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Business and Human Rights: Bridging the Legal Gap in the Enforcement of Anti-Bribery Laws

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Business and Human Rights (BHR) Law is centred on holding corporations accountable for the harm caused while conducting their operations. It mainly focuses on victims and impacted communities while articulating their concerns in terms of treaty-based rights to provide the basis for remedy and justice. The failure to enforce existing laws that regulate business respect for human rights is often a significant legal gap in State practice. This paper particularly focuses on anti-bribery laws to foster business respect for human rights. Whether such laws are currently being enforced effectively, and if not, reasons for failure and what measures may reasonably correct the situation will be discussed in the context of certain states' practices to formulate an argumentative analysis on bridging the legal gap in the enforcement of BHR law. Since International treaties are silent over state's extraterritorial jurisdiction over corporate human rights abuses, it is imperative to determine whether states have the right to legislate and enforce anti-bribery Laws with extraterritorial effect or not and if so, to what extent. This paper examines how BHR falls into the realm of binding law, state-sponsored oversight, and corporate accountability. The three pillars of structure for BHR provided by the UN Guiding Principles on Business and Human Rights UNGPs i.e, (1) state duty to protect against human rights abuses by business; (2) corporate responsibility to respect human rights; (3) Obligation on states and the private sector to provide victims with access to effective remedies will be discussed in the context of anti-bribery laws. How to narrow and ultimately bridge the gaps in relation to the enforcement of BHR law is central to this study. To complete and substantiate this study, a doctrinal research methodology will be adopted. Data will be gathered from scholarly and academic writings, case studies, expert reports, surveys and content analysis of legal documents and Court Judgments. It involves the use of a qualitative research method, which allows the

reporting of the research findings in a descriptive format. The main type of argument used in this case is an inductive argument, which bases the conclusion on the data collected in throughout the research.

Keywords: *business and human rights, corporation, business and state accountability, corporate law.*

INTRODUCTION

Human rights are the freedoms and rights that every individual possesses from the day of their birth, irrespective of their nationality, age, gender, or religion.[1] Basic rights include freedom of speech, education, privacy, health, life, liberty and security, as well as an adequate standard of living.[2] Human rights abuses associated with business activities are thought of as sweatshops in foreign countries where child labour and unsafe working conditions are common. But human rights can be affected by businesses in more subtle ways, at home and abroad.[3] One of the ways through which businesses can be held accountable for violating human rights is corruption. There are varying degrees of corruption, from small-scale influence to large-scale institutionalised bribery.[4] According to the Organization for Economic Co-operation and Development (OECD), the term briber means: "*An offer, promise, or giving of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business*".[5]

Such business activities may negatively affect human rights in a number of ways, either directly or indirectly. Giving bribes, for instance, to guarantee the smooth flow of expired or counterfeit medications negatively affects vulnerable people's right to health. With this in mind, smoke

[1] 'Business and Human Rights: a system for success' (*Eclt foundation*) <https://www.eclt.org/en/news/business-and-human-rights-a-system-for-success> accessed 06 October 2024
[2] *Ibid*
[3] *Ibid*
[4] 'Corruption' (*National Action Plans on Business and Human Rights*) <https://globalnaps.org/issue/corruption/> accessed 06 October 2024
[5] 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (*OECD*, 01 December 1997) <https://legalinstruments.oecd.org/public/doc/205/205.en.pdf> accessed 06 October 2024

control laws were passed in the UK in 2017 and have helped millions of people in the global north avoid death.[6] Payments either made in advance to influence a decision or reward a public official afterwards are not victimless crimes.[7] Conventional bribes and after-the-fact gratuities have been used to bypass standards pertaining to construction projects, public health, worker health and safety, and other matters that result in harm to the body or even death. Economic development and stability, as well as significant public infrastructure projects and disaster relief operations, have been harmed by the misappropriation of public funds to influence and reward public officials. A U.S.-based company offered mobile hospitals constructed out of spare components and reused medical equipment during the pandemic's peak. Million-dollar contracts were signed with some of the most vulnerable nations. The sales were widely believed to be the result of bribes. Undoubtedly, inadequate medical care caused suffering for a great number of COVID-19 patients. Therefore, it is essential that anti-bribery legislation be properly enforced in rights-based lawsuits.

Businesses have a big part to play in defending and upholding human rights.[8] Governments and international organisations recently passed laws and guidelines for corporations and States to implement the frameworks supporting business-related human rights. The paper particularly focuses on legislation done by the USA, UK and China to prosecute bribery offences and its extra-territorial reach in light of recent case laws. The extent of state oversight and corporate liability in protecting and mitigating the risks associated with bribery in national and multinational businesses are also discussed in light of the United Nations Guiding Principles on Businesses and Human Rights. The research also presents a precise outlook on the global enforcement rate of anti-bribery laws and the reasons for their rare enforcement. At last, the research argues that, given weak governance, enforcement of Anti-bribery laws in developing third-world countries cannot be done without the support and assistance of donor agencies and countries. Therefore, the International community, especially the USA, UK and China, should

[6] Sarah Boseley and Julia Kollewe, 'Serious Fraud Office opens investigation into BAT bribery claims' *The Guardian* (27 November 2017) <https://www.theguardian.com/business/2017/aug/01/serious-office-opens-formal-investigation-into-bat-bribery-claims> accessed 06 October 2024

[7] 'SUPREME COURT UNDERCUTS FEDERAL ENFORCEMENT OF ANTI-BRIBERY LAW' (*Transparency International*, 27 June 2024) <https://us.transparency.org/news/supreme-court-undercuts-federal-enforcement-of-anti-bribery-law/> accessed 06 October 2024

[8] *Ibid*

provide a helping hand to these states and take the lead in establishing a global level playing field for the equal enforcement of Anti-bribery laws worldwide.

UNGP: THREE PILLARS OF STRUCTURE FOR BHR IN THE CONTEXT OF ANTI-BRIBERY LAWS

On June 16, 2011, 42 states that supported the Organisation for Economic Co-operation and Development (OECD) and the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (Guiding Principles).[9] These guidelines state that businesses, whether they conduct business domestically or overseas, must uphold all internationally recognised human rights. They also underlined that it is expected of both domestic and international businesses to address negative effects on human rights that are either directly or indirectly related to their operations.[10] The principles provide 'Protection, Respect and Remedy' framework known as the three pillars: The State Duty to protect human rights, the Corporate responsibility to respect human rights and the Remedy for victims of business-related abuse.

ANTI-BRIBERY LAWS FALLING INTO THE REALM OF STATE OVERSIGHT

The UNGP requires states to safeguard citizens from third parties, especially commercial companies, violating human rights on their territory and/or under their authority. This necessitates implementing the proper policies, laws, rules, and procedures to effectively prevent, look into, punish, and address such abuse.[11] Although states are not legally required to control the actions of domestically headquartered corporations abroad, there are strong

[9] John Gerard Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011)
[10] 'THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE' (*United Nations Human Rights Office of the High Commissioner*, 2012) <https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf> accessed 06 October 2024
[11] 'GUIDING PRINCIPLE ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK' (*United Nations Human Rights Office of the High Commissioner*, 2011) <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 06 October 2024

policy reasons for governments to extend this expectation in order to ensure that companies uphold human rights abroad. Human Rights Treaty Bodies advocate this, and it falls under the purview of the UNGPs. This implies that governments are urged to uphold human rights obligations even when they cross national borders.[12]

Abuse of human rights by private actors may be in violation of the state's obligations under international human rights law if the violations can be linked to such state individuals or if the state has not taken the necessary action to stop, look into, punish, and address the violations.[13] To adhere to this principle, States must enact legislation that effectively criminalises bribery and makes corporations responsible for any involvement in human rights violations linked to corrupt activities. This entails creating precise legal frameworks that require due diligence on the part of companies, guaranteeing that their operations do not encourage or profit from bribes that may lead to abuses of human rights.

States are also expected to vigorously enforce these rules, making sure that there are procedures in place for looking into and prosecuting domestic and foreign businesses that engage in bribery. The state must also provide easily accessible remedies for victims of bribery offences, such as judicial or extrajudicial grievance procedures.[14]

CORPORATE LIABILITY TO RESPECT HUMAN RIGHTS

As per UNGP II, businesses should address any negative effects they may have been involved in and have a responsibility to respect human rights.[15] Some actions that corporations could take to prevent, reduce, or repair human rights violations in their supply chains include strict rules and codes of conduct to protect human rights in a business's professional culture and operations,

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[12] *Ibid*

[13] Ikonasio Tautakitaki, 'The Three Pillars of the United Nations Guiding Principles on Business and Human Rights: A 'Non-Binding' International Contract on the State Duty to Protect Human Rights, the Corporate Responsibility to Respect Human Rights and the Access to Remedy for Victims of Abuse' (2016) Victoria University of Wellington Legal Research Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817598> accessed 06 October 2024

[14] *Ibid*

[15] Navanethem Pillay, 'The corporate responsibility to respect: a human rights milestone' (2009) International Labour and Social Policy Review <https://www.ohchr.org/sites/default/files/Documents/Press/HC_contribution_on_Business_and_HR.pdf> accessed 06 October 2024

risk assessments on hazards to human rights, prevention and mitigation of possible harm following risk assessment and easily accessible procedures in businesses to take complaints about violations of human rights.[16] There have been lawsuits brought against corporations in some states for alleged extraterritorial infringement of human rights. In Nevun Resources Ltd v Araya, 2020 SCC 5, for instance, the Supreme Court of Canada ruled in 2020 that a Canadian firm may be held accountable under Canadian law for transgressions of international law committed in other nations.[17]

In the context of anti-bribery laws, this principle suggests that companies should not only abstain from corrupt activities but also actively oversee their operations to guarantee that they do not facilitate violations of human rights by means of bribery.[18] According to Article 2 of the OECD Convention and Article 26 of the UN Convention against Corruption (UNCAC), each Party is required to take any necessary steps, in compliance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official and other corruption offences.[19]

Corporate liability is being codified in certain state laws. The UK is the most recent example.[20] The Economic Crime and Corporate Transparency Act 2023 (2023 Act) received Royal Assent in the United Kingdom on October 26, 2023. The Act introduces a new corporate criminal offence i.e. failure to prevent fraud. To be considered for the offence, the corporation had to satisfy a minimum of two of the following requirements : (1) over 250 workers; (2) over £36 million in revenue; and (3) over £18 million in assets.[21]

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[16] *Ibid*

[17] Kangwa-Musole Chisanga and Raphael J Heffron, 'Nevun Resources Limited v Araya 2020 SCC 5' (2020) 1(2) Global Energy Law and Sustainability <https://www.euppublishing.com/doi/epub/10.3366/gels.2020.0037> accessed 06 October 2024

[18] Wilson Ang et al., 'Navigating corporate criminal liability regimes – risks and challenges' (*Norton Rose Fulbright*, 2024) <https://www.nortonrosefulbright.com/en-za/knowledge/publications/62f23ec5/navigating-corporate-criminal-liability-regimes--risks-and-challenges> accessed 06 October 2024

[19] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (n 5)

[20] Leah Moushey et al., 'Anti-Bribery & Corruption: Global overview' (*Lexology*, 02 February 2024) <https://www.lexology.com/library/detail.aspx?g=b8e34cdc-59f0-4560-80c0-708ac707e5cd> accessed 06 October 2024

[21] *Ibid*

In the past, a corporation could only be prosecuted for a crime if a natural person could be identified as the directing mind and will of the organisation. According to the 2023 Act, if a senior manager acting within the actual or perceived area of their authority commits a relevant offence, including the failure to prevent fraud charge, the firm may be held accountable.[22] According to the 2023 Act, a senior manager is a person who has a major influence on choices about the management of the company's operations or how those operations should be managed. The reform may allow for a wider variety of individual actions to result in corporation criminal responsibility.

However, failure to prevent bribery is not considered as an offence in many states, which means that a corporate employee's individual acts of bribery are not ascribed to the company as a whole. The Singapore Corruption Act of 1960 states that an employee's or agent's activities can only be held accountable to the business in two situations: either the individual is the company's living embodiment or the actions were carried out as part of a delegated function of management.[23] The challenges of satisfying such a test were highlighted in a recent high-profile prosecution of the Singapore branch of a Chinese engineering firm about the alleged bribery of a senior public official from the land transport department in Singapore.[24] In the said case, there were claims that in 2018 and 2019, a senior transport official received S$220,000 in bribery from two senior employees i.e. the general manager and the commercial manager at the engineering firm. The Singapore Prevention of Corruption Act 1960 brought three charges of corruption against the engineering firm.

The prosecution contended that the engineering firm should be held accountable for these corrupt activities because its management had failed to adequately implement the company's anti-corruption rules, which in turn had allowed the actions to take place. The defence contended that the general manager was neither the engineering firm's directing mind and will nor its living embodiment. The engineering firm further argued that the employees' corrupt actions could not be attributed to the company because they were committed for their gain.

[22] *Ibid*
[23] *Tom-Reck Security Services Pte Ltd v Public Prosecutor* [2001] SGHC 32
[24] Ang (n 18)

Following the trial, the engineering firm was found not guilty of any of the accusations. The District Judge concluded that the general manager was not carrying out a delegated function of management. The DJ also discovered that the majority of the money used for the bribes had been obtained fraudulently from the engineering firm and that the offences had been conducted without the engineering firm's consent. As a result, the engineering firm was held not accountable for the unethical behaviour of its workers.[25]

ACCESS TO REMEDY

Under Art. 8 of the Universal Declaration of Human Rights,[26] "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". This brings up the third pillar of the UN Guiding Principles, which states that a State's duty to safeguard entails making sure that people whose human rights have been violated by corporations have access to a strong and suitable remedy. This fundamental tenet is defined as follows in UNGP Principle 25:

"*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.*"[27]

The underlying tenet of principle 25 is that states are accountable for their failures to uphold international human rights standards even when they are not directly responsible for preventing or remedying human rights violations. States must also protect against human rights abuses by third parties, including companies.

According to international legal standards, remedies can take the following forms[28]:

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[25] *Ibid*
[26] United Nations Universal Declaration of Human Rights 1948
[27] 'Access to Remedy in Cases of Business-Related Human Rights Abuse: An Interpretive Guide' (*Office of the United Nations High Commissioner for Human Rights*, 18 October 2024) <https://www.ohchr.org/sites/default/files/documents/issues/business/access-to-remedy-bhr-interpretive-guide-advance-version.pdf> accessed 07 October 2024
[28] *Ibid*

- **Restitution:** It refers to actions taken to put a harmed individual or group back in the original situation as before the harm.
- **Compensation:** Actions taken to make up for economically measurable losses.
- **Rehabilitation:** Actions taken to help someone recover from injury; these may involve social, legal, and medical services in addition to medical or psychological treatment.
- **Satisfaction:** Actions that could include ending an ongoing abuse; apologising and taking responsibility for the facts; declaring that the rights, dignity, and reputation of the affected parties have been restored; imposing judicial and administrative penalties; and implementing symbolic remedies like commemorations
- **Non-Repetition Guarantees:** Actions taken to prevent comparable injuries from happening again in the future (e.g., injunctions or changes to laws, regulations, or corporate practices).

To put it briefly, this idea emphasises the state's obligation to ensure that victims of human rights abuses resulting from business-related activities, including those linked to bribery, have access to justice and effective remedies, as discussed above.

HOW THE CODIFICATION OF ANTI-BRIBERY LAWS INITIATED?

The United States is the first nation to recognise foreign bribery as a complex and serious crime.[29] According to the investigation of the Watergate scandal, 400 firms were found that paid $300 million in bribes to foreign authorities as unlawful domestic election payments. Consequently, the US Congress moved to ban foreign bribery.[30] The Foreign Corrupt Practices Act (FCPA) was signed into law in 1977.[31] It was the 'first law in the world' that regulated domestic corporate conduct with foreign government officials in international markets, [32] Being the only nation in the world that forbids international bribery, American businesses competed for government contracts with foreign firms that were not constrained by

[29] Mike Koehler, 'The Story of the Foreign Corrupt Practices Act' (2012) 73(5) Ohio State Law Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185406#paper-citations-widget> accessed 07 October 2024
[30] *Ibid*
[31] US Foreign Corrupt Practices Act 1977, ss 78dd-1 - 78dd-3
[32] Koehler (n 29)

anti-bribery laws.[33] In order to address this issue, congress encouraged the President to pursue an international anti-corruption pact with members of the Organisation for Economic Cooperation and Development (OECD) in 1988.[34] After seven years of mutual consensus amongst OECD member nations to outlaw bribery, the Committee on International Investment and Multinational Enterprises (CIME) of the OECD produced a report recommending some measures to counter bribery.[35] After the recommendations were accepted by the OECD, the members of the organisation enacted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (often known as the Anti-Bribery Convention) on December 18, 1997.[36] Signatories to the Anti-Bribery Convention committed to passing laws that would make offering bribes to foreign officials an illegal act. They further committed to implement measures to ban the same in the conduct of international business.[37] In reference to jurisdiction, the Anti-Bribery Convention required states to 'Establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part of its territory,' additionally, it urged nations to [interpret jurisdiction] broadly so that an extensive physical connection to the bribery act is not required.

ANTI-BRIBERY LAWS IN THE USA

Later, to comply with the Anti-Bribery Convention, Congress had to amend the FCPA, therefore extending its authority. Previously, the Act forbade US citizens and businesses from bribing foreign officials in the US.[38] However, to comply with the Anti-Bribery Convention's guidelines, congress increased criminal culpability to two groups: first, foreign nationals;[39] Second, citizens

[33] Steven R Salbu, 'Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act' (1997) 54(1) Washington and Lee Law Review <https://scholarlycommons.law.wlu.edu/wlulr/vol54/iss1/6/> accessed 07 October 2024
[34] US Foreign Corrupt Practices Act 1977, s 5003(d)
[35] 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (*OECD Legal Instruments*, 23 May 1997) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0276> accessed 07 October 2024
[36] 'Argentina-Brazil-Bulgaria-Chile-Slovak Republic - Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (1998) 37(1) International Legal Materials <https://doi.org/10.1017/S0020782900019380> accessed 07 October 2024
[37] *Ibid*
[38] US Foreign Corrupt Practices Act 1977
[39] United States Code 1926, s 78dd-3(a)

of the United States who broke the FCPA while being abroad.[40] By doing this, Congress broadened U.S. jurisdiction over foreign nationals, even those who may not have been physically present in the United States, and abandoned its previous reticence that was limited to individuals and companies inside the U.S.[41]

However, there are still some issues with the FCPA because it does not forbid foreign authorities from demanding bribes from US businesses and individuals under similar conditions.[42] To close this gap, the new Foreign Extortion Prevention Act (FEPA) was signed into law by US President Joe Biden in December 2023. The Act criminalises the demand side of bribery by altering the FCPA, 18 U.S. Code section 201, and making it illegal for foreign officials to solicit or accept bribes from U.S. individuals and businesses.[43]

Those who violate the FEPA face a maximum fine of $250,000 or three times the bribe amount, whichever is higher, and a potential sentence of 15 years in jail. The Attorney General is also required by the FEPA to provide an annual enforcement report.[44]

The Stricter Application of FEPA than FCPA: FEPA does not provide affirmative defences as the FCPA does.[45] A company may be able to defend itself under the FCPA if the payment is lawful under the written laws and regulations that apply to the foreign official or if it was a reasonable and bona fide expenditure that was directly related to the promotion, demonstration, or explanation of goods or services, or the execution or performance of a contract with the

[40] United States Code 1926, ss 78dd-1(g)(1) - 78dd-2(i)(1)
[41] H Lowell Brown, 'Extraterritorial Jurisdiction under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?' (2001) 26(2) North Carolina Journal of International Law and Commercial Regulation <https://scholarship.law.unc.edu/ncilj/vol26/iss2/1/> accessed 07 October 2024
[42] Maxwell Carr-Howard, 'Bridging the Gap: FEPA Beefs Up US Anti-Bribery Enforcement' (*Dentons*, 02 April 2024) <https://www.dentons.com/en/insights/alerts/2024/april/2/bridging-the-gap> accessed 07 October 2024
[43] 'Mind the (Bribery) Gap: Recent US Anti-Bribery Legislation Addresses Void Created by "Demand-Side" Bribery' (*Clifford Chance*, February 2024) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/02/Mind%20The%20(Bribery)%20Gap%20-%20Recent%20US%20Anti-Bribery%20Legislation%20Addresses%20Void%20Created%20By%20Demand-Side%20Bribery.pdf> accessed 07 October 2024
[44] *Ibid*
[45] Carr-Howard (n 42)

foreign government. Such protections do not exist under FEPA. Therefore, money paid to speed up regular government activity may still be used against the beneficiary under the FEPA.[46]

EXTRA-TERRITORIAL EFFECT OF US ANTI-BRIBERY LAWS

As discussed in the preceding sections, the USA has been the first state to codify and enforce Anti-bribery Laws. In view, it would be right to examine the extra-territorial effect of Anti-bribery laws through the lens of enforcement rules of the US. Even though Congress has the ability to apply its laws outside of the country, courts have traditionally assumed that U.S. laws apply solely to U.S. states and territories unless Congress expressly specifies otherwise.[47] The most famous assertion of this principle comes from Morrison v National Australia Bank, which held that [w]hen a statute gives no clear indication of an extraterritorial application, it has none,[48] This can be well understood by the *US v Hoskins:*

The US v Hoskins [2018]:

Facts: The main subject of this case was Alstom S.A. (Alstom), a global corporation with its headquarters located in France and subsidiaries all over the globe. Lawrence Hoskins, the defendant, was employed by Alstom's UK subsidiary, but he was working in France at the time of the relevant events. According to the Department of Justice (DOJ), Hoskins chose two consultants from the Alstom U.S. subsidiary while he was employed in France and gave them permission to bribe Indonesian officials.

Held: Hoskins never held a direct position with Alstom's American business, and while corresponding with the consultants via phone and email, he refrained from visiting the United States throughout the scheme.[49] The Court held that he could not be convicted for primarily violating the FCPA.[50] Thus, the DOJ accused him of aiding and abetting the breach of FCPA

[46] *Ibid*
[47] William S Dodge, 'Understanding the Presumption Against Extraterritoriality' (1998) 16 Berkeley Journal of International Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712012> accessed 07 October 2024
[48] *Morrison v National Australia Bank Ltd* [2010] 561 US 247
[49] *Ibid*
[50] United States Code 1926, s 78dd-3

by the US consultants.[51] Hoskins sought dismissal of this charge,[52] and the Second Circuit concurred, dismissing the DOJ's use of accomplice responsibility and ruling that the FCPA's extraterritorial reach of accomplice liability is limited to the extraterritorial reach of principle FCPA offences. The court provided multiple justifications for this holding.

First, the court reasoned that since Congress maintained principal liability under the backdrop of the presumption against extraterritoriality, congress meant to restrict the extraterritorial application of accomplice liability to the same degree that it restricted principle liability. In order to bolster this interpretation, the court cited legislative history that implied Congress's intention to restrict the FCPA's extraterritorial application.

The court also held that, due to the presumption against extraterritoriality, accomplice liability's extraterritorial reach was limited to FCPA's principal liability. Hence, Hoskins could be held liable under the FCPA only if he qualifies as an agent of AIstom's US subsidiary.[53] Because the court ruled that the FCPA does not allow the government to prosecute Hoskins, it did not continue its analysis. However, certain doctrines support the prosecution of Hoskins on an extra-territorial basis discussed later under the head of "*Bridging the gap in the enforcement of Anti-bribery laws*".

ANTI-BRIBERY AND CORRUPTION LAWS IN THE UK

In the UK, the Anti-Bribery Act 2010 (which went into effect on July 1, 2011) has been the cornerstone for safeguarding human rights pertaining to business.[54] The Bribery Act creates three offenses: bribing another person,[55] being bribed,[56] and bribing a foreign public official (collectively, the Bribery Offenses). Furthermore, the failure of commercial organisations to prevent bribery is now a crime according to the Bribery Act.[57]

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[51] *Ibid*
[52] *United States v Hoskins* [2018] 902 F 3d 69
[53] *Ibid*
[54] 'CMS Guide to Anti-Bribery and Corruption Laws - April 2016' (*Lexology*, April 2016) <https://www.lexology.com/library/detail.aspx?g=7c83986e-d2f3-4cd2-a1d7-7987075bf76d> accessed 07 October 2024
[55] Bribery Act 2010, s 1
[56] Bribery Act 2010, s 2
[57] Bribery Act 2010, s 6

Section 1 of the said act defines the conduct of bribing as: "*Offering or giving a financial or other advantage to a person to perform a public function or business activity, or as a reward for the same; or knowing or believing the acceptance would in itself constitute improper performance.*"

The Act of being bribed is explained under section 2 as: "*Requesting or accepting an advantage improperly to perform a public function or business activity, or as a reward for the same; or when the request or acceptance would itself constitute an improper performance of a public function or business activity; or Improperly performing such a function or activity in anticipation of receiving such an advantage.*"

Further, bribing a foreign public official is also an offence under section 6 of the said Act as follows: "*Offering or giving to (or with the assent of) a foreign public official any advantage that is neither permitted nor required by the written law applicable to that official intending to influence them in their capacity as a foreign public official and obtain or retain business or a business advantage.*"

The aforementioned offences have penalties that include an unlimited fine, ten years in prison, disqualification from public contracts, and a confiscation order (Under the Proceeds of Crime Act of 2002). If this act is committed by a British national, resident, or body incorporated in the UK, it may be caught even outside of the country. It's not necessary for the act to be prohibited in another nation.

Furthermore, as previously mentioned under the heading of corporate liability, the offence of corporate failure to prevent bribery has been expanded to include failure to prevent the facilitation of tax evasion, fraud, and money laundering through an amendment to the Economic Crime and Corporate Transparency Bill.[58] In other nations, the idea has also been embraced as a new paradigm for corporate criminal responsibility. [59]

[58] Tom Stocker, 'The UK Bribery Act 2010: principles, offences and penalties' (*Pinsent Masons*, 29 February 2024) <https://www.pinsentmasons.com/out-law/guides/the-uk-bribery-act-2010-principles-offences-and-penalties> accessed 07 October 2024

[59] *Ibid*

DO UK ANTI-BRIBERY LAWS HAVE EXTRA-TERRITORIAL REACH?

As was previously mentioned, the UK Bribery Act covers offences committed both inside and outside of the country. When illegal activity is carried out by people or business entities that have a close connection to the UK, the jurisdictional scope of the Bribery Offences expands.[60] People who are considered to have a close connection with the UK include British citizens, citizens of British overseas territories, and bodies established under the laws of any part of the UK.[61] They could nevertheless face legal consequences in the country where the offence occurs even if the act is not prohibited there.[62] Since foreign nationals who commit bribery offences abroad while domiciled or regularly residing in the UK are now subject to the Bribery Offences, it is actually the sole noteworthy extension made possible by the Bribery Act.[63]

The UK Bribery Act additionally criminalises a commercial organisation's failure to prohibit bribery, therefore greatly extending the Act's extraterritorial enforcement. No matter where a commercial organisation is incorporated, the Bribery Act states that if it is proven that it conducts all or part of its business in the UK, an associated person[64] (for example, an employee, agency, or subsidiary) bribes a foreign public official or another individual for its own gain, the commercial organisation can be held accountable for the offence unless it can show that it had sufficient policies and processes in place to prevent such conduct. Crucially, it makes no difference if the offence occurred overseas or if the associated person has no connection to the UK. This implies that, in theory, a parent company incorporated in Australia whose agent in Vietnam bribes a Chinese official on behalf of the parent company could face prosecution in the UK due to the presence of its London-based subsidiary, even if the subsidiary had nothing to do with the offence. The jurisdictional reach of the Bribery Offences is narrower than that of the Offence of Failure to Prevent Bribery, as the former is limited to entities having a close connection to the UK, while the latter covers foreign commercial organisations that conduct all or a portion of their operations in the UK.

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[60] Bribery Act 2010
[61] Bribery Act 2010, s 12(4)
[62] Bribery Act 2010, s 12(3)
[63] Bribery Act 2010, s 12(4)(g)
[64] Bribery Act 2010, s 8

ANTI-BRIBERY LAWS IN CHINA

China's legal instruments for prosecuting cases of bribery and corruption in businesses include the PRC Anti Unfair Competition Law (revised in 2019) and the PRC Criminal Law 1979 (revised in 2020).[65] Both active and passive bribery in the private sector is illegal under the PRC Criminal Law and the PRC Anti-Unfair Competition Law (commercial bribery).[66] Active bribery under the PRC Criminal Law 2020 includes giving money or property to state employees, non-state employees, close relatives of state employees, close relatives of ex-state employees, state organs, state-owned enterprises, public institutions, or organisations with the intent to obtain improper benefits. The aforementioned offence carries a ten-year jail sentence, a fine, the seizure of unlawfully obtained funds, and the cancellation of a company licence.

In order for a business bribe to be considered a criminal offence under the PRC Criminal Law, it must have a reasonably high transaction value: if committed by an individual, at least RMB 60,000; if committed by a business or other entity, at least RMB 200,000.

According to the PRC Criminal Law, passive bribery is the act of an entity or a person employed by an entity that demands or accepts illicit funds or property by using its or that person's position to further the interests of other entities or people. The offence is penalised by a fine, the seizure of unlawfully obtained funds, the cancellation of a business licence, and a maximum five-year fixed-term jail sentence.[67]

Article 8 of the PRC Anti-Unfair Competition Law sanctions unfair competition perpetrated by private persons or businesses. Business owners are not allowed to bribe competitors in the form of property or other means in order to buy or sell goods in a way that limits unrestricted competition. The word 'Property' can also refer to benefits like job offers, free travel, or free entertainment. It also alludes to money, assets, and covert kickbacks.

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[65] Bribery and Corruption Laws and Regulations 2024
[66] Sun Hong, 'Business ethics and anti-corruption laws: China' (*Norton Rose Fulbright*, June 2016) <https://www.nortonrosefulbright.com/en/knowledge/publications/406af5db/business-ethics-and-anti-corruption-laws-china> accessed 07 October 2024
[67] *Ibid*

However, there was no provision against bribing foreign public officials in China's initial Criminal Law, which was implemented in 1979. China ratified the United Nations Convention against Corruption in 2003. The convention mandates that all signatory states enact laws that make it illegal for foreign public officials (FPOs) and representatives of public international organisations (OPIOs) to accept bribes. China ratified the Convention, and in 2011 it amended its Criminal Law to include the offence of bribery of FPOs and OPIOs.[68]

EXTRA-TERRITORIAL REACH OF CHINA'S ANTI-BRIBERY LAWS

China has been the world's largest creditor, having extended its Belt and Road Initiative (BRI) to 154 nations and 32 international organisations. In the last three years, it has also given $78.5 billion in debt from its $1 trillion BRI infrastructure financing program, spending $240 billion in bailout funds between 2008 and 2021. These actions demonstrate China's growing assertiveness on the international stage.[69] The leadership of China is emphasising how important it is to be able to apply its own laws to foreign matters. The Supreme Court of China made public a lower court judgement concerning Xi Zhengbing and Zhou Zhonghe in October 2023 to communicate to all Chinese intermediate courts that the moment has come for China to exert extraterritorial jurisdiction over acts relating to commerce.

In an apparent first, China's Guangzhou Intermediate Court found two persons guilty of bribing foreign officials [70] It discovered that between 2017 and 2019, Xi Zhengbing and Zhou Zhonghe, two former senior employees of the state-owned China Railway Tunnel Group Co., Ltd. (CRTG), paid bribes totalling SG$220,000 (US$166,000) to Henry Foo Yung Thye, the deputy group director of Singapore's Land Transport Authority, in order to pursue illicit business interests. Xi was also found guilty of accepting bribes totalling $270,000 (or 1.92 million Chinese yuan). The

[68] *Ibid*
[69] Amy Hawkins, 'China spent $240bn on Belt and Road bailouts from 2008 to 2021, study finds' *The Guardian* (28 March 2023) <https://www.theguardian.com/world/2023/mar/28/china-spent-240bn-belt-and-road-debts-between-2008-and-2021> accessed 07 October 2024
[70] Chi Yin, 'A New Era for China's Overseas Anti-Corruption Campaign' *The Diplomat* (02 February 2024) <https://thediplomat.com/2024/02/a-new-era-for-chinas-overseas-anti-corruption-campaign/> accessed 07 October 2024

court sentenced Zhou to two years in prison for accepting bribes and five years in prison for Xi's combined actions of paying and accepting bribes.

A Singaporean court sentenced Foo to five and a half years in prison in 2021 for accepting the said bribes.[71]

The Xi and Zhou case offers insight into how China's anti-corruption laws use extraterritorial jurisdiction.[72]

This raises the question of what gives China the right to apply its anti-bribery laws outside of its borders. Chinese courts were given jurisdiction over offences included in international treaties or conventions to which China was a party or member when the country's Criminal Law was first updated in 1997. Later, in 2003, China joined the UNCAC, and as a result, in 2011, it modified the PRC Criminal Law to make it illegal to bribe FPOs and OPIOs. Therefore, the Chinese court could assert its jurisdiction in this case based on China's duties under the Convention and modified PRC Criminal Law, even though the crime was committed in Singapore and was a component of Foo's larger bribery scheme.

GLOBAL ENFORCEMENT OF ANTI-BRIBERY LAWS

Transparency International discovered that just two nations regularly implement their foreign anti-bribery laws, the United States and Switzerland, in their research titled 'Exporting corruption 2022'.[73] It was discovered that just two of the four nations that were found actively enforcing anti-bribery legislation in its 2020 report still do so. 38 countries enforced their anti-foreign bribery legislation either very little or not at all, while seven countries were judged to have moderate enforcement. But in the 2022 report, researchers examined 47 exporting nations.

[71] Ahmad Zhaki Abdullah, 'Former LTA deputy group director admits to taking S$1.24 million in bribes' *Channel News Asia* (26 August 2021) <https://www.channelnewsasia.com/singapore/lta-deputy-group-director-bribery-henry-foo-yung-thye-213672> accessed 07 October 2024

[72] Yin (n 70)

[73] 'US IS ONE OF ONLY TWO COUNTRIES ACTIVELY ENFORCING ANTI-BRIBERY LAWS' (*Transparency International*, 02 December 2022) <https://us.transparency.org/news/exporting-corruption-2022-statement/> accessed 07 October 2024

Three of these nations, China, India, and Singapore, have not ratified the OECD Anti-Bribery Convention.

According to the report, US enforcement is declining. The decline started in 2020 and accelerated in 2021. Penalties for FCPA enforcement reached a high of $7.13 billion in 2020 and fell to US$461 million in 2021. Based on preliminary statistics, it appears that although U.S. enforcement has increased again in 2022, it is still below pre-pandemic levels.[74]

According to a recent OECD report, Canada's anti-bribery laws are not well enforced.[75] According to the research, in the roughly 25 years since the Corruption of Foreign Public Officials Act was implemented in Canada[76] and the ratification of the OECD Anti-Bribery Convention, just four businesses have been sanctioned, and two individuals have been found guilty of foreign bribery.[77] One of the primary causes of the inadequate enforcement of anti-bribery laws in many jurisdictions is the OECD's inability to address the underlying causes of corruption.[78] One such cause includes the criminalisation of only the supply side of bribery of foreign public officials in international business transactions under the convention.[79] Till today, many state laws lack in the criminalization of the demand side because of the OECD convention's failure to incorporate it as an offence.[80]

WHY ANTI-BRIBERY LAWS ARE RARELY ENFORCED?

Neoliberal economic doctrines took the world's capitalist nations by storm in the 1980s. Their main point was that businesses needed to be liberated from government intervention in order

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[74] *Ibid*
[75] 'While important legislative and institutional framework enhancements are welcomed, Canada must boost its efforts to fight foreign bribery, says the OECD Working Group on Bribery' (*OECD*, 01 December 2023) <https://web-archive.oecd.org/temp/2023-12-01/667262-canada-must-boost-its-efforts-to-fight-foreign-bribery-says-the-oecd-working-group-on-bribery.htm> accessed 07 October 2024
[76] Corruption of Foreign Public Officials Act 1998
[77] Laureen Snider, 'The Conversation: Canada needs to move beyond poorly enforced bribery laws and tackle corruption's root causes' (*Queen's Gazette*, 17 November 2023) <https://www.queensu.ca/gazette/stories/canada-needs-move-beyond-poorly-enforced-bribery-laws-and-tackle-corruption-s-root-causes> accessed 07 October 2024
[78] *Ibid*
[79] Gillian Dell, 'OECD ANTI-BRIBERY CONVENTION AT 25: TIME TO STEP UP ENFORCEMENT' (*Transparency International*, 16 April 2024) <https://www.transparency.org/en/blog/oecd-anti-bribery-convention-at-25> accessed 07 October 2024
[80] *Ibid*

to operate at their highest levels of productivity and efficiency.[81] Unrestrained globalisation and widespread privatisation of public sector activities ensued. Funding was reduced, regulatory agencies were dissolved, and regulations were repealed. The removal of currency barriers and tariffs allowed businesses to grow internationally. Massive increases in corporate wealth, size, and influence were brought about by the explosion of globalised free trade, and this, in turn, led to increases in inequality both inside and between countries.[82] Neoliberal policies have had a significant impact. Numerous people in charge of enacting and upholding laws penalising corporate misconduct were ousted due to the deregulation, defunding, and downsizing of regulatory agencies and agents. Since multinational businesses have become so important to our economic and cultural life, and because they have been permitted to become so big and strong, governments are unable to stop them from breaking the law or penalising them for it. In light of all of this, meaningful action against corruption in all jurisdictions needs to go beyond the OECD's reactive and limited definition of bribery law and policy in order to address the negative effects of globalisation and place multinational firms under democratic governance. Although the Anti-Bribery Convention mandates that nations enact laws outlawing foreign bribery, there have been some disparities in how these laws have been implemented and enforced.[83] Transparency International study reveals that most OECD nations have alarmingly low levels of enforcement of foreign bribery rules despite some high-profile penalties and prosecutions.[84] According to the 2018 report, more than half of global exports come from nations that do not prosecute foreign bribery.[85] The lack of enforcement is most widespread in developing countries.[86] Therefore, in the following section, we discuss recommendations that can help

[81] Kean Birch, 'What exactly is neoliberalism?' *The Conversation* (02 November 2017) <https://theconversation.com/what-exactly-is-neoliberalism-84755> accessed 07 October 2024
[82] 'Looking Back: 2023 Year in Review' (*Queen's Gazette*, 18 December 2023) <https://www.queensu.ca/gazette/stories/2023-year-review> accessed 07 October 2024
[83] 'Working Group on Bribery' (*OECD*, 2013) <https://www.oecd.org/en/about/committees/working-group-on-bribery.html>
[84] 'STRENGTHENING ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION PROJECTS' (*Transparency International*, 2023) <https://www.transparency.org/en/projects/strengthening-enforcement-of-the-oecd-anti-bribery-convention-1> accessed 07 October 2024
[85] 'CORRUPTION PERCEPTIONS INDEX' (*Transparency International,* 2023) <https://www.transparency.org/en/cpi/2023> accessed 07 October 2024
[86] *Ibid*

bridge the gap in the enforcement of Anti-bribery laws with a particular focus on developing countries.

BRIDGING THE GAP IN THE ENFORCEMENT OF ANTI-BRIBERY LAWS

In view of the research findings, three gaps are found that hamper the enforcement of the Anti-bribery Law. 1) Non-prohibition of the demand-side of bribery under the OECD convention, 2) Non-prosecution of the person inducing a US national into committing bribery outside the US under the FCPA as found in Hoskin's case, 3) narrow scope of corporate accountability for the conduct of its employees or agents as found under Singapore's corruption Act 1960, 4) Lack of global level playing for the enforcement of anti-bribery laws due to a limited number of signatories to OECD and UNCAC conventions. In this section, the researcher tries to bridge these gaps for adequate enforcement of anti-bribery laws as follows:

In order to achieve a globally effective enforcement mechanism, both the supply side (the bribers) and the demand side (the public officials) of the bribery transaction must actually run the risk of being discovered, prosecuted, and sanctioned.[87] The overall deterrent effect of the international law enforcement system is strengthened if there are genuine enforcement risks for both the supply and demand sides of bribery. Because if one side of the bribe transaction is discovered in such circumstances, the other side will quickly be discovered as well. Together, these results show that mutually reinforcing outcomes are possible when both parties of bribery transactions implement effective enforcement. The Organisation for Economic Cooperation and Development (OECD) has also come to the conclusion that bribes are two-way payments. It recently made the following observation: *"To have a globally effective overall enforcement system, both the supply-side participants (i.e., the bribers) and the demand-side participants (i.e., the public officials) of bribery transactions must face genuine risks of prosecution and sanctions."*[88]

[87] 'Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?' (*OECD*, 2018) <https://web-archive.oecd.org/temp/2018-12-11/490046-Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf> accessed 07 October 2024

[88] *Ibid*

As a result, anti-bribery legislation has lately been approved by the USA, UK, France, Switzerland, and many other major economic powers, making it illegal for foreign officials to solicit or accept bribes.[89]

As far as the second gap is concerned, Hoskin's decision has sparked concerns about extra-territorial enforcement of Anti-bribery Laws in the US. It established that foreign nationals who organise and direct a criminal conspiracy in the United States from outside the country are immune from prosecution by the U.S. government, but those who merely act as agents for a conspiracy from abroad are subject to prosecution.[90] The highest management of firms cannot be monitored by the U.S. government due to this blatantly illogical plan. Furthermore, this enforcement gap is significant. According to the OECD, nearly all foreign bribery conspiracies involve business management, and two-thirds of them involve top corporation officials.[91] If the extraterritorial application of accomplice liability is limited, prosecutors won't be able to monitor the overseas group that organises and enables the majority of international bribes. To bridge this gap, some of the US doctrines that would support the extra-territorial prosecution of foreigners inciting US officials for commercial bribery are discussed in this section:

The Effects Doctrine supports extra-territorial prosecution: According to international law and conventions, the United States may only claim extraterritorial jurisdiction in situations which directly affect its interests and when doing so, is a justifiable exercise of its sovereignty.[92] To assess if jurisdiction is reasonable, the US courts have developed a standard known as the effects doctrine,[93] which requires the court to determine whether the defendant's actions caused direct and significant harm to American interests.[94] The effects doctrine unequivocally affirms jurisdiction over Hoskins in this case. Individuals who assist FCPA primary offenders cause direct and significant harm to American interests. For instance, Hoskins openly undermined

[89] Lucinda A Low et al., 'The 'Demand Side' of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough' (2015) 84(2) Fordham Law Review <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5145&context=flr> accessed 07 October 2024
[90] *United States v Hoskins* [2018] 902 F 3d 69
[91] 'OECD Business and Finance Outlook' (*OECD*, 2017) <https://doi.org/10.1787/9789264274891-en> accessed 07 October 2024
[92] Brown (n 41)
[93] *Ibid*
[94] *Tamari v Bache Co* [1984] 730 F 2d 1103

American efforts to stop international bribery by directing people of the United States to break the International Corrupt Practices Act (FCPA) inside US borders.[95] Courts have ruled that such acts fall under the effects doctrine many times.[96] Jurisdiction is not an issue here because the OECD called on countries to [interpret jurisdiction] broadly so that an extensive physical connection to the Bribery Act is not required. Therefore, charging defendants such as Hoskins would not violate international law or norms.

The Charming Betsy Doctrine supports extra-territorial prosecution: A canon of statutory construction known as the Charming Betsy Doctrine holds that when courts interpret American law, they should assume Congress did not intend to offend international norms.[97] The OECD Anti-Bribery Convention does not provide jurisdictional limits.[98] Hence, the reasonable presumption can be made that the extra-territorial application of FCPA would not violate international norms related to corruption and bribery.

Outrooting skepticism against extra-territorial application of Anti-Bribery Laws: When discussing the extraterritorial implementation of state laws, the majority of critics focus on one problem: international hostility.[99] They worry that by extending the FCPA's extraterritorial reach, the US will be committing moral and economic imperialism, which will infuriate the rest of the world. To justify their scepticism towards the extraterritorial application of the FCPA, most critics rely on international hostility towards antitrust laws.[100] However, it is inaccurate to compare anti-bribery enforcement to antitrust enforcement because, in contrast to antitrust enforcement, the expansion of the FCPA's extraterritorial application does not pose a significant threat to international harmony. In the last twenty years, No significant diplomatic rift can be

[95] *United States v Hoskins* [2018] 902 F 3d 69
[96] Evan Forbes, 'Extraterritorial Enforcement of the Foreign Corrupt Practices Act: Asserting US Interest or Foreign Intrusion?' (2020) 93 Southern California Law Review <https://southerncalifornialawreview.com/volumeandissue/vol-93-postscript/> accessed 07 October 2024
[97] *Murray v The Charming Betsy* [1804] 6 US 64
[98] 'Argentina-Brazil-Bulgaria-Chile-Slovak Republic - Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (n 53)
[99] Steven R Salbu, 'The Foreign Corrupt Practices Act as a Threat to Global Harmony' (1999) 20(3) Michigan Journal of International Law <https://repository.law.umich.edu/mjil/vol20/iss3/1> accessed 07 October 2024
[100] Gary E Dyal, 'The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes' (1985) 6 Northwestern Journal of International Law & Business <https://scholarlycommons.law.northwestern.edu/njilb/vol6/iss4/34/> accessed 07 October 2024

attributed to the enforcement of [the FCPA and no empirical evidence supports the conclusion that anti-bribery laws seriously offend host countries.[101] There are several reasons for this. Unlike antitrust law, in which international attitudes vary widely,[102] many states have condemned and criminalized bribery.[103] Resultantly, unlike antitrust laws, the U.S. cannot engage in moral imperialism regarding the general concept of anti-bribery enforcement because the same has been codified in international treaties and signed by a number of countries. In view, extending the extraterritorial application of the FCPA's accomplice liability would not produce the same outcome. Considering that the primary violators of the FCPA are required to have a connection to the United States either by citizenship or territoriality,[104] accomplice liability would naturally apply to those accomplices who participate in activities that either directly involve Americans or occur on American soil.[105] Therefore, there would be no danger of runaway jurisdiction or international animosity if accomplice liability under the FCPA were to be extended across national borders.

In view of the above, the US Congress should pass a law or amend its existing laws to expand the extraterritorial reach of accomplice liability under the FCPA to the limits of U.S. courts' jurisdiction under the effects test. Second, the Supreme Court could hold that the extraterritorial reach of accomplice liability is not limited to the extraterritorial reach of the FCPA's principal liability.

Further, as for the corporate liability under pillar II of UNGP, certain lacunas in anti-bribery laws need to be addressed, such as those found in the Singapore Corruption Act 1960 according to which corporation can be held liable for individual offences committed by its agents or employees only if such employee or agent is the "*living embodiment*" of the company or where the acts were performed "*as part of a delegated function of management*". The benefit of the doubt

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[101] Philip M Nichols, 'The Myth of Anti-Bribery as Transnational Intrusion' (2000) 33(3) Cornell International Law Journal <https://scholarship.law.cornell.edu/cilj/vol33/iss3/7/> accessed 07 October 2024

[102] Baker McKenzie, 'Antitrust Laws Around the World' *Global Compliance News* (2015) <https://globalcompliancenews.com/antitrust-and-competition/antitrust-laws-around-the-world> accessed 07 October 2024

[103] Fritz F Heimann, 'Combatting International Corruption: The Role of the Business Community' (1997) Institute for International Economics <https://www.piie.com/publications/chapters_preview/12/8iie2334.pdf> accessed 07 October 2024

[104] United States Code 1926, ss 78dd-1 - 78dd-3

[105] *Ibid*

about the delegated function of management results in the acquittal of individual offenders who commit bribery offences while being part of the corporations. In view, the 1960 Act needs to be amended on equal footing with the Anti-bribery laws of the UK that hold corporations accountable even for the failure to prevent the offence by any of its agents/subsidiaries.

Research on settled cases involving international bribery clearly identifies a number of issues that impede the enforcement of anti-bribery laws, particularly in developing countries where such laws are hardly ever enforced due to the following reasons:[106]

- Lack of ability in several areas pertaining to the examination and prosecution of FBL cases in developing nations;
- Insufficient information exchanged between prosecutors in developing and developed nations;
- Insufficient political will to look into and interfere politically in developing nations;
- Lack of transparency may also have some unexpected consequences for a parallel investigation in a developing nation. For instance, it might reveal the receipt of the payment, allowing a public official to conceal the proceeds of corruption or delete evidence before local authorities can look into it.

The following section looks at the role donor agencies can play in helping countries overcome some of these obstacles.

Donor agencies can help developing countries in the enforcement of Anti-Bribery Laws: Some of the negative externalities of international bribery laws and enforcement can be lessened with the assistance of donor organisations. For the following reasons, foreign bribery issues are expected to become even more relevant for donor organisations as more donor countries adopt anti-bribery laws and strengthen enforcement in an effort to comply with the OECD Anti-Bribery Convention and UNCAC:[107]

[106] Francesco De Simone and Bruce Zagaris, 'Impact of foreign bribery legislation on developing countries and the role of donor agencies' (2014) 14(6) Anti-Corruption Resource Centre <https://www.u4.no/publications/impact-of-foreign-bribery-legislation-on-developing-countries-and-the-role-of-donor-agencies.pdf> accessed 07 October 2024

[107] *Ibid*

- The agencies are perfectly positioned to facilitate foreign bribery investigations due to their function as a bridge between developing and developed nations. Donor organisations can serve as an intermediary between local businesses in their home nations and the governments of developing nations, who are on the supply and demand sides of international bribery, respectively. A transparent and corrupt-free environment would be advantageous to the foreign enterprise as well as the host government, and donor agencies have historically helped to foster such an atmosphere.
- Foreign bribery has an impact on foreign investments, which in turn impacts economic development and growth. It threatens democratic governance insofar as it erodes public confidence in institutions. Foreign bribery is essentially a development issue, and many developing nations may find it difficult to address it on their own without outside assistance. It, therefore, forms the core of donor agencies' missions.
- Donor organisations have the authority to push for the examination and legalisation of bribery cases in the host nations. Additionally, it can assist civil society and media organisations that fight corruption. Donor organisations can offer technical support and strengthen developing nations' ability to assert their victim status in international legal proceedings in the host countries.
- Donor organisations can push enforcement organisations in their home nations to acknowledge a foreign nation's ownership or damages claim in circumstances of bribery. It may also draw attention to the necessity of changing the law to permit the inclusion of other parties in settlements.

CONCLUSION

To conclude, the codification and enforcement of anti-bribery laws can be found in America, Europe and some of Asia states such as China, yet the same has not been developed worldwide. This can be adjudged from the fact that only 46 countries across the world have signed the OECD Anti-bribery Convention till date.[108] The global level playing for the enforcement of anti-bribery laws is not possible without the signing of the OECD and UNCAC by the majority of states.

[108] 'Fighting foreign bribery' (*OECD*) <https://www.oecd.org/en/topics/sub-issues/fighting-foreign-bribery.html> accessed 07 October 2024

Particularly in the 21st century, when multinational corporations are more likely to violate business-related human rights than ever before due to globalisation and inter-connectedness of businesses, the harm caused to local communities due to bribery offences is incalculable which necessitates the development of Anti-bribery laws regime on a priority basis. Developing and under-developed states are more exposed to the harm caused by bribery-related offences due to widespread corruption in government functionaries and private businesses losing ground in the face of global economic recession, especially after Covid 19 and the Russia-Ukraine war. In view, the adoption of international business and human rights treaties and consequent codification of anti-bribery laws as a state practice by developing and under-developed countries should be encouraged and supported. In that, donor countries and agencies can play a vital role. Lastly, If Western enforcement techniques continue to deliver contradictory messages, as has been found in the US and Singapore, anti-bribery laws will never gain traction in the third world. In less developed countries, it is unlikely that any anti-bribery movement will gain traction until the West takes genuine steps to implement the OECD and UNCAC on equal footing.