THE U.S. FOREIGN CORRUPT PRACTICES ACT (FCPA): ITS CONTAGION EFFECT ON OTHER JURISDICTIONS

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ABSTRACT

The U.S. Foreign Corrupt Practices Act ("FCPA") was enacted in 1977 to, among other things, put an end to bribery, restore an already impaired public confidence, create a level playing field for honest businesses to protect the integrity of the marketplace. The Act was enacted following discoveries and revelations of widespread global corruption in the wake of the Watergate political scandal in the U.S. This paper examined the key provisions that passed in the FCPA in 1977 and the amendments of 1988 and 1998. The impact of the FCPA on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as well as the countries that are signature to the OECD Convention on Combating Bribery was analysed. The paper also examined whether the U.S. FCPA has been mimicked in other countries, including UK, Canada, Russia and Belgium. The FCPA comprised both anti-bribery provisions and accounting provisions. The former were designed to stop individuals and corporate entities from bribing foreign government officials (in their attempt to obtain or retain business), while the latter were established to prevent accounting practices designed to conceal payments "corruptly" made to foreign government officials. The paper concluded that the FCPA has been mimicked in other countries. However, the degree to which this has been done varies from one jurisdiction to another.

Keywords: Bribe, Bribery, Anti-Bribery, Corruption, Anti-Corruption, Anti-Bribery Convention, FCPA, FCPA Enforcements.

INTRODUCTION

The United States (U.S.) Foreign Corrupt Practices Act ("FCPA" or "the Act") was enacted in 1977 to, among other things, put an end to bribery, restore an already impaired public confidence, create a level playing field for honest businesses and protect the integrity of the marketplace. The Act was enacted following discoveries and revelations of widespread global corruption in the wake of the Watergate political scandal ("scandal") in the U.S. The Securities and Exchange Commission ("SEC" or "the Commission") discovered in the immediate aftermath of the scandal that hundreds of millions of dollars had been paid in bribes to foreign government officials by more than 400 U.S. companies to secure business abroad (DOJ & SEC, 2012). The basic tenet of a free market system is that the sale of goods should happen on the basis of quality, price and service. Corporate bribery of foreign official which takes place mainly to help corporate entities in gaining business is destructive of this basic tenet. Indeed, corporate bribery is antithetic to healthy competition in the global marketplace.

The FCPA comprised both anti-bribery provisions and accounting provisions. The former were designed to stop individuals and corporate entities from bribing foreign government officials (in their attempt to obtain or retain business), while the latter were established to prevent accounting practices designed to conceal payments "corruptly" made to foreign

government officials (Cook & Connor, 2010). Specifically, the Act prohibits an offer to pay, a payment, promise to pay or authorisation of payment of money or anything of value to a foreign official with an intent or desire to wrongfully influence any act or decision of the foreign official (the recipient) in his or her official capacity or to secure any other improper advantage in order to "corruptly" obtain or retain business (Cook & Connor, 2010; DOJ & SEC, 2012). Corruptly, as used in this paragraph simply means an intent or desire (corrupt intent) to wrongfully influence or induce a recipient of anything of value. In other words, there must be a corrupt motive for offering to pay, paying, promising to pay or authorising the payment. Anything of value as used in this paragraph simply means that bribes can come in many forms (cash, gifts or any other guise), in which value can reasonably be ascribed to.

The broad application of the FCPA showed that the U.S. would continue to vigorously enforce the Act wherever there is a minimal nexus to the United States. The Act's anti-bribery provisions apply to:

- all companies listed in any stock exchange in the U.S. and their directors, employees, officers, agents and shareholders;
- all companies whose stocks are traded in the over-the-counter market in the U.S. and their directors, employees, officers, agents and shareholders;
- all foreign companies listed on any U.S. stock exchange or required to file reports under section 13(a) or 15(d) of the Securities and Exchange Act of 1934 (as amended) and their directors, employees, officers, agents and shareholders;
- all "domestic concerns" and their directors, employees, officers, agents and shareholders. Domestic concerns comprised any person who is a citizen, national or resident of the U.S., or any company, corporation, association, business trust, partnership, sole proprietorship or unincorporated organisations, which is organised under the laws of the U.S. or its states, possessions, territories or commonwealths or that has its principal place of business in the U.S.; and
- all persons and entities, other than those mentioned above, acting while in the territory of the U.S.

In 1988, the U.S. Congress amended the Foreign Corrupt Practices Act to add two affirmative defences: the local law defence; and the reasonable and bona-fide promotional expense defence. The former simply means that the payment was lawfully made under the written laws and regulations of the foreign country, while the latter simply means that the money was spent as part of performing a contractual obligation or demonstrating a product (DOJ & SEC, 2012). Due to the fact that these are affirmative defences, the burden of proof is on the defendant or the individual who made the payment or the person who spent the money. As part of the 1988 amendments of the FCPA, the U.S. Congress requested that the U.S. President should negotiate an international treaty with members of the OECD (Organisation for Economic Cooperation and Development) to prohibit bribery in international business transactions. Subsequently, several negotiations were held, which eventually resulted in the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention" or "Anti-Bribery Convention"). All 29 member countries and 5 non-member countries, including Argentina, Bulgaria, Brazil, Slovak Republic and Chile were signature to the OECD Anti-Bribery Convention in December 1997. Similarly, all 35 OECD member countries and 6 non-member countries, including Brazil, Argentina, Columbia, Russia, South Africa and Bulgaria have adopted the OECD Anti-Bribery Convention of 2011 as at September 2016. Some of the BRICS countries such as China and India and many other emerging economies such as Nigeria are yet to adopt

the OECD Anti-Bribery Convention. The anti-bribery convention, amongst other things, required each party to take such measures as may be necessary to make it a criminal offence to bribe foreign public officials. This was the foundation that marked the beginning of global efforts towards combating the menace of bribery of foreign public officials in international business.

In 1998, the Act was further amended to align its provisions with the requirements of the Anti-Bribery Convention. The 1998 amendments expanded the scope of the Act to, amongst other things:

- include public International Organisations in the definition of "foreign officials;"
- incorporate payments made to secure "improper advantage" into the FCPA; and
- apply criminal penalties to nationals of foreign countries employed by or acting as agent on behalf of U.S. companies.

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into force on 15th February, 1999, with the U.S. as a founding party.

ENFORCEMENT UNDER THE FCPA

The Department of Justice and the U.S. Securities and Exchange Commission share enforcement authority for the Foreign Corrupt Practices Act's anti-bribery and accounting provisions. The DOJ and the SEC also work with many other federal agencies and law enforcement partners such as the Federal Bureau of Investigation ("FBI"), the Department of Commerce and State, the Department of Treasury's Office of Foreign Assets Control and the Department of State's Bureau of International Narcotics and Law Enforcement Affairs to investigate and prosecute FCPA violations, to reduce or eliminate, if possible, bribery demands by setting up world class governance programmes and other measures and to create and promote a level playing field for U.S. companies conducting their business abroad (DOJ & SEC, 2012). The FBI is a critical partner in the fight against international corruption and fraud as it works with the DOJ to investigate potential FCPA violations.

The DOJ has criminal enforcement authority over all FCPA violations and has civil enforcement authority on anti-bribery provisions over "domestic concerns," while the SEC's Division of Enforcement has responsibility and authority over all other civil enforcement for FCPA violations. As a way of strengthening civil enforcement against violations of the provisions of the FCPA, the Enforcement Division of the SEC in 2010 created a specialised FCPA Unit, with Attorneys in Washington D.C. and in regional offices across the United States, to focus specifically on FCPA enforcement. Enforcement (both civil and criminal) of the FCPA is where the U.S. truly stands out in the fight against bribery of foreign public officials. The DOJ and SEC are known for interpreting the FCPA expansively and for pursuing enforcement vigorously. As at 31st of March, 2012, at least 81 companies worldwide were under the investigation of both the SEC and DOJ for possible violations of the FCPA (FBD, 2012). In 2011, the SEC and DOJ completed 15 enforcement actions, culminating in $502.5 million in penalties; while in 2010, the SEC and DOJ completed 22 enforcement actions, resulting in $1.8 billion in fines (FBD, 2012). In 2009, the SEC and DOJ completed 10 enforcement actions, resulting in $644.65 million in fines (FBD, 2012). Between 2009 and 2011, the SEC and DOJ brought 47 enforcement actions compared with 30 recorded for the period 2006 to 2008. FBD (2012) also reported that enforcement actions aimed at non-U.S. companies also increased between these two periods (from seven between 2006 and 2008 to 17 between 2009 and 2011). Total penalties collected by the SEC and DOJ

for the period 2009 to 2011was approximately $3 billion as against the $1.2 billion extracted by the SEC and DOJ between 2004 and 2008 (FBD, 2012). The abovementioned numbers are the very reason why the U.S. is at the fore-front and would continue to champion the fight against bribery of foreign public officials.

HAS THE FCPA BEEN MIMICKED IN OTHER COUNTRIES?

The United States is unarguably the number one leader in the fight against bribery and corruption in international business transactions with its extensive and robust enforcement of violations of the provisions of the Foreign Corrupt Practices Act of 1977 (as amended). Other countries, including 41 other States (Countries) parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions have also taken necessary steps to combat the menace of international bribery by either enacting new laws or strengthening through amendments of existing laws (e.g. Criminal Codes and Penal Codes). Several of these laws, if not all, have mimicked either to a greater or lesser extent, the United States Foreign Corrupt Practices Act. This has been made possible because all parties continue to work towards achieving the "minimum standard" encapsulated in the Ant-Bribery Convention adopted by the "Negotiating Conference" on 21st November, 1997 (OECD, 2011a) and the "Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" adopted by the Council on 26th November, 2009 (the 2009 recommendations), with subsequent amendments adopted by the Council on 18th February, 2010 (OECD, 2011b). The FCPA was also easy to mimic because the content of the minimum standard referred to above, when fully implemented, is not significantly different from the provisions of the FCPA. This is more so because the U.S. contributed significantly to the minimum standard through its negotiation with other members of the OECD between 1988 and 1997. Thus, the FCPA, being a pioneer legislation on international bribery, laid the foundation upon which the various Articles in the Anti-Bribery Convention were developed.

As of 10th February, 2014, there were 40 States Parties to the OECD Anti-Bribery Convention, which comprised 34 OECD member countries (including, the U.S., the UK, Canada, Australia and Germany) and six non-member countries (Argentina, Brazil, Bulgaria, Columbia, Russia and South Africa). All 40 parties are also members of the OECD Working Group on Bribery (Working Group). The Working Group has overall responsibility for monitoring the implementation of the Anti-Bribery Convention, the Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents/Instruments (DOJ & SEC, 2012). Members of the Working Group on a quarterly basis review and monitor the implementation and enforcement of the Anti-Bribery Convention as well as the 2009 recommendations and related instruments by member States across the world.

COUNTRY BY COUNTRY MONITORING REPORT

The Anti-Bribery Convention established an open-ended, peer-review monitoring mechanism to ensure that the international obligations States Parties have taken on under the Anti-Bribery Convention, the 2009 Conventions and related instruments are thoroughly, extensively and robustly implemented. The peer-review for each Party to the Convention is conducted in three phases, as follows:

- the first phase review encapsulates an in-depth evaluation of each State Party's domestic laws implementing the Anti-Bribery Convention;
- the second phase review assesses the effectiveness of each State Party laws and anti-bribery efforts; and
- the third and final phase review is a permanent cycle of peer review, which evaluates a State's Party enforcement actions and results, as well as the State's Party efforts towards addressing the observed weaknesses identified during the second phase review.

The phase 1 to phase 3 monitoring reports of the OECD Working Group for some of the States Parties to the Anti-Bribery Convention containing findings and recommendations upon rigorous reviews have been summarised from the OECD Country reports on the implementation of the Anti-Bribery Convention.

Belgium

Belgium has two laws criminalising bribery. The Bribery Prevention Act of February 1999, which came into force on 3rd April, 1999 and the Act Establishing the Criminal Liability of legal persons, which came into force on 3rd August, 1999. Although the anti-Bribery laws broadly defined the offence of bribery, however, the application of the principle of mutually exclusive liability between natural and legal persons hinder the enforcement of corporate liability.

In addition, as at October 2013, the Working Group was very much disappointed by the lack of priority Belgium gave to the fight against the menace of bribery against foreign public officials by Belgian companies and natural persons. The Working Group was also concerned by the flagrant lack of resources given to the authorities in charge of investigations, prosecutions and sentencing.

Bulgaria

On 15th January 1999, Bulgaria enacted legislation in the form of the Law on Amendment to the Bulgarian Penal Code, which entered into force on the 29th of January, 1999. The amended Penal Code broadly defined and criminalised the offence of bribery. However, many of the recommendations of the Working Group have not been implemented and no bribery enforcement in Bulgaria as at May 2013.

Canada

The Corruption of Foreign Public Officials Act (CFPOA) came into force on 14th February, 1999. Subsequently, amendments were made to the CFPOA in January 2002 as a result of the amendments to Canada's Criminal Code. The CFPOA is widely interpreted to cover both natural and legal persons and to both Canadian and non-Canadian citizens. Although the CFPOA broadly defined the offence of bribery, but the ability to continue criminalising the offence of bribery and increasing its enforcement momentum as well as its enforcement jurisdiction is still narrow in scope and the criminalisation does not apply to "not-for-profit organisations as at May 2013. Canada is currently taken steps to improve and address the recommendations.

New Zealand

The Crimes (Bribery of Foreign Public Officials) Amendment Act of 2001, which entered into force on 3rd May, 2001, broadly defined the offence of bribery foreign public official and extensively enforced the Act into extra-terrestrial jurisdictions. However, there is a complete lack of enforcement of the foreign bribery offence. Since becoming a Party to the Anti-Bribery Convention, New Zealand has not prosecuted any foreign bribery case as at September, 2010.

Russia

On 4th May, 2011, Russia caused far reaching amendments to be made to its Criminal Code and the Code of Administration Offences of the Russian Federation in relation to the strengthening of public governance in the area of combating corruption. The law came into force on 16th May, 2011. Although Article 291 of the Criminal Code widely defined foreign bribery and criminalised the offence of bribery by both natural and legal persons, the October 2013 report clearly stated that there were several areas in which the implementation of the Anti-Bribery Convention and related instruments falls short. There were concerns bordering on deficiencies in Russian laws on foreign bribery of public officials and the Working Group advised Russia to adopt appropriate laws as a matter of urgency and follow through with its implementation. It was also noted that there were no adequate procedures to protect whistle-blowers in both the public and private sectors. As of October 2013, no cases of foreign bribery have been uncovered, investigated or prosecuted. The Working Group posited that this inadequacy could be addressed if adequate resources are devoted to the enforcement of foreign bribery.

Sweden

Relevant amendments were made to the Swedish Penal Code, which came into force on 25th March, 2009, with subsequent amendments. The amendments took effect from 1st July, 2004. Although Sweden has criminalised foreign bribery for natural persons, it was yet to amend its laws to criminalise offences by legal persons. As at June 2012, Sweden's enforcement of the foreign bribery laws was far too weak.

United Kingdom

The United Kingdom ("UK") ratified the OECD Anti-Bribery Convention on 14th December, 1998. Since that date, the UK has criminalised the bribery of foreign public officials by mainly relying on the Public Bodies Corrupt Practices Act of 1889, the Prevention of Corruption Act 1906 and the common law bribery offence. Until a 2001 amendment of these laws, none of them, hitherto, addressed the act of foreign bribery.

On the 8th of April 2010, the UK's ground-breaking Bribery Act ("UK Bribery Act") which modernised the law on bribery received Royal Assent. The UK Bribery Act entered into force on 1st July, 2011. The UK Bribery Act provided the broadest definition of bribery offences as it covers both the "supply side" (e.g. offering), which is normally referred to as "active bribery" and the "demand side (e.g. requesting), which is usually referred to as "passive bribery" and cuts across both public and private sectors." Specifically, the UK Bribery Act created four categories of bribery offence, which addressed the following:

- offering to pay, promising to pay or paying a bribe to another person;
- requesting, agreeing to receive or accepting a bribe from another person;
- bribing a foreign public official; and
- a corporate offence of failing to prevent bribery.

The UK Bribery Act also provided for the liability of a company arising from the conduct of those associated with the company. Under the UK Bribery Act, an individual is associated with a company if he or she performs services on the company's behalf. In addition, The UK Bribery Act provided a broad definition of foreign public official in line with the OECD Convention. The introduction of the new offence for companies of "failing to prevent bribery" is one of the most significant aspects of the UK Bribery Act. Unlike the FCPA, the UK Bribery Act expressly provided for full defence ("adequate procedure defence") if a company can demonstrate or show that it had adequate procedures in place to prevent bribery. However, in determining the need for the design and implementation of this procedure, the UK Bribery Act recommended the adoption of a risk-based approach. Although the UK Bribery Act falls short of the FCPA with regard to jurisdictional reach, it still has a broad territorial scope.

As of March 2012, the Working Group commended the UK for the significant increase in enforcement actions brought against both natural and legal persons for foreign bribery offences since the last visit in May 2011. The Working Group further encouraged the UK to continue providing adequate resources and support to the Serious Fraud Office ("SFO"), the Public Prosecutions for Northern Ireland and other relevant law enforcement agencies to enable them continue improving the enforcement's records. On the other hand, the Working Group advised the UK to extend the progress made on the Anti-bribery Convention to its Overseas Territories at a much faster pace. Most, if not all of these territories are considered to be offshore financial centres which might be used to facilitate corrupt transactions.

CONCLUSIONS

There was enough evidence to show that the U.S. FCPA has had contagion effect on other jurisdictions. In other words, the FCPA has been mimicked in other countries. The degree to which this has been done varies from one country to another. A very critical aspect of the fight against bribery of foreign public official that requires more attention, more collaboration, more commitment, more resources and more support is enforcement. Without enforcement, particularly, criminal enforcement against both individuals and legal persons, there would be no deterrence, and if there is no deterrence, then, the "evil doers" would continue to thrive and continue to perpetrate their heinous crime of foreign bribery against the global marketplace.

RECOMMENDATION AND FUTURE RESEARCH

From the foregoing discussions, the author recommends that other jurisdictions should adopt the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This would likely curtail the widespread phenomenon of bribery in international business transactions. Furthermore, this study was theoretically oriented, thus, the author would suggest that empirical studies to explore the impact of bribery and corruption on global business transactions, as well as on the wealth and prosperity of nations should be conducted.

ACKNOWLEDGEMENTS

My sincere thank you goes to Professor Albert D. Widman, D.P.S, my Corporate Finance and Governance tutor at SMC University, who meticulously reviewed and provided helpful feedback on this paper. My profound gratitude also goes to my tutors in Strategic Leadership and Research Methodology at SMC University, Professor William L. Quisenberry, DBA, and Professor Ted Q. Sun, Ph.D, respectively. They both helped in sharpening my research skills.

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