/> (Accessed 2014-01-04).

4 3 4 4 4 2 Section 8(1)(j): providing an exemption for "information relating to personal information", which has no relationship to any public activity or interest; and
 4 3 4 4 4 3 Section 7(9): providing that information will be provided "in the form in which it is sought" unless doing so would contribute to the diversion of resources of the public authority.²⁵⁸

4 3 4 4 5 No whistle-blower protection

The last major criticism of the RTIA is that the act lacks a clause protecting whistle-blowers from retaliation by the powerful institutions they are capable of bringing down. India does not have a statute protecting whistle-blowers in any capacity, and critics believe this provides a major disincentive for those with important information about corruption to come forward.

The rationale for protecting whistle-blowers according to proponents of an amendment to the RTIA or supplementary legislation is that, in order for potential whistle-blowers to feel safe bringing critical information to the attention of investigators, they should be statutorily protected. Critics argue that, in a democratic society, the goal should be to make the act of whistle-blowing the responsibility of all citizens. However, these duties cannot be expected of average citizens without the state in turn offering practical legal protection to those citizens.

Because the RTIA pits individual citizens against powerful companies and political institutions, critics suggest that amending the statute to protect whistle-blowers from harmful retaliation would encourage inquiries under the act and ensure the act's suc-

²⁵⁸ Xindex "India: Right to information and privacy 'two sides of the same coin'" <http://www.indexon-censorship.org/2013/09/indias-right-information-act-colliding-privacy/> (Accessed 2014-01-04).

cess against corruption.²⁵⁹

4 3 5 The Foreign Contribution Regulation Act²⁶⁰

The Foreign Contributions (Regulation) Act²⁶¹ (FCRA) which came into force on May 1, 2011, replaces (the previous) The Foreign Contributions (Regulations) Act²⁶². The objective of this law is to regulate the way certain Indian individuals, associations, or companies accept and utilise foreign funds and to prevent foreign entities from interfering in the Indian political, decision-making, and opinion-forming process. The act, with both national security and anti-corruption objectives, bars a range of Indian persons/entities from accepting foreign contributions or foreign “hospitality”, including electoral candidates, members of the media (for example newspaper correspondents, contributors, publishers), civil servants, members of the judiciary, legislators and political parties and/or officeholders of political parties, and organisations of a political nature. Certain payments, such as salaries or disbursements in the ordinary course of business, or payments in the course of international commerce, are not prohibited. Also exempt are funds received by legitimate non-government organisations engaged in development activities and payments Indians receive from relatives abroad. The law’s definition of “foreign contribution” includes any articles/currency as well as any securities as defined in relevant sections of the Securities Contracts

²⁵⁹ Xindex “India: Right to information and privacy ‘two sides of the same coin’” <http://www.indexon-censorship.org/2013/09/indias-right-information-act-colliding-privacy/> (Accessed 2014-01-04).

²⁶⁰ 2010.

²⁶¹ 2010.

²⁶² 1976.

(Regulation) Act²⁶³, and the Foreign Exchange Management Act²⁶⁴. Persons receiving proscribed payments face punishment of up to five years of imprisonment.

The new FCRA has national scope, applying to the whole of India as well as to Indian citizens outside the country, and to foreign associate branches or foreign subsidiaries of Indian companies and bodies. Whoever accepts or assists another person in accepting a foreign contribution in contravention of the FCRA or any rules developed thereunder, can be imprisoned for up to five years. Similarly, a person who receives a permissible foreign contribution cannot transfer those funds to another unless the transferee is an authorised recipient under the act. When a company, firm, society or association commits an offence under the FCRA, those in charge of or responsible to that entity would also be deemed guilty of the violation unless they can establish that they had exercised due diligence to prevent the crime.²⁶⁵

As for banks and financial institutions, the new law creates certain reporting obligations with regard to these financial contributions. The nature and source of such foreign remittances must be disclosed to authorities. While the FCRA represents an intention to enforce greater accountability with regards to funds flowing into India, it does nothing with regards to funds flowing from the country to foreign officials or into opaque overseas investment assets that are held by Indian nationals.

²⁶³ 1956.

²⁶⁴ 1999.

²⁶⁵ "The Foreign Contribution Regulation Act, 2010 — An analysis" <http://www.bcasonline.org/articles/artin.asp?973> (Accessed 2015-07-11).

4 3 6 The Lokpal Debate

On January 30, 2011, thousands of citizens marched in New Delhi to protest against corruption and to demand an anti-corruption law and the passage of an effective Lokpal bill²⁶⁶ (Ombudsman's bill).²⁶⁷

The basic idea of a Lokpal is to provide for the filing of complaints of corruption against ministers and members of parliament. This popular demonstration was the precursor of a dramatic movement that has swept the country and engaged anti-corruption activists from all walks of Indian life. Perhaps the signature event of the rapidly growing movement – which has captured global attention – was the fasting and arrest of 74 year old Anna Hazare. Mr Hazare, a former army officer, has been fighting against the endemic corruption in India's political establishment for years, though his anti-corruption crusade seems to have resonated with his countrymen in 2011. Best-selling Indian writer Chetan Bhagat described this phenomenon in the following manner:

“(T)housands of non-government organisations fight for social causes every day in India, but none has ever achieved this kind of support. From rickshaw drivers to software engineers, from businessmen to spiritual leaders, people from all walks of life. After a relatively short fast in the spring, Mr Hazare forced the government into including his civil society

²⁶⁶ The Indian government's Lokpal Bill, 2011 is available at www.prsindia.org/uploads/media/Lokpal/The%20Lok%20Pal%20Bill%202011.pdf.

²⁶⁷ The Indian Express “AAP to bring back anti-corruption hotline” <http://indianexpress.com/article/india/india-others/aap-to-bring-back-corruption-hotline-lokpal-bill-in-houses-second-sitting/> (Accessed 2015-07-14).

movement into the drafting of a new anti-corruption bill.”²⁶⁸

In 2010, the Central Vigilance Commission (CVC) released the final draft of the Indian National Anti-Corruption Strategy,²⁶⁹ a governmental initiative aimed at creating a legal and regulatory anti-corruption framework and strengthening existing institutions to combat corruption. This draft legislation was expected to increase the role of institutions such as the CVC, Central Bureau of Investigation (CBI), Controller and Auditor-General as well as various other anti-corruption agencies. It is likely to address political and administrative corruption, as well as corruption within the private sector.²⁷⁰

This idea of a Lokpal bill²⁷¹ is not new. Such a measure was previously introduced on eight occasions – in 1968, 1971, 1977, 1985, 1989, 1996, 1998 and 2001²⁷² – in the Indian Parliament but failed to become law. In 1985 the bill was withdrawn after introduction and the other seven lapsed upon dissolution of the respective Lok Sabha

²⁶⁸ Chetan Bhagat, “Anna Hazare’s Fight for Change has Inspired Millions of Indians,” *The Guardian*, August 17, 2011, www.guardian.co.uk/world/2011/aug/17/anna-hazare-arrest-inspired-indians.

²⁶⁹ In 2010, the CVC released the final draft of the Indian National Anti-Corruption Strategy, a governmental initiative aimed at creating a legal and regulatory anti-corruption framework and strengthening existing institutions to combat corruption. The document is available at <http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf>.

²⁷⁰ In 2010, the CVC released the final draft of the Indian National Anti-Corruption Strategy, a governmental initiative aimed at creating a legal and regulatory anti-corruption framework and strengthening existing institutions to combat corruption. The document is available at <http://cvc.nic.in/NationalAntiCorruptionStrategydraft.pdf>.

²⁷¹ The Indian government’s Lokpal Bill, 2011 is available at www.prsindia.org/uploads/media/Lokpal/The%20Lok%20Pal%20Bill%202011.pdf.

²⁷² Chetan Bhagat, “Anna Hazare’s Fight for Change has Inspired Millions of Indians,” *The Guardian*, August 17, 2011, www.guardian.co.uk/world/2011/aug/17/anna-hazare-arrest-inspired-indians.

(House of the People, the lower house of the Indian Parliament) before they were considered by the Rajya Sabha (Council of States, the Upper House of Indian Parliament). Notwithstanding the input of Anna Hazare's movement, the draft Lokpal Bill,²⁷³ which the government introduced earlier in 2011, was widely viewed as a charade.²⁷⁴ At issue was the scope of the ombudsman's authority.

In essence, the government's proposal kept the prime minister (PM), the judiciary and the conduct of members of parliament outside the ambit of the new anti-corruption watchdog; in fact, the proposal covered less than 0,5% of Indian officials. Mr Hazare's supporters have derisively referred to the government's proposal as the "joke pal bill".²⁷⁵ They advocate a strong ombudsman that will have the power to investigate corruption charges against the PM, senior judges, and the MPs, amongst others. The government countered that such sweeping powers would contravene the allocation of government authority under the Indian Constitution and added that in most constitutional democracies, top leaders are shielded against such investigations. Mr Hazare's supporters ended up drafting their preferred version of a law in what is known as a Jan Lokpal (Citizens' Ombudsman) bill.²⁷⁶

The arguments in favour of the broader Jan Lokpal bill²⁷⁷ are that it would deal with

²⁷³ The Indian government's Lokpal Bill, 2011 is available at www.prsindia.org/uploads/media/Lokpal/The%20Lok%20Pal%20Bill%202011.pdf.

²⁷⁴ Law Resource India <http://indialawyers.wordpress.com/tag/lokpal/page/2/> (Accessed 2014-01-09).

²⁷⁵ Law Resource India <http://indialawyers.wordpress.com/tag/lokpal/page/2/> (Accessed 2014-01-09).

²⁷⁶ The Jan Lokpal Bill, 2011 is available at <http://ibnlive.in.com/news/full-text-the-jan-lokpal-bill/148401-53.html>.

²⁷⁷ The Jan Lokpal Bill, 2011 is available at <http://ibnlive.in.com/news/full-text-the-jan-lokpal-bill/148401-53.html>.

the country's pervasive corruption problem by creating a necessary independent ombudsman body outside of government control with the power to investigate complaints against politicians and public servants, without the need to get prior government approval. Its proponents believe that such a measure would be effective in redressing citizens' grievances and deterring corruption.²⁷⁸

The draft Jan Lokpal bill²⁷⁹ would create an institution called "Lokpal" at the central government level and Lokayuktas in each state with similar authority. Like the Indian Supreme Court and Election Commission, these new entities would be completely independent of government and no minister or government official would be able to influence their investigations. It would merge the CVC and the anti-corruption branch of the CBI into the Lokpal, and this institution would have the complete power – and machinery – to independently investigate and prosecute any official, judge or politician. Investigation in any case would have to be completed within one year and any ensuing trials wrapped up within another year. As such, corrupt politicians, officials, or judges would be punished within two years. Any losses to the government attributed to persons guilty of corruption would be recouped at the time of conviction. If work that is required to be done by an official on behalf of a common citizen is not completed within the prescribed time, the Lokpal would impose financial penalties on the offending official, and the amount would be given as compensation to the prevailing complainant. Lokpal members would be selected by judges, citizens and constitutional authorities – not politicians – through a completely transparent, participatory

²⁷⁸ Law Resource India <http://indialawyers.wordpress.com/tag/lokpal/page/2/> (Accessed 2014-01-09).

²⁷⁹ The Jan Lokpal Bill, 2011 is available at <http://ibnlive.in.com/news/full-text-the-jan-lokpal-bill/148401-53.html>.

process.²⁸⁰

The functioning of the Lokpal/Lokayuktas would also be completely transparent. Complaints against their officials would become investigations and be resolved within two months.²⁸¹ Finally, for the first time under Indian law, protection would be afforded to whistle-blowers.²⁸² It would be the duty of the Lokpal to provide protection to those who might be victimised by calling attention to corruption.²⁸³

As the government moved forward with its bill, Anna Hazare again began a hunger strike in August 2011 and was arrested by authorities.²⁸⁴ The resulting public clamour prompted the government to agree to more flexibility on these contested issues. Both Houses of Parliament adopted a nonbinding “sense of the House”, agreeing to consider some of the key issues raised by Mr Hazare.²⁸⁵ This agreement came in the form of a thumping of desks as opposed to actual votes. Mr Hazare ended his fast and eventually left official custody.²⁸⁶

The newest news on the Lokpal issue came on 13 February 2015 when Deputy

²⁸⁰ Law Resource India <http://indialawyers.wordpress.com/tag/lokpai/page/2/> (Accessed 2014-01-09).

²⁸¹ The Jan Lokpal Bill, 2011 is available at <http://ibnlive.in.com/news/full-text-the-jan-lokpal-bill/148401-53.html>.

²⁸² Law Resource India <http://indialawyers.wordpress.com/tag/lokpai/page/2/> (Accessed 2014-01-09).

²⁸³ Law Resource India <http://indialawyers.wordpress.com/tag/lokpai/page/2/> (Accessed 2014-01-09).

²⁸⁴ Chetan Bhagat, “Anna Hazare’s Fight for Change has Inspired Millions of Indians,” *The Guardian*, August 17, 2011, www.guardian.co.uk/world/2011/aug/17/anna-hazare-arrest-inspired-indians.

²⁸⁵ Chetan Bhagat, “Anna Hazare’s Fight for Change has Inspired Millions of Indians,” *The Guardian*, August 17, 2011, www.guardian.co.uk/world/2011/aug/17/anna-hazare-arrest-inspired-indians.

²⁸⁶ Law Resource India <http://indialawyers.wordpress.com/tag/lokpai/page/2/> (Accessed 2014-01-09).

Chief Minister-designate Manish Sisodia, AAP (Aam Aadmi Party) said that the Lokpal Bill²⁸⁷ is likely to be brought to the assembly in its second sitting.²⁸⁸

²⁸⁷ The Indian government's Lokpal Bill, 2011 is available at www.prsindia.org/uploads/media/Lokpal/The%20Lok%20Pal%20Bill%202011.pdf.

²⁸⁸ The Indian Express "AAP to bring back anti-corruption hotline" <http://indianexpress.com/article/india/india-others/aap-to-bring-back-corruption-hotline-lokpal-bill-in-houses-second-sitting/> (Accessed 2015-07-14).

5 Anti-bribery legislation in China

5 1 Introduction to China

There has been a general perception in the global business community that corruption has presented a problem to doing business in China.²⁸⁹ Indeed, it is not unusual to hear foreigners with commercial ties to China say that corruption there is inescapable, with a climate where personal relationships (*guanxi*) are often critical to sealing a deal.²⁹⁰ Sectors requiring extensive government approval have posed particular issues in this regard, including banking, finance, government procurement, and construction.²⁹¹ The lack of an independent press, and the fact that the entities responsible for conducting corruption investigations are controlled by the Communist Party, both hamper anti-corruption activities.

Prior to the 2011 amendment of China's anti-corruption laws, the People's Republic of China (PRC) had various laws prohibiting both commercial and official bribery.

Commercial bribery involves actions taken by individuals or companies that amount to unfair competition. Official bribery deals with payments made to a Chinese state functionary in return for a benefit. Such bribery of foreign government officials was not covered prior to the 2011 amendment.

The term "state functionary" is broadly construed to include individuals who fit the

²⁸⁹ Transparency International (2014) "Corruption Perception Index" <http://cpi.transparency.org/cpi2014/results/> (Accessed 2014-12-11).

²⁹⁰ Chambers "Guanxi: What is it and Why is it Important?" Dragon Business Network (2010-03-30).

²⁹¹ "Chinese Communist Party determined to fight corruption" *UPI* http://www.upi.com/Top_News/World-News/2013/12/25/Chinese-Communist-party-determined-to-fight-corruption/UPI-43471388031300/ (Accessed 2013-12-12).

traditional notion of government officials, who perform public services in a state-owned enterprise or civil organisation, who are assigned by state authorities to perform public services in a non-state-owned enterprise, and who otherwise perform public services pursuant to law.²⁹²

The fact that many major industries in the PRC are state-owned or state-controlled means that the number of people qualifying as government functionaries for official bribery purposes have exponentially increased in China.

Three government entities and one Communist Party organ are responsible for targeting corruption within the country. The Supreme People's Procuratorate and Ministry of Public Security investigate criminal violations of the anti-corruption laws, while the Ministry of Supervision and the Communist Party Discipline Inspection Commission enforce ethics guidelines and party discipline. Corrupt officials are first investigated by the Discipline Inspection Commission, which gathers extrajudicial evidence and decides whether to strip the official of party membership and hand the case over to the judicial system. Anti-corruption drives to date have seldom targeted foreign firms. China's National Audit Office also inspects accounts of state-owned enterprises and government entities.

It is fair to say that until relatively recently China's efforts to combat domestic corruption have concentrated mainly on cracking down on Chinese officials that accepted bribes.²⁹³ This demand-side focus represented a somewhat uneven application of the

²⁹² Chambers "Guanxi: What is it and why is it Important?" Dragon Business Network (2010-03-30).

²⁹³ Perry & Selden "Chinese Society: Change, conflict and resistance" file:///C:/Users/limunnik/Downloads/Chinese%20Society%20Change,%20Conflict%20and%20Resistance,%20Third%20Edition.pdf. (Accessed 2014-01-05).

PRC's domestic bribery law.

The key Chinese statutory provisions dealing with official bribery are articles 385 and 389 of the Criminal Law of the People's Republic of China.²⁹⁴ Pursuant to the relevant provisions of article 385, it is illegal for any "state functionary" to extort or accept "money or property" from another person in return for securing benefits.

Correspondingly, pursuant to the terms of article 389, it is illegal for a person to give money or property to a public official in return for a benefit.²⁹⁵

Violators of articles 385 and 389 are generally subject to fines and imprisonment based on the value of the involved bribe and the seriousness of the circumstances.²⁹⁶

Individuals who give or offer money or property to public servants to obtain "unjust benefit" can face up to three years of criminal detention. Public servants who solicit or accept bribes will have any illegally gained property confiscated and face penalties that vary based on the monetary value of the bribe, ranging from simple administrative fines (when the bribery is relatively minor and involves an amount of not more than 5 000 Yuan) to life imprisonment or death (in the event of serious violations involving sums greater than 100 000 Yuan).

Entities that violate article 389²⁹⁷ are also subject to fines based on the value of the bribe. If the prospect of fines and imprisonment do not put potential miscreants on

²⁹⁴ 2011.

²⁹⁵ Criminal Law of the People's Republic of China of 2011.

²⁹⁶ Criminal Law of the People's Republic of China of 2011.

²⁹⁷ Criminal Law of the People's Republic of China of 2011.

notice that the PRC's anti-corruption enforcement priorities are on officials accepting bribes, notable cases where the government has meted out more draconian sentences certainly will.

5 2 Corruption culture

In May 2007, Zheng Xiaoyu, the former head of China's food and drug administration, received a death sentence for dereliction of duty and accepting \$850 000 in bribes in exchange for approving a drug that had not undergone necessary testing. The medicine was later found to have been responsible for several deaths. Mr Zheng's sentence was carried out within two months of being rendered. Mr Zheng's deputy, Cao Wenzhuang, also received a capital sentence, but was given a two-year stay (a move often preceding a commutation of the death penalty to life in prison).²⁹⁸

Other more recent examples drive home the seriousness of the government's crackdown on official corruption. In August 2009, the chairman of a state-owned airport holding company was put to death after being convicted of corruption in the taking of more than £11 million in bribes.²⁹⁹

In July 2010, the Chinese executed Wen Qiang, a former top justice official in the city of Chongqing, was convicted of a variety of corruption charges, including accepting bribes. At the time, Mr Wen was the highest ranking PRC state functionary brought to justice in the country's anti-corruption campaign. The high profile investigation

²⁹⁸ "China food safety head executed" *BBC News* (2007-07-10).

²⁹⁹ Mail Online "Former Beijing airport chief executed for stealing £11m" <http://www.dailymail.co.uk/news/article-1204990/Former-Beijing-airport-boss-executed-guilty-corruption.html#ixzz3gahxtV1j> .

leading to his death sentence involved the prosecution of some 100 local officials.³⁰⁰

One final example of the seriousness with which PRC officials view state corruption was demonstrated in May 2011 and involved the China-centred aspect of the Siemens bribery scandal. In this case, an intermediate court in Henan rendered a death sentence for a China Mobile executive named Shi Wanzhong for bribery (China Mobile is state-owned). He was granted a two year reprieve. Tian Qu, who facilitated the bribe, was sentenced to a 15 year prison term. The court determined that Mr Shi and Mr Tian had accepted a total of US\$5,1 million in bribes from Siemens.³⁰¹

Prior to the 2011 amendment, two PRC laws prohibited commercial bribery – article 8 of the Anti-Unfair Competition Law (AUCL) and article 164 of the Criminal Law³⁰².

Article 8 of the AUCL prohibits business operators from “giving bribes in the form of property or other means for the purpose of selling or purchasing products.” The State Administration for Industry & Commerce (SAIC) enforces the AUCL.³⁰³

According to article 2 of the SAIC Provisional Rules of Prohibition of Commercial Bribery Activities³⁰⁴, commercial bribery is defined as “an activity by which a business operator bribes the other party to the transaction, either an entity or an individual, in the form of property or other means for the purpose of selling or purchasing prod-

³⁰⁰ Reddy “Chinese Justice Chief is executed for crimes” *The Wall Street Journal* (2010-07-08).

³⁰¹ “China Mobile executive gets death in bribery case” *China.org.cn* (2011-06-21).

³⁰² 1979.

³⁰³ 1979.

³⁰⁴ Decree No 60, SAIC Provisional Rules of Prohibition of Commercial Bribery Activities.

ucts”.³⁰⁵

Under article 20 of the AUCL, violators of article 8 may be investigated and held liable to those who have suffered as a result of the bribery at issue.³⁰⁶ Moreover, article 22 of the AUCL provides that such violators shall be investigated pursuant to the PRC Criminal Law.³⁰⁷

Article 164 of the Criminal Law – the other PRC law relevant in terms of commercial bribery – makes it unlawful for one to offer “money or property to the staff of a company or enterprise in order to make illegitimate benefits.”³⁰⁸

The consequences for violating this provision are graduated according to the amount of money or property offered. Any person found to be in violation of article 164 “shall be sentenced to a fixed term of imprisonment” of not more than three years or criminal detention if the amount involved is deemed “relatively large”.³⁰⁹ If the amount involved is found to be “huge”, the person committing the violation “shall be sentenced to fixed term imprisonment of not less than three years but not more than 10 years and shall also be fined”.³¹⁰ An entity committing an article 164 violation “shall be fined”, and the “persons who are directly in charge and other persons who are directly responsible for the crime shall be punished” as if they personally committed the

³⁰⁵ Decree No. 60, SAIC Provisional Rules of Prohibition of Commercial Bribery Activities.

³⁰⁶ 1979.

³⁰⁷ 1979.

³⁰⁸ Criminal Law of the People’s Republic of China of 2011.

³⁰⁹ Criminal Law of the People’s Republic of China of 2011.

³¹⁰ Criminal Law of the People’s Republic of China of 2011.

crime.³¹¹ Article 164 provides for leniency if the perpetrator voluntarily reports the violation before an investigation has been initiated.³¹²

As intimated *supra*, the primary focus of PRC bribery law before the 2011 amendment was on punishing state functionaries for their related corrupt acts. There are, however, signs of an increased concentration on commercial bribery. For example, in 2009, four employees of the British-Australian mining conglomerate Rio Tinto were prosecuted in China for obtaining business secrets by improper means and taking commercial bribes. The company supplies significant quantities of iron ore to the PRC, and its implicated employees were found to have accepted bribes from several Chinese steel companies in return for securing iron ore contracts. Their individual sentences spanned between seven and 14 years, including a 10 year stint in a Chinese prison for Stern Hu, an Australian national that served as the company's legal representative in its Shanghai office. He was also fined 1 million Yuan.³¹³

While some private corporations and individuals have been prosecuted under China's strict anti-corruption laws, the government's enforcement priority has been on integrity-challenged domestic officials. The jurisdiction of China's criminal law is rather broad. It applies to all Chinese citizens (whether they are located within the PRC or elsewhere), natural persons of any nationality located within the PRC, and all companies, enterprises, and institutions that are organised under PRC law.

Generally speaking, this includes – in addition to PRC companies – Sino-foreign joint

³¹¹ Criminal Law of the People's Republic of China of 2011.

³¹² Criminal Law of the People's Republic of China of 2011.

³¹³ Pierson "China charges four employees of outside mining company with bribery, theft" *Los Angeles Times* (2010-02-11).

ventures, wholly owned foreign enterprises (WOFEs), and foreign companies with representative offices in China.

5 3 Anti-bribery legislation in China

On February 25, 2011, the PRC legislature, the National People's Congress, passed a slate of some 49 amendments (the Eighth Amendment) to the country's criminal law. These changes took effect on May 1, 2011.³¹⁴ One of those amendments (article 29, the 2011 amendment) criminalises, for the first time under PRC law, paying bribes to foreign government officials (i.e. non-PRC government officials) and to officials of international public organisations.³¹⁵

The 2011 amendment to China's anti-corruption laws is a model of brevity.³¹⁶ The amendment adds a second provision to article 164 of the criminal law. It reads in its entirety as follows:

“Whoever, for the purpose of seeking illegitimate commercial benefit, gives money or property to any foreign public official or official of an international public organisation shall be punished in accordance with the provisions of the preceding paragraph [for instance the pre-existing article 164 as described above in conjunction with the discussion of commercial bribery].”³¹⁷

³¹⁴ Stocker “Chinese Amend Anti-Corruption Laws to Criminalize Bribery of Foreign Officials” https://www.mapi.net/system/files/LAR-507_0.pdf.

³¹⁵ Stocker “Chinese Amend Anti-Corruption Laws to Criminalize Bribery of Foreign Officials” https://www.mapi.net/system/files/LAR-507_0.pdf.

³¹⁶ Stocker “Anti-corruption Developments in the BRIC Countries: A MAPI Series” 2012 MAPI 1-70.

³¹⁷ Criminal Law of the People's Republic of China of 2011.

The penalty for violations of the amendment are the same as those previously in existence, and the jurisdictional reach – as expanded for foreign officials – remains the same.³¹⁸ The amendment does not contain any affirmative defences, exceptions, or exemptions from the pre-existing provisions of article 164.³¹⁹

Interestingly, the 2011 amendment was not inserted into the “Graft and Bribery” chapter of the PRC Criminal Law, covering corruption of public officials, but in the “Crimes against the Order of Socialist Market Economy” chapter³²⁰, dealing with “commercial bribery” (for instance the offence of actively bribing non-public officials).³²¹ While this placement seems unusual, it is consistent with China’s obligation under the United Nations Convention against Corruption to prosecute bribery of foreign officials where the purpose of the payment is to secure an advantage in the conduct of international business.³²² Moreover, by stating that the purpose of the bribe should be the receipt of an “illegitimate commercial benefit”, the amendment suggests that an offence will only be committed when the object of the bribe is of a

³¹⁸ Criminal Law of the People’s Republic of China of 2011.

³¹⁹ Criminal Law of the People’s Republic of China of 2011.

³²⁰ Criminal Law of the People’s Republic of China of 2011.

³²¹ Criminal Law of the People’s Republic of China of 2011.

³²² Article 16.1 of the UN Convention against Corruption provides in pertinent part that:

“Each State Party shall adopt such legislation and other measures as may be necessary to establish as a criminal offense, when committed intentionally or the promise, offering or giving to a foreign public official or an official of a public international organization, directly, indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.”

commercial nature.³²³

By enacting this legislation, China joins a growing list of countries providing criminal sanctions for bribery of foreign officials by either individuals or private entities.³²⁴ The new law, however, is short on specifics.³²⁵ As such, it will afford prosecutors broad discretion, and the government's enforcement priorities will determine the types of conduct that will probably result in liability under the new law. It is currently unclear whether the Chinese government will issue interpretive guidance before prosecutions begin. It seems likely that, as with other areas of the criminal law, the Supreme People's Court and Supreme People's Procuratorate will issue interpretive guidance.

Neither the existing nor the amended PRC criminal law defines the meaning of the phrase "illegitimate commercial benefit". This term in the 2011 amendment may also be translated as "seeking illicit interests" or "seeking improper advantages".³²⁶ On November 20, 2008, however, the Supreme People's Court and the Supreme People's Procuratorate issued a joint opinion, in the context of PRC commercial bribery laws, entitled "Opinions on Issues Concerning the Application of Law in the Handling of Commercial Bribery Cases" (the Opinion). This Opinion might well be instructive in determining the meaning of this term. It explains that the term "seeking illegitimate benefit" means that the briber "seeks any advantage in breach of laws, regulations,

³²³ Stocker "Chinese Amend Anti-Corruption Laws to Criminalize Bribery of Foreign Officials" https://www.mapi.net/system/files/LAR-507_0.pdf.

³²⁴ Background on the UN Convention against Corruption, including a link to the convention, is available at www.unodc.org/unodc/en/treaties/CAC/index.html.

³²⁵ Stocker "Chinese Amend Anti-Corruption Laws to Criminalize Bribery of Foreign Officials" https://www.mapi.net/system/files/LAR-507_0.pdf.

³²⁶ Criminal Law of the People's Republic of China of 2011.

rules, or policies” or requires the other party to provide assistance or facilitation that is in breach of laws, regulations, rules, policies, or industry codes of practice.³²⁷

The qualifying word “commercial” could be interpreted to have the effect of narrowing the broader term “illegitimate benefit”, meaning that some activities that are illegal in a domestic context might be permissible when the target of the payment is a foreign official – for instance, a payment to a foreign official in return for a non-commercial benefit.³²⁸ Even with the qualifier, if any guidance is offered from the Opinion’s definition of “illegitimate benefit”, the term “illegitimate commercial benefit” is likely to be construed quite broadly.³²⁹ The 2011 amendment may very well be read as criminalising the making of bribes to foreign officials in return for any commercial advantage.

Neither the 2011 amendment nor the existing PRC criminal law defines the term “property”.³³⁰ A Chinese source, however, sheds some light on this matter.³³¹

The aforementioned Opinion stated that with regard to PRC commercial bribery law, the term “money or property” includes not only money and property in kind, but also any property interest that can be quantified in monetary terms, such as the provision of home decoration, membership cards having monetary value, token cards with

³²⁷ Criminal Law of the People’s Republic of China of 2011.

³²⁸ Criminal Law of the People’s Republic of China of 2011.

³²⁹ Criminal Law of the People’s Republic of China of 2011.

³³⁰ Criminal Law of the People’s Republic of China of 2011.

³³¹ Zhang “The New Frontier of Chinese Legal Horizon” http://rjglb.richmond.edu/wp-content/uploads/2013/03/rjl_10-4.pdf.

cash worth, and travel expenses.³³²

Additionally, a regulation related to commercial bribery issued in 1996 by SAIC defined property broadly to include: cash and cash in kind, including properties offered by a business operator to a counter party entity or individual, for purpose of sale or purchase of commodities, disguised as a promotional fee, publicity fee, sponsorship fee, research fee, labour fee, consulting fee, commission, etcetera, or by way of reimbursement of various fees.³³³

Neither the 2011 amendment nor any other PRC laws define the term “foreign public official”.³³⁴ Indeed, it appears that the amendment is the first PRC criminal law to use the term. It is not illogical to expect that the Chinese might look to a treaty to which they are a signatory for definitional guidance on this matter. Article 2 of the United Nations Convention against Corruption provides in that regard as follows:

“‘Foreign Public Official’ shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including a public agency or public enterprise.”³³⁵

The 2011 amendment to China’s criminal law is not unlike laws of other jurisdictions

³³² Zhang “The New Frontier of Chinese Legal Horizon” http://rjglb.richmond.edu/wp-content/uploads/2013/03/rjl_10-4.pdf.

³³³ Decree No 60, SAIC Provisional Rules of Prohibition of Commercial Bribery Activities.

³³⁴ Zhang “The New Frontier of Chinese Legal Horizon” http://rjglb.richmond.edu/wp-content/uploads/2013/03/rjl_10-4.pdf.

³³⁵ United Nations Convention against Corruption http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (Accessed 2014-01-20).

that prohibit bribery of foreign government officials, such as the United States Foreign Corrupt Practices Act³³⁶ and the UK Bribery Act³³⁷. The intent of all such laws is straightforward; that is to prevent individuals and companies from gaining unfair business advantages by paying bribes to such officials. Unlike most of those other statutes, however, the 2011 amendment does not contain any exceptions, exemptions or affirmative defences.³³⁸ It lacks detail as to contingencies that have posed interpretive problems in enforcing other jurisdictions' anti-bribery laws, such as how hospitality and entertainment costs are to be handled; whether small, non-discretionary payments to secure performance of routine governmental actions are permissible; what types of foreign officials are covered by the new law; whether expenses directly related to sales promotion, including travel and accommodation costs, are allowable; whether employees of state-owned enterprises are "foreign government officials" and whether officials with foreign non-governmental organisations are "officials" of an "international public organisation" and whether having an effective anti-bribery compliance program is a defence for a corporate entity whose employee engages in the proscribed activity.³³⁹

The 2011 amendment gives both PRC and non-PRC companies another cause for concern when doing business in China. Non-PRC companies that are partners in joint ventures, have formed other business entities organised under Chinese Law, or

³³⁶ 1977.

³³⁷ 2010.

³³⁸ Zhang "The New Frontier of Chinese Legal Horizon" http://rjglb.richmond.edu/wp-content/uploads/2013/03/rjl_10-4.pdf.

³³⁹ Zhang "The New Frontier of Chinese Legal Horizon" http://rjglb.richmond.edu/wp-content/uploads/2013/03/rjl_10-4.pdf.

have representative offices in China, are now for the first time subject to the risk of liability under PRC Criminal Law for bribing non-PRC government officials.

The effectiveness of the 2011 amendment will depend on its enforcement.³⁴⁰ There is every indication that the Chinese government and ruling Communist Party, which at its core is focused on social stability, are serious about combating corruption. As detailed *supra*, the government has been stepping up its fight against both commercial and official domestic bribery, even expanding enforcement for foreign individuals and companies. By bringing its criminal law into conformance with its international treaty obligations – that is, including coverage for bribery of foreign officials – China seems poised to further demonstrate its commitment against corruption.

Another indication of the Chinese government's anti-corruption focus is found in its rhetoric. In late 2013, the Information Office of the State Council of China published a report on the country's efforts entitled "China's Efforts to Combat Corruption and Build a Clean Government".³⁴¹

The report provides an overview of the PRC's anti-corruption activities since the state's inception in 1949. While admitting that corruption persists, the report touts the country's successes in trying to eradicate the problem. The State Council report cites a study showing that from 2003 to 2010, Chinese citizens' rate of satisfaction with "the work of combating corruption and building a clean government" rose dramatically from 51,9% to 70,6%. Among other notable statistics, the report said that from

³⁴⁰ Zhang "The New Frontier of Chinese Legal Horizon" http://rjglb.richmond.edu/wp-content/uploads/2013/03/rjl_10-4.pdf.

³⁴¹ "China's Efforts to Combat Corruption and Build a Clean Government" <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf>. (Accessed 2013-02-02).

2003 to 2009, Chinese authorities filed more than 240 000 cases of embezzlement, bribery, dereliction of duty and infringement of rights.³⁴²

Moreover, in 2009 alone, 3 194 people were criminally punished for offering bribes. Since 2005 (until 2009), when China was said to have launched a special anti-bribery campaign, more than 69 200 cases of commercial bribery were reported to have been “investigated and dealt with”.³⁴³

The report also dwells upon what it refers to as China’s “Education in Clean Government and Construction of the Culture of Integrity” efforts.³⁴⁴ Along with its enforcement focus, China is said to have taken preventative efforts to “promote the culture of integrity” throughout society. Finally, the report stresses the PRC’s commitment to international cooperation or related issues, noting that the country has entered into 106 judicial assistance treaties with 35 countries, and established the China-US Joint Liaison Group on Law Enforcement Cooperation. The article noted that historically, the Chinese have concentrated their domestic anti-bribery efforts on corrupt officials accepting pay-outs, and neglected targeting foreign companies who bribed those officials. By contrast, the article noted that the United States government has been more active than China in bringing bribery charges against United States companies making bribes in China. The article intimated that the climate has changed and the Chinese government is stepping up its enforcement of foreign enti-

³⁴² “China’s Efforts to Combat Corruption and Build a Clean Government” <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf>. (Accessed 2013-02-02).

³⁴³ “China’s Efforts to Combat Corruption and Build a Clean Government” <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf>. (Accessed 2013-02-02).

³⁴⁴ “China’s Efforts to Combat Corruption and Build a Clean Government” <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf>. (Accessed 2013-02-02).

ties and persons making bribes in China as well as outside of the country in cases where the jurisdictional requirements of the 2011 amendment are satisfied.³⁴⁵

³⁴⁵ “China’s Efforts to Combat Corruption and Build a Clean Government” <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan043696.pdf>. (Accessed 2013-02-02).

6 Anti-bribery legislation in South Africa

6 1 Introduction to South Africa

South Africans are of the opinion that public sector corruption is getting worse. Transparency International's 2014 global Corruption Perception Index shows that South Africa has dropped over thirty places since 2001. This country is currently ranked at number 67 out of 175 countries with a score of 4,4.³⁴⁶

The Human Sciences Research Council's (HSRC) annual South African Social Attitudes Survey shows the proportion of people who think that tackling corruption should be a national priority almost doubling, from 14% to 26%, in the five year period between 2006 and 2011.³⁴⁷

This trend is supported by the latest 2013 Afrobarometer report, titled "Governments Falter in Fight to Curb Corruption", released on November 13, 2013. This report, based on surveys of 51 000 people in 34 African countries, demonstrates that South Africa is one of the countries where there is a notable increase in public perceptions that corruption is getting worse, particularly since 2008. This is in contrast with countries such as Botswana, Malawi, Mozambique, Senegal and Zambia, where people believe that their governments are making gains in curbing public sector corruption.³⁴⁸

³⁴⁶ Transparency International (2014) "Corruption Perceptions Index" <http://cpi.transparency.org/cpi2014/results/>. (Accessed 2015-07-01).

³⁴⁷ Human Science Research Council "South African Attitudes Survey" <http://www.hsrc.ac.za/en/departments/sasas> (Accessed 2014-05-07).

³⁴⁸ Afrobarometer "Afrobarometer Report 2013" <http://www.afrobarometer.org/> (Accessed 2014-05-07).

6 2 Corruption culture

Interestingly, South Africa is better placed than many other African countries to tackle this problem. There are thirteen public sector agencies that have a particular legal or policy role to play in combatting graft. Moreover, a number of national mechanisms – such as the National Anti-Corruption Task Team – have been established to coordinate the functions of these agencies. South Africa also has dedicated policies, standards and legislation specifically designed to enable the state to tackle corruption through both criminal and civil action.

The question then arises, why, with all these resources available to tackle corruption, do South Africans perceive the government to be failing in this regard? For example, Afrobarometer has found that on average a little over half (56%) of the people on the African continent thought that their governments were doing a poor job in “their efforts to fight corruption”. However, South Africa performed notably worse than the average, with two out of three citizens (66%) believing the government to be performing poorly in combatting graft.³⁴⁹

Importantly, these opinions are not held because South Africans are regularly confronted with public sector corruption. In fact, the 2013 Afrobarometer report shows that South Africa was ranked fifth lowest among African countries when it came to citizens having direct experiences of paying a bribe for public services.³⁵⁰

Only 15% of South Africans said that they had paid a bribe in the previous year com-

³⁴⁹ Afrobarometer “Afrobarometer Report 2013” <http://www.afrobarometer.org/> (Accessed 2014-05-07).

³⁵⁰ Afrobarometer “Afrobarometer Report 2013” <http://www.afrobarometer.org/> (Accessed 2014-05-07).

pared to an average of 30% of Africans who had paid a bribe. The worst performer was Sierra Leone, where 63% admitted that they had paid a bribe.³⁵¹

So why do South Africans have such negative perceptions of corruption?

Arguably, it is because although most people are not expected to pay a bribe to access a public service, the public are aware that politicians and public officials divert public funds away from service delivery for personal gain. In 2011 the former head of the Special Investigation Unit, Willie Hofmeyer, reported before parliament that between R25 billion and R30 billion was lost to the government procurement budget each year due to this type of fraud.³⁵²

Moreover, there is evidence that incidents of corruption are increasing. A report by Edward Nathan Sonnenbergs, currently South Africa's largest law firm, based on documented fraud and malfeasance cases presented to parliament and contained in Public Service Commission reports, found that the amount involved increased from R130 million in the 2006/07 financial year to over R1 billion in 2011/12.³⁵³

There is thus evidence that the heart of the problem lies in the lack of accountability for maladministration and corruption. Corruption Watch, a non-profit organisation that provides a platform for the public to report corruption, states that this problem starts

³⁵¹ Afrobarometer "Afrobarometer Report 2013" <http://www.afrobarometer.org/> (Accessed 2014-05-07).

³⁵² Woods *Anti-corruption Reader (Unpublished, available on request; Woods 2011. Anti corruption legislation - a failed response to procurement corruption. Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

³⁵³ Powell Steven, ENS Forensics (Pty) Ltd "The Procurement fraud risk to local government". IMFO – Autumn 2008 20.

with the president. While there are various efforts by the government to tackle corruption, “these actions were countered by the continuing impunity on the part of those who were politically and financially powerful”. In particular, it was explained that the “Gupta wedding saga and on-going fiasco surrounding the president's private Nkandla residence are indicators in the past year of impunity in operation”. Little symbolises the nature of this public sector corruption challenge better than the scandal of the R246 million in tax payers’ money being diverted away from the public to upgrade president Jacob Zuma's private homestead.³⁵⁴

Unsurprisingly, research data supports the argument that corruption committed by politicians and government officials is driving negative public perceptions of corruption in South Africa.³⁵⁵

According to the 2013 Afrobarometer survey, perceptions of the office of the president being corrupt more than doubled – from 13% in 2002 to 35% in 2011.³⁵⁶ This finding is backed up by the latest Future Fact Survey released that showed “a massive slide in trust and confidence in president Zuma to a current score of 37 from a high of 257 five years ago”.³⁵⁷

³⁵⁴ Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption.
Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.

³⁵⁵ Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption.
Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.

³⁵⁶ Afrobarometer “Afrobarometer Report 2013” <http://www.afrobarometer.org/> (Accessed 2014-05-7).

³⁵⁷ Future Fact “Future Fact Survey” <http://www.futurefact.co.za/>.

The phenomenon of corruption has captured the attention of South Africans that are committed to good governance. Good governance is reflected in terms of value driven perspectives which manifest itself in effective, legitimate, democratic government and high levels of institutionalisation or combinations of *supra*. The negative consequences of corruption represent only one side of the argument, but any focus on corruption must be coupled with an equivalent focus on the positive side of good governance.

Corruption is especially harmful in developing countries such as South Africa due to the fact that these countries tend to have fewer resources and need to use these scarce resources in the most effective way, as well as the fact that there is a lack of confidence in the government.³⁵⁸

6 3 Anti-bribery legislation discussed specifically

Written law and formal law enforcement are essential components of effective systems for combating corruption.³⁵⁹ Such law in South Africa includes:

6 3 1 The Public Service Act³⁶⁰

Amongst other things this act deals with misconduct of “a person employed in terms of the act who accepts, without the necessary permission, or demands in respect of

³⁵⁸ Kroukamp “Corruption in South Africa with particular reference to Public Sector Institutions: The Evil of all Evils 2006 *Journal of Public Administration* 206 – 217.

³⁵⁹ Woods *Anti-corruption Reader (Unpublished, available on request; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

³⁶⁰ 1994.

carrying out or the failure to carry out his or her duties, commission, fees or pecuniary or other reward not being due to him or her in respect of his or her duties”.

6 3 2 The Public Service Regulations

These regulations, which flow from the act *supra*, give an obligation to any official employed in terms of the Public Service Act³⁶¹ to report to appropriate authorities any acts of fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial in the public interest.

6 3 3 The Prevention and Combating of Corrupt Activities Act³⁶² (replaced Corruption Act 94 of 1992)

On April 27, 2004 South Africa’s Corruption and Combating of Corrupt Activities Act³⁶³ (PCCAA) came into operation, with the intention of bolstering South Africa’s fight against corruption. The PCCAA must be seen in the context of the Prevention of Organised Crime Act of 1998,³⁶⁴ the Financial Intelligence Centre Act of 2001,³⁶⁵ the SADC Protocol against Corruption, the African Union Convention on Preventing and Combating Corruption³⁶⁶ and recent legislative measures by the United Nations aimed at tackling “white-collar-crime”. The PCCAA, which is surely a sign of increasing awareness of the threat of corruption, also aims to implement the obligations of

³⁶¹ 1994.

³⁶² Act 12 of 2004.

³⁶³ Act 12 of 2004.

³⁶⁴ Act 121 of 1988.

³⁶⁵ Act 38 of 2001.

³⁶⁶ 2003.

South Africa under the United Nations Convention against Corruption³⁶⁷ adopted by the General Assembly on 31 October 2003.³⁶⁸

6 3 3 1 This, as the primary anti-corruption act in South Africa, contains the following important provisions:

6 3 3 1 1 Extends the legal definition of what constitutes a corrupt practice (i e it widens the net), and provides harsh sentences (including life imprisonment);

6 3 3 1 2 Establishes that any person who directly or indirectly “accepts, agrees, or offers to accept gratification” from any other person to benefit himself or another person, is guilty of the crime of corruption.

MTHIYANE DP explains:

“[9] The first element (acceptance) is self-explanatory and does not require any elucidation. As for the second element (gratification) it is said to include ‘money, whether in cash or otherwise’. The third element (inducement) depends on whether receipt of the gratification is directed at procuring the recipient to act in one or more of the ways as set out in the subsection. I have dealt with ‘unlawfulness’. Just as with ‘unlawfulness’, ‘intention’ referred to in (e) above, is not specifically mentioned in the definition section of the PCCA Act but the definition must be construed as requiring intention. The recipient must have the required intention at the moment he receives the gratification. Snyman says:

‘[I]ntention always includes a certain knowledge, namely knowledge of the

³⁶⁷ 2003 by Resolution 58/4.

³⁶⁸ Burchell & Milton *Principles of Criminal Law* 3 ed (2005) 890 – 930.

nature of the act, the presence of the definitional elements and the unlawfulness. A person has knowledge of a fact not only if she is convinced of its existence, but also if she foresees the possibility of the existence of the fact but is reckless towards it; in other words she does not allow herself to be deterred by the possibility of the existence of such fact. She then has intention in the form of *dolus eventualis*.³⁶⁹

6 3 3 1 3 Establishes that it is also a crime to offer or receive any form of gratification not earned;

6 3 3 1 4 Establishes that the person who makes the offer or inducement to another to commit a corrupt practice is also guilty of an offence;

6 3 3 1 5 Establishes that if a person offers to perform a corrupt service for another, he or she will be guilty of the crime of corruption;

6 3 3 1 6 Criminalises corruption in the private sector;

6 3 3 1 7 Places a duty on managers and directors in both the private and public sectors to report corrupt colleagues and employees, and if they fail to do so, jail sentences can be imposed on them;

6 3 3 1 8 Provides that public officials who are obviously living beyond their means may be investigated and prosecuted (the “unexplained wealth” clause);

6 3 3 1 9 Criminalises corrupt practices by South Africans on foreign soil. South Africans who corrupt foreign public officials may be prosecuted for corruption in South Africa;

6 3 3 1 10 Establishes a blacklist of businesses and business people who have been guilty of corrupt practices. They may not tender for state contracts for between five

³⁶⁹ *Selebi v S* (240/2011) [2011] ZASCA 249; 2012 (1) SA 487 (SCA); 2012 (1) SACR 209 (SCA); [2012] 1 All SA 332 (SCA) (2 December 2011).

and ten years;

6 3 3 1 11 Makes any member of a legislative authority who directly or indirectly accepts or agrees or offers to accept gratification from another person guilty of corruption;

6 3 3 1 12 Targets judicial officers and members of prosecuting authority guilty of corrupt practices;

6 3 3 1 13 Provides for seizure, after judicial processes, of property used in the commission of corrupt practices or which are the proceeds of corruption. Cash or funds may also be seized; and

6 3 3 1 14 Compels companies to report all corruption greater than R100 000.

6 3 4 The Prevention of Organised Crime Act³⁷⁰ replaces The Proceeds of Crime Act (76 of 1966).

This Act does the following:

6 3 4 1 Introduces measures to combat organised crime;

6 3 4 2 It prohibits money laundering;

6 3 4 3 It prohibits and criminalises certain gang activities;

6 3 4 4 It prohibits certain activities relating to racketeering;

6 3 4 5 It makes it obligatory to report certain information;

6 3 4 6 It provides for the recovery of the proceeds of unlawful activity; and

6 3 4 7 It provides for the civil forfeiture of criminal assets that have been used to commit an offence, or assets that are the proceeds of unlawful activity.

³⁷⁰ Act 121 of 1998.

6 3 5 The Protected Disclosures Act³⁷¹ (aka “The Whistle-blowers’ Act”)

Whistle-blower type law has been introduced in many countries especially over the past 10 years. As such there is much commonality of approach between countries in this regard. For example, this act draws heavily on the UK’s Public Interest Disclosure Act.³⁷² The more usual provisions would:

6 3 5 1 Protect employees in both the public and private sectors from discrimination in circumstances where they blow the whistle on corruption; and

6 3 5 2 Encourage honest and concerned employees to report wrongdoing within their workplace without fear.

6 3 6 The Financial Intelligence Centre Act³⁷³ (FICA)

This Act establishes a Financial Intelligence Centre and a Money Laundering Advisory Council in order to:

6 3 6 1 Combat money laundering activities, the financing of terrorist and related activities; and

6 3 6 2 Impose certain duties on persons or institutions that might be used for money laundering or financing of terrorist related activities.

This act was amended and expanded upon by way of the Financial Intelligence Cen-

³⁷¹ Act 26 of 2000.

³⁷² Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

³⁷³ 2001.

tre Amendment Act of 2008. This included changing the name of the Money Laundering Advisory Council to the Counter-Money Laundering Advisory Council.

The Financial Intelligence Centre has the mandate and obligation to establish an effective policy and compliance framework and operational capacity to oversee compliance and to provide high quality, timeous financial intelligence for use in the fight against crime, money laundering and terrorist financing.

6 3 7 The Promotion of Access to Information Act³⁷⁴

This act is to give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.

6 3 8 The Investigations of Serious Economic Offences Act³⁷⁵

This act dealt with the investigation of economic offences, whether committed by government officials or members of the public, and with the reporting to prosecuting authorities for matters which have to go to court. The act also gave necessary investigative powers to the office established under this act.

6 3 9 The Public Finance Management Act³⁷⁶ (PFMA)

This act governs and regulates the management of public monies and public assets across all national and provincial government institutions. The act:

³⁷⁴ 2004.

³⁷⁵ Act 117 of 1999.

³⁷⁶ Act 1 of 1999.

- 6 3 9 1 Modernises the systems of financial management within government organs;
- 6 3 9 2 Gives public sector managers the responsibility and authority to play a more rigorous and purposeful management role;
- 6 3 9 3 Ensures the production of timely, accurate and relevant information; and
- 6 3 9 4 Reduces waste and corruption concerning state finances and other assets.

This is achieved through the act introducing financial management facilities such as:

A modern performance system, internal controls, risk management, accrual accounting, best procurement practice, a sanctions regime, treatment of unauthorised, irregular and wasteful expenditure, a strong legal and regulatory financial management framework, a clear basis for capacity building and training, well-defined institutions of governance and accountability arrangements, and a wide-ranging quality information and reporting facility.³⁷⁷

6 3 10 The Municipal Finance Management Act³⁷⁸ (MFMA)

This act governs and regulates the management of public monies and public assets within the municipal sphere of government throughout the country. Similar intentions as these expressed in the PFMA *supra* are contained in this act. In addition, the act includes interventions that may be carried out where a municipality is deemed to be experiencing serious administrative failures.

It is clear from above that South Africa has a comprehensive anti-corruption legisla-

³⁷⁷ Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption.

Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.

³⁷⁸ Act 56 of 2003.

tive environment.

7 Conclusion

There is a tendency by many people to seek dishonest and undeserved advantage at the expense of others. It is a situation which, to some degree or another, is prevalent in all societies and which, given emerging attitudes of entitlement and materialism, is likely to remain a serious problem across the world.³⁷⁹

As a sociological phenomenon it is increasingly understood for its disruptive and distorting effects on the quality of many innocent peoples' lives. The phenomenon is generally known as "corruption" and comprises a range of unethical activities which pervade and transverse both the commercial sector and the public sector of a given country, with the latter situation having greater standards of living consequences for the general public.³⁸⁰

The general sense of alarm has grown since the 1980's in keeping with the mounting incidences of reported cases of corruption and the accompanying realisation of the consequences this has on the general well-being of a society.³⁸¹

This in turn leads to anxious speculation regarding the consequences on any country which does not do the necessary to curb these tendencies. Against this we've seen

³⁷⁹ Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption.
Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.

³⁸⁰ Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption.
Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.

³⁸¹ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

the tentative emergence of researchers and practitioners from across a range of relevant disciplines that produce thinking on how to better understand corruption and its various manifestations, and how to combat the perceived causes of this corruption. In recent years we have seen a wide range of counter-corruption initiatives and practices which propose to restore an improved morality in the workplace, but evidence to date indicates that such approaches have had limited success and in many instances have even failed to reduce the incidence of corruption and to change the environment in which it thrives.

From the discussion it is clear that corruption is not only a critical threat to the delivery of basic services and good governance, but it also hampers development and impedes growth initiatives and diverts resources from where they are needed. While good governance refers to the ideal of any government, corruption is a scourge that any government needs to combat as it destroys good governance.³⁸²

7 1 Consequences of corruption

High levels of corruption can become self-perpetuating as corruption tends to feed on itself once it realises a certain level of incidence. Once the environment becomes characterised by a loss of ethical standards, the combination of a compelling need for individuals to satisfy their own personal financial and material interests, the opportunities to do so, and the absence of sufficient deterrents not to do so, can raise the levels of corrupt behaviour to a point where a broad culture of corruption develops – to the severe detriment of an entire country.

³⁸² Van Niekerk & Olivier “Enhancing anti-corruption strategies in promoting good governance and sound ethics in the South African public sector” 2012 *Tydskrif vir Christelike Wetenskap* 131 – 156.

Such levels of corruption have serious consequences for any country. These consequences and costs to a country, or even to a specific community, are usually difficult to measure but evidence without doubt shows this ultimately has a negative bearing on the living standards of the more socio-economically vulnerable people – which usually constitute the majority of a country's citizens, especially in the case of a developing country.³⁸³

Consequences can be listed as:

7 1 1 Private investment deterrent

It reduces investment and, as a consequence, reduces the rate of growth. Such reduction in investment is assumed to be caused by the higher costs and the uncertainty that corruption creates.³⁸⁴

7 1 2 It lowers employment

By deterring fixed investment and making it more costly to do business or start new businesses.³⁸⁵

7 1 3 It negatively affects the inflation and exchange rates

Depending on the extent of the corruption and which industries, products, etcetera dominate a particular country's economy, prices can be caused to rise in the case of importing and the exchange rate can, as a result, be influenced. The suppliers of goods and services can increase their prices so as to include the bribes they have to

³⁸³ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559..

³⁸⁴ Mauro *The Quarterly Journal of Economics* (1995) 681-712.

³⁸⁵ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

pay.³⁸⁶

7 1 4 It harms international trade

It reduces foreign direct investment because corruption has the same effect as a tax, and in fact operates as a tax. The less predictable the level of corruption (the higher its variance), the greater is its impact on foreign direct investment. A higher variance makes corruption behave like an unpredictable and random tax. Thus, increases in corruption and in its unpredictability are equivalent to increases in the tax rate on enterprises.³⁸⁷

7 1 5 It reduces GDP growth

For almost all of the reasons given *supra*, economic growth can be negatively affected, meaning fewer taxes and less government services.

7 1 6 It influences and distorts consumption patterns

Where corruption is widespread a significant number of wealthy people can be unnaturally introduced into a society who then buys and imports expensive and luxury goods and properties. This increases the wealth distribution disparity and affects consumption patterns.³⁸⁸

³⁸⁶ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

³⁸⁷ Wei & Zeckhauser *Dark deals and dampened destinies: Corruption and economic performance* (1999) 443-454.

³⁸⁸ Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

7 1 7 It leads to resource misallocations

Resources can be allocated so as to take advantage of corruption rather than in terms of supply and demand.³⁸⁹

7 1 8 It harms a country's international reputation

Many businesses are simply not prepared to pay bribes or to get involved in corrupt activities in any way. This includes many of the world's biggest companies. As such, these companies will avoid doing business in a country where they are likely to be put under pressure to do so. This affects both trade and investment.³⁹⁰

7 1 9 It reduces competition, efficiency and innovation across the economy

Where some firms seek the benefits that can be derived from corruption – for example being awarded tenders – other more honest firms, notwithstanding their pricing and quality of product, will be marginalised causing a reduction in competition, efficiency and innovation. Furthermore, corrupt tendering often results in the awarding of contracts to incompetent companies at an excessive cost.³⁹¹

7 1 10 It biases the allocations of talent and capital

For reasons already explained, talent and capital might not be employed in areas

³⁸⁹ Tanzi *Corruption around the world: causes, consequences, scope and cures* (1998) 559.

³⁹⁰ Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

³⁹¹ Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

where they could otherwise contribute optimally towards the economy.³⁹²

Each and every one of the consequences of corruption mentioned *supra* is known to exist, not least through a wide range of case studies. Their undermining effect on public sectors around the world has also been witnessed. The listing of the more proven of these consequences helps to show just how wide and pervasive corruption can become if not combated in an effective way. As indicated at the beginning of this section, these various corrupt situations are highlighted as situations which have a broad “macro” effect on a country.

7 2 Where legislation fits in

The PriceWaterhouseCoopers 2009 Crime Survey observed three factors to be commonly found where fraud occurs. Firstly, the would-be perpetrators need an incentive or motive to engage in an act of corruption. Secondly, there needs to be an opportunity to commit the act. Thirdly, and less central to the act, is the fact that perpetrators are usually able to rationalise their actions.³⁹³

Contemplate the issue of opportunity for a moment: If opportunity were to be hampered, corruption will necessarily not take place and all consequences mentioned *supra* will not happen. Therefore, a strong and modern legal framework addressing the causes of corruption (as stated in introductory remarks) together with relevant

³⁹² Woods *Anti-corruption Reader (Unpublished, available on request)*; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. *Paper presented to the Public Procurement Regulation in Africa Conference*, Stellenbosch, South Africa.

³⁹³ PriceWaterHouseCoopers “PriceWaterhouseCoopers Global Crime Survey 2009” http://www.pwc.co.za/en_ZA/za/assets/pdf/pwc-sa-global-economic-crime-survey-nov-2009.pdf.

statutory institutions, are essential dimensions to hamper opportunity.³⁹⁴

The BRICS, as it will have been noted, are equipped with such laws and institutions. However, the test for all countries, but especially for developing countries, is based on the integrity of the criminal justice system upon which the effectiveness of this law relies.³⁹⁵ Crucial to this integrity is the absolute independence of the judiciary, its ethical standing, as well as that of the law enforcement agencies. This in turn necessitates these two agencies being fully and properly capacitated and supported.³⁹⁶

7 3 Why BRICS

As mentioned in Chapter 1 it is estimated that by 2027 BRICS countries will overtake the G7 countries. The BRICS are in a similar stage of economic development. This group represents a huge economic power shift from the developed G7. Therefore these countries' economic wellbeing is of paramount importance to the economic development of the world.

All emerging markets, including Brazil, Russia, India, China and South Africa, embody potential profits for investors. They also, however, bear greater risks than developed economies because they come with a degree of ambiguity, as their environments provide for a lot of flexibility in policy and legal interpretation. A compre-

³⁹⁴ Rose-Ackerman *The Political economy of corruption* 46 http://www.iie.com/publications/chapter-s_preview/12/2iie2334.pdf (Accessed 2014-11-03).

³⁹⁵ Woods *Anti-corruption Reader (Unpublished, available on request; Woods 2011. Anti-corruption legislation – a failed response to procurement corruption. Paper presented to the Public Procurement Regulation in Africa Conference, Stellenbosch, South Africa.*

³⁹⁶ Masiloane & Dintwe "Developing an Anti-Corruption Strategy for the South African Public Sector" 2014 *Journal for Public Administration* 180 – 198.

hensive understanding of specifically anti-bribery legislation in these countries will therefore contribute to a greater understanding of legislative ambiguities and positive legislative trends experienced in the BRICS and lead to the implementation of “strong legislation” as mentioned earlier in this chapter.

7 4 Strong legal framework

It can be inferred that characteristics that make anti-corruption legislation successful are detection, investigation and prosecution of cases while punishment, prevention and enforcement aspects are imperative for effective anti-corruption laws. While having anti-corruption legislation in place has proven to be the first step, there are, however, other complementary measures necessary, such as informed citizens, a need to foster and sustain high levels of professional and ethically imbued civil servants and legislation that supports the transition towards a corruption-free society.³⁹⁷

For purposes of this thesis, what is considered to be a strong legal framework is legislation directly addressing the causes of corruption. After taking a look at all current laws and laws to be implemented in the various BRICS countries and after assessing all critics’ opinions, it can safely be deduced that what is considered a strong legal framework in order to curb corruption (and therefore bribery) is the following:

7 4 1 Comprehensive definition

As stated earlier in this chapter a strong definition of “corruption” and specifically “bribery” is needed as many people do not understand these concepts, and one

³⁹⁷ Majila, Taylor & Raga “A comparative analysis of the implementation of anti-corruption legislation by anti-corruption agencies in the provinces of the Eastern and Northern Cape” *TD The Journal for Transdisciplinary Research in Southern Africa* (2014) 219 – 240.

cannot refrain from wrongdoing if you did not know that it is considered questionable behaviour.³⁹⁸

7 4 2 Clearly defined oversight body

The act/law should have a clearly defined overseeing body as one notes the criticism of the Brazilian Access to Information Law.^{399 400}

7 4 3 Well-equipped enforcement authority

All laws will come to no effect if the enforcement authority is ill-equipped, as one sees in Russian Federal Laws No 273-FZ, 274-FZ and 280-FZ. The PGO is understaffed and lacking expertise and effective legal instruments to investigate sophisticated bribery schemes, particularly of the transnational variety. The other important ingredient in Gary Becker's analysis is the probability that those who commit crimes would get caught. This leads to the role of institutional controls. The existence of these controls reflects to a large extent the attitude of the political body toward this problem. Generally, the most effective controls should be those that exist inside institutions. This is really the first line of defence. Good and transparent procedures should make it easier for these offices to exercise their controls.⁴⁰¹

³⁹⁸ Chêne "International good practice in anti-corruption legislation" 2010 U4 Expert Answer 1 - 9.

³⁹⁹ Act 12.527 of 2011.

⁴⁰⁰ Majila, Taylor & Raga "A comparative analysis of the implementation of anti-corruption legislation by anti-corruption agencies in the provinces of the Eastern and Northern Cape" *TD The Journal for Transdisciplinary Research in Southern Africa* (2014) 219 – 240.

⁴⁰¹ Majila, Taylor & Raga "A comparative analysis of the implementation of anti-corruption legislation by anti-corruption agencies in the provinces of the Eastern and Northern Cape" *TD The Journal for Transdisciplinary Research in Southern Africa* (2014) 219 – 240.

7 4 4 Protection of whistle-blowers

The reporting of a crime (whistle-blowing) is usually the first line of defence in any business fraud prevention, therefore comprehensive whistle-blowing protection is needed – see Russian Federal Laws No 273-FZ, 274-FZ and 280-FZ and the RTIA in India. The rationale for protecting whistle-blowers according to proponents of an amendment to the RTIA or supplementary legislation is that, in order for potential whistle-blowers to feel safe bringing critical information to the attention of investigators, they should be statutorily protected. Critics argue that, in a democratic society, the goal should be to make the act of whistle-blowing the responsibility of all citizens. However, these duties cannot be expected of average citizens without the state in turn offering practical legal protection to those citizens.

7 4 5 Publicity

7 5 5 1 The RTIA is a perfect example of where a state allocates power to the average citizen and the average citizen lacks the time and resources to uncover corruption and will therefore hamper the effective working of the act.

7 5 5 2 The RTIA is of effect on Indian citizens. The argument is that Indian citizens lack political clout and confidence in their own knowledge of the legal system and this inadequacy creates a rift of power and authority, with the citizen at a disadvantage.⁴⁰²

7 4 6 Exemptions

Beware of too many exemptions (RTIA as reference) and vague exemptions. Even if

⁴⁰² Masiloane & Dintwe “Developing and Anti-Corruption Strategy for the South African Public Sector” 2014 *Journal for Public Administration* 180 – 198.

the RTIA would otherwise scare politicians with the threat of the democratic process (that is citizens getting involved and promoting change), critics argue that overly-broad exemptions to the RTIA render the act ineffective in many instances. Critics point to several exemptions which contain vague language that under liberal interpretation provides public authorities with a shield from the RTIA's provisions. Some overly-vague exemptions include:

7 4 6 1 Section 8(1)(h): providing an exemption for information that would impede the process or investigation of offenders;

7 4 6 2 Section 8(1)(j): providing an exemption for "information relating to personal information", which has no relationship to any public activity or interest; and

7 4 6 3 Section 7(9): providing that information will be provided "in the form in which it is sought" unless doing so would contribute to the diversion of resources of the public authority.⁴⁰³

The creation of public awareness about corruption is closely related to the first element of measuring public perceptions on corruption. In this instance, however, the main focus is to show the public that corruption will not thrive if they do not become passive role-players when corruption is being perpetrated.⁴⁰⁴

7 4 7 Penalties

Following Gary Becker's (1968) classic analysis of crime prevention, given the probability that the perpetrator of a crime would be caught, the penalty imposed plays an

⁴⁰³ Xindex "India: Right to information and privacy 'two sides of the same coin'" <http://www.indexon-censorship.org/2013/09/indias-right-information-act-colliding-privacy/> (Accessed 2014-01-04).

⁴⁰⁴ Masiloane & Dintwe "Developing an Anti-Corruption Strategy for the South African Public Sector" 2014 *Journal for Public Administration* 180 – 198

important role in determining the probability that criminal or illegal acts would take place. In theory, all things being equal, corruption could be reduced by increasing the penalties on those who get caught. This analysis implies that the penalty structure existing in a country is an important factor in determining the extent of corruption in that country.⁴⁰⁵ But once again, at least theoretically, higher penalties may reduce the number of acts of corruption, but they may lead to demands for higher bribes on the corrupt acts that still take place.

According to Lodge⁴⁰⁶, professor of Peace and Conflict Studies in the Department of Politics and Public Administration and dean, Faculty of Arts, Humanities and Social Sciences at the University of Limerick, with the government's retreat from the 'dirigiste' models of public administration favoured under apartheid, the proliferation of privatisation and the contracting out of what were exclusively government's functions, the government's regulatory functions have expanded rapidly, well beyond its administrative capacity. This loophole in the regulation of private work performed for government requires an anti-corruption strategy which will make corruption unprofitable. It is a tedious and lengthy engagement to investigate corruption, apprehend perpetrators and recover the losses suffered by the government and this makes corruption to be lucrative to the perpetrators. The anti-corruption strategy should contain remedial measures which are structured in such a way that the punishment meted out to those found guilty of corruption, becomes deterrence to the prospective fraudsters. It is therefore submitted that de-incentivising corruption is a hallmark and an

⁴⁰⁵ Barsukova "Academic Debates and Russian Reality" 2009 *Russian Politics and Law* 8 - 27.

⁴⁰⁶ Lodge "Countering public corruption in South Africa" 2001 available at <http://archive.lib.msu.edu/DMC/African%20journals/pdfs>.

important facet of any anti-corruption strategy.⁴⁰⁷

7 4 8 Clarity

Those who formulate anti-corruption legislation need to ensure clarity and non-ambiguity of the law, that it is simple to apply, and that it demands little or no judgment in determining its applicability.⁴⁰⁸ Laws written this way are said to contain bright-line rules and are contrasted with those containing standards that are open to interpretation by enforcement agencies.⁴⁰⁹ When drafting such acts, the instinct is to list every activity that can conceivably be considered corrupt, and to avoid deliberate misinterpretation, as people are creative in finding ways to enrich themselves or their friends and family at the public's expense.⁴¹⁰

7 4 9 Examples by leadership

A final contributing factor is the example provided by leadership. When the top political leaders do not provide the right example, either because they engage in acts of corruption or, as is more often the case, because they condone such acts on the part of relatives, friends or political associates, it cannot be expected that the employees in the public administration will behave differently. The same argument applies within particular institutions such as tax administration, customs and public enterprises.

⁴⁰⁷ Masiloane & Dintwe "Developing and Anti-Corruption Strategy for the South African Public Sector" 2014 *Journal for Public Administration* 180 – 198.

⁴⁰⁸ Messick & Kleinfeld "Writing an effective anti-corruption law" 2001 *World Bank: Open knowledge Repository* <https://openknowledge.worldbank.org/bitstream/handle/10986/9777/multi0page.pdf?sequence=1>.

⁴⁰⁹ Kaplow "Rules versus standards: An economic analysis" 1992 *Duke Law Journal* 42 (3).

⁴¹⁰ World Bank. 2001. Writing an effective anti-corruption law. Public Sector Preliminary notes No.58.

These institutions cannot be expected to be corruption free if their heads do not provide the best examples of honesty.⁴¹¹

7 4 10 An Adequately Independent Anti-Corruption Unit

MOGOENG CJ explained “Adequate Independence” in the *Glenister* case as:

“The Constitution requires the creation of an adequately independent anti-corruption unit. It also requires that a member of the Cabinet must be ‘responsible for policing’. These constitutional duties can productively co-exist, and will do so, provided only that the anti-corruption unit, whether placed within the police force (as is the DPCI) or in the NPA (as was the DSO), has sufficient attributes of independence to fulfil the functions required of it under the Bill of Rights. The member of Cabinet responsible for policing must fulfil that responsibility under section 206(1) with due regard to the state’s constitutional obligations under section 7(2) of the Constitution.”⁴¹²

7 4 11 Sufficient funding for the Anti-Corruption Unit

The OECD report on a review of models of specialised anti-corruption institutions internationally notes the following:

“Adequate funding of a body is of crucial importance. While full financial independence cannot be achieved (at minimum the budget will be approved by the Parliament and in many cases prepared by the Government), sustainable fund-

⁴¹¹ Masiloane & Dintwe “Developing an Anti-Corruption Strategy for the South African Public Sector” 2014 *Journal for Public Administration* 180 – 198.

⁴¹² *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (CCT 07/14, CCT 09/14) [2014] ZACC 32 (27 November 2014)

ing needs to be secured and legal regulations should prevent unfettered discretion of the executive over the level of funding”.⁴¹³

After a discussion of the mentioned anti-bribery legislative environments in the BRICS, a definition of a “strong legal framework” was explained. This understanding can now be used in the South African context and in turn further our economic development.

Therefore, South African law can benefit from a critical comparative analysis of anti-corruption (in particular anti-bribery) legislation in the other BRICS countries. Using and adapting existing laws from the other members of the BRICS group to complement the South African set of laws, could be to the benefit of all five members of the unity and could possibly restore the necessary faith in South African leaders and in the country as a growing nation.

South Africa is seen as a pantry of the future for the growing world population since the country’s agricultural possibilities are exceeding these of other countries. Knowing that there is little endurance for and proven control of corruption in South Africa may increase the possibilities investments by the greater economies of the world in this country at the bottom of Africa.

⁴¹³ OECD “Specialised Anti-Corruption Institutions – Review of Models” <http://www.oecd.org/corruption/acn/specialisedanti-corruptioninstitutions-reviewofmodels.htm>.

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