

**MANAGING CORRUPTION RISKS THROUGH  
CORPORATE GOVERNANCE: A CRITICAL STUDY OF  
ENGINEERING, PROCUREMENT AND CONSTRUCTION  
(EPC) CONTRACTS IN THE OIL AND GAS SECTOR**

A thesis submitted to the  
University of Petroleum and Energy Studies

For the award of  
**Doctor of Philosophy**  
in  
Law

By  
**Ravidasan N.S**

March 2023

SUPERVISOR  
Prof. (Dr.) Vijay Kumar Singh



School of Law  
University of Petroleum & Energy Studies  
Dehradun-248007: Uttarakhand

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# Declaration

I declare that the thesis entitled “**Managing Corruption Risks through Corporate Governance: A Critical Study of Engineering, Procurement and Construction (EPC) Contracts in the Oil and Gas Sector**” has been prepared by me under the guidance of Prof. (Dr.) Vijay Kumar Singh. No part of this thesis has formed the basis for the award of any degree or fellowship previously.



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## Certificate

I certify that **Mr. Ravidasan N.S** has prepared this thesis entitled “**Managing Corruption Risks through Corporate Governance: A Critical Study of Engineering, Procurement and Construction (EPC) Contracts in the Oil and Gas Sector**”, for the award of PhD degree in Law of the University of Petroleum & Energy Studies (UPES), under my guidance. He has carried out this work at the School of Law, UPES.

**Guide**

A handwritten signature in blue ink, appearing to read 'Singh', is written over a faint, circular official stamp.

**Prof. (Dr.) VIJAY KUMAR SINGH**

Date: 20<sup>th</sup> March 2023

## **ABSTRACT**

In the current economic environment, corporations play a significant position in the financial growth and the advancement of a country. They control what individuals consume or dress or indeed in what way they settle. Corporations have become prominent channels of development and are increasingly accountable for offering employment, supplies, facilities, and infrastructure. However, there must be measures to ensure that corporations do not take undue advantage of the finances and power they have over the economy. There must be fair and sustainable competition in the market. Even, efficiencies between the companies can be increased in this global economy through a robust and fair competition.

A good quality of service is ensured through competition and corruption destroys the value of the services. Even developed nations are not exempt from corruption as culture of corruption is tolerated by many countries though not encouraged by them.

The growth of infrastructure is critical for the economic development and alleviation of poverty in the country. However, corruption affects allotment of public procurement contracts resulting in substandard public infrastructure and services. The return on infrastructure investment and its quality is reduced by corruption and it also increases investment costs.

The development of most infrastructure projects is undertaken through the EPC contract. An EPC Contract is suitable for infrastructure projects since it provides for single point responsibility and the contractor undertakes the entire responsibility. It is advantageous to the project owner as it provides for the fixed contract price unless the owner issues a change order to the work. The contract completion date is also fixed at the beginning of the work. In case of delay in completion of the project, the Owner may levy liquidated damages.

There is a risk of corruption involved in various stages of infrastructure projects, viz, project appraisal, project selection, design, budgeting, bidding process, implementation, and operation and maintenance.

Corporate governance and compliance are the preventive vigilance mechanism available to deter and detect the corrupt activities. Fraud, corruption, and mismanagement can be substantially prevented through good governance.

The research proceeds on the hypothesis that there is lack of corporate governance principles in the Indian oil and gas sector to detect and prevent corruption, which results in denial of level playing field. The study is intending to discover solutions to *interalia* the following research questions: (i) whether EPC Contracts in Oil and Gas Sector include sufficient measures to prevent corruption? and (ii) Do the legislations in India provide for civil enforcement actions against the corporate corruption?

The study of existing literature shows that there is no specific study about prevention and detection of corruption in the EPC Contracts in the oil and gas sector. Corruption is treated as purely a criminal offence and there is no alternative enforcement mechanism in India. The lack of civil enforcement provisions in the legal framework of India were not a subject matter of study in the previous research. Hence there is merit in conducting research to identify the corrupt practices during the various stages of an EPC Contract and additionally, study the role of corporate governance in managing corruption risks in oil and gas sector.

The reluctance on the part of the employees and companies to admit or share the details of non-compliances, acts, omissions, and failures in the implementation of anti-bribery compliance policies are the major limitations of this research.

Empirical and doctrinal research methodology is adopted in the research study. The primary data is collected through questionnaires shared with the executives (including former employees) working in the oil and gas sector and experts in the field. The antibribery and anti-corruption policies, code of conduct, whistleblower policy, etc of the oil and gas public sector companies were collected to analyse their role in the prevention of corruption, and a qualitative analysis was conducted. The American Psychological Association 7th Edition citation is followed in research work.

The research work discusses the key concepts and analyses Indian and foreign legislative frameworks including the international convention which facilitates the prevention of corruption. The research work delves into the implementation of laws, compliance of laws by the companies and corporate governance policies adopted to prevent corruption in the public procurement process. It also evaluates the enforcement mechanism adopted by the state and the political will of the nation in implementing anti-corruption practices.

The second chapter examines the legislative mechanism in India to tackle corporate corruption. Prior to the amendment in 2018, *the Prevention of Corruption Act 1988* (the PC Act) did not address the issue of corporate corruption. Businesses' integrity and compliance

were bolstered by the amendment in 2018 concerning bribery by commercial organisations. If a business associate is involved in the crime of giving or attempting to give any undue advantage for a commercial organisation, then the organisation can be prosecuted for the offence. Commercial organisations are now held vicariously liable for any bribes paid by their employees to public servants. The second chapter also analyses *the Whistle Blowers Protection Act 2014* (the WP Act) and *the Companies Act 2013*. It is noticed that the WP Act does not provide compensation for whistleblowers for victimisation. The foreign legislations like the *Foreign Corrupt Practices Act 1977* (FCPA), *Sarbanes-Oxley Act*, *the Bribery Act 2010* (UKBA) and the role of United Nations Convention Against Corruption (UNCAC) in the prevention of corrupt practices are analysed in second chapter.

The third chapter of the research explains the methods that are essential for realising stronger and more efficient corporate governance in any business or institution. The upper management sets the tone throughout the organisation by setting an example for their employees to follow. The tone at the top has a cascading effect as the employees tend to emulate their managers' actions and behaviour. The culture of an organisation should support ethical behaviour and adherence to the law.

The third chapter analyses *the Companies Act 2013* on the touchstone of transparency, fairness, accountability, disclosure, and checks and balances. It is worth to note that the internal controls, independence of directors, the audit committee, and shareholder activism have all been included in the Indian law. Despite adopting a robust legal framework, corporate corruption cases are not uncommon. There is still a need for effective implementation of the laws at all levels to ensure that the corruption can be prevented effectually.

In the absence of public procurement law enacted by the Parliament, the role of the Manuals for Procurement for Goods 2017, Manual for Procurement of Works 2019, Manual for Procurement of Consultancy and Other Services 2017 and the General Financial Rules 2017 (GFR) in improving transparency in the procurement process as well as reduction of subjectivity is analysed in the third chapter. The manual states that the reduction in risk factor enables the contractor to submit a competitive price. Responsibility for each risk shall be with the party best suited to handle it. Fair price variation clauses should reduce risk for both the contractor and the public sector organisation by mimicking market forces of price escalation and price decrease. The manual as well as the GFR recommends for inclusion of price variation formulae for the contracts in which the delivery period is beyond 18 months.

The fourth chapter discusses the effectiveness of corporate governance policies and their ability in preventing corruption within a corporate organisation. The code of conduct, business ethics and vigil mechanism of Public Sector Undertakings (PSUs), private sector companies, and oil and gas corporations in the Gulf Cooperation Council (GCC) countries were analysed to understand the corporate governance principles and vigil mechanisms adopted by them to prevent corruption in the award and execution of EPC Contract. The analysis focuses on the anti-bribery commitments and implementation of the same by the enterprises. It is noticed that the policies adopted by the Indian companies does not expressly prohibit its employees from obtaining or disclosing competitor or customer information through illegal means. Though fairness in action is mentioned in the code of conduct, the tender documents floated by the PSUs do not contain fair and transparent provisions. The abuse of dominance by PSUs are visible in the EPC Contract and the unfair contract terms are incorporated to the detriment of the contractor. Unequal bargaining power coupled with unfair terms in the EPC Contract force contractors to succumb to the demand of bribery or use unethical means to overcome any disadvantageous situations. The research analysis carried out on certain companies showed that companies does not give any guidance to its employees with respect to maintenance of correct and accurate records, nor does it prescribe what are the documents to be stored or archived to foster ethical practices. There is a possibility of disguising bribe as charitable or political contribution. Red flags such as demand for pre-payment without plausible business reasons, transfer funds to offshore accounts or third parties, unusually high commission, service fee not in consonance with the services, suspicious business arrangements or personal relationships is not addressed and/or clarified in the code of conduct.

As per the prevailing policy (except ONGC) only employees are eligible to give whistleblower complaints to the company and an aggrieved business partner is denied the opportunity to approach the company to disclose any demand of bribe or other gratification by the public officials. There is no provision to give anonymous complaints to the organisation.

A questionnaire on a 5-point Likert scale was prepared to collect the primary data from the respondents. The questionnaire was prepared to collect data under five sub-heading, viz, corporate governance effectiveness, compliance, audit, change agents (business partners) and code of conduct. As part of the pilot study, the draft questionnaire was distributed to general counsels, company secretary cum compliance officer, head of internal audit and employees in



the information technology and legal department. The questionnaire was revised based on the valuable comments and suggestions received from the respondents. The respondents were identified through industry contacts of the researcher and the google form questionnaires were sent to the respondents. It is noticed that most of the respondents were not willing to share the information pertaining to corrupt activities followed by the companies. Data analysis results showed that business partners and compliance play vital role in the effectiveness of corporate governance.

The tender documents floated by three major Indian PSUs for the execution of onshore and offshore EPC contracts were analysed to understand the implementation of corporate governance policies in EPC Contracts. The contractual clauses were analysed on the principles of transparency, fairness, accountability, conflict of interest, compliance, checks and balance, ethics and value, and risk assessment. The analysis shows that EPC contracts fail to adhere to the basic principle of corporate governance, i.e., transparency, fairness, and accountability. Majority of the EPC contracts are highly slanted towards favouring the Owner and the contractor has no option but to accept or leave it. Most of the clauses incorporated in the EPC contracts deny the contractor the right to adequate compensation even in case of enhancement of the scope of work or for delays for causes chargeable to the Owner. The contractor is denied its lawful claims even if the Owner fails to fulfil its reciprocal obligations, viz, handing over work front or free issue material. Moreover, the EPC contracts instead of specifically providing a clause for levying liquidated damages, incorporate a clause for price adjustment. Thus, the owner instead of complying with the applicable laws, has incorporated ways to circumvent the law of the land.

The chapter five of the research majorly analyses the EPC Contracts in the Oil and Gas segment in India. The research identifies circumstances in which abuse or misuse of the discretion by the public authorities in the tender process is possible to favour a bidder discarding the public interest. The researcher analyses situations where corruption takes place at pre-bid and post-bid stage of the EPC contract. In order to deter and detect corruption, and to enhance integrity and uphold the transparency in the bidding process, compliance declaration is taken from the bidders. The Owner has the right to disallow the bid or cancel the contract, if the bidder is (a) placed on blacklist or holiday list, or (b) if any enquiry is pending or results in conviction or settlement of any fraudulent or corrupt practises or (c) if the bidder gives a false declaration or suppresses information in relation thereto. The genuineness of the documents is to be certified by the CEO /CFO /Company Secretary of the bidder. Also, the integrity pact

duly signed by the authorised representative of the bidder should be submitted along with the bid proposal. Adequate provisions are incorporated to prevent conflict of interest and the bidders are prohibited from submitting multiple bids, either directly or indirectly.

The fifth chapter discusses about the corrupt practices found in the planning and design stages of the EPC projects. The misuse and/or abuse of position by the PMC/Owner in the preparation of pre-qualification documents may lead to the selection of bidder of their choice for the project. There are several ways that corruption can affect the tender and contract process. The project Owner or PMC might receive illegal gratification from a bidder to illegally disqualify any other bidder at pre-qualification stage. A bidder may resort to payment of illegal gratification to a public official to get favourite treatment during the bidding process, or to manipulate the tender evaluation.

The research discusses about appointment of an agent by the bidder to hide the payment of a bribery to a public official or project Owner. The consideration mentioned in the agreement may not be commensurate with the quantity of the service, or an exaggerated or bogus services will be mentioned in the agreement. The fee paid is grossly more than the face value of the services which the agent is committed to provide under the agreement. The consideration under the contract may be a fraction of the contract value and the success fee will be paid to an agent upon awarded of the contract to the company.

The research examines the usage of change order mechanism as a tool to enhance the contract value. Bribery may be used as a means to induce the Engineer in Charge (EIC) to give extension of time. A subcontractor may be used as a channel to pay bribe. False services may be added under the scope of subcontract in exchange for a definite reward. No service will be rendered by the subcontractor or value of services will not be adequate in return for the subcontract consideration.

The research work identifies the situations in which opportunity for misuse or abuse of discretionary power by public officials to their advantage and seek uncalled demands is available. The opportunities for extortion include approval of documents, certification, change order, approval of vendor, procurement of materials, etc. There is possibility of fraud by collusion between contractor, PMC, and Owner.

The research fingers out that opportunities for corruption are greater in the EPC Contract since it gives excessive discretion to the Owner. Such opportunities can be reduced by minimising discretion, and maximising transparency and accountability. The Government

of India has carried out various measures like E-tendering, Government e-Marketplace (GeM) for public procurement, e-Governance, adoption of Integrity Pact, etc. to tackle corruption and enhance integrity and accountability. The general public should be made aware of the presence of corrupt practices and the measures that can be taken to curb the corruption.

The sixth chapter discusses about the enforcement mechanism prevalent in United States, United Kingdom, and India. It analyses and compares the deterrent effect of criminal and civil enforcement actions taken to prevent the menace of corruption. It also discusses and analyses the various enforcement actions taken against EPC Contractors at the international level. The sixth chapter aims to provide policymakers with insights and guidance on how to use civil enforcement tools in India to fight corporate corruption.

In United States, the criminal enforcement actions are taken by Department of Justice (DOJ), whereas the civil enforcement proceedings are taken by Securities Exchange Commission (SEC). The DOJ introduced the Deferred Prosecution Agreement (DPA) as an alternative to criminal prosecution. In the Non-Prosecution Agreements (NPA), the DOJ agrees that if the terms of the agreement are satisfied, they shall not prosecute the suspected wrongdoer for its alleged wrongdoings and permits the corporate entity to continue to its business.

United States Sentencing Commission Guidelines Manual, 2018 encapsulate the general principles to be followed while sentencing an organisation. The existence of an effective compliance and ethics program is considered as mitigating circumstances at the time of punishing the organisation.

*The Bribery Act 2010* of United Kingdom (UKBA) is the main legislation governing bribery and corruption and it treats corruption as a strict liability criminal offence. UKBA covers the activity of individuals and companies conduct in United Kingdom as well as outside of its territory. It also introduced DPA as an alternative to criminal prosecution through *the Crime and Courts Act 2013*. A DPA must be approved by the Court during the preliminary hearing as well as finalisation of the terms of the settlement. DPA may require payment of compensation to the victim, disgorgement of profits, payment of penalty, or charitable donations. Sentencing guidelines were also introduced by the Sentencing Council for corruption-related offences.

India has adopted the adversarial system of trial in criminal prosecution. Under the adversarial system, the burden of proving the accusation beyond reasonable doubt falls on the prosecutor who makes the accusation. The punishment of companies is not regulated by any

precise rules. policy should consider the corporation as a collective and as individuals to deter corporate crime.

The research speaks about the plea bargaining, which is not recognised by the criminal jurisprudence in India but pleading guilty for the petty offences is provided under the law. The 142<sup>nd</sup> Law Commission report weighed the pros and cons of the plea bargaining and concessional treatment of the offenders for their voluntary pleading as provisions relating to release on probation is effectively implemented by the statute. In India, the burden of proof as well as sentencing issue taunts criminal prosecution against corporates for their criminal activity in their business operation.

The sixth chapter further discusses about episodes of corruption occurred in India, but the perpetrators were brought to justice elsewhere, and the Indian government took no action as a result, save in rare occasions.

The research speaks about the necessity of unity among the nations for enforcement of anti-corruption measures globally to prevent and detect corporate corruption. When the preventive measures fail, the investigation and punishment of offender is essential to instil confidence of the public. A strong political will is required for the effective implementation of anti-corruption measures. A narrow-minded approach or focussing on domestic concern alone would be detrimental to the public good. The government leader must provide their political will to address the corruption issues for the benefit of society and achieve reform. In order to fight against corruption, a strong political will is required to establish a fiscal institution that encourages integrity and accountability throughout the organisation.

The research signifies that only an efficient legislation backed by independent investigating agencies, fair prosecutions, and an active court that acts as a check and balance system can prevent corrupt actions. Furthermore, a political will is needed to enforce anti-corruption measures for the benefit of the public without looking into the face of the offender.

Based on the research work, it is concluded that the unfair clauses in the EPC Contract acts as a catalyst for rent seeking. No guidelines have been laid down for the exercise of discretionary power by the public official. Adoption of unfair means or methods destroys healthy competition in the EPC sector. No policy has been adopted to prevent abuse of dominant position by the procurement entity.

In order to prevent the corruption in EPC Contract, the cause of corruption needs to be identified. It is very clear from the research study that there is a clear lack of fairness, reasonableness, and checks and balances in the EPC Contract. Unfair clauses in the EPC Contract favour the public officials to exercise their discretionary power in an arbitrary manner and assist in rent seeking. The EPC Contract does not incorporate the principles and guidelines prescribed under the Manual for Procurement of Works, Manual for Procurement of Goods and General Financial Rules in its letter and spirit. The research proves that there is no adequate and effective corporate governance mechanism in the oil and gas sector companies in India to prevent and detect corruption.

The researcher is of the view that an ethical pledge can be mandated in the schools and colleges to develop good citizens of future. The seeds of honesty and integrity should be sown in the minds of budding students and build inroads against corruption. The schools and colleges shall include value education and ethics as part of its curriculum.

The CEO and the leadership team act as a role model for the employees and their actions should show commitment and accountability. Management should lead by example, and they should walk the talk. Code of conduct should prohibit employees to keep off the record money or assets for any illegal purposes. Corporations should not give discretionary power to any person who has engaged in any prior illegal activities. There should be a periodical evaluation of the internal control measures and compliance checks to identify the deficiencies and implement control measures.

Every organisation should conduct regular training on an ongoing basis for its employees on their rights and protections under the whistleblower mechanism. The vigil mechanism should induce a sense of trust in the minds of the potential whistleblower that the concerns put forward by them will be tackled honestly without any prejudice to the complainant.

Public sector companies should be directed not to invent new ways, means and concepts to circumvent the law of the land and impose unreasonable conditions in the EPC contract for its benefit. Such public sector companies should not benefit from their own fault and the contractor must be given reasonable extension of time or costs benefit to the contractor, for any act or omission of the Owner. The denial of compensation for the act or omission of Owner is unfair, unreasonable, and arbitrary exercise of power by the Owner. The EPC Contract executed by a PSU should satisfy the test of reasonableness and public interest. The contract

of adhesion executed by contractor must not be arbitrary, unreasonable or against public policy. The standard form of contract should be fair and abide by the principle of good faith. The inequality in bargaining power of the contractor in the EPC Project cannot be abused to take advantage in the standard form of contract.

The procurement authority should develop an appropriate policy and guidelines to assist the decision makers in exercising discretionary powers. Instead of concentration of power in one individual, the exercise of discretionary power may be vested with a committee of three including Chief Vigilance Officer and Compliance Officer of the Owner. As a checks and balance mechanism the exercise of discretionary power can be reviewed by Independent External Monitor.

The researcher is of the view that there is a requirement to have a legislation to uphold the ethical practices in the business as well as administration by the government. The researcher proposes the Ethical Practices Act 2023 for the creation of the Ethical Commission of India (ECI) to prevent corrupt practices. A contractor engaged by the public procurement authority should be directed to submit to ECI all the service contracts as well as supply and service contract executed by it while performing its obligations under the public procurement contract. Substantial penalty should be levied on the contractor who fails to submit service contract with ECI. A Company shall nominate a director to act in its behalf to ECI and the director should be personally liable for the violation of the Ethical Practices Act by the company. Civil penalty shall be imposed on the company for the violation of Ethical Practices Act. The provision of the Ethical Practices Act is in addition to and not in derogation of any other law.

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**Ravidasan N.S**

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## CHAPTER VI

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# Abbreviations

ACC	Anti-Corruption Commission
ADNOC	Abu Dhabi National Oil Company
AGM	Annual General Meeting
AIR	All India Reporter
ALD	Andhra Legal Decisions
All ER	All England Law Reports
Anr.	Another
APMIP	Andhra Pradesh Micro Irrigation Project
BQC	Bidder Qualification Criteria
C.A	Court of Appeal
CA	Certification Agency
CACG	Commonwealth Association for Corporate Governance
CAG	Comptroller & Auditor General
CAPEX	Capital expenditure
CARO	Companies Auditor Report Order
CBI	The Central Bureau of Investigation
CCA	<i>The Competition Act 2002</i>
CCI	The Competition Commission of India
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CDA Rules	Conduct, Discipline and Appeal Rules
CMD	Chairman and Managing Director
Comp. Cas.	Company Cases
COP	Communication on Progress
CPBG	Composite Performance Bank Guarantee
CPI	Corruption Perceptions Index
CPPP	Central Public Procurement Portal
CPS	Crown Prosecution Service
CPSE	Central Public Sector Enterprise
CPWD	Central Public Works Department of India
Cr.P.C	The Criminal Procedure Code
Cri. LJ	Criminal Law Journal
CVC	Central Vigilance Commission
CVO	Chief Vigilance Officer
DG	Director General
DLP	Defect Liability Period
DMRC	Delhi Metro Rail Corporation
DOJ	Department of Justice

DPA	Deferred Prosecution Agreement
DPIIT	Department for Promotion of Industry and Internal Trade
DPR	Detailed Project Report
ECNEC	Executive Committee of the National Economic Council
ED	Executive Director
EIA	Environmental Impact Assessment
EIC	Engineer in Charge
EIL	Engineers India Ltd.
EMD	Earnest Money Deposit
EOI	Expression of Interest
EOT	Extension of Time
EPC	Engineering, Procurement and Construction
EPCC	Engineering, Procurement, Construction and Commissioning
EPCM	Engineering, Procurement and Construction Management
FBI	The Federal Bureau of Investigation
FCPA	<i>The Foreign Corrupt Practises Act 1977</i>
FEED	Front End Engineering Design
FIM	Free Issue Materials
FRMC	Fraud Risk Management Committee
GCC	General Conditions of Contract
GCC Countries	Gulf Cooperation Council Countries
GCD	Gujarat Current Decisions
GeM	Government e-Marketplace
GFR	The General Financial Rules
GLH	Gujarat Law Herald
GNLU	Gujarat National Law University
GST	Goods and Services Tax
GTC	General Terms & Conditions
HPCL	Hindustan Petroleum Corporation Limited
HR Department	Human Resource Department.
HRRL	HPCL Rajasthan Refinery Limited
HSE	Health, Safety and Environment
IAASB	International Auditing and Assurance Standards Board
IBRD	The International Bank for Reconstruction and Development
ICAI	The Institute of Chartered Accountants of India
	The International Centre for Settlement of Investment
ICSID	Disputes
ICV	In Country Value
IDA	International Development Association
IEM	Independent External Monitor
IFB	Invitation for Bid
IFC	The International Finance Corporation
IIPL	InBev India International Private Limited
IKTVA	In-Kingdom Total Value Add

IL&FS	Infrastructure Leasing and Financial Services Ltd
INR	The Indian Rupee
IOCL	Indian Oil Corporation Limited
ITB	Instructions to Bidder
ITB	Invitation to Bid
KB	King's Bench Division
KBR	Kellog Brown & Root Inc
KSA	Kingdom of Saudi Arabia
LD	Liquidated Damages
LLP	Limited Liability Partnership
LLP Act	<i>The Limited Liability Partnership Act 2008</i>
LODR	Listing Obligations and Disclosure Requirements
MD	Managing Director
MDBs	Multilateral Development Banks
MIGA	The Multilateral Investment Guarantee Agency
MLC	Member of a State Legislative Council
MNC	Multinational Corporation
MoPNG	Ministry of Petroleum and Natural Gas
MOU	Memorandum of Understanding
MP	Member of Parliament
MRAU	Market Research and Analysis Unit
MRPL	Mangalore Refinery and Petrochemicals Limited
NHPC	National Hydro Electric Power Corporation
NGO	Non-governmental Organisation
NIC	National Informatics Centre
NIP	National Infrastructure Pipeline
NIT	Notice Inviting Tender
NPA	Non-prosecutions Agreements
OEC	Outside Expert Committee
OECD	Organisation for Economic Co-operation and Development
OPEX	Operational expenditure
O&M	Operations and Maintenance
ONGC	Oil and Natural Gas Corporation Ltd.
Ors.	Others
PAC	Provisional Acceptance Certificate
PAN	Permanent Account Number
PBG	Performance Bank Guarantee
PC Act 1988	<i>The Prevention of Corruption Act 1988</i>
PDO	Petroleum Development Oman LLC
PE	Preliminary Estimate
PIL	Public Interest Litigation
PC Act	<i>The Prevention of Corruption Act 1988</i>
PMC	Project Management Consultant
PPR	Preliminary Project Report

PQ	Pre-qualification
PSE	Public Sector Enterprise
PSU	Public Sector Undertaking
PwC	PricewaterhouseCoopers
QB	Queen's Bench Division
RBI	Reserve Bank of India
RCE	Rough Cost Estimate
RCMP	Royal Canadian Mounted Police
REL	Religare Enterprises Ltd.
RFQ	Request for Quotation
RTI	Right to Information
RUF	Residue Up-Gradation Facility
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
SD	Security Deposit
SEBI	The Securities and Exchange Board of India
SEC	Securities Exchange Commission
SFIO	Serious Fraud Investigation Office
SFO	Serious Fraud Office
SOX Act	<i>Sarbanes Oxley Act 2002</i>
TDS	Tax Deducted at Source
TI	Transparency International
TPI	Third-Party Inspection
Tul. L. Rev	Tulane Law Review
UAE	The United Arab Emirates
UK	The United Kingdom
UKBA	<i>The UK Bribery Act 2010</i>
UN	The United Nations
UNCAC	United Nations Convention Against Corruption
U.P.	Uttar Pradesh
USA	The United States of America
USD	United States Dollar
VRMP	Visakh Refinery Modernization Project
WP Act	<i>The Whistle Blowers Protection Act 2014</i>
WP (C)	Writ Petition (Civil)

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# CHAPTER I

## INTRODUCTION

*“When you see that in order to produce, you need to obtain permission from men who produce nothing. When you see that money is flowing to those who deal, not in goods, but in favours. When you see that men get richer by graft and by pull than by work, and your laws don’t protect you against them, but protect them against you. When you see corruption being rewarded and honesty becoming a self-sacrifice- You may know that your society is doomed.”*

*Ayn Rand*

*Atlas Shrugged, 1957*

The economic growth and progress of a nation is depended upon the performance of the business corporations. The life of the citizens including clothes and eating habits are influenced by these corporations. Nevertheless, the companies for their supplies rely on society and they have significant duty to society in which they subsist. They are renowned instrumentality for growth and augment occupation, supplies, service, and infrastructure.

Infrastructure sector is the crucial input and key driver for the Indian economy. In the construction development and construction sector, as per the Department for Promotion of Industry and Internal Trade (DPIIT), the Foreign Direct Investment during April 2000 and September 2020, stood at \$25.78 billion and \$17.22 billion, respectively. In order to promote sustainable development in the country, India intends to spend 1.4 trillion USD on infrastructure segment in between the period of 2019-23.<sup>1</sup> The government has unveiled National Infrastructure Pipeline (NIP) to boost the areas such as highways, energy, agricultural infrastructure, urban development, railways, health, education and

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<sup>1</sup> Sheoran, K. (2021, May 5). The future of infrastructure industry. *The Times of India*. <https://timesofindia.indiatimes.com/blogs/voices/the-future-of-infrastructure-industry/>

digital services. As per the allocation of investments, the energy sector gets 24%, roads 19%, railways 13% and urban development 16% and about 72% of the anticipated outflow allocated for these four divisions. Within the proposed time of five years, Centre and State Government would bear 39 per cent each of the proposed expenditure and the balance of 22 per cent would be expected from the private sector. NIP is a critical step towards realising governments ambitious plan of making India a \$5-trillion economy.<sup>2</sup> Public sector companies play a vital role in the growth of infrastructure projects especially improving energy infrastructure in the country. Oil and gas sector in India has monopolistic position, which creates a suitable environment for arbitrariness in action and public authorities take advantage of their domination for corruption.

The education, health, infrastructure and utilities, and extractive industry are the four business sectors which are indispensable for fiscal growth and progress of the nation but also susceptible to corruption.<sup>3</sup> Magnitude of the infrastructure developmental projects offer larger prospective rents for unethical individuals. Globally the construction industry is rated as topmost industry which is susceptible for corrupt practises.<sup>4</sup> In order to win or alter the terms of government contracts, the construction companies pay bribes ordinarily of 7% of state contract prices.<sup>5</sup> Corruption reduces the quality and return on investment in infrastructure sector and raises the price of infrastructure.<sup>6</sup>

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<sup>2</sup> Ladwa, M. (2020, January 3). India's ambitious \$1.4 trillion infra investment plan. *India Global Business*. <https://www.indiaglobalbusiness.com/igb-archive/indias-ambitious-1-4-trillion-infra-investment-plan>

<sup>3</sup> Organisation for Economic Co-operation & Development. (2015). *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*. [https://read.oecd-ilibrary.org/governance/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development\\_9789264230781-en#page1](https://read.oecd-ilibrary.org/governance/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development_9789264230781-en#page1)

<sup>4</sup> Transparency International. (2005, March 16). *Corruption in construction and post-conflict reconstruction*. <https://www.transparency.org/en/publications/global-corruption-report-2005-corruption-in-construction-and-post-conflict>

<sup>5</sup> Kenny, C. (2007, June). *Construction, Corruption, and Developing Countries*. World Bank. <https://openknowledge.worldbank.org/bitstream/handle/10986/7451/wps4271.pdf?sequence=1&isAllowed=y>

<sup>6</sup> Kenny, C. (2007, August). *Infrastructure Governance and Corruption: Where Next?*. World Bank. <https://openknowledge.worldbank.org/bitstream/handle/10986/7314/wps4331.pdf?sequence=1&isAllowed=y>

Relatively small number of individuals are involved in corruption, but it consists of substantial quantities of wealth and involves misuse of discretionary power. The parties engaged in corrupt activities will try serious endeavours to disguise their activities because of its size and sensitivity. Private companies are likely to employ third party representatives with a directive to ensure contracts and design a layer of anti-corruption mechanism and move away themselves as soon as corruption comes to limelight.<sup>7</sup> Bribery and collusion are potential forms of corruption in infrastructure projects. Companies may give certain kind of advantage to unduly sway a decision or to act. Two or more bidders may come to an arrangement and design among themselves on bid prices to improperly decide winner of the project. Bribes may be paid to public officials to deliberately ignore the arrangement during the bidding process.<sup>8</sup> Unsatisfactory completion of projects due to collusion between public service agencies and contractors is another hotspot of corruption.

Corruption is normally concealed to avoid detection and prosecution, and to achieve the intended benefit. A bribe paid for the award of a project must be covered up or else the award of the contract will be annulled. A bribe paid to get an inflated variation order must remain confidential if not the variation will be denied. Similarly, kickback given to obtain planning authorisation kept secretive to avoid the setting aside of planning approval. The corruption is concealed in the following ways (i) use of agents (ii) use of fake credentials (iii) making of incorrect declarations (iv) physical coverup.<sup>9</sup>

## **1. EPC Contract**

Engineering, Procurement and Construction Contract (EPC Contract) is used in the development of complex Infrastructural Projects wherein private

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<sup>7</sup> Wells, J. (2009, November). Grand designs: Corruption risks in major water infrastructure projects. *U4*. <https://www.u4.no/publications/grand-designs-corruption-risks-in-major-water-infrastructure-projects.pdf>

<sup>8</sup> de Asís, M.G., O'Leary, D., Ljung, P. & Butterworth J. 1 (2009). *Improving transparency, accountability, and integrity in water supply and sanitation: action, learning, experiences*. The World Bank. <https://openknowledge.worldbank.org/bitstream/handle/10986/2628/479680PUB0REVI101Oficial0Use0only1.pdf?sequence=1&isAllowed=y>

<sup>9</sup> *How Corruption Occurs*. (2021, July 1). Global Infrastructure Anti-Corruption Centre. <https://giaccentre.org/how-corruption-occurs/>

sector undertake construction work on large scale.<sup>10</sup> An EPC Contract is suitable for infrastructure projects since it provides for single point responsibility and the contractor undertakes the entire responsibility.<sup>11</sup> Detailed scope of work, technical and functional specifications of any machinery or facility to be constructed will be provided by the EPC contractor to the project owner, and from its commencement to final completion the EPC contractor develops the Project. The EPC contractor is accountable for the designing, engineering, procurement, construction, and commissioning activities. It is advantageous to the project owner as it provides for the fixed contract price unless the owner issues a change order to the work. EPC Contract payment is secured through achievement of milestones prescribed under the contract and does not depend upon the variation of prices in the market. The contract completion date is also fixed at the beginning of the work. In case of slowdown in accomplishment of the project, the Owner may levy liquidated damages to compensate himself for the losses arising due to the late completion.<sup>12</sup>

In an EPC Contract, the contractor is assigned with the responsibility of investigation, design, and construction for the lump sum price.<sup>13</sup> The contractor undertakes the construction risk with time and costs fixed at the time of scheduled performance of the contract. EPC Contract period, price adjustments and technical parameters are stated upfront based on which EPC contractor quotes the lump sum price for the project.<sup>14</sup> The procuring entity or the Owner specifies the core requirements such as quality, reliability, maintainability, durability, and safety of assets in the tender documents. The contractor has the freedom to plan the construction schedule using best industry practises to

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<sup>10</sup> Bali, R. & Apte, M.R. (2014). Financial Risks and Bankability in EPC Contracts. *IOSR Journal of Mechanical and Civil Engineering*. 11(3), 45. <https://www.iosrjournals.org/iosr-jmce/papers/vol11-issue3/Version-3/F011334549.pdf>

<sup>11</sup> Eryigit, B. (2015, March 23). *EPC Contracts in the Energy Sector*. Mondaq. <https://www.mondaq.com/turkey/energy-law/383098/epc-contracts-in-the-energy-sector>

<sup>12</sup> Thomazios, C.N. & Wong, T. (2021, June 30). *What Is An EPC Contract?*. Mondaq. <https://www.mondaq.com/government-contracts-procurement-ppp/1085960/what-is-an-epc-contract>

<sup>13</sup> Manual for Procurement of Works 2019, cl. 3.2.5(i) (In.)

<sup>14</sup> Manual for Procurement of Works 2019, cl. 3.2.5(iv) (In.)

achieve the efficiency and economy. The contractor is assigned with the risks pertaining to weather conditions, soil, design, and construction.<sup>15</sup>

The contractor is likely to compensate liquidated damages (LD) for every single day delay beyond time specified in the agreement subject to maximum LD specified in the EPC Contract. EPC contract also provides for extension of time for the delays on account of change in scope of work by Owner/Procurement Entity and/or force majeure events.<sup>16</sup>

Project Management Consultant (PMC) with good experience in design, project supervision, and works management is appointed as Engineer in Charge (EIC). PMC monitors and supervises the activities of the contractor and acts as a single window coordinator with the contractor.<sup>17</sup> In complex projects, Owner/Procuring Entity may also appoint a third-party consultant to cross check the diligence of PMC.<sup>18</sup>

In an EPC Contract, the fees are associated to the achievement of certain milestones or clearly specified outputs.<sup>19</sup> In order to save costs, the contractor may reduce quality or scope of work. Disputes relating to quality, scope of work, time-over-run are unavoidable and an EPC Contract should incorporate a stipulation for assessment of the quality, scope of work, monitoring of the work to ensure progress per month and issuance of certificate of acceptance.<sup>20</sup> The payment to the contractor should be commensurate with the actual work done and ploughing money at the beginning of execution of contract should be strictly prohibited.<sup>21</sup> The departmental estimate of the work, prevailing schedule of rates, quantities of work done, etc shall not be referred in the contract and the leakage of such information to be strictly prevented.<sup>22</sup>

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<sup>15</sup> Manual for Procurement of Works 2019, cl. 3.2.5(iii) (In.)

<sup>16</sup> Manual for Procurement of Works 2019, cl. 3.2.5(vi) (In.)

<sup>17</sup> Manual for Procurement of Works 2019, cl. 3.2.5(vii) (In.)

<sup>18</sup> Manual for Procurement of Works 2019, cl. 3.2.5(ix) (In.)

<sup>19</sup> Manual for Procurement of Works 2019, cl. 3.2.1(i) (In.)

<sup>20</sup> Manual for Procurement of Works 2019, cl. 3.2.1(ii) (In.)

<sup>21</sup> Manual for Procurement of Works 2019, cl. 3.2.1(vi) (In.)

<sup>22</sup> Manual for Procurement of Works 2019, cl 3.2.1(vii) (In.)

## 2. Corruption

Corruption flourished in every period of civilisation and a particular section of the community always availed benefit and advantage of it. It is laborious to define or quantify corruption. Irrespective of the political composition of a country and economic or social progress, corruption occurs in the important fields of public life.<sup>23</sup>

Prevention of corruption and extortion is described in the oldest sacred Hindu text the *Rigveda* and it speaks about the punishment including forfeiture of property of bribe takers. Corrupt practices have been known in all of ancient civilizations of India, Rome, Greece, China, and others.<sup>24</sup> Kautilya's *Arthashastra* written in 3<sup>rd</sup> century BC mentions about the forty types of embezzlement by public officials during Ashoka regime. The British parliamentary committee tried Robert Clive and Warren Hastings and found them guilty of corruption.<sup>25</sup> The revolutions were the result of corruption. Extensive corruption in the government led to French revolution and the bureaucratic corruption led to October revolution in Russia.<sup>26</sup>

The attitude of the people towards corruption is one of the factors that determines the quantum of corruption in a state. In India, the vice of corruption has deeply infiltrated into the morality of the society, and it has been approved by the people.<sup>27</sup>

### 2.1 Conceptualisation of Corruption

When privatization and liberalisation were reforming the economy in 1980's, corruption is recognised as rent seeking, where the power of the public office is abused for private gain. Corruption in an organisation or society is based upon the factors, firstly individuals' perception of ethics, secondly social

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<sup>23</sup> Sangram K.P. (2009). *Governance and Corruption: A Comparative Study with Special Reference to India (1999-2008)*. [Doctoral Thesis, Pondicherry University].

<sup>24</sup> Rahul. C. (2016). *The Prevention of Corruption Act, 1988: A Critical Study*. [Doctoral Thesis, Kurukshetra University].

<sup>25</sup> Hanamagouda C. (2002). *The Social Reality of Corruption*. [Doctoral Thesis, Karnatak University].

<sup>26</sup> Ajay.S. (2021). *White-Collar Crime vis-a-vis Genesis of Corruption in India: A Socio-Legal Study*. [Doctoral Thesis, Banaras Hindu University].

<sup>27</sup> Supra 24.

values recognised by the society and thirdly the system of administration or governance. Social roots of corruption and system of governance decide the dimensions of corruption in public life.<sup>28</sup>

### **2.3 Risks of Corruption**

Corruption is originated from the Latin adjective ‘corruptus’ connoting broken, destroyed or spoiled.<sup>29</sup> It undermines the legitimate and ethical standards as it negates territorial limits and encourages more corrupt deeds since it is infectious. Curbing of corrupt practices are challenging since integrity and trust levels are reduced.<sup>30</sup> The faith in the business association is diminished by corruption. Widespread competition and collaboration are abandoned owing to corruption and business atmosphere is broken into illegal factions.<sup>31</sup>

The corruption is contagious like a plague otherwise regulated, sweeps like a blaze in a forest.<sup>32</sup> Corruption takes numerous shapes, and it happens equally in hidden and public places. No country is free from corruption, and it is a global phenomenon.<sup>33</sup> Corruption can be described through analytical of 4 W’s- Who, What, Where and Why.

- (i) Who: illustrates the numerous personnel involved in the corruption events (e.g. Corporate agents, executives)
- (ii) What: describes the size, frequency and the variety of fraud being perpetrated. (e.g. bribing public official to get procurement contract)
- (iii) Where: describes both the place and sector
- (iv) Why: deals with the purpose or motive behind corrupt activities.<sup>34</sup>

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<sup>28</sup> Supra 23.

<sup>29</sup> Hodgson, G.M. & Jiang, S. (2007, December). The Economics of Corruption and the Corruption of Economics: An Institutional Perspective. *Journal of Economic Issues*, 41, 1044.

<sup>30</sup> Id. at 1047

<sup>31</sup> Id. at 1057

<sup>32</sup> *State of M.P. v Ram Singh* (2000) 5 SCC 88 (In.).

<sup>33</sup> Ferguson, G. (2017). *Global Corruption: Law, Theory and Practise* (2<sup>nd</sup> ed.).1-31.

<sup>34</sup> Id. at 1-33

## 2.4 Causes of Corruption

Today, corruption means misappropriation of public money for private gain.<sup>35</sup> As per Transparency International “corruption is the abuse of entrusted power for private gain.” Three constituents of corruption are: abuse, entrusted power, and private gain. Absolute power without accountability leads to corruption.

The causes of corruption may be both individual and institutional levels. According to Robert Klitgaard-

*The opportunity for corruption is a function of the size of the rents under a public official's control (M), the discretion that official has in allocating those rents (D), and the accountability that these official faces for his or her decisions.*<sup>36</sup>

The opportunity for institutional corruption is explained in the following formula-

$$\text{Corruption} = (\text{Monopoly}) + (\text{Discretion}) - \text{Accountability}$$

The United Nations Development Programme<sup>37</sup> adds more detail:

$$\text{Corruption} = (\text{monopoly} + \text{discretion}) - (\text{accountability} + \text{integrity} + \text{transparency})$$

The vile of corruption has stretched its limbs in all terrains of life. Corruption induces the misallocation of wealth thereby harm the private sector

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<sup>35</sup> Fanjul, J.A. (2008). Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act. *Penn State International Law Review*, 26(3), 736.  
<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1774&context=psilr&httpsredir=1&referer=>

<sup>36</sup> Klitgaard, R. (1988). *Controlling Corruption* (1<sup>st</sup> ed.). Berkeley, University of California Press.

<sup>37</sup> United Nations Development Programme. (2003, February). *Anti-Corruption*. <http://www.undp-aci.org/publications/finances/anticor/undp-ati03e.pdf>



development and hurts the poor. Corruption will be directly proportional to the discretion accorded to the decision-making authority.

## 2.5 Opportunities for Corruption

The extent of corruption in a country depends upon the availability of resources, employment, effective legislative and judicial measures against corruption, moral and economic standard of the people living in it, etc.

A negative effect is created by the corruption in the system as whole. It leads to the expenditure of public money for the unproductive objects deviating from the intended purposes. Corrupt officials favour project expenditure that maximizes opportunity for their personal benefits. The occasions for corrupt practices increase:

- (i) whenever discretionary powers are exercised by public authorities without any liability for their deeds.
- (ii) whenever there is a gap or lacunae in the government policies then it creates opportunities for corruption by middlemen.
- (iii) administrative secrecy fosters corruption and lobbying.<sup>38</sup>

The factors that boost the corruption prospects are broad discretion, concentration of power, absence of transparency and inadequate accountability.<sup>39</sup>

The breeding ground for corruption is discretion and conflict of interest. These preconditions are strengthened by bad governance. The opportunities for corruption are increased by lack of accountability and monopoly of power over discretionary decisions.<sup>40</sup> Widespread tolerance of corruption, lack of protection for whistleblowers, lack of sanctions for individuals and

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<sup>38</sup> Reddy, J. (2001, December). *The Public Interest Disclosure and Protection of Informers* (179). Law Commission of India. <https://lawcommissionofindia.nic.in/reports/179rpt1.pdf>

<sup>39</sup> Graycar, A., & Smith, R.G. (2011). *Handbook of Global Research and Practice in Corruption*. Cheltenham, Edward Elgar.

<sup>40</sup> Supra 33, at 1-41

organisations, and condonement by the management, are the circumstances that inspire parties to manipulate occasions for corruption.<sup>41</sup>

## 2.6 Consequence of Corruption

The efficiencies among the companies can be increased in this global economy through a robust and fair competition. A good quality of service is ensured through competition in business. Corruption destroys the value of the services thereby ruining the life of general population. A party who has missed the lucrative contract is seldom aware of the loss or injury caused by illegitimate compensation and poor competition.<sup>42</sup>

The social and economic growth of the nation is thwarted by bribery and corruption. Even developed nations are not exempt from corruption as culture of corruption is tolerated by many countries though not encouraged by them. The competition is distorted by the companies that does not adhere to the laws and it increases the risk for other compliant organisations.

Corruption creates a shadow economy, causes market failure, and decreases competition in the market. Tracking of corruption through various means is required since raises the poverty standards and affects economy. Ethical crises are escalated by corruption, and it destabilises legitimate financial system. Equity is infringed by corrupt practises, and which is also unfair, immoral and against established ethical standards. It discourages efficiency and weeds out competition.

Profit margin shrinks as competition intensifies and the business and the government pay close attention to the risks of bribe and corruption. An honest, fair, and transparent trading is required for the sustenance of open, free, and competitive world market. Transparency is highly demanded as the 'survival of the fittest' capitalism spreads. Corruption is incompatible with

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<sup>41</sup> Id. at1-42

<sup>42</sup> Coffee, J.C.Jr. (1980). Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, *American Criminal Law Review*, 17, 419-442.

competitiveness, drains the confidence of the people and distorts proper functioning of the market.<sup>43</sup>

Basic rights of human beings are ignored by corruption, and it impacts rule of law. Economic affairs among the nations are distorted by corruption. Security of the nation and development is affected by the transnational bribery, and it also endangers health and safety of the people besides threatening the democracy.<sup>44</sup> Bribery deprives honesty and dedicated service, which is expected by a nation.<sup>45</sup>

Corruption affects allotment of public procurement contracts resulting in substandard public infrastructure and services. Those who support corruption neglects to consider the purposes except temporary gain, the World Bank stated in its report.

*In the long run, expectations of bribery may distort the number and types of contracts put up for bid, the method used to award contracts, and the speed or efficiency with which public officials do their work in the absence of bribes. It may also delay macroeconomic policy reform. In addition, the gains from such bribery may be inequitably distributed (accessible only to certain firms and public officials).<sup>46</sup>*

The prevalence of corrupt practises in public procurement raises the expenses by 10-20% of the contract value, which indicates that bribery in OECD countries costs at least four hundred billion USD every year.<sup>47</sup>

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<sup>43</sup> Almond, M.A. & Syfert, S.D. (1996). Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy. *North Carolina Journal of International Law, & Commercial Regulation*, 22, 389.

<sup>44</sup> Id. at 403

<sup>45</sup> Id. at 405

<sup>46</sup> World Bank. (1997). *Helping Countries Combat Corruption*.

<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>

<sup>47</sup> Organisation for Economic Co-operation and Development. (2009) *OECD Principles for Integrity in Public Procurement*. <https://www.oecd.org/gov/ethics/48994520.pdf>

## 2.7 Corporate Corruption

Evolution theory of Charles Darwin, i.e., “*survival of the fittest*” applies to economic success of the company. Globalisation increases the competition and intimidates companies to adopt the illegal means of bribery and corruption for survival.

All companies are vulnerable to corruption, and it may take various types that differ in magnitude from minimal usage of influence to organised corruption. The potential damage due to corruption is substantial and the companies can face legal risk, reputational risk, financial costs, and erosion of internal trust and confidence.<sup>48</sup>

The juristic form of company is employed as a means for corruption and performing illegal pursuits. The corporate power is abused to commit crimes and the victims include employees, public, consumers, government, other companies, and the environment. Sometimes organisation itself turns out to be a sufferer of a corporate corruption.

The companies employ blue-washing technique to depict itself as conforming to ten principles of the United Nations Global Compact for corporate sustainability, whilst contrary is real. In order to publicise itself, the organisations may adopt blue-washing practice and try to showcase its association with United Nations movement against corruption.<sup>49</sup>

## 2.8 Corruption in EPC Contract

Growth of the nation is directly related to the corruption prevalent in the country. The development of infrastructure is imperative for the financial growth and alleviation of poverty in the state. The return on infrastructure investment and its quality is reduced by corruption besides increasing investment costs.

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<sup>48</sup> Supra 33, at 1-90

<sup>49</sup> Sarvahitey. (2018, March 16). *Greenwashing and Blue-washing*. <https://sarvahitey.wordpress.com/2018/05/16/greenwashing-and-blue-washing/>

The complicated administration of bid processes, high project cost, the prolonged period of execution, and strong competition encourage bidders indulge in corrupt activities.<sup>50</sup> Public procurement is a lengthy process and corruption can occur at any time in many forms. The corruption risks involved in various stages of infrastructure projects are<sup>51</sup>:

- (i) **Project Appraisal:** Instead of maintenance of existing infrastructure, the Rent seekers encourage new projects involving substantial costs. In order to get approval of the project, rent seekers underestimate the costs and overestimate the benefits without adequate economic justification.
- (ii) **Project selection, design, and budgeting:** Costly designs may be planned to increase consultants' fees and contractors' profits. Designs may be tailor made to favour a specific contractor. High-cost estimates are provided in the project for diversion of funds at a later stage.
- (iii) **Bidding process:** Rent seekers may interfere in procurement process to favour specific firms or individuals. The organisations may provide bribe to obtain contracts and recover the said costs at later stages of the project. There is a possibility of collusion among bidders to increase the prices or allocate contracts with the help of procurement officers. Tenders may be invited for the projects that are not in the budget and contracts may be awarded.
- (iv) **Implementation:** The contractor and the Engineer in Charge (EIC) may collude, with or without Owners' awareness, use substandard materials and perform substandard work. In order to benefit, hide prospective damages, or recoup the bribery expenses, the contractor and EIC may collude to enhance the contract value or increase the scope of work.

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<sup>50</sup> Supra 7

<sup>51</sup> Wells, J. (March 2015) Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation, U4. <https://www.u4.no/publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation-1.pdf>

- (v) Operation and maintenance: Acceptance of substandard works or works below specification leads to rapid deterioration of assets. Sufficient amount may not be allocated for the maintenance of the assets while favouring new construction in the developmental stage of the projects.

Corruption is exact opposite to progress and good governance. “*Prevention is better than cure*” adage applicable to corruption also. If the causes and situation which enhance the possibility of corruption are identified, then it is easier to plug the loopholes in the EPC Contract as well as ensure good governance.

## 2.9 Liability of Corporations

A company is a distinct juristic personality from its investors and executives. A company must operate its business recognising the benefit of all its stakeholders.

The accountability is imposed on the corporates for the wrongdoings committed by itself or their agents and corporate misconduct is a punishable offence.<sup>52</sup> A corporation is an artificial person, which has no soul to be blamed and no physique to be kicked.<sup>53</sup> The real culprits of corporate corruptions are the managers and employees who operate at the rear curtain of the corporation. Corporate managers handle large amounts of company’s money and business cashflow, and they enjoy enormous power. The misuse and abuse of powers by corporate managers affects all stakeholders of the organisation.

During the course of commission of a crime, each one in command is deemed to be held responsible and answerable to the company for running of its transactions and supervise the activities of the firm.<sup>54</sup> A constructive liability created on the persons who is accountable for the activities of the trade of the

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<sup>52</sup> Saurav, K. & Savajiyani, K. (n.d.). *Corporate Criminal Liability - White Collar Crime*. Legal Service India, Retrieved July 11, 2021, from <http://www.legalserviceindia.com/legal/article-521-corporate-criminal-liability-white-collar-crime.html>

<sup>53</sup> Coffee Jr. J.C. (1981). No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment. *Michigan Law Review*, 79, 386.

<sup>54</sup> *The Negotiable Instruments Act 1881*, s.141(1) (In.)

enterprise.<sup>55</sup> A company or body corporate can be arrayed as an accused and it may assign any person for the purposes of investigation or trial.<sup>56</sup>

The legal policy adopted by the legislature made the corporation as well as officer in charge accountable for the crimes perpetrated by the firm. Officer who is handling the affairs of the business could be accountable for the *mens rea* crimes. The negligence, failure to supervise and blameful inadvertence can be designated as mens rea. The requisite *mens rea* is attributed if the leader has knowledge of renege and allowed the default to continue by not taking any actions to avert the same. All the directors are accountable for the non-compliance of the requirements of the statute, and it is not the sole responsibility of the managing director.<sup>57</sup>

An enterprise is accountable for the conduct of its representatives under the doctrine:

- (i) Respondeat superior
- (ii) Alter ego.<sup>58</sup>

As per the doctrine of *respondeat superior*, when a representative of a firm perpetrates a misconduct within the capacity of occupation and for its advantage then the company is liable.<sup>59</sup> A corporation is held vicariously answerable for the behavior of its workforces within capacity of their work. The doctrine justifies that corporate tort liability as a means for the distribution of loss and corporation should promote better supervision of its employees.<sup>60</sup> The corporation is in a most excellent situation to foresee the damage and protect against the subsequent injury. The employer has the opportunity to control the employees, hence compelled to take precautionary actions to forbid the misconduct of its employees. The owner is responsible for the crime perpetrated

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<sup>55</sup> *Standard Chartered Bank v State of Maharashtra* (2016) 6 SCC 62 (In.)

<sup>56</sup> *The Code of Criminal Procedure 1973*, s. 305 (In.)

<sup>57</sup> *Gopal Khaitan v State* (1969) AIR 132 (Calcutta)

<sup>58</sup> Khanna, V.S. (2003). Should the Behaviour of Top Management Matter. *Georgetown Law Journal*, 91,1215.

<sup>59</sup> *New York Central & Hudson River Railroad v United States* (1909) 212 US 481 (USA).

<sup>60</sup> Pitt, H.L. & Groskaufmanis, K.A. (1990). Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, *Georgetown Law Journal*, 78, 1559.

by the workers, if the act or omission of the employee is within the scope of employment and is done with the objective to secure gain for the owner.<sup>61</sup> The courts have expansively interpreted the word 'agent' and the 'intent to benefit.'<sup>62</sup> Courts have found company liable for the low level employees working within their capacity of occupation nonetheless he is committing an act forbidden by the internal policies of the company.<sup>63</sup>

Vicarious liability is inapplicable to the offences requiring *mens rea* and corporations are not vicariously accountable for the deeds of the workers for offences which require mental element.<sup>64</sup> To overcome this difficulty, the English courts evolved the doctrine of identification, where the corporation is recognised with its controlling employees. Persons who control or regulate the activities of the firm is considered as corporation. The corporation is identified with the acts as well as minds of the controlling officers.<sup>65</sup> The frame of mind of the representative is attributed to the corporation under the Doctrine of Identification. The said doctrine was expressed by Viscount Haldane in *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Company Ltd.*<sup>66</sup> in the following terms:

*My Lords, a corporation is an abstraction. It has no mind of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and the centre of the personality of the corporation. The person may be under the direction of the share-holders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that person has authority coordinate with board of directors given to him under the Articles of*

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<sup>61</sup> Id. at 1571

<sup>62</sup> Diskant, E.B. (2008). Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure. *Yale Law Journal*, 118, 126.

<sup>63</sup> *United States v Automated Med. Labs., Inc.* (1985) 770 F.2d 399 (4th Cir. USA)

<sup>64</sup> Bhaskar, T.K. & Umakanth, V. (1996). Corporate Criminal Liability and Law. *Journal of the Indian Law Institute*, 38, 218.

<sup>65</sup> Williams, G. (1983). *Textbook of Criminal Law* (2<sup>nd</sup> ed.).

<sup>66</sup> (1915) AC 705 (Eng.).



*Association and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.*

The doctrine of identification or alter ego is developed to render the corporation liable for the *mens rea* offences. Certain officials of the organisation are treated as an organ for whose conduct the firm is accountable, like an individual is answerable for the acts of their limbs.<sup>67</sup> The accountability of the organisation for the knowledge or attitude of its employee or agent is contingent upon the nature of allegation, status of employment and other circumstances.<sup>68</sup> If a person who is sufficiently senior in the organisation to constitute corporations directing mind and will commits any wrongdoing then the corporation would be directly liable for the said wrongdoing. The culpable mindset and action of such individual is treated as that of the company itself. An organisation is said to possess guiding mind of the leader of the organisation or person whose personality mirrored by the enterprise.<sup>69</sup> The top-level management need not always be the directing mind of the organisation. Directing mind concept applies to an individual who is ultimately accountable for the particular transaction.<sup>70</sup> An organisation is culpable if the systems and process followed by the organisation is insufficient or unreasonably fail to prevent corporate crimes.<sup>71</sup>

Organic Theory of corporate liability was evolved by Lord Denning in *Bolton Engineering Co. Ltd. v T.J. Graham and Sons Ltd.*<sup>72</sup> and the same was adopted in India in *Gopal Khaitan v State*.<sup>73</sup> Company was compared to human body where the employees or representatives are the fingers of the enterprise who manages the job while the board and executives are the controlling intellect and mind of the business. The attitude of the operating executives is the will of

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<sup>67</sup> *Bolton (Engineering) Co. Ltd. v T.J. Graham & Sons Ltd.* (1957) 1 QB 159 (Eng.).

<sup>68</sup> *R v I.C.R Haulage* (1944) KB 551 (Eng.).

<sup>69</sup> *Tesco Supermarkets Ltd. v Natrass* (1971) 2 All ER 27 (HL).

<sup>70</sup> *El Ajou v Dollar Land Holdings plc* (1994) 2 All ER 685(CA).

<sup>71</sup> Notes. (1978-1979). Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions. *Harvard Law Review*, 92, 1227.

<sup>72</sup> (1956) 3 All ER 624 (CA).

<sup>73</sup> (1969) AIR 132 (Calcutta).

the business, and their mistake will be considered as individual liability of the corporation.

The Court of Appeals in *United States v Bank of New England*<sup>74</sup> adopted the aggregation method while sentencing the bank and held:

*“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation. It is irrelevant whether employees administering one component of an operation know of the specific activities of employees administering another aspect of the operation.”*

Proving the ‘culpable failure’ of the corporation in a criminal prosecution is difficult for the prosecution. Generally, corporation compartmentalises the knowledge and subdivides the particular tasks and responsibilities into minor elements. The cumulative or collective knowledge of the group of employees is sufficient for the conviction of the corporation for the crime committed. Thus, *mens rea* of different individuals and employees can be pooled and assigned to the enterprise.

No immunity can be given to the company on the ground that minimum mandatory imprisonment and fine is prescribed for the offence in respect of which prosecution has been initiated against the company. When imprisonment and fine is prescribed, the courts can impose punishment of fine.<sup>75</sup> The intent of a statute is not to permit wrongdoer to flee the meshes of the act. Penal statute may not always be given narrow, pedantic, literal, and lexical construction to enable the companies to go scot-free.<sup>76</sup> An organisation can be reprimanded for the crime for which penalty as well as detention is prescribed by the statute. A corporation cannot be sued or disciplined for a crime where just imprisonment is prescribed as punishment.

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<sup>74</sup> (1987) 821 F.2d 844 (1st Cir.).

<sup>75</sup> *Standard Chartered Bank v Directorate of Enforcement* (2005) AIR 2622 (In.).

<sup>76</sup> *Balram Kumawat v Union of India* (2003) AIR 3268 (In.).

## 2.11 Prevention and Detection of Corruption

The corporate behaviour is controlled through the administrative controls like accounting and auditing, disclosure requirements, and imposition of civil and criminal sanctions for the contravention of fiduciary duties. Fiduciary duty is imposed upon the director of the company and an obligation is cast on him to act honestly.<sup>77</sup> The director is accountable for contravention of trust if he disregards fiduciary duty.

Shareholder control of a public company is largely a myth.<sup>78</sup> The shareholders can replace the existing board of directors and bring changes to the corporate policy. However, very limited power is vested on shareholders to remove the directors of the corporation. The theoretical power of the stockholders to substitute the directors face substantial impediments.<sup>79</sup> Hence regulatory measures are imposed to ensure accountability of directors and corporate managers.

Legal framework of the countries should include effective measures to monitor the business activities of the companies, evaluate their performance levels and ensure compliance of laws. The deterrence of corruption increases efficiency and international competitiveness. It is the obligation of the state to establish a 'level playing field' to enhance the competition and encourage the economy. However, the regulatory bodies have restricted means to discover, examine and charge the commercial offences.

The tenth principle of the UN Global Compact accepted in 2004 obliges the members to avert bribery, coercion, and other forms exploitation, and foresightedly create rules and certain techniques to deal with exploitation internally and in logistic network. The United Nations Convention Against Corruption (UNCAC) is the fundamental legal instrument for the tenth

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<sup>77</sup> Christie, M. (1992, July). The Director's Fiduciary Duty Not to Compete. *The Modern Law Review*, 55, 506. <https://www.jstor.org/stable/1096651>

<sup>78</sup> Stout, L.A. (2007). The Mythical Benefits of Shareholder Control. *UCLA Law School*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=978775](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=978775)

<sup>79</sup> Bebchuk, L.A. (2005, January). The Case for Increasing Shareholder Power. *Harvard Law Review*, 118, 833. <https://www.jstor.org/stable/4093350>

principle. Three elements to be considered by the participant while fighting corruption are:

- (i) Internal: Organisations to propose anti-corruption strategies and procedures in their commercial operations.
- (ii) External: Organisations to communicate their effort opposed to corruption in its annual report and reveal occurrences and procedures.
- (iii) Collective action: Scale up the anti-corruption efforts by joining hands with industry peers and other stakeholders to create fair competition and level playing field for all.<sup>80</sup>

Policing measures such as internal audit and ongoing monitoring program increases chances of the liability of the company under strict liability as it enhances the availability of the information to the state authorities.<sup>81</sup> A corporation cannot be held accountable for negligence if it has taken sufficient policing measures. Strict liability weakens the credibility of the company to threaten the employees to implement the internal enforcement measures.<sup>82</sup> In strict liability, the personnel may think that the corporation will not inform the transgression to the state instrumentalities or maintain the data since it strengthens the probabilities of punishment. Strict liability results in sanctions being levied on company even if it reports the wrongdoing of the employees to the authorities. Companies that give warning to reveal the incriminating employees become less reliable for strict liability offences, because it would increase the chances of facing sanction on company.<sup>83</sup> Company would be employing ‘window dressing’ measures and not actually doing any internal enforcement measures.<sup>84</sup>

In negligent standard, the company may report the wrongdoing of the employees or monitor them because it will qualify the company as being attentive and would benefit the firm to avert or minimize the penalty even if a

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<sup>80</sup> United Nations Global Compact. (n.d.). *The Ten Principles of the UN Global Compact*. Retrieved October 25, 2022, from <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10>

<sup>81</sup> Supra 58, at 1228

<sup>82</sup> Id. at 1230

<sup>83</sup> Id. at 1230

<sup>84</sup> Id. at 1231

worker indulged in misconduct. Corporation's escaping of punishment creates its threat to take enforcement measures credible. The enforcement measures taken by the company increases the likelihood of sanction being imposed on the employees, thereby reducing the incentive to do wrongdoing by employees and results in greater deterrence effect.<sup>85</sup>

## 2.12 Enforcement Action

Corporation exists in eyes of law; it is invisible and intangible.<sup>86</sup> Company acts through its agents and agents lacks adequate resources to compensate for the misconduct done to the society. The imposition of liability on the corporate enhances deterrent effect compared to agent liability.<sup>87</sup> Corporate accountability set down the business properties at peril and drives the firm to assume the social costs for the wrongdoing thereby increasing deterrence. The bearing of social costs by the company for wrongdoing forces the company to supervise its representatives and thwart them from participating in the unlawful activity.<sup>88</sup>

The liability standards used to assess the corporate liability are:

- (i) **Strict liability:** Whenever a harm is caused, strict liability imposes liability on the actor irrespective of exercise reasonable care or working with virtuous intention.
- (ii) **Negligence:** Negligence necessitates legal responsibility whenever an injury is triggered, and the measure of reasonable care is not encountered.
- (iii) ***Mens rea:*** *Mens rea* entails legal responsibility whenever an individual performs acts with the requisite mindset.
- (iv) **Combinations of the above.**<sup>89</sup>

The determination of the above standards helps us to identify the factors for sanctioning. Under strict liability, the corporation bears the costs for its activities, whereas in negligence requirement, the firms legal responsibility for

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<sup>85</sup> Id. at 1231

<sup>86</sup> Supra 60, at 1562

<sup>87</sup> Supra 58, at 1223

<sup>88</sup> Id. at 1224

<sup>89</sup> Id. at 1224

the injury triggered depends upon its negligence. Even if any harm results when the company has taken due care, then company is not liable. *Mens rea* standard does not impose any liability for unintentional acts. Hence, *mens rea* is analogous to non-negligent acts.<sup>90</sup>

Strict liability drives the corporation to carry the complete social costs for its pursuits. The liability standard induces the company to develop and execute internal enforcement mechanisms to reduce the occurrence of wrongdoing or extent of harm. This will help to reduce the social costs associated with the wrongdoing.<sup>91</sup>

### **3. Corporate Governance**

Corporate governance is about conducting business in ethical manner and fostering of standards and principles that enable the employees to elect between what is correct and wrong. All the stakeholders of the company as well as the market as whole is interested in ethical conduct of business.<sup>92</sup>

Whistleblower plays an indispensable role in efficient corporate governance by giving information about an illegal or unethical act or omission by the company which will prejudicially impact the concern of the investors of the corporation. The legal framework and the policies adopted by the companies should create an environment that encourage whistleblower as it will reduce the corruption and enhance the goodwill of the companies.

Corporate governance cannot exist in a vacuum and does not stand alone; it is part of political and economic systems where laws, rules and regulations apply. Legal and regulatory compliance in a country are the external elements that facilitate corporate governance. The internal elements like ethics and value also guides the development and implementation of corporate governance.

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<sup>90</sup> Id. at 1226

<sup>91</sup> Id. at 1227

<sup>92</sup> Singh, V.K. (2013, October). Whistle Blowers Policy Challenges and Solutions for India with Special Reference to Corporate Governance. *GNLU Journal of Law, Development and Politics*, 3, 5.

Corporate governance by itself is not a panacea for all corporate ills. The values and ethical behaviour of an organisation coupled with good governance makes corruption an exception rather than the rule.

Law and regulatory authorities perform crucial part in the deterrence of corruption, improving transparency, upholding ethical values, preventing conflict of interest, and encouraging good governance. It is necessary that companies should adopt good governance policies to protect its integrity, long term commercial growth and it is indispensable for the very existence of the company.

Corporate governance stipulates the allocation of privileges and duties amongst the various stakeholders of the company. It governs the relationship between the different stakeholders to ensure that the company achieves its objectives. Transparency, accountability, fairness, and responsibility are the four cardinal principles which helps to build trust and maintain relationship among the stake holders of the company. Corporation that behave ethically perform efficiently.<sup>93</sup>

Transparency indicates the standard of corporate governance in an economy.<sup>94</sup> Ban Ki-moon, United Nations former Secretary General, details the linkage between public procurement and transparency in the succeeding terms:<sup>95</sup>

*Transparency is a core principle of high-quality public procurement. An open and transparent procurement process improves competition, increases efficiency and reduces the threat of unfairness or corruption. A robust transparency regime enables people to hold public bodies and politicians to account, thereby instilling trust in a nation's institutions.*

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<sup>93</sup> Supra 43, at 446

<sup>94</sup> Ho, S.S.M. & Wong, K.S. (2001). A Study of the Relationship Between Corporate Governance Structures and the Extent of Voluntary Disclosure. *Journal of International Accounting, Auditing & Taxation*, 10, 139.

<sup>95</sup> United Nations. (2011). *Transparency and Public Procurement*.

[https://www.ungm.org/Areas/Public/Downloads/ASR\\_2011\\_supplement.pdf](https://www.ungm.org/Areas/Public/Downloads/ASR_2011_supplement.pdf)

Transparency was explained at the 1999 International Anti-Corruption Conference<sup>96</sup> as:

*Transparency, in the context of public procurement, refers to the ability of all interested participants to know and understand the actual means and processes by which contracts are awarded and managed. Transparency is a central characteristic of a sound and efficient public procurement system and is characterised by well-defined regulations and procedures open to public scrutiny, clear standardised tender documents, bidding, and tender documents containing complete information, and equal opportunity for all in the bidding process. In other words, transparency means the same rules apply to all bidders and that these rules are publicised as the basis for procurement decisions prior to their actual use.*

#### **4. Compliance**

The prospective punishment and public humiliation can be averted by the multinational corporations for the acts of its representatives through compliance programs.<sup>97</sup> The culture of every organisation is not the same and unique to themselves. A compliance culture is to be developed by the leadership to perform the business in an ethical way in consonance with law.

The word compliance can be defined as an act of observing or conforming with applicable law, rule, or regulations. With regard to the corporations, the term suggests the program devised by the firm to avert and identify the contravention of applicable laws or codes which the enterprise ought to comply. It charts the action plan by codifying all applicable legal framework and internal compliance requirements. The existence of compliance program, in and of itself is not sufficient to escape the criminal charges for the

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<sup>96</sup> Supra 33, at 11-22.

<sup>97</sup> Supra 35, at 744



misconduct undertaken its employees or agents but it may help to reduce the corporations' culpability.<sup>98</sup>

Company should be vigilant and keep watchful of the ever-changing legal landscape of the country and adopt its business policies to continue to operate in good standing within its industry, community, and customer base.

Most of the companies work in multiple jurisdictions and shall have to create a cohesive and comprehensive compliance policy. This shall entail costs that will have to be incurred by the companies with no visible returns on such compliance. However, the lawsuits arising out of non-compliance, fines, penalties, compensatory payments, and settlement of disputes generally costs millions of dollars. Companies should be made to understand about bottom-line financial benefits and its long-term prospects.

Ethics remains the heart and soul of the operational program like corporate compliance. It facilitates the workers to accomplish their task with comfort, concentrate on the assignment in their authority and aids to diminish the chance of criminal act.

## **5. Statement of Problem**

A corporation cannot imagine or do something on its own. It thinks and acts through its employees who may come and go from time to time. There is every possibility that the employees and agents engaged by the companies may indulge in illegal and corrupt activities for their personal gain. Corruption is not the result of the sole conduct and behaviour of companies and their employees; there are other stakeholders who are equally and if not more responsible for corruption. However, the corporation is vicariously answerable for the deeds and lapses of its employees and representatives.

Corporate governance and compliance are the preventive vigilance mechanism available to deter and detect the corrupt activities. Fraud, corruption, and mismanagement can be substantially prevented through good

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<sup>98</sup> Id. at 751

governance. The success of corporate compliance is fastened to the conduct of employees within the organisation. There is lack of corporate governance principles in the Indian oil and gas industry to detect and prevent corruption, and to set up a balanced playing area.

Whistleblower performs a crucial position in the augmentation of the good governance of an organisation and implementation of ethical practises by the company. Strong whistleblower policy will strengthen the preventive vigilance mechanism of an organisation. Absence of an effective legal framework prejudicially affect the safety of the whistleblower.

The companies do not cooperate with the criminal investigation pertaining to corporate corruption as it involves collateral consequences. Implementation of multiple enforcement mechanism ensures effective association and harmonization with the corporate group. Alternative enforcement mechanism enhances effectiveness of anti-corruption measures. There is no legal regime in India to initiate civil prosecution against commercial corruption.

## **6. Research Questions**

The study is intended to discover solutions to the following issues:

1. Whether Engineering, Procurement and Construction (EPC) Contracts in Oil and Gas Sector include sufficient measures to prevent corruption?
2. Whether the Corporate Governance policies in the oil and gas sector help in preventing or reducing the corruption and foster competition?
3. Do the legislations in India provide for civil enforcement actions against the corporate corruption?
4. Whether the Public Sector Undertakings (PSUs) in India doing business in the oil and gas sector implement preventive vigilance mechanism in its letter and spirit?

## **7. Literature Review**

Building of infrastructure especially in the energy sector plays a significant part in the financial growth of the population. A fair and transparent

bidding process and execution of the EPC contract is required to sustain the commercial progress of the state and create public confidence in the system. Corruption prevailing in the award of agreements in the oil and gas segment as well as in the execution of the EPC Contract is a major concern and corporate governance issue. The analysis of the legal provisions and internal control measures helps us to know measures taken by the authorities and companies to deter and detect corruption. The role of corporate governance in managing corruption was found necessary to design a level playing field between the establishments and to achieve transparency and accountability among the stakeholder of the corporation in this globalised economy.

Literature review was done to get the knowledge of what data and materials are available for the purpose of testing the hypothesis. It is also required to understand the concepts and theories involved in the research. The research delves into aspects of corporate corruption, compliance, and principles like transparency, fairness, accountability, tone at the top, conflict of interest, etc which help in the implementation of corporate governance. Whistleblower is one of the stakeholders who gives first-hand information about the misconduct and prevention of victimisation of whistleblower plays a vital spot in uncovering and prevention of corruption. An attempt is made to assess the available work in the field of research to draw guidance from the exiting literature for the present research. The study of available information in the research field has some impact on the objectives of the study. Review of literature and study of available information is of utmost important in the research as it gives clear picture about the managing of corruption risks through corporate governance.

The initial search for the materials was done using JSTOR digital library of academy journals, HeinOnline, West Law India and Google Scholar. The key words used for the search are '*corporate governance and compliance*. The search was narrowed down by using the words '*corporate corruption, causes, detection and prevention, sanctions, incentives, whistleblower*' etc. along with the key word.

The menace of corporate corruption was discussed in the book titled "Corporations, Crime and Accountability" by Brent Fisse and John Braithwaite

(1993). This book discusses about accountability for corporate crimes, scheme for assigning accountability for corporate misconduct, enterprise liability and responsibility for corporate crimes. The book deals with fixing of responsibility and liability after corrupt act has been committed. The book confines itself to the issue of corporate corruption and fixing of responsibility.

The research work conducted by Mrs.Preetha<sup>99</sup> titled “Accountability of Corporate Managers: Role of Criminal Sanctions” for the Degree of Doctor of Philosophy (2012) under guidance and supervision of Prof. (Dr.) A.M.Varkey, School of Legal Studies, Cochin University of Science and Technology deals with contribution of criminal punishments in creating accountability of corporate leaders for their deeds and lapses. The researcher discusses that the liability of the corporate managers is based on the omission, knowledge or acquiescence resulting in crime. Corporates involve in unethical activities to increase profits and the corporates should bear the responsibility since profits derived from the unethical activity flows to the coffers of the corporation.

The thesis identifies jurisprudential challenges in inflicting criminal charge on corporation and other difficulties in the criminal sanction. The main obstacle for enforcing criminal responsibility on business is its juristic character. The intent or moral blameworthiness for the crime is not possessed by the corporation. The courts also rely upon the doctrine of *ultravires* for holding corporation not answerable for the crime. The apprehension, inquiry and trial of the corporate crime are harder since the regulatory authorities are understaffed and there is lack of vigilance on the part of directors, auditors, and accountants to detect the corporate crime and they often cover the crime.

The thesis discusses about the fine imposed in the criminal proceedings and its spill over effects. A corporation may absorb fine as a cost of doing business.<sup>100</sup> The fines imposed by the courts is extremely low and it has no preventive effect. If the crime is to be deterred, then the corporation should be

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<sup>99</sup> Preetha.S. (2012). *Accountability of Corporate Managers: Role of Criminal Sanctions* [Doctoral Thesis, Cochin University of Science & Technology].

<https://shodhganga.inflibnet.ac.in/handle/10603/107148>

<sup>100</sup> Jefferson, M. (2001). Corporate Criminal Liability: The Problem of Sanctions. *Journal of Criminal Law*, 65, 235.

denied opportunity to reap the fruits of its illegal activity. The fines imposed by the courts are not enough to deter the crime as the companies retain the lion's share of its bounty. The spill over effect of fine is that the ultimate burden of fine falls on the innocent parties, like shareholders, customers, and employees in form of reduction in dividends, increase in price of goods, and reduction in wages.

The thesis discusses about the numerous types of penalty that can be employed in blend with penalising of corporation for its corrupt activities. Imposition of equity fine to compensate the victim induces the corporation to establish internal control mechanism and diminishes the occurrences of corporate wrongdoing. The disadvantage of equity fine is that it unfavourably impacts the stockholder's interest by reducing their stock and it is vulnerable to hostile takeover. Corporate probation and supervision interfere with managerial power and prestige. Monitoring of workforce reduces misconduct and corporate probation has no spill over effects. The punishment of community service provides opportunity to the company to make restitution for its crime. No change in the organisation structure is contemplated by the community service order and there is a disadvantage that company may reap favourable publicity because of community service.

The thesis highlighted that court could order the corporation to announce regarding the kind of wrongdoing perpetrated by the firm and imposition of sentence. Loss of corporate image is the natural corollary of adverse publicity, and it helps to prevent recurrence of similar offence. The researcher also highlighted about the 47<sup>th</sup> report of the Law Commission of India which recommended the need for judgment of condemnation. The Indian statutes which require for dissemination of sentence of a corporation at their costs include section 10B of the Essential Commodities Act 1955, section 49 of the Legal Metrology Act 2009 and section 35 of the Drugs and Cosmetics Act 1940. The advertisement about the wrongdoing committed by the company would alert the society and it would affect the corporate good will, its capacity to manage business with community and increase investment for business through open markets. The loss of reputation would force the companies to implement procedures to prevent repetition of offences. The spill over effect of adverse

publicity is that the company would be forced out of business and innocent workers, suppliers, distributors, and shareholders will be adversely affected. The erring corporation can be dissolved for their repeated offences. The drawback of corporate dissolution is that the ultimate burden is borne by the shareholders, consumers, and workers.

The thesis exposes the disadvantages of criminal prosecution in case of corporate corruption. The major drawback for the effective trial against the organizations are the heavier burden proof, criminal prosecution procedures, and strict construction of the statutes. It is extremely challenging to prove corporate remorse and guarantee sentence. Corporate leaders and executives can be held accountable for their deeds performed in their position as an agent or trustees of the corporation. Their liability is in the nature of direct liability, strict liability or vicarious liability. Further, the use of criminal sanctions discourages directors from taking any business risk and their behaviour become too cautious. Overburdening of directors with responsibility constrains decision-making power of the directors and it would lead to inefficiency in management.

The thesis speaks about corporate culture and environment that drives the employees to deviate from law. The organisational failure might lead to corporate crime. In such case it would not be appropriate to punish the employees. The person responsible for the corruption is to be properly identified and charged to impose criminal liability. It is very difficult to identify the perpetrator of corrupt activity in the organizational structure of corporation. Group decision making and diffusion of responsibility in the corporate creates difficulty in identifying the decision maker.

In the conclusion of the thesis, it is observed that very low punishment is awarded even if the company is convicted. The sanctions imposed on the company is not sufficient for the deterrence of the crime. The benefits of corporate corruption outweigh the cost of fines. Internal disciplinary actions are seldom taken by the corporates against erring officers. There is a requirement for fostering an alternative system for inflicting criminal responsibility on corporate leaders.

The issue of corruption is also found in the book titled “Corporate Power to Corporate Crimes: Understanding Corporate Criminal Liability in India” by

Dr. Vijay Kumar Singh (2013). The book is an amended version of his doctoral thesis “Growth of Corporate Power and the Need to Impose Criminal Liability on Corporations in the light of Increasing Trend of Corporate Crimes: A Critical Study” submitted to Nagpur University. It tested the hypothesis that law is not capable to take on the challenges of indicting the corporate delinquents in absence of a bright picture on commercial criminal responsibility. It outlines the vicarious liability to wrongdoings having *mens rea* and presented comprehensive growth of corporate crimes.

A notable book on corruption is “Global Corruption: Law, Theory and Practise” by Gerry Ferguson (2017). The book comprehensively addresses the issue of worldwide corruption: its landscape and magnitude, and some ideas on its ancient, communal, fiscal, and political factors. The book speaks about the requirements in respect of combating corruption and mainly discusses United Nations Convention Against Corruption (UNCAC) and the Organisation for Economic Cooperation and Development (OECD) Convention. The implementation of international treaty obligations by USA, UK and Canada in their laws are discussed in the book. The anti-corruption measures and whistleblower protection steps taken by the various laws and treaties are compared.

The book highlights that in case of briber, there are two contracts involved:

- (i) Primary Contract: Offer and receipt of bribe.
- (ii) Secondary Contract: originates as a result of the bribe.

The primary contract is unenforceable, and the courts will not intervene in the debates around the main contract. The resulting contract is usually void or voidable at the choice of the betrayed party. Public policy demands the abrogation of the secondary contract, and the court may possibly require refund of money funded by the sufferer. If the betrayed party does not rescind the contract, then the court may award damages considering the unfavourable terms in the contract. This permits the deceived party to recoup the sum of bribe as well as the loss occasioned due to bribery.<sup>101</sup>

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<sup>101</sup> Supra 33, at 5-18

The book necessitates the importance of restitution and imposition of civil penalty for corporate corruption. If one party at the expense of another acquires and retain a benefit, then action for unjust enrichment is available. The secret profit is deemed as flow from infringement of fiduciary obligation and the victim is not expected to prove the damage to get restitution. Common law also provides for disgorgement of profit as an equitable remedy in corruption cases. Disgorgement is an essential element in the enforcement action and settlement of bribery offences in US. The settlement sought by Department of Justice (DOJ) or Securities and Exchange Commission (SEC) include retrieval of the advantages for unethical acts or illicit enrichment.<sup>102</sup> Shareholders can bring class action suits to claim damages caused by dishonest and deceptive information about corrupt practices. Civil action can be brought under anti-trust laws if it affects competition between the companies.<sup>103</sup> Disgorgement and confiscation seek to remove ill-gotten benefit and it is possible to have both confiscation and disgorgement used in the same case. Whereas the intent of penalty is to reprimand the wrongdoer and not to forfeit the advantages of offence per se. Considering the damages suffered by the victim the compensation is awarded irrespective of any profit or benefit for the briber.<sup>104</sup>

The book emphasis on the importance of adoption of UNCAC and OECD anti-bribery conference in the national laws as it is a key incentive for worldwide anti-corruption procedures. The ideal goal of anti-corruption measures is to prevent the corruption before it occurs. A huge social and monetary expenses is linked with fraud and anti-corruption actions plays a vital role in the deterrence of corruption. Corruption occurs when the preventive measures fail, hence inquiry and reprimand of delinquents is essential to inject public trust in the legal structure. The state shall not sit idle when corporations and individuals make profit out of illicit activities at the expense of global citizens. The implementation of effective detection, prosecution, and punishment of wrongdoer is vital for the prevention of corruption. The high

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<sup>102</sup> Id. at 5-19

<sup>103</sup> Id. at 5-21

<sup>104</sup> Id. at 5-24



prospect of being exposed and delivery of justice is the strongest disincentive to corruption.<sup>105</sup>

The book highlighted the importance of compliance, monitoring and internal control measures in the prevention and detection of corruption. Public enforcement authorities perform external investigation into the accusations of corruption against persons and establishments and internal enquiry is performed by enterprises as part of its domestic compliance schedule or in reaction to corruption reports inside the business. Companies in their international business activities use internal compliance program to observe the legitimacy of their actions and to avoid violation of anti-corruption legislations. A strong internal compliance program serves as a strong defence to corruption charges. It also helps for not charging the company, reduction in sentences and entering into deferred prosecution agreement. The additional benefits of conducting internal investigation are:

- (i) to persuade the enforcement authorities to exercise their judgment not to initiate charges.
- (ii) to gather data and devise a plea or compromise tactic for prosecution, coercive action or class action suits.
- (iii) to fulfil managements fiduciary duty towards shareholders and satisfy their concern.
- (iv) To evaluate the efficacy of domestic bookkeeping technique.<sup>106</sup>

The book discusses about the various sources of internal investigation such as anonymous reporting, whistleblowers, internal and external accounting, competitor complaints. The corporations and public officials have power to resist and react against those who inspect, sue, and give testimony in the offence.

An article written by Vikramaditya S. Khanna, “Should the Behavior of Top Management Matter”<sup>107</sup> discusses about the jurisdictional principles which support the levy of criminal responsibility on corporation. It analyses the standard used to assess the criminal liability and ill consequences of poor tone

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<sup>105</sup> Id. at 6-3

<sup>106</sup> Id. at 6-38

<sup>107</sup> Supra 58

at the top and window dressing compliance mechanism. The article states that the sanctioning of the corporation is based on the standards like strict liability, negligence, and *mens rea* or combination of all. The article highlights that it is the strict liability that induces the company to develop internal control measures. The role of the top management is emphasised in creating ethical culture, otherwise in strict liability offence the employees may threaten to report the misbehaviour which will trigger top management liability. The author of the article thrusts the significance of tone at the top in uncovering and averting corporate corruption.

The research work, viz, “Corporate governance in India: Issues and Perspective, a Critical Review of Legal Dimensions” by Dolly Jabbal,<sup>108</sup> submitted to Utkal University (2008) discusses about the legal framework in India such as SEBI, *the Companies Act 1956* and clause 49 of the listing agreement. The thesis identifies that lack of transparency, subordination of the board to the management and manipulation of finance and accounts are the corporate governance problems in India. The researcher opines that besides drafting of code of corporate governance, the practising of it is very vital. Commitment of various persons and institutions like legislature, regulatory bodies courts, etc are required for the growth and upkeep of corporate governance. Corporate governance should come from the management rather than imposed by the regulatory bodies and no point in making statute enforcing ethical conduct. The thesis further state that corporate governance reflects company’s culture, commitment to its values, policies, and relationship with stakeholders. A fair and transparent transaction is imperative in a business environment. Corporate governance is outside the sphere of law, and it come from the ethos and attitude of the leadership.

An article written by Karl Sidhu, “Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal”<sup>109</sup> analyses the Siemens corruption tactics and bribery practices. It then reviewed the anti-corruption

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<sup>108</sup> Jabbal, D. (2008). *Corporate governance in India: Issues and Perspective, a Critical Review of Legal Dimensions*. [Doctoral Thesis, Utkal University]. <http://hdl.handle.net/10603/191652>

<sup>109</sup> Sidhu, K. (2009). Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal. *German Law Journal*, 10, 1343.

compliance standards put in place by Siemens after the scandal. The author also discussed the effect of the scandal on the compliance measures in both Germany and USA. The author concludes that compliance should also consider the integration of competitors into their anti-corruption policy, to ensure that it creates a level playing field.

The role of self-regulatory practices and policies especially corporate social responsibility (CSR) policies adopted by the industrial, technology and telecom sectors in the anticorruption activities were addressed in the article titled “Controlling Corruption through Corporate Social Responsibility and Corporate Governance: Theory and Practice” authored by Indira Carr and Opi Outhwaite.<sup>110</sup> Corruption can be addressed by way of two different paths. One by way of legislative regulatory mechanism and other through self-regulation, i.e., business integrity. Bribery can be arrested only when companies set up their own rules and control mechanism against corruption. The compliance policies and code of conduct adopted by the business organisation helps to integrate anti-corruption measures. Corporate governance helps the business with structures and process to maximise the economic efficiency. The business which gets attention from the external stakeholders make efforts to prevent corrupt practices. The article concludes that the corporate governance framework plays greater role in the anticorruption efforts adopted by the business.

The research work titled “Corporate Governance in India in Preset Globalization Era: An Analytical Study” by Vivek<sup>111</sup> submitted to Dr. Rammanohar Lohia Avadh University (2012) analysed the role of the judiciary and SEBI in corporate governance. The researcher is of the view that judicial control is required considering the scandals and necessary direction to be given to ensure accountability and independence of the directors. The business judgment rule will not be available to the directors who indulge in corruption, fraud, and wilful misconduct. The thesis states that directors are expected to act

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<sup>110</sup> Carr, I. & Outhwaite, O. (2011). Controlling Corruption through Corporate Social Responsibility and Corporate Governance: Theory and Practice. *Journal of Corporate Law Studies*, 11, 299.

<sup>111</sup> Vivek. (2012). *Corporate Governance in India in Preset Globalization Era: An Analytical Study*. [Doctoral Thesis, Dr. Rammanohar Lohia Avadh University]. <http://hdl.handle.net/10603/236464>

for the primary advantage of the company and stockholders since they are the trustees and custodian of funds. The fiduciary duties are to be discharged by the directors in the interest of stockholders and they shall not do any act with *malafide* intention or ulterior motive. Considering the peculiarities of the industries, in researcher's view, industry specific corporate governance to be implemented. The corporate governance should adhere to the principles of leadership, accountability, integrity, integration, commitment and transparency.

Aarati Tyagi in her research work "Corporate Criminality- An Offshoot of Corporate Misgoveranance"<sup>112</sup> submitted to Acharya Nagarjuna University (2012) analysed the impact of corporate scandals on the state and the society. The research tested the hypothesis that weak sanctions and corporate misgovernance breeds corporate crime. The board should create defacto governance culture and good governance to be cascaded down the establishment to reach every rank. In this globalised economy, considering the corporate crimes committed across the globe, there is a greater need for control, monitoring, and accountability of corporate activity. Liability of the corporate for its crime is complementary to the individual liability. The research work states that the corporate prosecution is an alternative remedy when it is difficult to determine the individual liability. Social responsibilities are to be performed by the companies to enable the individuals to enjoy their qualitative life. The researcher opined that it is the implementation of the company law is ineffective in most case and not the law. is The researcher suggested that Indian legislative framework should provide for serious fraud office like that of UK. The research recognised the importance of shareholder activism in the development of corporate governance. Awareness among the shareholders to be created to take initiative. The research work recommended for the expansion of protection to the whistleblowers who report fraud and suggested a separate law for the protection of the interest of the whistleblowers.

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<sup>112</sup> Tyagi, A. (2012). *Corporate Criminality- An Offshoot of Corporate Misgoveranance*. [Doctoral Thesis, Acharya Nagarjuna University].  
<https://shodhganga.inflibnet.ac.in:8443/jspui/handle/10603/126773>

The research work<sup>113</sup> titled “Corporate Governance - Law and Policy Perspectives” by Paramata Bhuvanewari, submitted to Acharya Nagarjuna University (2016) framed the hypothesis that scams are the result of lack of implementation of corporate governance principles. It attempted to evaluate the role of corporate governance in shielding the interest of stakeholders and examined the effort of the judiciary in promoting good corporate governance. The thesis states that corporate governance can be achieved through transparency, integrity, ethical business conduct, commitment to the values and accountability of the directors while performing their duties. One should follow the essence of law and not the letter of law.

The research work<sup>114</sup> conducted by Mansi Khanna titled “Corporate Governance and Law: A Study with Special Reference to Corporate Frauds” under the guidance of Mithilesh Vishwakarma submitted to Jaipur National University (2019) dealt with the need for good corporate governance for the growth of the economy and eradication of frauds. The big corporate frauds like Harshad Mehta scam, Saradha scam, Satyam Computer Ltd. scam, Vijay Mallya scam, Sahara scam, etc was analysed in the thesis. The research emphasised the independence of the board and independent director and recognised the protection of the minority shareholder. The absence of corporate governance systems is highlighted in the research by discussing the conflict of interest in Chanda Kochhar case, independence of independent directors in the Tata Mistry case, and PNB- Nirav Modi scandal. The researcher is of the view that good corporate governance practices contribute towards social goods besides safeguarding the interest of the shareholders. The researcher opines that the authority of the major stockholder poses crucial challenge to the corporate governance structure in India.

Corporate governance framework requires establishment of whistleblower mechanism and prevention of victimisation of whistleblowers. Article titled “Whistle Blowers Policy Challenges and Solutions for India with

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<sup>113</sup> Bhuvanewari, P. (2016). *Corporate Governance - Law and Policy Perspectives*. [Doctoral Thesis, Acharya Nagarjuna University]. <http://hdl.handle.net/10603/287779>

<sup>114</sup> Khanna, M. (2019). *Corporate Governance and Law: A Study with Special Reference to Corporate Frauds*. [Doctoral Thesis, Jaipur National University]. <http://hdl.handle.net/10603/262019>

Special Reference to Corporate Governance” by Dr. Vijay Kumar Singh <sup>115</sup> deals with the corporate governance and whistleblower’s policy in India. It speaks about the contribution of the whistleblowers in corporate governance and the necessity to provide adequate safeguard to the whistleblowers. In modern day, the shareholding of a company is largely dispersed, and the management is granted to a small number of employees and there must be a process in place to test the functions of the management. Whistleblower policy put a shield on the administration, that other stakeholders are observing with ability to testify to higher authorities, and it acts a deterrent mechanism. The Article examined the legal provisions prevalent in various countries such as United Kingdom, Australia, New Zealand, USA, and India. As per the *Sarbanes Oxley Act*, audit committee to take a role in reduction of corruption and whistleblowing. The reporting mechanism to be developed by the audit committee for recording, tracking, and taking action on the anonymous and confidential information provided by the employees. *Sarbanes Oxley Act* provides protection to the person who reports the violation of federal laws to the enforcement officer. Protection is given to the whistleblowers from retribution by the wrongdoer.<sup>116</sup>

“Role of Whistleblower in Prevention or Detection of Corporate Frauds: a Study” by Shikha Sachdeva<sup>117</sup> submitted to University of Delhi (2018) made an attempt to study the death and retaliation caused to the whistleblowers in the process of disclosing fraud and the need to strengthen the legislative framework. The research work states that the intention of the whistleblowing is *interalia* affected by the factors like organisational climate, size of the organisation, type of the organisation, channels for communication, severity of the fraud, power of the wrongdoer, retaliation, and organisational commitment. The researcher is of the view that no single agency is provided under the Whistle Blowers Protection Act to consider all whistleblower complaints. The Competent Authority varies with the person against whom the complaint is filed by the whistleblower. The thesis states that in case of corporate fraud, employees are

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<sup>115</sup> Supra 92

<sup>116</sup> Id. at 5

<sup>117</sup> Sachdeva, S. (2018). *Role of Whistleblower in Prevention or Detection of Corporate Frauds: a Study*. [Doctoral Thesis, University of Delhi]. <http://hdl.handle.net/10603/370838>

the vital source of information and the government as well as the organisation shall encourage the employees to blow the whistle. The researcher opines that measures are to be taken to build the confidence of the private sector personnel since they are most exposed and prone to retaliation for blowing the whistle.

The research book titled “Corruption, Integrity and the Law: Global Regulatory Challenges” authored by Nicholas Ryder and Lorenzo Pasculli (2020) deals with the efficacy of anti-corruption laws. The interdisciplinary method adopted by the book covers the disciplines of law with ethical issues as well as governance, political philosophy, justice, and criminology. Implementation of international principles and guidelines by various countries like Switzerland, United States, United Kingdom, Nigeria, etc. are explored in the book. This book uncovers the sources, framework and shortcomings of the international anti-corruption laws and analyses positive corruption prevention strategy. As per the authors, the implementation of the anticorruption mechanisms by the states does not appropriately addresses the causes of corruption. Multiple anti-corruption mechanisms are present in fragmented way and the cooperation and harmonisation of the states differ during the implementation of these anti-corruption mechanisms. Developing nations lack of resources and capacity, primacy to national interest, and reluctance of the states are some of the factors that impact implementation of anti-corruption measures.

Corruption is prevented by way negative measures such as imposition of international sanctions and resorting to criminal justice enforcement mechanisms to restrict the freedom and rights of the individuals as well as enterprises. As per the authors, the negative measures in the anti-corruption framework are unbalanced, insufficient and ineffective. Criminal justice system is vulnerable since it remains fundamentally local. Each state defines the offence of corruption in different manner and territorial jurisdiction of the state causes impediments in the investigation, apprehension, and trial of wrongdoers in transnational crime. The corruption is committed in a secretive environment which poses challenges to the states to detect the crime. The state authorities rely upon corporate disclosures or whistleblowers for the detection of crime. The difficulty in gathering of watertight evidence, inadequate sentencing, and

collateral damages like loss of revenue, loss of employment, relocation of enterprises, etc causes insurmountable obstacles in the prosecution of corporate corruptions. In order to overcome the said difficulties, some states adopt deferred prosecution agreement (DPA), which help to enhance corporate compliance and reduce future corruption risks. The justice delivery system can be frustrated by the corporations by using DPAs to get out of criminal prosecution and escape punishment.

The virtue of integrity is used as a positive measure for the resolution of sources of corruption and the organisations adopt fair code of conduct, education, communication, training, and corporate social responsibility (CSR) activities as part of developmental practices. The reporting obligations cast on corporation increases transparency. Responsibility is cast on the corporations to prevent bribery. The responsibilities enable the organisations to remove motivation and lessen the prospects for corruption.

The harmonisation of the states and their cooperation is required for the implementation of the anti-corruption mechanisms. The ideal solution, as per the authors is creation of global crime prevention and enforcement agencies. The adage of sovereignty of the nation prevents the achievement of this ideal solution. International organisations and states shall promote transparency, integrity, accountability, sustainability, etc through education, training, and communications. The positive sanctions can be made effective by recognising the honest practices of individuals or enterprises and accolading whitelist of trustworthy companies instead of financial rewards. The appraisal and promotion of the employees can be based on the assessment of their integrity. Common criteria shall be provided for exercising prosecutorial discretion for resorting to DPA. Duplication of punishments and sanctions is unfair and the same shall be avoided by international law.

## **8. Gaps Identified in the Literature Review**

The study of existing literature shows that many of the authors writing on the subject discussed about the corporate corruption and analyses criminal enforcement. The review of literature shows that study was conducted about the behaviour of the top management and the requirement about whistleblower



policy for reporting of misconduct. The gaps noticed during the review of literature is as follows:

1. There is no specific study made about prevention and detection of corruption in the EPC Contracts in the oil and gas sector.
2. There is no research work available to identify corrupt practices prevailing in different stages of EPC Contract.
3. No study is available to identify the causes of corruption which essential for the prevention of corrupt practices occurring in different stages of EPC Contract.
4. Corruption is treated as purely a criminal offence and there is no alternative channel of enforcement mechanism in India.
5. There is a need to understand about the multiple channels available for the investigation, prosecution, and enforcement mechanism against corporate corruption.
6. A comparative study of civil and criminal enforcement mechanism is necessary to devise a suitable enforcement mechanism.
7. The lack of civil enforcement provisions in the legal framework of India was not made a subject matter of study in the previous research.
8. There is a necessity to understand the benefits civil enforcement mechanism to propose a multiple enforcement regime in resistance to corporate corruption in India.

All the works discussed in the review of the literature indicates that the statutes in India does not accept corruption and believe it as entirely criminal wrongdoing. The adversarial system of criminal justice followed in India imposes herculean task on the prosecution to substantiate the corruption beyond the reasonable doubt. There is no study conducted about the corrupt practice prevailing in the EPC Contract in the oil and gas sector. Hence there is merit in conducting research to point out the unethical practices in the EPC Contract and study the role of corporate governance in managing corruption risks in oil and gas sector.

## **9. Rationale and Significance of the Study**

In the contemporary time with the advancement of technology, the age-old schemes of corporate bribery, fraud emerge with new modus operandi, which makes it difficult to predict, or to prevent them. With ever increasing motivations and along with the help of lacunas in laws regulating corporate conduct, the fraudsters successfully perpetrate corporate frauds. Ranging from embezzlement of company property to offering bribes for public procurement projects, corporate fraud takes various forms with ever increasing impacts on stakeholders. The loss due to these corporate criminal acts is estimated to be several billion dollars and results in loss of jobs, fall in the Gross Domestic Product growth, etc. These acts of corruptions have a devastating effect on the company, its investors and employees, markets at large including the global customers, the taxpayer, and the society at large.

The objective of this study is to examine the landscape and insight of corporate corruption in the execution of Engineering, Procurement and Construction Contract (EPC Contract) in the oil and gas sector and their consequences in the business and economic systems. The adequacy of the existing legal and monitoring commitments must be examined to redefine and structure it to prevent corruption.

While addressing corporate corruption and fraud, the research will delve into the contribution of corporate governance, compliance, existing legislation in detecting and preventing corporate corruption. A comparative study of Indian law with that of UK, USA and international conventions is undertaken to suggest solutions for the prevention of this global menace.

## **10. Objectives of the Study**

Research will enable us to identify the effectiveness of the present legal mechanism to prevent corporate corruption. It will also help us to predict possible sources of corporate corruption and fraud in the EPC Contracts in the oil and gas sector. We can prevent corporate corruption and develop a good governance system based on the lacunae identified. The research will benefit

the corporation to fix the loopholes in their contracts and thereby deter and detect corruption. Our legal system can enact appropriate legislations or amendments to the existing laws in line with foreign laws and conventions.

Therefore, it becomes imperative to have in place an organic, ever updating framework of corporate governance policies and statutes which provide for multiple enforcement mechanism. The laws and corporate governance policies shall be efficient enough to foresee the different modes of corporate corruption and prevent it, or upon its occurrence to mitigate its effects with efficiency.

The research is proposed with the following objectives:

1. To identify corrupt practices in different stages of EPC Projects in the oil and gas sector.
2. To examine the Corporate Governance policies in the oil and gas sector companies and analyse its role in the stoppage and detection of corruption.
3. To identify the role of compliance in designing a level playing field among the EPC contractors and increasing competition in the oil and gas sector and its impact on containing corruption.
4. To collect data relating to utility of Corporate Governance policies in the oil and gas sector in prevention and detection of corruption in EPC Contracts.
5. To compare the civil and criminal enforcement of corruption cases and propose an alternate mode of enforcement mechanism against corporate corruption in India.

## **11. Hypothesis**

The research proceeds on the hypothesis that:

1. There is lack of corporate governance mechanism in the oil and gas sector companies in India to prevent and detect corruption.
2. There is lack of legislations in India to take civil enforcement action against corporates for their corrupt practices.

3. Lacunas in the legal framework in India and the prevalent compliance policies does not foster competition and reduces the quality of services in the oil and gas sector.

## **12. Scope of the Research**

The scope of the research is to identify the chances of bribery and corruption in different stages of execution of the EPC Projects in the oil and gas industry. It attempts to trace the causes of corruption, bribery, and non-compliance by companies in the oil and gas industry.

The research would enumerate the role of corporate governance, compliance and whistleblower in the prevention and uncovering of corruption in the oil and gas public sector undertaking. The research would high light the comparative analysis of the civil enforcement action initiated against the corporates in the oil and gas sector at national and international level, for their antibribery practises.

## **13. Limitations of the Research**

The research is restricted to the analysis of anti-bribery and corruption policies prevalent in oil and gas sector in India and their efficacy in the prevention of corruption. There is no past study conducted about the EPC contracts in oil and gas sector, and the past study always helps to lay foundation stone for understanding the research problem. The limited data and the absence of prior study created a little obstacle in the research, but the research took it as an opportunity to fill the lacunae.

There is reluctance on the part of the individuals and companies to admit or share the details of non-compliances, acts, omissions, and failures in the implementation of anti-bribery compliance policies. Access to people, organizations, and documents are limited considering the sensitive nature of the issue. Despite the above limitation, RTI application was submitted to collect antibribery and corruption policies, last ten (10) years whistleblowing data in the oil and gas sector PSUs in India. Majority of the PSUs denied information under Section 7(9) of the Right to Information Act, 2005 stating that records are voluminous, and it would avert the human resources of public authority.

Unlike other jurisdiction, legal framework in India does not provide for the civil enforcement actions against the company. It concentrates on the criminal proceedings against the public official for the offence of bribery and corruption. The civil enforcement actions against companies for their corrupt activities is lacking in prior research studies. This limitation provides opportunity for further research on the civil enforcement actions against corporate corruption.

#### **14. Research Methodology**

Empirical and doctrinal research methodology is adopted to examine the first hypothesis. Doctrinal research is proposed to examine the second and third hypothesis. Data available in the public domain will also be used to test the hypothesis and draw out the consequences. The primary data is collected by way of circulation of questionnaire to the executives (including former employees) working in the oil and gas sector and other experts. The antibribery and corruption policies, code of conduct, whistleblower policy, etc of the oil and gas public sector companies was collected to analyse their role in the prevention of corruption, a qualitative analysis was carried out. The Right to Information Act 2005 was used for the collection of data relating to the whistleblowers' complaints. The contents of the search materials are analysed using quantitative research method. The comparative method adopted to identify and/or highlight the shortcomings of legislation in India and suggest improvements.

**Mode of Citation:** American Psychological Association: 7<sup>th</sup> Edition is followed in research work.

#### **15. Scheme of Chapters**

##### **Chapter-1: Introduction**

It deals with the meaning and definitions of various terms related with the corporate governance, anti-bribery and corruption, compliance and whistleblowers. Corruption is an act that deviates from the normal society norms with the objective to attain gain, either monetary or otherwise. In the construction industry, corruption is the abuse of assigned authority at the

expense of a construction project. It also explains the nature, scope, limitations, purpose, objectives, and hypothesis of the research.

## **Chapter-2: Anti-Corruption Laws and Regulations: An Analysis**

Corruption is not a problem singular to India and is in fact an issue across the globe. Collective international action has been attempted to combat corruption through the United Nations Convention Against Corruption (UNCAC), and initiatives by international organisations like Organisation for Economic Co-operation and Development (OECD) and Transparency International (TI).

The chapter analyses the applicable laws across the various jurisdictions. *The Bribery Act 2010* (UKBA) and *the Foreign Corrupt Practises Act 1977* (FCPA) are most effective and stringent legislation taking enforcement actions against the violators.

The chapter discusses about the effectiveness of international conventions, laws, and the procedural rules in attaining their intended objectives. It discusses about the role played by NGOs in the anti-bribery compliance.

The chapter also analyses the applicable laws, rules and policies facilitating anti-bribery and corruption compliances in India, *interalia* including *the Prevention of Corruption Act 1988*, *the Competition Act 1988*, *the Whistle Blowers Protection Act 2014*, Central Vigilance Commission (CVC), Law Commission Report, Corporate Governance Committee Report, etc.

## **Chapter 3: Corporate Governance and Compliance**

Corporate Governance balances the interests of the various stakeholders and implements procedures and policies to ensure protection of their interests. There are several interests that need to be harmonized by the corporate and implemented in an equitable form across multiple jurisdictions in case of multinational conglomerates.

This chapter deliberates on the responsibility of the leadership to guide corporate governance. It focuses on institutionalization of integrity through

anti-corruption programmes, compliance systems and strategies. The Chapter discusses about the various constituents of corporate governance like Internal Controls, Internal Investigations and Risk Management, Whistleblower policy, etc.

It delineates the role of the stake holders in the oil and industry and how it is used to prevent corruption. Whistleblowers is one such stakeholder who raises their voice against corruption and take a risk for the public good. A whistleblower plays an important role in the preventive vigilance to check corruption. Prevention of victimisation will encourage whistleblowers to come forward and raise their voice against the malaise of corruption. Safety in the mind of whistleblower has to be created by law and company policies and their identity is to be guarded without risking their interest or safety.

#### **Chapter- 4: Implementation of Corporate Governance**

The corporate governance policies prevailing in the national and international companies doing EPC contract business in the oil and gas sector is analysed and the data are being collected by way of questionnaires.

Empirical study of the whistleblower's disclosure received in Indian oil and gas public sector companies in the last 10 years are requested for analysis. It also analyses protection granted to the whistleblowers against victimisation.

#### **Chapter- 5: Corruption in the Engineering, Procurement and Construction (EPC) Contracts**

The corrupt practises in every stage of the EPC Projects are in different scale. The corrupt practises *interalia* can be found in the planning, pre-bid, and post bid stages of EPC Contract. There is abuse of bidding process to delay the project execution and abuse of discretionary power by public official during bidding process as well as execution stage.

#### **Chapter- 6: Civil Enforcement Actions against Corporate Corruption**

This chapter briefly identifies and discusses the various enforcement actions taken against the corrupt practises. It compares criminal and civil

enforcement mechanisms prevailing in USA, UK and India and analyse the deterrent effect of the same.

This chapter also discusses and analyses the various enforcement actions taken against EPC Contractors at the international level.

### **Chapter- 7: Conclusion and Suggestions**

The conclusion delineates the major limitations found during the research on good governance practises, and anti-bribery and corruption compliance. It focuses on the inadequacies of legal framework in India and the incompetence of policies and enforcement of anti-bribery compliance.

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## **CHAPTER II**

### **ANTI-CORRUPTION LAWS AND REGULATIONS: AN ANALYSIS**

*Integrity, transparency, and the fight against corruption  
have to be part of the culture. They have to be taught as  
fundamental values.*

*Angel Gurría, OECD secretary general.*

Corruption is not a problem exclusive to India; rather, it is a problem that affects the entire world. United Nations Convention Against Corruption (UNCAC), and the international organisations like the Organization for Economic Co-operation and Development (OECD), and Transparency International (TI) attempted to tackle corruption through collective international action.

*The Prevention of Corruption Act 1988, the Competition Act 2002, the Whistle Blowers Protection Act 2014, the Central Vigilance Commission (CVC), and the Integrity Pact are among the laws, norms, and policies examined in this chapter.*

In this chapter, the numerous laws that apply in various jurisdictions are examined. Enforcement measures against offenders of *the Bribery Act 2010* (UKBA) and *the Foreign Corrupt Practices Act 1977* (FCPA) are the most effective and rigorous.

The chapter also discusses the effectiveness of international conferences, regulations, and procedural norms in achieving their intended goals.

## 1. Indian Legislations

The Indian Penal Code recognises corporate criminal culpability.<sup>1</sup> It is pertinent to note that only an individual human being can commit certain crimes such as murder, treason, rape, and perjury, which means that corporations cannot be held criminally liable. A firm cannot be punished for some offences that dictate corporal punishment.<sup>2</sup>

### 1.1 The Prevention of Corruption Act, 1988

Sections 161 to 165 of *the Indian Penal Code* (IPC) were repealed by *the Prevention of Corruption Act 1988* (the PC Act). Special judges are appointed under the PC Act to deal with the public sector corruption. The PC Act requirements are in addition to and do not exempt public servants from any other proceedings commenced under legislation already in existence.<sup>3</sup>

As an effective preventive measure, the PC Act imposes burden of proof on the accused.<sup>4</sup> As long as the defendant does not challenge the presumption, it is assumed that the accused has received illegal benefits from a third-party source. Bribery charges can be established beyond a reasonable doubt because of a presumption in legislation. The presumption has eased the prosecution's burden of proving the defendant's motivation for taking the reward. The prosecution must first show that the accused accepted the gratification and had a consenting mind referring to the *mens rea*.

The PC Act also made abetment, conspiracy, agreement, and attempt to perform corrupt activities illegal in order to discourage acts of bribery and corruption. For their criminal wrongdoing, repeat offenders are given harsher penalties.<sup>5</sup>

No court can hear a case unless the appropriate authority approves it in advance.<sup>6</sup> The prosecution has a pre-requisite requirement to seek mandatory

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<sup>1</sup> *Indian Penal Code 1860*, s.11: "Person"- The word "person" includes any Company or Association or body of persons, whether incorporated or not.

<sup>2</sup> *State of Maharashtra v Syndicate Transport Co.(P) Ltd.* (1964) AIR 195 (Bombay).

<sup>3</sup> *The Prevention of Corruption Act 1988*, s.28 (In.).

<sup>4</sup> *The Prevention of Corruption Act 1988*, s.20 (In.).

<sup>5</sup> *The Prevention of Corruption Act 1988*, s.14 (In.).

<sup>6</sup> *The Prevention of Corruption Act 1988*, s.19 (In.).

sanction from the proper authorities, and without legal sanction, the trial court is ineligible to hear the case. The court shall discharge the accused if an order of sanction is invalid or illegal.<sup>7</sup> Court shall not stay the proceedings for any error or irregularity unless such irregularity results in failure of justice.

The sanctioning authority does not need to find the truth or analyse the facts or information presented to him. A sanction is not a judicial duty, but rather an executive one.<sup>8</sup> Application of mind by the concerned authority upon examination of the evidence placed before it is a pre-requisite before deciding as to whether to prosecute someone. In legitimate cases, sanctions will not be delayed or refused, and in cases of malicious and vexatious allegations against public workers, sanctions will be denied in the interest of justice. At the time of filing a criminal prosecution against a public official, a previous sanction is not required, but a sanction is required while taking cognizance of the wrongdoing by the court. There is no restriction on the authority of police to conduct investigations, record statements, and gather evidence under the PC Act.

The prosecution is required to demonstrate a valid sanction either by presenting evidence indicating that a competent authority was satisfied based on evidence presented to it or by submitting the sanction order that comprises the relevant facts establishing the wrongdoing and basis for its satisfaction. Sanction is not just a formality, but a sacred act that protects public officials from being falsely accused. When a sanction is granted, the court merely looks at whether the sanctioning authority was aware of the facts that constitute the offence at the time of granting the sanction and applied its mind to the decision making process.<sup>9</sup> Non-giving of any reasons for satisfaction of the grounds amounts to invalidating the sanction order itself and is not in accordance with law.<sup>10</sup> When punishing a public official, the proper authorities should exercise prudence and care. There is a role for a sanctioning authority in justice from being achieved.

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<sup>7</sup> *Nanjappa v State of Karnataka* (2015) AIR 3060 (In.).

<sup>8</sup> *Parasnath Pande & anr. v State* (1962) AIR 205 (Bombay).

<sup>9</sup> *Mohd. Fasal Ahmed v State of A. P.* (1979) AIR 677 (In.).

<sup>10</sup> *Periasamy v Inspector Vigilance & Anti-Corruption, Tiruchirapalli* (1994) Cri. LJ 753 (In.).

The PC Act ensures that the accused has an equal opportunity to defend himself and testify in his own defence or on behalf of anyone else named as an accomplice. The accused will not be presumed guilty if he or she refuses to testify.

Convicted criminals serve as a deterrent to future criminals because of the punishments they receive. As a deterrent to future wrongdoing and a source of public confidence, the severity and duration of an individual's sentence is critical in the criminal justice system.

A police officer has the authority to search the banker's books of a suspect who has committed an offence or has money in their possession on behalf of suspected person and they can extract any pertinent entries. Authorities want banks to assist them in their investigations.<sup>11</sup>

### **1.1.1 Before 2018 Amendment**

Corruption always involves two (2) parties: the briber and the bribe taker. The PC Act did not distinguish between 'collusive corruption' as well as 'coercive corruption'. Since all corruption is assumed to be coercive, the bribe giver is also considered a victim. In collusive corruption, both the donor and the recipient of bribes hold the same standard of accountability, which was not addressed in the PC Act. An offender who willingly provides evidence that he or she provided the public worker with illicit benefits is shielded from legal action. Immunity under the PC Act was given to the bribe givers, which meant that they could not be prosecuted for making statements in a proceeding about offering of gratification or any other valuable item to the public official.<sup>12</sup> The PC Act shielded the bribe donor from prosecution, as if he or she had been compelled to do so by the circumstances. The immunity is granted in the hopes that it may encourage citizens of filing complaints against public officials who take bribes for services rendered.

Section 24 of the PC Act disregarded in its entirety of collusive corruption, where the bribe sender is not a sufferer but a beneficiary. Bribe

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<sup>11</sup> *The Prevention of Corruption Act 1988*, s.18 (In.).

<sup>12</sup> *The Prevention of Corruption Act 1988*, s.24 (In.).

givers in collusive corruption should be punished in the same way as bribe takers since they are 'abettors' of the crime. The state as well as society as a whole are negatively impacted by collusive corruption.

The PC Act was unable to stop corporate corruption, which is a form of collusive corruption. The companies indulged in bribery in order to secure or keep business escaped from prosecution. The PC Act assumes that all bribery is the result of a positive act or a demand by the public servant for illegal gratification. Corruption in the corporate sector was not anticipated by the PC Act, which made no provision for the identification or prohibition of such practises by the corporates. It did not take into account the corporate muscle and its voluntary corrupt conduct for its business goals. In addition, the PC Act did not address the issue of corruption involving a foreign official.

### **1.1.2 After 2018 Amendment**

It is a common misconception that corruption moves from the government into business. There is an inducement of corruption in the public sector by the international business community.

The PC Act amendments made in 2018 include provisions that address the supply side of corruption, which was previously a largely ignored aspect. 2018's amending statute abolished the bribe giver's immunity.<sup>13</sup> Those who denounce bribes offered to public officials and testify as witnesses in the prosecution of the crime are granted immunity under the PC Act section 24. The 2018 change dramatically reduces the protection afforded to the bribe giver and places the onus on the bribe giver to notify the occurrence of an offence. The individual who is 'compelled' to provide such an unfair advantage must notify the appropriate law enforcement agency within seven days of the offence being

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<sup>13</sup> Dunn, G. (2018, August 9). *Amendments to the Prevention of Corruption Act, 1988: Implications for Commercial Organizations Doing Business in India*. Gibson Dunn. [https://www.gibsondunn.com/amendments-to-prevention-of-corruption-act-1988-implications-for-commercial-organizations-doing-business-in-india/#\\_ftn4](https://www.gibsondunn.com/amendments-to-prevention-of-corruption-act-1988-implications-for-commercial-organizations-doing-business-in-india/#_ftn4)

committed.<sup>14</sup> What material facts and evidence to be adduced to demonstrate that an individual was forced to give bribe to a public official is unclear.<sup>15</sup>

Businesses' integrity and compliance were meant to be bolstered by the 2018 provisions concerning bribery by commercial organisations. If a business associate is involved in the crime of offering or attempting to hand out any undue benefit for establishment, then the organisation can be prosecuted for the offence.<sup>16</sup> Among the commercial organisations in India are both Indian-owned and foreign-owned corporations as well as joint ventures.<sup>17</sup> Vicarious liability is cast on the commercial organisation for the bribery provided by its employees to the public servants.

The PC Act stipulates that a person who executes services for or in place of an establishment is considered to be linked with that establishment in order to include a wide net of intermediaries.<sup>18</sup> It is irrelevant to consider the position of the representative of the organisation and it does not matter if they are subsidiary of the organisation, agent or an employee.<sup>19</sup> Employees of a commercial organisation are considered to be doing work for or on behalf of their employer unless the contrary is proven.<sup>20</sup>

A fine may be imposed on the commercial organisation for the offence committed by the organisation.<sup>21</sup> By establishing that they had proper compliance measures in place to guard against bribery by anyone linked with the establishment, and they can escape legal responsibility.<sup>22</sup> The Central Government is responsible for establishing the rules that must be followed by the organisation.<sup>23</sup>

The directors, managers, secretary, and other executives are personally responsible for the violation of section 9 of the PC Act by their organisations.

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<sup>14</sup> *The Prevention of Corruption Act 1988*, s.8 (In.).

<sup>15</sup> *Supra* 13

<sup>16</sup> *The Prevention of Corruption Act 1988*, s.9(1) (In.).

<sup>17</sup> *The Prevention of Corruption Act 1988*, s.9(3) (In.).

<sup>18</sup> *The Prevention of Corruption Act 1988*, s.9(3)(c) (In.).

<sup>19</sup> *The Prevention of Corruption Act 1988*, s.9, Explanation 1 (In.)

<sup>20</sup> *The Prevention of Corruption Act 1988*, s.9, Explanation 3 (In.).

<sup>21</sup> *The Prevention of Corruption Act 1988*, s.8 (In.).

<sup>22</sup> *The Prevention of Corruption Act, 1988* s.9(1) (In.).

<sup>23</sup> *The Prevention of Corruption Act 1988*, s.9(5) (In.).

Accountability is imposed on the person in charge of the business if it can be demonstrated that a wrongdoing was perpetrated with his or her consent or participation. In cases where the management is found guilty, he or she will be sentenced to no less than three (3) years in prison but may extend up to seven years.<sup>24</sup> Right tone at the top is to be established by the management and ensure effective compliance and uphold ethics to avoid personal liability.

### **1.1.3 Limitation of the *Prevention of Corruption Act 1988***

The noticeable limitations of the PC Act are:

- i. not applicable to foreign public official
- ii. no extra territorial application
- iii. no protection for the whistleblower

The intent of all criminal statutes is not only to penalise the offender but also to deter the wrongdoers to get involved in such acts in future.

Public servants are defined by the PC Act. For lack of cash or resources in a welfare state, the public duty is transferred to private persons or organisations. The PC Act has to be updated to include private bribery because the government is increasingly relying on the PPP model.

Without the protection of witnesses and whistleblowers, the PC Act's goals cannot be achieved. As a result of the lack of protection afforded to whistleblowers by the PC Act, evidence is withheld, resulting in lack of evidence and eventual exoneration of the accused.

## **1.2 Legislations for Whistleblower Protection in India**

Whistleblowers are people who become aware of an organization's fraudulent, improper, and unethical practises and, in the interest of the public, prefer to speak up rather than remain silent in the face of blatant injustice.<sup>25</sup>

Whistleblowing is described as an employee's revelation in public interest about an organization's illegal acts, corruption, or mismanagement. Whistleblowing can be regarded as:

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<sup>24</sup> *The Prevention of Corruption Act 1988*, s.10 (In.).

<sup>25</sup> Chandrachud, A. (2004). Protection for Whistleblowers: Analysing the Need for Legislation in India, *Supreme Court Cases Journal*, 6, 91.

- (i) raising apprehension about malpractices inside the organisation;
- (ii) giving information to the appropriate authorities about the illegal and underhand activities;
- (iii) exposing a malpractice or cover up in the business;
- (iv) offering help to apprehend a criminal.<sup>26</sup>

In order to report an issue, it must be based on a genuine fear for the safety and well-being of people and the environment.

Internal or external disclosure of information is possible. A whistleblower could be an employee or someone from outside the company. Honesty and integrity are essential attributes for a whistleblower. The fundamental goal of a whistleblower's activity should be to purge the organisation for the greater good. He shouldn't do anything out of self-interest.<sup>27</sup> Whistleblowing activity has the following three stages<sup>28</sup>

1. Causation: A person notices an illegal, immoral, or unethical activity.
2. Disclosure: The person discloses the unethical activity to the relevant public authority for taking remedial action.
3. Retaliation: The employer upon knowing the identity of the informant takes retaliatory measures including dismissal, harassment, intimidation, etc.

In order to facilitate disclosure of unlawful activity, the state or the organisation must address the following concerns of the whistleblower:

1. Worry of consequences or outcome
2. The ambiguity as to whom, where and when to raise the issues
3. The assumption that no action will be taken even after reporting about the illegal or unethical activity

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<sup>26</sup> Id.

<sup>27</sup> *Manoj H. Mishra v Union of India* (2013) 6 SCC 313 (In.).

<sup>28</sup> Feldman, E. (1999). *Protection for Whistleblowers*. 9<sup>th</sup> International Anti-Corruption Conference, Durban.



The organisation should cultivate a culture of fairness, trustworthiness, and mutual faith in order to instil bravery in its personnel. Employees need to know that if they blow the whistle, they will be protected and will not face any repercussions, both professionally and personally. Whistleblowers should have faith and confidence that their concerns will be taken seriously.

The employees who shield the internal safety at the workplaces by blowing the whistle are like internal army. Whistleblowers who do good deeds should be shielded from retaliation by their employers. It's possible that the employees could lose their jobs, be forced to retire early, be degraded by colleagues, or be blacklisted, among many other things.

### **1.3 N.R. Narayana Murthy Committee Report on Corporate Governance**

Whistleblower policies are mandated by the N.R. Narayana Murthy Committee's corporate governance report.<sup>29</sup> The committee chaired by Mr.Narayana Murthy made a necessary recommendation that:

*Personnel who observe an unethical or improper practice (not necessarily a violation of law) should be able to approach the audit committee without necessarily informing their supervisors. Companies shall take measures to ensure that this right of access is communicated to all employees through means of internal circulars, etc. The employment and other personnel policies of the company shall contain provisions protecting “whistle blowers” from unfair termination and other unfair prejudicial employment practices.<sup>30</sup>*

According to the committee's recommendations for an internal policy on audit committee access, employee should be able to speak to the audit committee if they notice an unethical or improper activity. This mechanism must be

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<sup>29</sup> Singh, V.K. (2013, October). Whistle Blowers Policy Challenges and Solutions for India with Special Reference to Corporate Governance. *GNLU Journal of Law, Development and Politics*, 3, 5.

<sup>30</sup> Murthy, N.R.N. (2003, February 8). *Report of the SEBI Committee on Corporate Governance*. Securities and Exchange Board of India. <https://www.sebi.gov.in/reports/reports/mar-2003/the-report-of-shri-n-r-narayana-murthy-committee-on-corporate-governance-for-public-comments-12986.html?QUERY>

understood by the worker. In order to protect the internal auditors from unjust dismissal and other discriminatory employment practises, the whistleblower policy sought to empower and offer independence to the whistleblowing employees. According to the Narayana Murthy Committee's mandate:

*Companies shall annually affirm that they have not denied any personnel access to the audit committee of the company (in respect of matters involving alleged misconduct) and that they have provided protection to “whistle blowers” from unfair termination and other unfair or prejudicial employment practices. The appointment, removal, and terms of remuneration of the chief internal auditor must be subject to review by the Audit Committee. Such affirmation shall form a part of the Board report on Corporate Governance that is required to be prepared and submitted together with the annual report.*<sup>31</sup>

However, the whistleblower policy features under non-mandatory recommendation under the Listing Agreement.

#### **1.4 179<sup>th</sup> Law Commission Report**

In the combat against corruption and mismanagement, whistleblowers play a vital role. Individuals working in the same department or organisation have a deeper understanding of the corrupt actions taking place there. Unfortunately, many are afraid of the repercussions of disclosing this knowledge to those in positions of authority. Adequate statutory protection for whistleblowers will help government agencies learn more about corrupt practises and inefficiencies.

Workers have a right to report unethical or corrupt practises, and the protection of whistleblowers is linked to this. The rule of law is implied in safeguarding the rights of whistleblowers. It is considered as a sort of support for the public interest to encourage whistleblowers to come forward, and hence

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<sup>31</sup> Narayana Murthy Committee Report, Para 3.11.2.4

whistleblowing implies “public interest.” Whistleblowing also calls into question the authority of public officials and their ability to use discretion. Employee engagement in the governance process of public institutions is facilitated and protected through whistleblowing, which promotes 'institutional' or 'democratic transformation.'

The idea of whistleblower legislation is to protect the public interest while simultaneously protecting society's right to know about wrongdoing. It is not required for a public servant to remain silent about the corruption of other public servants because of his confidentiality commitment. According to the Law Commission, the legislation should allow individuals or non-governmental organisations (NGOs) to file complaints against public officials and such complaints should be protected under the law.

The Law Commission believes that both the government and the public sector need to be rid of corruption. For whistleblowers, public interest and public policy serve as a foundation for their protection. There must be a balance struck between a person's right to privacy and their ability to express themselves freely. Among other things, a 2002 Law Commission bill, the Public Interest Disclosure (Protection of Informers) Bill, mandates the safety of whistleblowers:

- (i) Protecting people from harm and giving the Competent Authority the authority to issue directives, including the authority to order the status quo ante.<sup>32</sup>
- (ii) The public interest disclosure made in good faith outweighs the 'Official Secrets Act, 1923' and the discloser reasonably believes that the information provided is true. A complaint made anonymously will not be considered.<sup>33</sup>
- (iii) Name of complainant shall be secretive, and the competent authority shall adhere to natural justice in inquiry.<sup>34</sup>

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<sup>32</sup> Reddy, J. (2001, December). *The Public Interest Disclosure and Protection of Informers*, Law Commission of India, (179). Para 7.15.

<https://www.cdjournal.com/file/lawcommissionpdf/law16/Report179P1.pdf>

<sup>33</sup> Law Commission of India, (179). Para 7.16

<sup>34</sup> Law Commission of India, (179). Para 7.18

- (iv) Competent Authority shall grant sufficient security to the witnesses and others supporting the inquiry.<sup>35</sup>
- (v) It provides punishment for false, frivolous, reckless, and malicious disclosure.<sup>36</sup>

Based on the recommendations of the Law Commission of India, the Public Interest Disclosure and Protection of Persons Making the Disclosures Bill 2010 was introduced in Lok Sabha in August 2010. The Committee on Personnel, Public Grievances, Law and Justice renamed the Bill as the Whistle Blowers' Protection Bill 2011.<sup>37</sup>

In India, the whistleblowing guidelines are dealt with in the following regulatory frameworks:

1. *The Companies Act 2103*
2. Companies (Auditor's Report) Order,2020 (CARO 2020)
3. Companies (Meetings of Board and its Powers) Rules 2014
4. SEBI (Listing Obligations and Disclosure Requirements) Requirements 2015
5. Clause 49 of SEBI Listing Agreement
6. *The Whistle Blower Protection Act 2014*
7. Corporate Governance Voluntary Guidelines, 2009
8. Witness Protection Scheme 2018
9. *The Maharashtra Witness Protection and Security Act 2017*
10. *The Limited Liability Partnership Act 2008* (LLP Act)

### **1.5 Clause 49 of SEBI Listing Agreement**

The Listing Agreement, in Clause 49 provides for a whistleblower method for initiating concerns about the company's unethical conduct and real or suspected fraud. There will be no retaliation for expressing concerns about

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<sup>35</sup> Law Commission of India, (179). Para 7.25

<sup>36</sup> Law Commission of India, (179). Para 7.29

<sup>37</sup> Sharma, G. (2021, October 17). *The Public Interest Disclosure and Protection to Persons Making the Disclosures Bill, 2010' - Is the scope of the proposed legislation on public interest disclosure is sufficient?* Legal Services India.

<http://www.legalservicesindia.com/article/1286/The-Public-Interest-Disclosure-and-Protection-to-Persons-Making-the-Disclosures-Bill,-2010.html>

unethical activity, and whistleblower can approach Audit Committee Chairman to state his or her concern. The Audit Committee will look into the effectiveness of the system for reporting wrongdoings.

### **1.6 Corporate Governance Voluntary Guidelines 2009**

Management of a business are free to accept or ignore voluntary guidelines, which are only recommendations. Companies should prioritise establishing a system for employees to report unethical practises, corruption, and contravention of its code of ethics. As a further measure, companies must provide sufficient safety against victimisation and give opportunity to approach to audit committee chairman.

### **1.7 The Whistle Blowers Protection Act 2014**

Corruption can only be detected and prevented if the whistleblower is sufficiently protected. It was the purpose of the WP Act to create an environment where public servants might be held accountable for corruption, abuse of power, or abuse of discretion, and to shield whistleblowers from retribution. *The Whistle Blowers Protection Act 2014*, had been approved by the President of India on 09/05/2014. Despite this, the Act has yet to be adopted and implemented. The following quote indicate the political will of the country:

*“Whistleblowers protection is a policy that all government leaders support in public but few in power tolerate in private.”*

Thomas M. Devine<sup>38</sup>

#### **1.7.1 Scope and Clarity of Legislation**

The WP Act covers a wide variety of people and disclosures. Its scope is broad. Whistleblower law that follows best practises covers the public and private sectors equally, has no loopholes, and encourages both types of disclosures. It doesn't matter if the whistleblower works in the public or private sector; all whistleblowers should be protected by legislation because their contributions can be critical, the public must be protected against coercion or reprisal. Access to the complaint process should be free and open to everyone,

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<sup>38</sup> Devine, T.M. (1999). The Whistleblowers Protection Act, 1989: Foundation for the Modern Law of Employment Dissent. *Administrative Law Review*, 51, 533.

regardless of their audience, and harassment should be protected against. As a result of the Act, whistleblowers will be protected as well as those who have supported whistleblowers or are in the process of making a disclosure.<sup>39</sup>

The scope of wrongdoing and the types of disclosures that are protected should be extensive. Whistleblowing protection should extend to any disclosure that is acceptable in a judicial forum or aid in the organisation of compliance functions. As opposed to how the disclosure is presented or what category it is placed in, focus should be on its content.

Laws and regulations governing whistleblowers must define the forms of misbehaviour that fall under the purview of the laws, since the general public may not be familiar with terminology like “public interest.” The opacity in legislation about the area of applicability or the mechanism by which crucial information must be revealed substantially hinders the overall efficiency of the legal system.

Any person can make a complaint regarding disclosure under the WP Act.<sup>40</sup> The WP Act recognises NGO’s, human rights activists, RTI activists, etc as whistleblowers and they can make public interest disclosures in good faith.<sup>41</sup> The disclosure<sup>42</sup> shall be given to the competent authority having jurisdiction in relation to:

- (i) corrupt act committed in violation of the Prevention of Corruption Act of 1988.
- (ii) willful abuse of authority or discretion that results in harm to the state or a unjust benefit to the public official, or a third party.
- (iii) the public servant's attempt or commission of a crime.

It is only possible to file a formal complaint against a public employee in writing or by email. The complainant to include all relevant details and accompanying documents or materials when submitting their complaint.<sup>43</sup> The WP Act does not recognise making disclosure against private organisations.

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<sup>39</sup> Ferguson, G. (2017). *Global Corruption: Law, Theory and Practise* (2<sup>nd</sup> ed.). 12-12

<sup>40</sup> *The Whistle Blowers Protection Act 2014*, s.3(c) (In.).

<sup>41</sup> *The Whistle Blowers Protection Act 2014*, s.4(1) (In.).

<sup>42</sup> *The Whistle Blowers Protection Act 2014*, s.3(d) (In.).

<sup>43</sup> *The Whistle Blowers Protection Act 2014*, s.4(4) (In.).

A consolidated yearly report on disclosure and its performance should be prepared by the competent authority and sent to the central and state governments. The competent authority's yearly report must be presented to both the Houses of Parliament and the State Legislature, if appropriate.<sup>44</sup>

### **1.7.2 Mechanisms for Disclosure**

Whistleblowers will be supported via the design and maintenance of internal reporting systems that are easy to access for the whistleblower. Internal measures are in place to guarantee that disclosures are investigated promptly and independently, and that appropriate enforcement and follow-up mechanisms are in place.<sup>45</sup> Additionally, an external whistleblower disclosure system should be in place where material can be shared with regulators and the media. There must be a variety of communication channels available to suit the situation, and whistleblowers must be given the option of which channel they feel most comfortable using.<sup>46</sup> These channels should not be difficult to use, and they should allow for reporting based just on suspicion.<sup>47</sup>

The individual disclosing the information ought to have a bona fide belief that it is largely accurate.<sup>48</sup> The WP Act does not recognise disclosures based on mere suspicion.

The definition of Competent Authority<sup>49</sup> provides for different authority assigned according to the level of status of the individual being accused of corruption or misbehaviour. As far as complaints and investigations into disclosure are concerned, there is no formal organisation or entity recognised as a “Competent Authority.” For purposes of receiving disclosures, the competent authority designated by the Act is:

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<sup>44</sup> *The Whistle Blowers Protection Act 2014*, s.23 (In.).

<sup>45</sup> Transparency International. (2009). *Recommended Draft Principles for Whistleblowing Legislation*. [https://www.transparency.org/files/content/activity/2009\\_PrinciplesForWhistleblowingLegislation\\_EN.pdf](https://www.transparency.org/files/content/activity/2009_PrinciplesForWhistleblowingLegislation_EN.pdf)

<sup>46</sup> Organisation for Economic Co-operation and Development. (2016, March 16). *Committing to Effective Whistleblower Protection*. <http://dx.doi.org/10.1787/9789264252639-en>

<sup>47</sup> *Supra* 45, at 8

<sup>48</sup> *The Whistle Blowers Protection Act 2014*, s.4(3) (In.).

<sup>49</sup> *The Whistle Blowers Protection Act 2014*, s.3(b) (In.).

- (i) The Prime Minister for the council of ministers for the Union government
- (ii) Rajya Sabha Chairman or Lok Sabha Speaker for Members of Parliament
- (iii) Chief Minister for Ministers of State or Union Territories, depending on the jurisdiction
- (iv) Legislative Council Chairman for MLC's and Speaker of the House for MLA's
- (v) A subordinate judge or arbitrator can be dealt with by the High Court,
- (vi) The CVC, or any other authority for the Central Government employees.
- (vii) In the case of state government personnel, the State Vigilance Commission or any officer so designated by the State Government may be contacted.
- (viii) Appropriate authority for military forces, police, intelligence organisations, or anybody connected to these organisations' telecommunication systems, as determined by the Central or State Government.

The Competent Authority shall conduct a discrete enquiry to ascertain the basis for further investigations.<sup>50</sup> If after completing an investigation, the competent authority concludes that the disclosure is ill-considered or vexatious, or that there are no adequate causes for continuing further, the matter shall be closed.<sup>51</sup> If the investigation uncovers evidence of a willful abuse of authority or judgement, the Competent Authority shall make a recommendation:

- (i) taking of corrective measures
- (ii) commencement of criminal proceedings consistent with the relevant laws
- (iii) redressal mechanism for the damage caused to the state.<sup>52</sup>

The public authority may dissent with the recommendations of the Competent Authority by recording its reasons.<sup>53</sup> The Competent Authority shall

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<sup>50</sup> *The Whistle Blowers Protection Act 2014*, s.5(2) (In.).

<sup>51</sup> *The Whistle Blowers Protection Act 2014*, s.5(6) (In.).

<sup>52</sup> *The Whistle Blowers Protection Act 2014*, s.5(7) (In.).

<sup>53</sup> *The Whistle Blowers Protection Act 2014*, s.5(8) (In.).



communicate steps it has taken to address the complaint and the outcome of those steps to the complainant. Before the matter is closed, the complainant will be heard.<sup>54</sup>

The Competent Authority is not authorised to investigate into any disclosure:

- (i) where the dispute has been decided by a court or tribunal
- (ii) in which inquiry has been directed under *the Public Servants (Enquiries) Act 1850*
- (iii) matter has been entrusted for an inquiry under *Commission of Enquiries Act 1952*.<sup>55</sup>

Complaints to the appropriate authority must be made within seven years of the date of the alleged cause of action.<sup>56</sup>

An investigation into a matter may necessitate the Competent Authority requesting information or documents from any person or public authority.<sup>57</sup> In the same way that witnesses cannot be compelled to testify in court, no one can be compelled to offer evidence or produce records for the purpose of investigation.<sup>58</sup> As a matter of policy, no individual will be asked for information or documents that could jeopardise public order, morality, and decency as well as state security and friendly ties with foreign countries as well as risk India's sovereignty and integrity.<sup>59</sup>

### **1.7.3 Protection of Identity**

Whistleblower confidentiality necessitates protecting the identity of the complainant as well as any other personally identifying information. To maximise the flow of information, confidentiality must be protected in the channels via which it is disclosed. Whistleblowers should be given advance notice if their name is to be revealed for testimony or any other reason.

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<sup>54</sup> *The Whistle Blowers Protection Act 2014*, s.5(9) (In.).

<sup>55</sup> *The Whistle Blowers Protection Act 2014*, s.6(2) (In.).

<sup>56</sup> *The Whistle Blowers Protection Act 2014*, s.6(3) (In.).

<sup>57</sup> *The Whistle Blowers Protection Act 2014*, s.7(1) (In.).

<sup>58</sup> *The Whistle Blowers Protection Act 2014*, s.8(2) (In.).

<sup>59</sup> *The Whistle Blowers Protection Act 2014*, s.8(1) (In.).

Transparency International recommends that legislation safeguard whistleblowers' identities while yet allowing for anonymous reporting.<sup>60</sup>

If the whistleblower does not identify himself or herself when making public interest disclosures, no action will be carried out by the appropriate body.<sup>61</sup> When a complainant's identity is to be revealed, the complainant's written consent must first be acquired by the competent authority.<sup>62</sup>

#### **1.7.4 Protection Against Retaliation**

The protection of whistleblowers from retribution is an essential part of good whistleblower law. Promoting a culture of transparency among government employees is a critical part of protecting those who come forward to report wrongdoing. Personnel receiving or working with protected disclosures, such as whistleblowers, should be made aware of their legal duties. The retribution could take place months or years after revelation of information and hence no time limit shall be prescribed for the protection against victimisation. Broad legal protections for one's freedom of expression are necessary.

The WP Act mandates that the union government protect anyone who comes forward with information or offers aid to the investigation.<sup>63</sup> No liability is cast on the State Government to protect the whistleblowers. The Competent Authority shall give suitable direction to the public official to safeguard complainant from being harassed or avoid victimisation.<sup>64</sup> The Competent Authority is empowered to restore *status quo ante* in case of victimisation of the public servant.<sup>65</sup> When the complainant expresses his or her apprehension about victimisation, the public official shall prove that the asserted steps initiated by it does not constitute victimisation.<sup>66</sup> Protecting witnesses and anybody else who helps with the investigation will be a priority for the

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<sup>60</sup> Supra 45, at 12

<sup>61</sup> *The Whistle Blowers Protection Act, 2014* s.4(6) (In.).

<sup>62</sup> *The Whistle Blowers Protection Act, 2014* s.5(4) (In.).

<sup>63</sup> *The Whistle Blowers Protection Act 2014*, s.11(1) (In.).

<sup>64</sup> *The Whistle Blowers Protection Act 2014*, s.11(2) (In.).

<sup>65</sup> *The Whistle Blowers Protection Act 2014*, s.11(4) (In.).

<sup>66</sup> *The Whistle Blowers Protection Act 2014*, s.11(2) (In.).

Competent Authority, which will issue any necessary directives to the relevant public authority.<sup>67</sup>

### 1.7.5 Remedies

Whistleblowers who are retaliated against should be compensated adequately and quickly under the law. All of the repercussions of the retribution, both immediate and long-term, to be compensated, including reinstatement with back pay, pain and suffering awards, and other damages. No upper limit should be placed on the amount of compensation provided; it should cover all damages and return the victim to their pre-disclosure position. As a result of the enormous costs to whistleblowers of time delays in pursuing the remedies, the legislation to provide effective temporary relief.

The WP Act does not provide compensation for whistleblowers who have been victimised by the Competent Authority. Penalty up to 30,000 rupees may be levied on the person who deliberately contravenes the Competent Authority's orders.<sup>68</sup> The Competent Authority is empowered to pass such interim orders to prevent the immediate stoppage of corrupt practices.<sup>69</sup> Penalty not exceeding fifty thousand shall be levied for knowingly furnishing incomplete, incorrect or false report, or destroying information.<sup>70</sup> The person who divulges the identity of the discloser is punishable with imprisonment upto three years besides fine ranging upto rupees fifty thousand.<sup>71</sup> The fraudulent or frivolous discloser would attract imprisonment upto two years besides fine upto 30,000 rupees.<sup>72</sup> Each and every person in control at the time of the offence, as well as the firm itself, shall be held to be guilty of it and penalised as such.<sup>73</sup>

Civil courts are barred to exercise its jurisdiction over the matters in which the Competent Authority is authorised to determine under the WP Act 2014.<sup>74</sup> Unless the Competent Authority or another authorised official files a

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<sup>67</sup> *The Whistle Blowers Protection Act 2014*, s.12 (In.).

<sup>68</sup> *The Whistle Blowers Protection Act 2014*, s.11(5) (In.).

<sup>69</sup> *The Whistle Blowers Protection Act 2014*, s.14 (In.).

<sup>70</sup> *The Whistle Blowers Protection Act 2014*, s.15 (In.).

<sup>71</sup> *The Whistle Blowers Protection Act 2014*, s.16 (In.).

<sup>72</sup> *The Whistle Blowers Protection Act 2014*, s.17 (In.).

<sup>73</sup> *The Whistle Blowers Protection Act 2014*, s.19(1) (In.).

<sup>74</sup> *The Whistle Blowers Protection Act 2014*, s.21 (In.).

complaint, no court lower than the Chief Judicial Magistrate may take cognizance of an offence punishable under the WP Act.<sup>75</sup>

### **1.8 *The Whistle Blowers Protection (Amendment) Act 2015***

*The Whistle Blowers Protection (Amendment) Act 2015* was passed by the Lok Sabha on 13th May 2015 but failed in Rajya Sabha. The Amendment Bill lapsed on the dissolution of the 16<sup>th</sup> Lok Sabha in May 2019. Its aim was to amend the section 4, 5 and 8 of *the Whistle Blowers Protection Act 2014*.

Irrespective of status of employment, any person including NGO was capable of making disclosure to the competent authorities. The 2015 amendment intended to prohibit disclosure of information coming within the ambit of the Official Secrets Act, 1923. No public servant or NGO can make public interest disclosures of 10 types of information in accordance with the Amendment Act, if the disclosure would:

- (i) jeopardise India's national security, integrity, or sovereignty, or harm friendly affairs with other nations, or
- (ii) be contrary to a court order including tribunal, or it would be considered contempt of court or
- (iii) be a breach of Parliamentary or State Legislative privilege, or
- (iv) be in violation of intellectual property rights or trade secrets of third party
- (v) be in violation of fiduciary duty
- (vi) violate the relationship with a foreign country
- (vii) threaten the security of any person
- (viii) hamper the investigation or prosecution of the offenders
- (ix) relates to the cabinet papers, deliberation of council of ministers
- (x) personal affairs or invasion of right to privacy

However, if evidence connected to (iv), (v), (ix), and (x) is accessible under *the Right to Information Act of 2005*, then it can be divulged.

The proposed amendment in section 5 prohibits the inquiry by the competent authority into any disclosures which contain information in sub-

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<sup>75</sup> *The Whistle Blowers Protection Act 2014*, s.22 (In.).

section (1A) of section 4. The proposed amendment to section 8 lays down that no one shall be mandated to supply any information or document, if it comes under the ten prohibited categories of information listed in sub-section (1A) of section 4.

### **1.9 The Companies Act 2013 and Rules**

In accordance with *the Companies Act 2013*, Section 177 (9) read with Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014, the following companies are required to implement a vigil mechanism:

- a) Listed Company
- b) Company which receives deposits from the public
- c) Company which has borrowed in excess of rupees fifty crores from banks and public financial institutions.

According to the Companies Act, anyone who makes use of the vigil mechanism must be given with proper protections against victimisation and have direct contact to the Chairman of the Audit Committee in the event of an emergency.<sup>76</sup> Vigil mechanism as well as Board of Director's report are required to be published in the company website.<sup>77</sup>

CARO 2020 was released by the Ministry of Corporate Affairs in order to strengthen the corporate governance structure under the Companies Act, which is applicable to all companies, including foreign companies. The onerous obligation is cast on the corporations to provide auditors with copies of all whistleblower complaints received during the year. There must be a comprehensive description the fraud, if any, committed by the company or any fraud committed against a corporation in an auditor's report.

There must be an effective whistleblower process in place for the listed entity's stakeholders and workers to report illegal or unethical practises.<sup>78</sup> SEBI (Listing Obligations and Disclosure Requirements) Regulation, 2015 requires every listed entity to disseminate information about vigil

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<sup>76</sup> *The Companies Act 2013*, s.177(10) (In.).

<sup>77</sup> *The Companies Act, 2013* s, 177(10) Proviso (In.).

<sup>78</sup> SEBI (Listing Obligations and Disclosure Requirements) Rules 2015, Regulation 4(2)(d)(iv)

mechanism/whistleblower policy on their website.<sup>79</sup> Audit Committee is also mandated to evaluate the operation of the whistle blower facility.<sup>80</sup> The annual report's corporate governance section must include information on the company's policy for handling whistleblowers, as well as a statement stating that no employees have been refused access to the committee's audit.<sup>81</sup>

For the sake of investors, shareholders, and regulators, independent directors must also adhere to the code of conduct established by the board of directors.<sup>82</sup> The duties of the independent directors<sup>83</sup> include the following:

- (i) safeguard that the concern of the person who uses the vigil mechanism are not prejudiced;
- (ii) report unethical behaviour or policy, contravention of the code of conduct, and actual or expected fraud;
- (iii) assist in protecting legitimate company interests;
- (iv) support in shielding the legitimate interests of shareholders and employees.

The report of the Board of Directors laid before the general meeting shall include the Directors Responsibility Statement and the details of fraud reported by the auditors.<sup>84</sup> The Directors Responsibility Statement<sup>85</sup> shall state that:

- (i) applicable accounting principles were followed in the preparation of the accounting statements;
- (ii) the accounting rules depict the fair and true statement of companies profit, and loss;
- (iii) sufficient accounting records are maintained for
  - (a) protecting the properties of the company
  - (b) preventing and detecting fraud and
  - (c) other irregularities
- (iv) proper system had been devised to observe the applicable laws, and the same is adequate and functioning effectively.

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<sup>79</sup> SEBI (Listing Obligations and Disclosure Requirements) Rules 2015, Regulation 46(2)(e)

<sup>80</sup> SEBI (Listing Obligations and Disclosure Requirements) Rules 2015, Schedule III, Part C

<sup>81</sup> SEBI (Listing Obligations and Disclosure Requirements) Rules 2015, Schedule V

<sup>82</sup> *The Companies Act 2013*, s.149(8) (In.).

<sup>83</sup> *The Companies Act 2013*, Schedule IV (In.).

<sup>84</sup> *The Companies Act 2013*, s.134(3) (In.).

<sup>85</sup> *The Companies Act 2013*, s1.34(5) (In.).

Companies that violate section 134 of the Companies Act face a fine of at least 50,000 rupees and as much as 25 lakhs rupees if they are found guilty of the offence. Depending upon the severity, the violation of Section 134 of the Companies Act would result in sentencing upto 3 year or levy of penalty upto five lakhs or both.<sup>86</sup>

Chapter XIV of *the Companies Act 2013* titled ‘Inspection, Inquiry and Investigation’ deals with whistleblowing, though the terminology was not used therein. The Registrar of Companies (ROC) is empowered to carry out inquiry, inspect books, or seek information or explanation from the company to satisfy the state of affairs of the company.<sup>87</sup> The company or the officer in charge might face a fine of up to one lakh rupees if they fail to provide the requested information, and additional fines of up to five hundred rupees each day if the offence continues.<sup>88</sup>

The Companies Act provides for the enquiry into the activities of the company,<sup>89</sup> inquiry into company’s activities in other cases<sup>90</sup> and scrutiny of ownership of company.<sup>91</sup> The Tribunal may order probe by the inspector designated by the Central Government into activities of the company on a petition filed by shareholders or any person or otherwise<sup>92</sup> suggesting that,

- (i) the operation of the company is directed
  - (a) to cheat creditors, member or any other person
  - (b) for unlawful or deceitful purpose
  - (c) unfair to any of its members
- (ii) company was formed for unlawful or fraudulent purpose
- (iii) company does not give all particulars concerning its affairs

For the investigation of frauds involving companies, the Serious Fraud Investigation Office (SFIO) has been founded.<sup>93</sup> White-collar crime and major business fraud are investigated and prosecuted by this multi-disciplinary

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<sup>86</sup> *The Companies Act 2013*, s.134(8) (In.).

<sup>87</sup> *The Companies Act 2013*, s.206(4) (In.).

<sup>88</sup> *The Companies Act 2013*, s.206(7) (In.).

<sup>89</sup> *The Companies Act 2013*, s.210 (In.).

<sup>90</sup> *The Companies Act 2013*, s.213 (In.).

<sup>91</sup> *The Companies Act 2013*, s.216 (In.).

<sup>92</sup> *The Companies Act 2013*, s.213(b) (In.).

<sup>93</sup> Central Government Notification. (2015, July 21). F.No .A-35011/2011-admn.III.

organisation. There are specialists in the fields of law, business, accounting, forensics, technology and the capital markets available at the SFIO.<sup>94</sup> Central Government assigns the investigation into the affairs of the company to SFIO on:

- (a) receipt of report under section 208 from the Registrar of Companies or inspector
- (b) special resolution by the company to investigate into the affairs of the company
- (c) public interest
- (d) request of any department of state or central government.<sup>95</sup>

If SFIO has been given a case under the Companies Act, no other state or federal government agency can conduct an investigation, and all relevant documents and records must be submitted to SFIO.<sup>96</sup> The special court shall consider the SFIO's report as a police report filed under section 173 of the Criminal Procedure Code.<sup>97</sup>

It is the responsibility of the company, its officers and employees to submit necessary information, documents and explanation regarding the conduct of business of the company and provide required assistance to the SFIO to facilitate the investigation.<sup>98</sup> If the Central Government directs, SFIO shall submit its interim report<sup>99</sup> and the investigation report shall be submitted to the Central Government on completion of the investigation.<sup>100</sup> SFIO had set up a Market Research and Analysis Unit (MRAU) for gathering data for the early identification of corporate frauds. MRAU was set up in 20th August, 2009 to analyse the media reports and complaints pertaining to corporate financial fraud. The functions of MRAU are (a) repository of information (b) improving investigation skills (c) to provide inputs for adopting best international practises and (d) co-ordinate with other investigating agencies.

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<sup>94</sup> *The Companies Act 2013*, s.211(2) (In.).

<sup>95</sup> *The Companies Act 2013*, s.212(1) (In.).

<sup>96</sup> *The Companies Act 2013*, s.212(2) (In.).

<sup>97</sup> *The Companies Act 2013*, s.212(15) (In.).

<sup>98</sup> *The Companies Act 2013*, s.212(5) (In.).

<sup>99</sup> *The Companies Act 2013*, s.212(11) (In.).

<sup>100</sup> *The Companies Act 2013*, s.212(12) (In.).



The Companies Act contains provisions for the investigation, and it encourages employees to assist in the curbing of unethical acts. Protection is afforded to the employees throughout the investigation under chapter XIV and during the pendency of any proceeding under chapter XVI (Prevention of Oppression and Mismanagement). Without the prior approval of the Tribunal, no company shall:

- (i) Discharge or suspend any employee
- (ii) Dismiss, remove, or reduce rank of the employee
- (iii) Change the terms of employment to the disadvantage of the employee.<sup>101</sup>

Sections 209 and 220 of the Companies Act provide for the seizure and search of the company's books and files. The assets of the company might be frozen for the benefit of the public, or if there is good reason to suspect that the company may remove, transfer, or dispose of assets detrimental to the firm's interests as well as those of its shareholders, creditors.<sup>102</sup>

In cases when SFIO suspects a person has violated Section 447 of the Companies Act, it has the authority to detain him.<sup>103</sup> Companies Act utilises the term "person" to cover consultants, auditors, senior managers, independent directors and advisors if the alleged acts are done within their knowledge. Special courts take cognizance of offences committed under section 447 of the Companies Act if they are notified by the Director, SFIO or any other authority permitted to do so by the Union Government.<sup>104</sup>

The punishment under section 447 of the Companies Act will be attracted for the fraudulent activities mentioned herein below:

- (i) Furnishing of false or incorrect information or suppression of material information during incorporation of the company<sup>105</sup>
- (ii) Company incorporated by fraudulent means by furnishing false or incorrect information or suppression of material information<sup>106</sup>
- (iii) Misleading or untrue statement in the prospectus<sup>107</sup>

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<sup>101</sup> *The Companies Act 2013*, s.218 (1) (In.).

<sup>102</sup> *The Companies Act 2013*, s.221 (In.).

<sup>103</sup> *The Companies Act 2013*, s.212(8) (In.).

<sup>104</sup> *The Companies Act 2013*, s.212(6) (In.).

<sup>105</sup> *The Companies Act 2013*, s.7(5) (In.).

<sup>106</sup> *The Companies Act 2013*, s.7(6) (In.).

<sup>107</sup> *The Companies Act 2013*, s.34 (In.).

- (iv) Fraudulently inducing a person to invest money in securities<sup>108</sup>
- (v) Personation for purchase of securities<sup>109</sup>
- (vi) Issuance of duplicate share certificates<sup>110</sup>
- (vii) Fraudulent transfer of shares by depository or depository participant<sup>111</sup>
- (viii) Concealing the name of creditor who is entitled to object for the reduction in share capital, or misrepresenting the claim of the creditor, or abets the concealment or misrepresentation as aforesaid<sup>112</sup>
- (ix) Direct or indirect fraudulent act by auditor, or abetting or colluding by auditor about company, its directors, and officers<sup>113</sup>
- (x) Business of the company is carried on for a fraudulent or unlawful purpose<sup>114</sup>
- (xi) Conducting the business of the company with intent to defraud the creditors or for unlawful purpose<sup>115</sup>
- (xii) Furnishing of false statement, mutilation, and destruction of documents<sup>116</sup>
- (xiii) Fraudulent application for removal of name from company register<sup>117</sup>
- (xiv) Fraudulent conduct of business<sup>118</sup>
- (xv) Making false statement in the financial statement, return, certificate, prospectus, etc.<sup>119</sup>

Section 447 of the Companies Act defines “fraud” as a “inclusive definition.” It is illegal for anyone to do anything that is intended to deceive, gain an unfair advantage, or harm the interests of a company, its shareholders and creditors, or anyone else, and that person will be punished with a sentence of up to ten years in prison. This is regardless of the wrongful gain or loss. If the fraud in question affects the public interest, the sentence must be at least

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<sup>108</sup> *The Companies Act 2013*, s.36 (In.).

<sup>109</sup> *The Companies Act 2013*, s.38(1) (In.).

<sup>110</sup> *The Companies Act 2013*, s.46(5) (In.).

<sup>111</sup> *The Companies Act 2013*, s.56(7) (In.).

<sup>112</sup> *The Companies Act 2013*, s.66(10) (In.).

<sup>113</sup> *The Companies Act 2013*, s.140(5) (In.).

<sup>114</sup> *The Companies Act 2013*, s.206(4) (In.).

<sup>115</sup> *The Companies Act 2013*, s.213 (In.).

<sup>116</sup> *The Companies Act 2013*, s.229 (In.).

<sup>117</sup> *The Companies Act 2013*, s.251 (In.).

<sup>118</sup> *The Companies Act 2013*, s.339 (In.).

<sup>119</sup> *The Companies Act 2013*, s.448 (In.).

three years in jail. Additionally, a fine up to three times the amount of the fraudulent transaction can be imposed, which is equal to the fraudulent amount. Analysis of the Companies Act, 2013 indicates whistleblowing provisions in

- (i) Establishment of SFIO
- (ii) Affording protection to the employees who assist in the investigation
- (iii) Inclusion of former officers of the body corporate in the investigation
- (iv) In addition to the Registrar of Companies, other inspectors are also authorised for inspection as well as investigation
- (v) Punishment for misleading information
- (vi) Liquidation or winding of the company does not stop the investigation
- (vii) Obligation is cast on the independent director to blow the whistle
- (viii) Other investigations agencies assist in the investigation

Penalties under the Companies Act are not weighed by how much money the perpetrator made from the deception. Instead than focusing on the amount involved in the fraudulent transaction, the penalty amount should have been equivalent to or greater than the consequential gain enjoyed by the corporation or the individual. The Companies Act, does not authorise SFIO to levy penalty on companies that indulge in corrupt practises. SFIO does not have the authority to conduct investigations on its own; instead, it must be given this authority by the union government.

### **1.10 The Witness Protection Scheme 2018**

Protecting whistleblowers and witnesses is essential in the battle against corruption. Whistleblowers feel more secure when they know they will be protected by the state. It is hoped that whistleblower and witness protection legislation will promote and speed up reporting of illegal, unethical, and corrupt activity.

As a result of India's adversarial criminal justice system, judges make decisions based on the evidence they are presented with. It is possible to provide evidence in the form of documents or oral testimony before the court. It is the witness' job to make it easier for judges to zero in on the relevant facts and come

to a conclusion. Because of this, Indian courts place a high value on testimony as a basis for making decisions and rely heavily on it.<sup>120</sup>

Because of this, the 2018 Witness Protection Scheme has been implemented. Keeping witnesses from not being scared or intimidated for testifying in criminal investigations, prosecutions, and trials is the purpose of the Scheme. In order to maintain the rule of law, witnesses must not be intimidated or retaliated against when they testify in court or work with law enforcement agencies. The purpose of the scheme is to protect those who assist law enforcement personnel, whether they are doing so directly or indirectly. Witnesses must feel comfortable and secure in order for them to assist law enforcement agencies and the courts. Implementation of the Scheme was done in order to safeguard witnesses from harassment and the threat of life or property.

The draft of the Witness Protection Scheme prepared by the Ministry of Home Affairs was placed on record in *Mahender Chawla & Ors. v Union of India*.<sup>121</sup> The Supreme Court directed that the approved Scheme shall be put into effect in its letter and spirit by the Union and State governments and Union Territories. Until a new law on witness protection is enacted by the Union and State legislatures, the Witness Protection Scheme, 2018 will continue in operation under Article 141/142 of the Indian Constitution.

There is a potential seven-year prison sentence and a fine or both for anyone who threatens another person, their property, or their reputation as an incentive to give false testimony.<sup>122</sup>

According to the Scheme, a “witness” is anyone who has knowledge or documentation regarding an offence.<sup>123</sup> However, the Scheme is applicable for the crime punishable by death, life sentence, or a sentence of seven years or more in the Indian Penal Code, as well as those punishable by sections 509, 354,

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<sup>120</sup> *Mahender Chawla & Ors. v Union of India & Ors.* (2018) SCC Online 2679 (In.).

<sup>121</sup> (2018) SCC Online 2679 (In.).

<sup>122</sup> *The Indian Penal Code 1860*, s.195A (In.).

<sup>123</sup> The Witness Protection Scheme 2018, cl.2(k)

354A, 354B, 354C, and 354D.<sup>124</sup> A request for witness protection can be made by a witness, his family, his lawyer, or the station house officer or jail superintendent.<sup>125</sup> The threat perception of the witness or his family members is to be prepared by the District Head of the Police, investigating the case and present Threat Analysis Report to the Competent Authority upon its request based on the application. The Threat Analysis Report should include information on the types of threats, as well as the motivations behind them and the resources necessary to counter them.<sup>126</sup> Upon receiving the Threat Analysis Report, the application must be disposed of within five days. Interim protection orders can be issued by a competent authority for witnesses and their families.<sup>127</sup> During the course of the hearing, no one shall expose the identity of the witness. Police Chiefs in the States and Union Territories have the overall responsibility for implementing the order of the Competent Authority.<sup>128</sup>

Witnesses are classified into three categories<sup>129</sup> based on threat perception:

- (i) Category 'A':- Threat extends to the life of witness or his family members
- (ii) Category 'B':- Threat extends to the safety, reputation and property of witness or his family members
- (iii) Category 'C':- Harassment or intimidation of witness or his family members

As per the Scheme, the witness' 'family members' include spouse, live-in partner, parents, guardian, children, siblings and grandchildren.<sup>130</sup>

Witness Protection Fund<sup>131</sup> is constituted as per the Scheme and it comprises of the following:

- (i) State Government budgetary allocation made in the annual budget
- (ii) Deposit made as per the order of the courts or tribunals

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<sup>124</sup> The Witness Protection Scheme 2018, cl.2(i)

<sup>125</sup> The Witness Protection Scheme 2018, cl.2(l)

<sup>126</sup> The Witness Protection Scheme 2018, cl.2(j)

<sup>127</sup> The Witness Protection Scheme 2018, cl.6(b)

<sup>128</sup> The Witness Protection Scheme 2018, cl.6(h)

<sup>129</sup> The Witness Protection Scheme 2018, cl.3

<sup>130</sup> The Witness Protection Scheme 2018, cl.2(d)

<sup>131</sup> The Witness Protection Scheme 2018, cl.4

- (iii) Donations received from philanthropists, charitable organisations, etc
- (iv) Funds contributed under the Corporate Social Responsibility Scheme

The Witness Protection Fund will cover the costs of protecting the witness. The State or Union Territory's Department/Ministry of Home Affairs is responsible for managing the Fund.

The witness protection measures shall be for a specific period, not exceeding three months at a time. The protective measures<sup>132</sup> ordered shall be proportionate to the threat perceived and may include:

- (i) Concealment of identity of witness
- (ii) Installation of security devices in the witness's residence
- (iii) Regular patrolling around witness's home
- (iv) Temporary change of residence of witness
- (v) Escort to and from the court
- (vi) Holding of in camera trials
- (vii) Allowing a supporting person to present during deposition
- (viii) Monitoring of email and telephone
- (ix) Providing unlisted telephone number to the witness
- (x) Ensuring witness and the accused does not come face to face during investigation or trial
- (xi) Awarding financial aid or grants to the witness
- (xii) Expeditious trial without adjournments
- (xiii) Disguise the witness's identity by employing cutting-edge technology such as live video links, one-way mirrors, photo manipulation, audio message manipulation, etc.

Every quarter, the competent authority will review the order and request a monthly report from the witness protection unit. Witnesses may be temporarily relocated by the proper authorities in some situations.<sup>133</sup>

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<sup>132</sup> The Witness Protection Scheme 2018, cl.7

<sup>133</sup> The Witness Protection Scheme 2018, cl.11

In case witness has filed a false complaint, necessary proceedings shall be initiated to recover the expenditure incurred from the Witness Protection Fund.<sup>134</sup>

### **1.11 The Maharashtra Witness Protection and Security Act 2017**

For crimes punishable by more than seven years, *the Maharashtra Witness Protection and Security Act 2017*, protects those who testify against the accused. For major offences, the witnesses include the victims and their close family, who may be at risk during the trial itself.<sup>135</sup> The State Committee is constituted under the Act to monitor the protection provided to the witnesses and to give necessary direction to the District Committees and police.<sup>136</sup> The District Committees exercises the following functions<sup>137</sup>

- (i) To decide about the witness who is eligible protection, including the nature and extent of protection
- (ii) To take action of the witnesses' application for protection
- (iii) Give direction to the police for protection of witnesses
- (iv) Decide on the withdrawal of protection
- (v) Provide information to the Government and State Committee
- (vi) Maintain records of witnesses to whom protection was given or withdrawn

In order to make an application for protection, a witness or his family members, the prosecutor in the trial, or the investigating officer can do so. On the orders of the court, the District Committee offers security, as well as that of the State Government or State Committee.<sup>138</sup> Upon receipt of an application from or *suo moto*, the Committee may call a report from the police officer regarding threat to life to take necessary action for providing protection to the witness. The Committee may also provide interim protection to the witness till the date of receipt of report from the police.<sup>139</sup>

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<sup>134</sup> The Witness Protection Scheme 2018, cl.14

<sup>135</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.2(e) (In.).

<sup>136</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.4 (In.).

<sup>137</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.5 (In.).

<sup>138</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.6 (In.).

<sup>139</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.7 (In.).

The Committee shall consider the following factors prior to giving protection to the witnesses:

- (i) nature of the case
- (ii) importance of the witness in the case
- (iii) degree of perception of threat to witness
- (iv) previous record of the witness<sup>140</sup>

The court may take evidence of the protected witnesses via video link or by any other mode and avoid mentioning the name and address of the witnesses in its judgment, orders or any other public records.<sup>141</sup> Revealing information for the identification of a protected witness by any person, including an investigator or police official is a crime punishable by up to three years in prison and a fine of up to 5,000 rupees. The Act is in addition to and not in lieu of any other legislation in existence at the time.<sup>142</sup>

### **1.12 The Limited Liability Partnership Act 2008**

According to the Limited Liability Partnership Act of 2008 (the LLP Act), a court or tribunal may waive or reduce punishment of whistleblower, who may be partner or employee of LLP, if it is convinced that:

- (i) whistleblower has provided useful information during investigation
- (ii) when LLP or partner or employee is being convicted based on the information given by the whistleblower.<sup>143</sup>

During an investigation, the Court or tribunal has the power to decide what information is useful. A whistleblower can come forward at any moment during the investigation or otherwise to report any wrongdoing by the LLP, its partners, or any of its employees. Whistleblowing is motivated by the possibility of a reduced or waived penalty, which is advantageous to those who are complicit

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<sup>140</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.10 (In.).

<sup>141</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) sl.12 (In.).

<sup>142</sup> *The Maharashtra Witness Protection and Security Act 2017* (Mah.) s.15 (In.).

<sup>143</sup> *The Limited Liability Partnership Act 2008*, s.31(1) (In.).



in corrupt or unethical behaviour.<sup>144</sup> Section 31 created a mechanism for the detection of frauds committed by LLP.

Whistleblowers are safeguarded by the LLP Act, which prohibits LLP from dismissing, demoting, suspending, or otherwise discriminating against an employee or a partner for disclosing information to a court or tribunal.<sup>145</sup>

### **1.13 *The Competition Act 2002***

Unlike other jurisdictions, Indian law considers corruption as a criminal offence. There are a number of legislations in India that deal with corporate corruption investigations and prosecutions, as well as convictions, sentencing, and compensation. These include the Indian Penal Code, *the Prevention of Corruption Act 1988*, and *the Code of Criminal Procedure 1973*.

It is the Competition Commission of India (CCI)'s authority to conduct investigations and issue substantial fines that serves as a deterrence to future violations of *the Competition Act 2002*. Penalties under the Competition Act apply to anyone found guilty of anti-competitive conduct or abuse of a dominant position. Before or after an inquiry is complete, penalties might be imposed under the Competition Act. A penalty of rupees one lakh per day extending upto one crore is imposed if the CCI or Director General (DG) does not receive information or documents necessary for an investigation.<sup>146</sup> The CCI or DG can impose penalties of up to one crore rupees on anyone who provides false statements, omits material facts, or willfully modifies, suppresses, or destroys any records.<sup>147</sup> Non-compliance with CCI's notice requirements can result in a penalty as high as one percent of the combined company's total turnover or assets, whichever is greater.<sup>148</sup> False statements or omissions of material details

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<sup>144</sup> Agarwal, S. (2010, March 29). *Limited Liability Partnership - Part-XIII - Whistle Blowing*. Tax Management India.

[https://www.taxmanagementindia.com/visitor/detail\\_article.asp?ArticleID=739](https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=739)

<sup>145</sup> *The Limited Liability Partnership Act 2008*, s.31(2) (In.).

<sup>146</sup> *The Competition Act 2002*, s.43 (In.).

<sup>147</sup> *The Competition Act 2002*, s.45 (In.).

<sup>148</sup> *The Competition Act 2002*, s.43A (In.).

by a party to a combination will result in a penalty of at least Rs. 50 lakhs but up to Rs. 1 crore for that party.<sup>149</sup>

CCI can impose a penalty for abuse of power up to three times the profit or 10% of the three most recent financial years' average turnover, whichever is larger.<sup>150</sup> For indulging in anti-competitive practises, a total penalty of Rs. 840 crores have been imposed by the CCI on 126 companies in the last three financial years.<sup>151</sup> Recently, the Supreme Court upheld the imposition of penalty of rupees 1788 crore by CCI on five tyre manufacturing companies for indulging in cartelisation.<sup>152</sup> Since of the large fines imposed, compliance with competition law became a necessity because it serves as a deterrence.

#### **1.14 The Central Vigilance Commission (CVC)**

The preamble of *the Central Vigilance Commission Act 2002*, states that the CVC was established to investigate the PC Act violations by certain government employees. The CVC investigates and supervises the Government's anti-corruption and vigilance programmes when a complaint is made against a public official. It's an independent anti-corruption agency in India.

#### **1.15 The Code of Criminal Procedure 1973 (Cr.P.C)**

In India, compensation is regulated under *the Criminal Procedure Code 1973*. Section 357 of the Cr.P.C. was recommended by the 41st Law Commission Report (1969) to provide compensation for victims of crime. It is possible for the court to pay compensation to the victim, but judges rarely use this option. Victims of crime and their families will be compensated as a result of a joint effort scheme between the union and state governments. The legal services authority fix the quantum of compensation upon the advice given by the court. The State must compensate the victim and/or his/her dependents if

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<sup>149</sup> *The Competition Act 2002*, s.44 (In.).

<sup>150</sup> *The Competition Act 2002*, s.27 (in.).

<sup>151</sup> Thakur, A.S. (2020, February 10). CCI imposed Rs 840 crore fine on 126 companies in last three financial years. *Financial Express*. <https://www.financialexpress.com/industry/cci-imposed-rs-840-crore-fine-on-126-companies-in-last-three-financial-years-says-anurag-singh-thakur/1863368/>

<sup>152</sup> CCI Imposes ₹1,788 Cr Penalty on Appollo, MRF and Other Tyre Manufacturers, The Mint. (2022, February 2). *Livemint*. <https://www.livemint.com/news/india/cci-imposes-rs-1-788-cr-penalty-on-apollo-mrf-and-other-tyre-manufacturers-details-here-11643814915367.html>

the criminal cannot be discovered or recognised.<sup>153</sup> It is the State's duty to compensate the victims under Section 357A(1),(4),and(5) of the Cr.P.C., which is substantive legislation rather than procedural laws. Financial aid available to victims who have been harmed by a crime committed before the implementation date of Section 357A(4) of the Cr.P.C.<sup>154</sup>

The recovery of fines and other monetary penalties imposed by the law is the focus of Chapter XXXII. Section 421 of the Cr.P.C. allows the court to take and sell an offender's property in order to compensate the victims. Sub-section (1) of Section 421 lays out the conditions that need to have been met before an arrest warrant is issued. In accordance with section 431, a court can seize any money (other than a fine) owed by virtue of an order issued under CrPC. Section 64 of I.P.C allows the court to sentence a person to prison for non-payment of a fine.

The court is obligated to take into account the nature of the offence, the injury sustained, the justness of the demand for compensation, the offender's ability to pay, and other relevant facts while awarding compensation.<sup>155</sup> The decision of the Supreme Court in *Hari Singh v Sukhbir Singh and Ors*<sup>156</sup> gave victims some measure of comfort and reassurance that they are not forgotten throughout proceedings under Section 357 of the Cr.P.C., which grants courts the authority to award compensation as an additional sanction. A suitable amount of compensation should be paid, and criminal courts should use this power as much as possible to achieve justice.

The Supreme Court ruled in *Swaran Singh v State of U.P*<sup>157</sup> that monetary compensation might be an alternative to imprisonment. There have also been cases where courts have utilised compensation to decrease the sentence given. For effective punishment that serves as a deterrence, the amount of damages

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<sup>153</sup> *The Code of Criminal Procedure 1973*, s.357A (In.).

<sup>154</sup> *District Collector Alappuzha v District Legal Services Authority Alappuzha* (2020) SCC Online 8292 (Kerala).

<sup>155</sup> *Swaran Singh v State of Punjab* (1978) AIR 1525 (In.).

<sup>156</sup> (1988) AIR 2127 (In.).

<sup>157</sup> (1998) 4 SCC 75 (In.).

that a wrongdoer must pay should be proportional to the gravity of the offence and the financial resources available to cover the cost of the compensation.<sup>158</sup>

Section 306 and 307 of the Cr.P.C. enables the court to grant pardon to an accomplice on the condition that he or she fully and truthfully discloses the facts to his or her knowledge. There will be no pardon for the accomplice who does not fully disclose his or her involvement or who conceals vital evidence. The court has the option of revoking the pardon. Accomplices are permitted to testify against the accused in accordance with Indian Evidence Act, 1872, Section 133.

In the Indian legal system, the individual offender is solely taken into account within the context of the sentence framework. Deterrent punishment for corporations who are convicted of criminal offences is required to prevent them from committing future crimes. Because an artificial person like a corporation cannot be imprisoned physically, the court has little choice but to issue a fine.<sup>159</sup>

In order to deter corporate crime in India, the sentencing policy should focus on the corporation as a collective individual.<sup>160</sup> To make up for the wrongdoing done against the victim, statutes does not provide for any concrete measures of compensation. There is no comprehensive legislation addressing corrupt practises and effective countermeasures, like United States Foreign Corrupt Practices Act (FCPA).

If a police officer is charged with investigating an offence under the PC Act, he or she must have at least the level of Deputy Superintendant of Police or an equivalent position. After receiving an order from the Metropolitan Magistrate or Judicial First-Class Magistrate, the investigation and arrest for an offence punishable by the PC Act must be carried out.<sup>161</sup> The statutory provision was designed to protect the public servant from harassment and victimisation.

The fine imposed by the court should not be excessive and should not exceed the maximum fine that can be given by a civil court. Compensation

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<sup>158</sup> *Union Carbide Corporation v Union of India* (1990) AIR 273 (In.).

<sup>159</sup> Bhaskar, T.K. & Umakanth, V. (1996). Corporate Criminal Liability and Law. *Journal of Indian Law Institute*, 38, 218.

<sup>160</sup> Id. at 228

<sup>161</sup> *The Prevention of Corruption Act 1988*, s.17 (In.).

should be fair and not excessive. Before imposing compensation, the defendant's ability to pay must be assessed.<sup>162</sup>

### 1.15.1 Compounding of Criminal Cases

Cr.P.C. section 320 addresses the issue of charges being compounded for the offences. Compounding offences has been divided into two categories: those that require court approval and those that do not require it. The high court has inherent authority to issue orders:

- (i) to give effect to the criminal procedure code
- (ii) to prevent abuse of process of court
- (iii) to secure the ends of justice.<sup>163</sup>

If an offence stems from a commercial transaction or is purely a civil problem, the parties can resolve their differences and the criminal case can be thrown out. It is also possible to quash proceedings by the high court if there is a remote chance of conviction, and the continuance of the criminal procedures would inflict injustice on the accused.<sup>164</sup> Even non-compoundable offences can be annulled by the high court under section 482 of Cr.P.C. when the parties have reached an agreement. When quashing non-compoundable offences, extreme caution and sparing use are advised.<sup>165</sup> Compounding an offence requires the court to take into account the crime's impact on society as well as on the individual.<sup>166</sup> Even attempt to commit murder under Section 307 IPC was compounded by the Supreme Court of India under Article 142 of Constitution of India to render complete justice to the parties in *Mahesh Chand v State of Rajasthan*.<sup>167</sup>

The Supreme Court laid down the following guidelines for quashing of non-compoundable offences under Section 482 of Cr.P.C

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<sup>162</sup> *Dilip S. Dahanukar v Kotak Mahindra Co.* (2007) 6 SCC 528 (In.).

<sup>163</sup> *The Code of Criminal Procedure 1973* s.482 (In.).

<sup>164</sup> *Gian Singh v State of Punjab* (2012) 10 SCC 303 (In.).

<sup>165</sup> *Narinder Singh v State of Punjab* (2014) 6 SCC 466 (In.).

<sup>166</sup> *Gian Singh v State of Punjab* (2012) 10 SCC 303 (In.).

<sup>167</sup> (1988) AIR 2111 (In.).

- (i) It is possible to have criminal charges dropped if the offence is more civil or commercial in character.
- (ii) The High Court should not overturn convictions for crimes that have a significant impact on society.
- (iii) There should be no compounding of offences under special statutes such as the Prevention of Corruption Act, 1988, or by public servants acting in their official position.
- (iv) The accused's history and actions must be taken into account when using inherent abilities.<sup>168</sup>

### **1.16 The Comptroller & Auditor General (CAG)**

CAG is an independent constitutional institution that monitors the government's finances and operations. As a watchdog, it is tasked with keeping government operations open and accountable to the legislature and the general public. Union and state governments, as well as other state-owned or funded institutions, are subject to the oversight of the CAG. Accounting standards and rules are enforced by CAG to ensure that the Government and its institutions are operating in accordance with these standards and rules. To ensure that government departments are responsible, CAG provides support to Parliament.

## **2. Foreign Legislations**

### ***2.1 The Foreign Corrupt Practices Act 1977***

To ensure a more open global economy, the United States passed the Foreign Corrupt Practices Act (FCPA) in 1977 in the wake of the scandal surrounding the Watergate building complex.<sup>169</sup> The government is making its most concerted effort to ensure that overseas commercial transactions are honest.<sup>170</sup> It is a unique legislation with extraterritorial reach prohibiting its

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<sup>168</sup> Misra, C., Lobo, K., & Joshi, P. (2019, March 26). *Compounding of Non-Compoundable Offences by High Courts under Section 482 of Cr.P.C. - Supreme Court Re-Affirms Position*. Mondaq. <https://www.mondaq.com/india/trials-appeals-compensation/793048/compounding-of-non-compoundable-offences-by-high-courts-under-section-482-of-crpc-supreme-court-re-affirms-position>

<sup>169</sup> Almond, M.A., & Syfert, S.D. (1996). Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy, *North Carolina Journal of International Law & Commercial Regulation*, 22, 389.

<sup>170</sup> Id. at 394

nationals from engaging in bribery abroad.<sup>171</sup> FCPA serves as an example to the countries seeking to prevent bribery and United States leads the world in prosecuting corruption.<sup>172</sup>

The FCPA prohibits anybody or any company from offering, authorising, promising to pay, or making a payment to a public official in order to influence that person's official capacity in order to achieve an illegal advantage.<sup>173</sup> The anti-bribery section of the FCPA is at its core, prohibiting the use of corrupt practises to gain or maintain business.<sup>174</sup>

### 2.1.1 Facilitation Payment

In order to allow United States business more latitude in competing with foreign competitors, the Omnibus Foreign Trade and Competitiveness Act of 1988 amended the FCPA.<sup>175</sup> Grease payment to government officials are permitted to facilitate or expedite an already legitimate act.<sup>176</sup> Payments made to expedite or secure routine government action by a foreign official, political party or party official are exempt from the FCPA.<sup>177</sup> Routine, ministerial, or clerical actions are not prohibited, but a public official's choice to award or continue doing business with a company does not fall under this category.<sup>178</sup> Facilitation payments are permitted by the FCPA if they are explicitly permitted by the written laws of the host country, and if they are incurred in relation to the

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<sup>171</sup> Id.

<sup>172</sup> Lippman, J. (2013). Business Without Bribery: Analyzing the Future of Enforcement for the UK Bribery Act. *Public Contract Law Journal*, 42, 649.

<sup>173</sup> Fanjul, J.A. (2008). Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act. *Penn State International Law Review*, 26, 735.

<https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1774&context=psilr&httpsredir=1&referer=>

<sup>174</sup> Warin, F.J., Diamant, M.S., & Root, V.S. (2011) Somebody's Watching Me: FCPA Monitorships and How They Can Work Better. *University of Pennsylvania Journal of Business Law*, 13, 321. [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1105/](https://scholarship.law.nd.edu/law_faculty_scholarship/1105/)

<sup>175</sup> Baugher, T. (2014, February). *Payments that 'grease the rails'*. Fraud Magazine. <https://www.fraud-magazine.com/article.aspx?id=4294980870>

<sup>176</sup> Supra 173, at 737

<sup>177</sup> 15 USC §§ 78dd-1(b), 78dd-2(b), 78dd-3(b)

<sup>178</sup> Hunter, R.J., Mest, D., & Shannon, J. (2011). A Focus on the Foreign Corrupt Practices Act (FCPA): Siemens and Halliburton Revisited as Indicators of Corporate Culture. *Atlantic Law Journal*, 13, 60.

promotion of the products or services or the execution of the contract with a foreign government, such as travel and boarding expenses.<sup>179</sup>

FCPA was amended by International Anti-Bribery and Fair Competition Act of 1998, to implement the anti-bribery convention of Organisation for Economic Cooperation and Development (OECD).<sup>180</sup>

FCPA covers three categories of persons:

- (i) Issuers: any company registered in USA or that it is required to file periodic financial statement with SEC
- (ii) Domestic Concerns: Any business organisation which has its principal place of business in US or which is organised in US or any individual who is a US citizen, national or a resident in the United States.
- (iii) Other persons, while within the territory of United States, who take any step-in furtherance of a corrupt payment.<sup>181</sup>

Anti-bribery legislation will be attracted, if an issuer or domestic firm authorises its agent, consultant, attorney, or subsidiary or any third parties to make any corrupt payment. FCPA exerts jurisdiction whenever any act in furtherance of an infraction is performed inside the territory of USA and based on the nationality. In order to evaluate the extraterritorial scope of FCPA, the courts look into or consider the following factors:

- (i) the connection of the activity to the territory of the regulating state\;
- (ii) the relation between the controlling state and the person primarily accountable for the activity to be regulated, or between that state and those whom the rule is intended to safeguard;
- (iii) the existence of justified expectations that might be protected or hurt by the regulation;
- (iv) the significance of the rule to the international legal, political or economic system;

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<sup>179</sup> Supra 174, at 324

<sup>180</sup> *International Anti-Bribery and Fair Competition Act of 1998*. (1998, November 20). ReedSmith. <https://www.reedsmith.com/en/perspectives/1998/11/international-antibribery-and-fair-competition-act>

<sup>181</sup> Supra 174, at 323



- (v) the extent to which another state may have an interest in controlling the activity; and
- (vi) the possibility of conflict with the law by another state.<sup>182</sup>

Collateral damages from an FCPA investigation include large legal expenditures, loss of employment, a fall in reputation or goodwill, litigation by investors and others, debarment from government contracts, a drop in stock price, and other tax issues.<sup>183</sup>

### **2.1.2 Anything of Value**

A payment is defined by the FCPA as “anything of value,” although the term “anything of value” isn't defined in the FCPA.<sup>184</sup> DOJ and courts broadly interpreted the term to include discounts, gifts, drinks, entertainment, insurance benefit and a promise of future employment.<sup>185</sup> The perception of the individual and the subjective evaluation of the thing delivered are the most important considerations for the DOJ or SEC.<sup>186</sup>

It is against the law to pay, promise to pay, or authorise the payment of any money, gifts, or delivering anything of value to a foreign official by any issuer, domestic firm, or other persons. Anything of value' has been read by the court to encompass tangible and intangible assets such as debts, future employment, college scholarships, information and monetary equivalents.

### **2.1.3 Corrupt Intent**

The FCPA's anti-bribery rules are violated when corrupt payments are made to influence a foreign authority. If payment is made with a need that the foreign official to use his or her position in a wrongful manner for the benefit of the organisation. Corruption occurs when an act is done knowingly and

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<sup>182</sup> Torre, M.J. (2016). The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets. *Cornell International Law Journal*, 49, 469.

<sup>183</sup> Supra 174, at 325

<sup>184</sup> Supra 178, at 66

<sup>185</sup> Id.

<sup>186</sup> Id.

voluntarily to achieve an unlawful outcome, or when an unlawful method or means is utilised to obtain a legitimate result in an unlawful manner.

#### **2.1.4 Business Purpose**

The FCPA forbids firms from making unethical payments in order to gain an unfair advantage in winning or keeping business. It is not a pre-requisite to do business with a government agency in a foreign country to secure a contract.

#### **2.1.5 Record Keeping and Internal Controls**

The existence of compliance program, in and of itself is not sufficient to escape the criminal charges for the misconduct undertaken by its employees or agents but it may help to reduce the corporations' culpability.<sup>187</sup>

Issuers are also responsible for maintaining records and implementing internal control mechanisms in addition to anti-bribery compliance. The Securities and Exchange Commission (SEC) requires publicly traded corporations to maintain accurate books and records in order to safeguard investors and ensure fair dealing in the securities market. Regardless of whether or not the company has international activities, every issuer having securities registered with the SEC is required to file a report with the SEC. There should be no discrepancies or omissions in the issuer's books, records, and accounts.

Internal accounting controls in corporations should be developed and maintained to ensure that (i) all transactions are carried out with management authorization (ii) financial statements are recorded in accordance with generally accepted accounting practises (iii) transactions are carried out to maintain accountability for assets (iv) access to assets is given in accordance with management authorization (v) and at reasonable intervals, compare to the current properties and cure inconsistencies.<sup>188</sup>

Bribe payments are frequently misrepresented by companies, and irregularities in their financial records are frequently overlooked. The issuers

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<sup>187</sup> Supra 173, at 751

<sup>188</sup> 15 USC §§ 78m(b)(2)

need to make sure that their affiliates have their own internal accounting controls in place as well. Falsification of business expenses as legitimate ones is a common tactic for concealing illegality and impropriety when it comes to record-keeping infractions, as does the omission of any information about the nature of the transactions itself.

### **2.1.6 Enforcement**

The FCPA's anti-corruption efforts have been lauded as an example for the rest of the world. Multiple organisations such as the DOJ, SEC, and the Office of General Counsel for the Department of Commerce compose the FCPA enforcement.<sup>189</sup> The FCPA permits both civil and criminal enforcement actions. Civil and criminal actions may be brought by the DOJ, but the SEC only launches civil actions.<sup>190</sup> FBI may also be involved in the investigations.<sup>191</sup>

### **2.1.7 Monitor**

As a condition precedent for the settlement of FCPA violation investigations, DOJ or SEC enforces appointment of an independent compliance monitor. Monitors are referenced by many names such as independent consultant, compliance consultant, compliance counsel, etc and their mission is to independently monitor a corporation and its adherence to the FCPA.

Generally, firms seek to avoid appointment of compliance monitors, as the control over the finance and human resources by monitors raises the probability of finding additional corruption.<sup>192</sup> There is no attorney -client connection between monitor and company, which may expose firm to greater legal danger. The independent monitor might identify and reveal previously unearthed corrupt practises, leading to further examination by the government and extra sanctions.<sup>193</sup>

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<sup>189</sup> Supra 172, at 663

<sup>190</sup> Supra 174, at 382

<sup>191</sup> Supra 172, at 664

<sup>192</sup> Supra 174, at 332

<sup>193</sup> Id. at 353

Monitor is a useful tool to set a compliant tone within the organisation, infuse high standards of ethical behaviour and change its organic culture by sowing the seeds of reform within the organisation.<sup>194</sup> Corporate crime is less likely to recur because of the successful use of monitoring in the DPA (Deferred Prosecution Agreement) or NPA (Non-prosecution Agreement).<sup>195</sup> Rehabilitating a corporation, promoting good corporate citizenship, rooting out illegal and unethical behaviour, and disciplining guilty workers are all aims of DPA.<sup>196</sup>

Companies indulge in corrupt practices not necessarily to gain advantages over the competitors but the overseas environment in which it operates forces them to pay bribe to operate the business.<sup>197</sup>

When the SEC enforces a rule, the monitorship is normally part of the settlement or a final judgement. In contrast, the Department of Justice uses monitorship in the DPA and NPA. There must be government-corporate cooperation in the monitor selection process.<sup>198</sup> DOJ can choose the monitor if DOJ and company can't agree on monitor appointment. Morford Memorandum enables this proposition.<sup>199</sup> The Grindler memorandum instructed the prosecutors to include language in any agreements to ensure accountability of the monitors and outline how DOJ will intervene if there is a disagreement between the monitoring firm and a company they represent.<sup>200</sup>

An EPC joint venture of Technip, Kellogg Brown & Root Inc (KBR), and two other businesses paid bribes between 1995 and 2004 to secure four contracts from Nigeria LNG Ltd to develop LNG facilities on Bonney Island. As part of a deferred prosecution agreement (DPA) with the DOJ, Technip agreed to pay a \$240 million criminal fine, maintain an independent compliance monitor for a two-year term, and cooperate with DOJ investigators. In addition, Technip

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<sup>194</sup> Id. at 327

<sup>195</sup> Morford, C.S. (2008, March 7). *Memorandum for Heads of Department Components United States*. Department of Justice. <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>

<sup>196</sup> Supra 174, at 327

<sup>197</sup> Id. at 327

<sup>198</sup> Id. at 348.

<sup>199</sup> Id. at 351

<sup>200</sup> Id. at 352

agreed to pay 98 million dollars in disgorgement of earnings as part of a settlement deal with the SEC.<sup>201</sup> A total of \$125 million has been agreed upon by the other two JV partners, ENI SpA and Snamprogetti Netherlands B.V. To avoid the imposition of a monitor in the DPA, DOJ assessed a criminal penalty of \$240 million dollars, which Snamprogetti agreed to pay.

### **2.1.8 Influencing Factors to Appoint Monitors**

There should be no actual or possible conflicts of interest in the monitorship, according to the Morford memorandum, and the public should have confidence in the effectiveness of monitorship, as per the merit-based selection procedure. Neither the monitor nor the corporation shall engage in any conflict of interest, directly or indirectly, during the monitorship period or after the monitorship terminates.<sup>202</sup>

The most determinative factor considered by the prosecutors to include monitorship in the FCPA settlement agreement is the (a) entrenched culture of corruption at the organisation (b) existence of effective compliance program prior to the commission of anti-bribery violations.<sup>203</sup>

**2.1.8.1 Culture of Corruption:** - The trial of Siemens is a typical example of corporate corruption. Approximately \$1.4 billion in improper payments to third parties were used to bribe public officials around the world in exchange for Siemens contracts. Since eliminating widespread illicit conduct is both difficult and time-consuming, prosecutors need monitors. Uprooting a company's culture of corruption, which has resulted in widespread FCPA infractions, is similarly tough. An effective internal control system must be developed by a monitor. Internal controls can be strengthened with the assistance of a third-party monitor, who can point out areas of concern and potential threats.<sup>204</sup>

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<sup>201</sup> Department of Justice. (2010, June 28). *Technip S.A. resolves foreign corrupt practices act investigation and agrees pay 240 million* [Press Release].

<https://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million>

<sup>202</sup> Supra 174, at 346 & 355

<sup>203</sup> Id. at 337

<sup>204</sup> Id. at 341

2.1.8.2 Internal Control Mechanism: - Pre-existing internal compliance mechanisms meant to detect and deter illicit activity are significantly regarded by prosecutors according to the Morford memorandum.<sup>205</sup> The existence of a compliance mechanism alone is not enough; the self-policing compliance mechanism must help prevent and detect unlawful behaviour.

Corporate ethics and compliance monitors have the primary role of reviewing and/or proposing ways to lessen the likelihood of future corporate misbehaviour.<sup>206</sup>

2.1.8.3 Length of Monitorship: - The agreement contains a term permitting increase or decrease of the term of monitorship depending upon the periodic report to the government. The flexibility of duration gives company an opportunity to fix the problems at the earliest and exit the monitorship, which has the potential of large costs savings.<sup>207</sup>

## **2.1.9 Knowledge Standard**

Due to its strict liability provisions, the FCPA holds persons responsible for bribery schemes of which they have real knowledge, despite their willful ignorance or wilful disregard.<sup>208</sup>

The anti-bribery sections of the FCPA have a broader 'knowing standard,' and knowledge of the breach is not a prerequisite for a violation.<sup>209</sup> FCPA liability cannot be avoided by the use of third-party advisors or novel organisational structures. To be held accountable for violating the FCPA, one must have reason to believe that the money paid or authorised to be paid would be used to corrupt a public official.<sup>210</sup>

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<sup>205</sup> Id. at 341

<sup>206</sup> Id. at 346

<sup>207</sup> Id. at 348

<sup>208</sup> *The known the unknown: The knowledge standard for bribes by third parties.* (2014, May). Clifford Chance.

<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2014/06/the-unknown-known-the-knowledge-standard-for-bribes-by-third-parties.pdf>

<sup>209</sup> *FCPA: The knowledge Standard.* (2012, July 1). Deming PLLC.

<http://deminggroup.com/2012/07/01/fcpa-the-knowledge-standard/>

<sup>210</sup> *Supra* 178, at 83

A person or entity has knowledge if they are aware of the high chance that FCPA anti-bribery rules are being violated. When an organization intentionally ignores conduct of its employees, representatives, agents, or partners, knowledge is satisfied. If the company wants to know why its money is being spent, it must take reasonable affirmative steps to find out. The company has a legal obligation to keep accurate and fair records of all of its financial transactions and asset sales.<sup>211</sup>

The attitude of the individuals or company such as ‘wilful blindness,’ ‘deliberate ignorance,’ ‘putting head in the sand’ constitute knowledge of improper conduct or unethical practise.

#### **2.1.10 Use of Third Parties**

Business organisations are liable for the improper payments made by the agent, service provider, vendor, or any third party, if the company authorises the same or if it ‘knew’ about the corrupt payments would be made.

#### **2.1.11 US Sentencing Guidelines Manual 2018**

An organization's punishment can be increased for any of four reasons: (i) engagement in or tolerance of illegal action, (ii) the organization's prior guilty history, (iii) violation of an order, and (iv) obstructing Justice. The factors that alleviate the punishments is (i) the existence of an effective internal compliance and ethical mechanism, and (ii) self-reporting, cooperation, or acknowledgment of responsibility. The court takes both into account when disciplining a company.<sup>212</sup>

When it comes to international bribery, the United States DOJ levied fines of \$7.76 billion in the year 2020, compared to a penalty total of \$2.83 billion in 2019.<sup>213</sup>

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<sup>211</sup> Id. at 84

<sup>212</sup> United States Sentencing Commission Guidelines Manual 2018, chapter 8

<sup>213</sup> Tokar, D. (2020, December 4). Foreign Bribery Enforcement on Track for Record-Breaking Year. *The Wall Street Journal*. <https://www.wsj.com/articles/foreign-bribery-enforcement-on-track-for-record-breaking-year-11607114397>

Airbus SE has agreed to pay €3.6 billion (\$4 billion) to resolve bribery charges and to appoint a monitor to oversee its global defence business. For years, Airbus paid bribes in the United States, France, and the United Kingdom to gain contracts for its jets and other items. The penalty it paid was the highest international settlement ever levied.<sup>214</sup>

## ***2.2 The Sarbanes Oxley Act 2002***

In order to combat corporate criminal fraud, the Sarbanes-Oxley Act (SOX Act) was enacted. It ensures the auditor's independence and improves financial reporting. Audit committee must institute processes for employees to present anonymous grievances about internal accounting controls or auditing concerns, as mandated by the SOX Act.<sup>215</sup> Whistleblower employees are also permitted to approach regulatory or law enforcement authorities directly instead of first making complaints to their employees.

In case of victimisation, the whistleblower can commence legal proceedings and if found guilty, imprisonment upto 10 years will be imposed.

The purpose of SOX Act is to prevent accounting errors and fraudulent practises in an organisation and protect the stakeholders. An attempt is done to improve corporate governance and accountability. The SOX Act offers protection to any person including accounting firms, former or current employees, and subcontractors, who highlights about the violation of federal laws by the publicly traded companies.

## ***2.3 The Bribery Act 2010***

United Kingdom relied upon a combination of common and statutory law to prevent bribery, prior to the enactment of the Bribery Act of 2010 (UKBA).<sup>216</sup> UKBA covers active bribery. i.e., offering, promising, or giving bribery and passive bribery. i.e., asking for, consenting to get, or receiving bribery.

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<sup>214</sup> Katz, B. & Dalton, M. (2020, February 1). Airbus Agrees to Monitoring in \$4 Billion Settlement of Bribery Charges. *The Wall Street Journal*. [https://www.wsj.com/articles/airbus-bribery-charges-unveiled-after-4-billion-settlement-11580480153?mod=article\\_inline](https://www.wsj.com/articles/airbus-bribery-charges-unveiled-after-4-billion-settlement-11580480153?mod=article_inline)

<sup>215</sup> *The Sarbanes Oxley Act 2002*, s.301 (USA).

<sup>216</sup> *Supra* 172, at 652



UKBA recognises the fact that bribery prevention regime is always not capable of preventing bribery. Affirmative defence mechanism prevalent in the Act encourages the companies to create internal controls that pre-empt bribery before it occurs. Mandatory procedures or control measures are not prescribed by the Act. It is for the companies to assess its individual risk of bribery and implement the necessary internal control measures.<sup>217</sup>

The Serious Fraud Office (SFO) is the bureau charged with the enforcement of the UK Bribery Act of 2010 and the Crown Prosecution Service (CPS) prosecutes the violations that are investigated by the police.<sup>218</sup> SFO also uses DPA wherein the entity or individual undertakes to certain actions in exchange of dropping of criminal charges. The use of DPA by UKBA requires a judge to condone the agreement.<sup>219</sup>

The six guiding principles published by the Ministry of Justice helping organisations to support the implementation of the ‘adequate procedures’ for the prevention of bribery are:

- (i) Proportionate procedures: Business organisations shall implement the procedures proportionate to corruption risk it faces
- (ii) Top level commitment: The commitment to prevent corruption and the anti-bribery culture should come from the board of directors. The policies should be visible to the internal and external stake holders of the business organisation.
- (iii) Risk assessment: Asses the risks associated with the geographical locations of the business.
- (iv) Due diligence: To identify the potential risks, conduct proper due diligence while engaging business partners and agents.
- (v) Communication (including training): Anti-bribery and corruption policies must be communicated to all the employees and training at regular intervals should be carried out; and

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<sup>217</sup> Id. at 655

<sup>218</sup> Id. at 650 & 664

<sup>219</sup> Id. at 667 & 668

- (vi) Monitoring and reviewing: Ensure periodic review of the policies considering the developing business needs.

There will be no presumption raised against the organisation for the departure from the guiding principle that it does not have adequate procedure.<sup>220</sup>

Bribing a foreign public official to get or keep business is a crime, whether done directly or through a third party.<sup>221</sup> In the case that an employee of a commercial organisation is found to have paid bribes in order to secure or maintain business, the commercial organisation would be guilty of the offence unless proper processes were in place to avoid such misbehaviour.<sup>222</sup> The commercial organisation shall create an atmosphere unfavourable to corruption. Strict liability is cast upon the corporates and the failure to prevent bribery and corruption leads to punishment. The commercial organisation, specified in section 7 of UKBA, includes a partnership or body incorporated in UK or a legal entity which carries on business in any part of UK.

If a person is acting on behalf of a business, it doesn't matter in what capacity. When a subsidiary or employee or third party agent performs a service for a company on its behalf, then it is treated as an act of "associated person."<sup>223</sup> If a senior executive of an organisation, who has a close connection to the United Kingdom, is indulged in the commission of an offence under section 1, 2 or 6 of the UKBA, that officer is guilty of the same offence committed by the corporation.<sup>224</sup>

### **2.3.1 Serious Fraud Office (SFO)**

The Serious Fraud Office (SFO) has been instituted by the Attorney General to probe and prosecute serious fraud and bribery, both domestic and international. The SFO and the police work together to undertake an investigation.

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<sup>220</sup> Id. at 661

<sup>221</sup> *The Bribery Act 2010*, s.6, (Eng.).

<sup>222</sup> *The Bribery Act 2010*, s.7, (Eng.).

<sup>223</sup> *The Bribery Act 2010*, s.8, (Eng.).

<sup>224</sup> *The Bribery Act 2010*, s.14, (Eng.).

## 2.4 Comparison between FCPA and UKBA

Bookkeeping and anti-bribery sections are the main sections of the FCPA whereas the UKBA is restricted to anti-bribery. The bookkeeping provisions of the FCPA prevent bribery expenditures from being hidden by weak or inaccurate record keeping. Similar to FCPA, the UKBA's section 7 w.r.t failure to prevent bribery, compel firms to have internal controls to prevent bribery.<sup>225</sup>

Jurisdiction under both FCPA and UKBA extends to actions that occur outside the territory of the country.<sup>226</sup>

FCPA punished 'active bribery,' i.e., act of giving bribe. Whereas UKBA punishes 'passive bribery,' i.e., receiving of bribe as well. UKBA does not mandate proving of corrupt intent.

FCPA does not prohibit facilitation payment and promotional expenses. Reasonable and bona fide expenses given for the purpose of promotion are not a defence under UKBA.

## 2.5 Theft Act 1968

*The Theft Act 1968*, criminalises false accounting. A false accounting offence is committed, when a person with a view to acquire an advantage for himself or another person, or cause harm to another-

- (i) deliberately generates or operates any misleading, deceptive, or fraudulent account or document
- (ii) falsifies, hides, destroys, or damages accounts or documents required for accounting purposes.<sup>227</sup>

Conspiracy or omission are one of the modes of committing the crime. The prosecution must prove that a person's dishonest intent to gain or cause a loss constitutes the offence. The company's officers are accountable for the

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<sup>225</sup> Supra 172, at 657

<sup>226</sup> Id. at 658

<sup>227</sup> *The Theft Act 1968*, s.17(1), (Eng.).

company's misleading accounting offences.<sup>228</sup> Misleading or false representations made to creditors or shareholders by the company's directors are grounds for criminal prosecution.<sup>229</sup>

### **3. International Treaties and International Organisations**

#### **3.1 United Nations Convention Against Corruption (UNCAC)**

UN General Assembly approved the treaty of United Nations Convention Against Corruption (UNCAC) in October 2003 and it is ratified in total by 186 states parties.

The purposes of the UNCAC are:

- (i) To keep corruption at bay and eliminate it.
- (ii) Encourage international collaboration in the fight against corruption.
- (iii) Anti-corruption experts will be on hand to provide technical aid in the fight against corruption, as well as to assist in the effective management of public affairs as well as public property.<sup>230</sup>

It provides for international cooperation for curbing corruption at global level and return of the proceeds of corruption. State parties are obliged to help each other to deter and detect cross border corruption through technical assistance. The signatories to UNCAC and OECD wanted to create mandatory and optional offences. The mandatory offences are bribery of national public official, bribery of foreign public official, money laundering, conspiracy to commit money laundering, public embezzlement, obstructions, liability of legal entities, accomplices and attempts, and books and records offences. Taking a bribe by a foreign official, abusing their public position to get bribe, giving a bribe to influence peddling, accepting a bribe for influence peddling, illicit enrichment, concealing bribery

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<sup>228</sup> *The Theft Act 1968*, s.18, (Eng.).

<sup>229</sup> *The Theft Act 1968*, s.19, (Eng.).

<sup>230</sup> United Nations Convention Against Corruption, art.1

property, embezzling in the private sector, and bribery in the private sector are all optional offences that states can choose to implement.<sup>231</sup>

Corruption is not defined by UNCAC; instead, it describes what constitutes corruption in each jurisdiction. Bribery, embezzlement, money laundering, concealment, and obstruction of justice are all examples of this type of behaviour. Corruption in both the public and private sectors is addressed in the treaty. The treaty outlines widely accepted definitions of corruption as well as strategies for combating it. Anti-corruption experts from around the world can learn from each other's experiences.

UNCAC safeguards the sovereignty and territorial integrity of its member states and does not allow one state to exercise jurisdiction over another state's land.<sup>232</sup>

The rule of law, integrity, transparency, and accountability must be reflected in each state's legal system in order to encourage public engagement and anti-corruption efforts to be coordinated. Moreover, in order to prevent and combat corruption, the treaty mandates that legal instruments and administrative procedures be evaluated on an ongoing basis. International and regional organisations, as well as member states, should work together to prevent and uncover corruption.<sup>233</sup>

State parties are required to designate a body or a collection of entities to oversee and coordinate the fulfilment of the treaty's aims. It is a requirement imposed by the Convention on all States Parties to set up independent anti-corruption agencies devoid of any undue influence. The United Nation's Secretary-General will be informed of the specifics of this authority.<sup>234</sup>

The preventive measures include establishment of transparent procurement system, access of information to the public, sound financial management, merit based civil service, independent judiciary, maintain auditing standards for private companies, prevent money laundering, and

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<sup>231</sup> *Supra* 39, at 2-4.

<sup>232</sup> United Nations Convention Against Corruption, art. 4

<sup>233</sup> United Nations Convention Against Corruption, art. 5

<sup>234</sup> United Nations Convention Against Corruption, art. 6

encourage active participation of civil society in the efforts to prevent corruption.

In order to prevent corruption in the public sector, the legal system of each state party shall,

- (i) reform the civil service recruitment, retention, promotion, and retirement process in favour of a merit-based system in accordance with the principles of efficiency and transparency.
- (ii) public officials should be paid fairly and rotated on a regular basis; they should also have access to proper training and resources.
- (iii) measures shall be taken to prevent conflict of interest and promote transparency in the domestic law.<sup>235</sup>

Authorities of the state are required by law to disclose any outside activities, assets, investments, gifts, or perks they have received that could create a conflict of interest with their duties as public officials.<sup>236</sup>

Transparent public procurement system shall be adopted by the state parties to promote competition and to prevent corruption. The legal systems of state parties shall address the following requirements:

- (i) potential bidders shall be given adequate time for the preparation and submission of proposal
- (ii) publish in advance of conditions for pre-qualification, selection and award of the contract
- (iii) public procurement rules or procedures shall use objective and pre-determined criteria
- (iv) recourse to legal remedies shall be provided, in event of failure to follow established rules or procedure
- (v) establish screening procedures and obtain declaration of interest in public procurements.<sup>237</sup>

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<sup>235</sup> United Nations Convention Against Corruption, art. 7

<sup>236</sup> United Nations Convention Against Corruption, art. 8

<sup>237</sup> United Nations Convention Against Corruption, art. 9(1)

Accordingly, public finance management should be restructured to improve openness and accountability and the legal frameworks of state parties:

- (i) adopt a procedure for national budget
- (ii) report revenue and expenditure in a timely manner
- (iii) a system of accounting and auditing standards
- (iv) effective risk management and internal controls
- (v) corrective action in case of failure.<sup>238</sup>

Protecting public spending and revenue accounting records is a civil and administrative obligation for each state party.<sup>239</sup>

Enhancement of transparency is needed to combat corruption in the public administration and each state party shall take measures such as:

- (i) access to information about public sector operations including decision making process
- (ii) reporting of dangers of corruption and simplify administrative procedures.<sup>240</sup>

The private sector must improve its accounting and auditing standards in order to reduce corruption there. Violations of accounting and auditing standards will be punishable civilly or criminally under the law of each state party.<sup>241</sup> The following measures shall be taken to prevent private sector corruption:

- (i) in a contractual connection with the state, apply sound commercial practises;
- (ii) to encourage transparency, identify the legal and natural people involved in the establishment and operation of the corporations;
- (iii) prohibit the misuse of procedures;
- (iv) restrict the employment of former public officials by the private sector in order to prevent conflicts of interest;

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<sup>238</sup> United Nations Convention Against Corruption, art. 9(2)

<sup>239</sup> United Nations Convention Against Corruption, art. 9(3)

<sup>240</sup> United Nations Convention Against Corruption, art. 10

<sup>241</sup> United Nations Convention Against Corruption, art. 12(1)

- (v) appropriate auditing and certification of financial statements of private enterprises.<sup>242</sup>

These acts are to be prohibited by the domestic laws and regulations of each state party with relation to bookkeeping, accounting, and auditing as well as financial statement disclosure:

- (i) establishment of off the book accounts
- (ii) making of inadequately identified transactions
- (iii) use of false documents
- (iv) intentional destruction of bookkeeping documents
- (v) recording of non-existent expenditure
- (vi) entry of liability with incorrect identification of their objects.<sup>243</sup>

Convention mandates each state party to disallow tax deductibility of expenses that constitutes bribes.<sup>244</sup>

In the fight against corruption, the domestic law of state parties shall promote active participation of individuals and non-government organisations by taking strengthening measures such as:

- (i) promote transparency and public participation in the decision-making process
- (ii) access to information given to the public
- (iii) undertake education programs that contribute to non-tolerance of corruption
- (iv) disseminate information pertaining to corruption and protect freedom of speak.<sup>245</sup>

Each state party shall ensure and facilitate anonymous reporting of incidents of corruption by the public to the anti-corruption bodies.<sup>246</sup>

The following acts will be made criminal offences by the state parties by legislative action:

- (i) bribery to national public officials<sup>247</sup>

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<sup>242</sup> United Nations Convention Against Corruption, art. 12(2)

<sup>243</sup> United Nations Convention Against Corruption, art. 12(3)

<sup>244</sup> United Nations Convention Against Corruption, art. 12(4)

<sup>245</sup> United Nations Convention Against Corruption, art. 13(1)

<sup>246</sup> United Nations Convention Against Corruption, art. 13(2)

<sup>247</sup> United Nations Convention Against Corruption, art. 15



- (ii) bribery to foreign public officials and officials of public international organisation<sup>248</sup>
- (iii) embezzlement, misappropriation, or diversion of public or private funds or securities or property by public officials<sup>249</sup>
- (iv) influence trading with a view to obtain undue advantage<sup>250</sup>
- (v) abuse of positions or function by public official while discharging official duties<sup>251</sup>
- (vi) a public official's unlawful gain that cannot be adequately explained in regard to their legitimate income<sup>252</sup>
- (vii) bribery committed by private sector entity for an undue advantage<sup>253</sup>
- (viii) embezzlement of private funds or securities or property<sup>254</sup>
- (ix) concealment or disguise of proceeds of crime<sup>255</sup>
- (x) obstruct the justice delivery system by giving or inducing or threatening or intimidating to give false testimony<sup>256</sup>
- (xi) criminal or civil liability shall be imposed on juristic entities for their corrupt activities<sup>257</sup>

Any public official can utilise immunity or jurisdiction protection as a shield to avoid being held accountable if they engage in corrupt behaviour. UNCAC mandates that state parties balance their ability to investigate and prosecute corruption with the immunity afforded to public officials.<sup>258</sup> Deterrence of commission of an offence and maximisation of enforcement measures shall be considered by the state party while exercising its discretion to prosecute a person for corruption.<sup>259</sup>

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<sup>248</sup> United Nations Convention Against Corruption, art. 16

<sup>249</sup> United Nations Convention Against Corruption, art. 17

<sup>250</sup> United Nations Convention Against Corruption, art. 18

<sup>251</sup> United Nations Convention Against Corruption, art. 19

<sup>252</sup> United Nations Convention Against Corruption, art. 20

<sup>253</sup> United Nations Convention Against Corruption, art. 21

<sup>254</sup> United Nations Convention Against Corruption, art. 22

<sup>255</sup> United Nations Convention Against Corruption, art. 23

<sup>256</sup> United Nations Convention Against Corruption, art. 25

<sup>257</sup> United Nations Convention Against Corruption, art. 26

<sup>258</sup> United Nations Convention Against Corruption, art. 30(2)

<sup>259</sup> United Nations Convention Against Corruption, art. 30(3)

Gathering and transmitting evidence for use in a trial is part of the treaty's international cooperation provisions. Convention holds that the right to retrieve stolen property is a fundamental principle. In order to help track down, freeze, forfeit, and return stolen public funds as a result of corrupt practises, states must adjust civil and criminal law. Orders for the seizure or release of bank and financial documents can be issued by courts or other authorities. The secrecy of the bank cannot be used as an excuse for withholding records or failing to comply with the terms of the agreement.<sup>260</sup> There must be an effective procedure for overcoming the hurdle posed by bank secrecy rules during domestic investigations of corruption offences included in the agreement, according to the state parties to the convention.<sup>261</sup>

### **3.1.1 Liability of Legal Persons**

Article 26 of the UNCAC mandates the establishment of legal entity liability for participation in the UNCAC infraction. The state party may impose civil, criminal, or administrative liability on the legal entity in accordance with state law. The legal entity's liability will not affect the criminal liability of the natural people who committed the offences. In addition to the criminal accountability of the corporation, the individuals who committed the offence will be held personally liable. It is the state party's obligation under UNCAC to implement criminal or monetary sanctions that are effective, proportionate, and deterrent.

### **3.1.2 Witness and Whistleblower Protection**

Effective protection of witnesses must be provided by the state parties within their means, including physical security, relocation to a safe location, and specific arrangements for testifying. Victims have the right, subject to domestic law, to participate in the criminal justice process and express their concerns and opinions.<sup>262</sup> Bribery and embezzlement of state finances must be criminalised by all state parties. State parties may also provide protection to those who bring violations to the attention of the

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<sup>260</sup> United Nations Convention Against Corruption, art. 31

<sup>261</sup> United Nations Convention Against Corruption, art. 40

<sup>262</sup> United Nations Convention Against Corruption, art. 32

appropriate authority. UNCAC calls on all states parties to provide adequate protection to those who, in good faith and on reasonable grounds, reveal any facts that violate the convention.<sup>263</sup>

The state parties shall encourage the participants or those who participate in offence:

- (i) to assist in the investigation and the presentation of evidence.
- (ii) to assist law enforcement in recovering the proceeds of crime and depriving those who have committed them of those proceeds.
- (iii) to ensure the safety of individuals, such as witnesses.<sup>264</sup>

To ensure the safety of the witnesses, specialists, and victims, the state shall take suitable and adequate steps. The person who decides to disclose corruption shall be protected, regardless of his or her standing.

Those who have been harmed by corruption are entitled to receive compensation, and the domestic laws of the countries that have signed the UNCAC shall recognise this right.<sup>265</sup> The right of action is subject to sovereignty and domestic law.<sup>266</sup>

### **3.1.3 Enforcement Authorities**

In order to combat corruption through law enforcement, UNCAC requires the development of specialised enforcement organisations that are sufficiently autonomous and free from undue influence. Those in charge of enforcing the law will receive adequate training and support.<sup>267</sup> Since no clear guidelines are established to preserve the independence of anti-corruption enforcement authorities, the investigation and prosecution are influenced by the state's political and economic interests. There should be no political meddling in anti-corruption agencies. Anti-corruption policy should include true political resolve to fight corruption as a pre-requisite for independence. In addition to institutional and operational autonomy, the

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<sup>263</sup> United Nations Convention Against Corruption, art. 33

<sup>264</sup> United Nations Convention Against Corruption, art. 37

<sup>265</sup> United Nations Convention Against Corruption, art. 35

<sup>266</sup> *Supra* 39, at 5-14.

<sup>267</sup> United Nations Convention Against Corruption, art. 36

enforcement agencies will be provided with a clear legal basis. Transparent procedures and internal control mechanisms are essential for preventing unauthorised interference with law enforcement's ability to do their job. Rule of law and human rights must be adhered to and public access to information provided by enforcement agencies must be ensured. The cooperation between the different enforcement agencies, society and business are important factors to ensure combined fight against corruption and effective operation of the anti-corruption bodies.<sup>268</sup>

Adequate financial and material resources, the specialised staff and their training are required for the effective operation of the anti-corruption institutions. They must have legal power to conduct clandestine surveillance, conduct undercover investigations, intercept communications, freeze bank accounts, monitor financial transactions, access financial data and information systems, and protect witnesses. There shall be a proper checks and balance of the power to carry out the above functions. The teamwork between the investigating agency, prosecutors, and other specialist such as auditors, financial experts, information technology experts are required for the most effective use of resources.<sup>269</sup>

State Parties are encouraged to work together with law enforcement agencies to improve public safety. Whenever there is a reasonable apprehension that a crime has been committed, particulars should be passed on to the relevant enforcement authorities. The public authorities are obliged to supply the enforcement authorities with all relevant information upon request.<sup>270</sup> In the event of a corruption-related offence, state authorities must encourage private sector and public sector cooperation in accordance with respective laws. Corruption violations committed in the state should be brought to the attention of the law enforcement authorities by citizens and residents of the state.<sup>271</sup>

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<sup>268</sup> Supra 39, at 6-23.

<sup>269</sup> Id. at 6-24.

<sup>270</sup> United Nations Convention Against Corruption, art.38

<sup>271</sup> United Nations Convention Against Corruption, art. 39

In civil and administrative cases involving allegations of corruption, the parties to the treaty agree to cooperate with one another.<sup>272</sup> The convention mandates that the state parties recognise the right of a foreign state to sue and that the courts have the authority to require damages to be paid to the foreign state. Take into account civil claims from other countries when deciding on criminal confiscation.<sup>273</sup>

States are obligated to assist each other in gathering and sharing data related to corruption for the purpose of inquiry and evidence in court. An accused individual who contributes significantly to the investigation and prosecution of criminal offences is entitled to a lesser punishment or immunity from legal action.<sup>274</sup>

National investigating and prosecuting authorities shall cooperate with private sector entities in relation to commission of an offence and encourage its nationals to report the offences.<sup>275</sup> Disqualification from holding public office for anyone found guilty of corruption should be considered by state parties.<sup>276</sup>

### **3.1.4 Extraterritorial Jurisdiction**

The concept of state sovereignty must be balanced with the extra territorial jurisdiction. Article 4 of the UNCAC reaffirms the state sovereignty, equality, and territorial integrity. Without the approval of the other state, the legislative functions of a state may not be exercised in the territory of that state.<sup>277</sup>

When a crime is committed inside the jurisdiction of a state or on board a vessel with a state flag, the state parties are entitled to claim jurisdiction.<sup>278</sup> UNCAC permits establishment of jurisdiction<sup>279</sup> by the state in case of the following circumstances

- (i) an offence against a citizen of the state is committed.

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<sup>272</sup> United Nations Convention Against Corruption, art. 43

<sup>273</sup> United Nations Convention Against Corruption, art. 53

<sup>274</sup> United Nations Convention Against Corruption, art. 37

<sup>275</sup> United Nations Convention Against Corruption, art. 39

<sup>276</sup> United Nations Convention Against Corruption, art. 30(7)

<sup>277</sup> Supra 39, at 3-2.

<sup>278</sup> United Nations Convention Against Corruption, art. 42(1)

<sup>279</sup> United Nations Convention Against Corruption, art. 42(2)

- (ii) a citizen or a habitual resident of a state commits an offence.
- (iii) there is an offence against the state.
- (iv) conspiracy committed outside the state with a view to commit offence within the state.

The extraterritorial jurisdiction would result in higher incidence of concurrent jurisdiction and conflicting assertions civil and criminal jurisdictions. Multiple proceedings would invite dual criminality and double jeopardy and would pose new challenges for compliance.<sup>280</sup>

Coordination of investigations, prosecution, and judicial proceedings is required if two or more states have jurisdiction over the same criminal conduct.<sup>281</sup> In criminal cases where several jurisdictions are involved, the state parties shall in the interest of justice and with a view to concentrate on prosecution, consider transfer of cases to one another.<sup>282</sup>

### **3.1.5 Mutual Legal Assistance**

State parties shall cooperate in criminal matter and assist each other, consistent with their legal system, in investigations pertaining to civil enforcement matters relating to corruption.<sup>283</sup> Corruption-related investigations, prosecutions, and court proceedings will be supported by mutual legal assistance supplied by states parties.<sup>284</sup> The enforcement agencies of each state party shall cooperate with each other by giving assistance, coordinating investigations, exchanging information, and so forth. Law enforcement authorities should join into bilateral or multilateral treaties to speed up international corruption investigations and prosecutions.<sup>285</sup>

One of the major drawbacks of the UNCAC is that it may not fit into the country's institutional arrangements and procedures. Its nature as international treaty does not lend itself to enforceability within national courts.

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<sup>280</sup> *Supra* 39, at 3-22.

<sup>281</sup> United Nations Convention Against Corruption, art. 42(5)

<sup>282</sup> United Nations Convention Against Corruption, art. 47

<sup>283</sup> United Nations Convention Against Corruption, art. 43

<sup>284</sup> United Nations Convention Against Corruption, art. 46

<sup>285</sup> United Nations Convention Against Corruption, art. 48

### **3.2 Organization for Economic Co-operation and Development (OECD)**

In 1961, 34 countries established the Organization for Economic Co-operation and Development (OECD) in order to promote global economic growth and commerce. Good practises, answers to common issues and comparisons of policy experiences may all be found here. It outlines how the legislation should be implemented and how it should be evaluated.

It will be a crime to bribe foreign public authorities, regardless of whether it is done directly or through intermediaries.<sup>286</sup> The criminal sanctions for bribery of foreign public officials must be effective, dissuasive, and appropriate.<sup>287</sup> Bribery of a foreign public official shall result in culpability for the perpetrators including juristic entity.<sup>288</sup> In order to bring charges against a juristic entity, it is not mandatory to first bring charges against a natural person. Bribery of foreign public officials or the concealment of bribery will be prevented by each state party by prohibiting companies from keeping off-the-books accounts, from carrying out transactions that are not properly documented, from entering liabilities that have the wrong object identified, from recording fictitious expenditures, and from using false documents. Maintaining books and records, accounting and auditing requirements, and financial statement disclosures are among the actions that state parties must take to resist bribery of foreign public officials. If a company falsifies its financial statements by manipulating its books and records, the state must apply appropriate civil, criminal, and administrative consequences.<sup>289</sup>

Each state party shall establish its jurisdiction to prosecute bribery of foreign public official:

- (i) when the crime is committed in whole or part of its territory.
- (ii) when its nationals commit bribery abroad.

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<sup>286</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.1

<sup>287</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.3

<sup>288</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.2

<sup>289</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.8

- (iii) when one or more state parties have jurisdiction over alleged offence, then the parties shall consult each other and decide about the appropriate jurisdiction.<sup>290</sup>

### **3.2.1 Enforcement Authorities**

State parties shall not be influenced by national economic interest, relationship with another state, and identity of the natural or legal person while taking enforcement action against the bribery of foreign public officials.<sup>291</sup> A country's laws and principles shall govern any investigation into or prosecution of a foreign public officer for corrupt actions. Accurate and thorough investigations shall be conducted into allegations of bribery against foreign officials. As a matter of principle, member nations must establish channels of communication for reporting bribery activities undertaken by foreign public officials. The reporting of bribery suspicions by public officials to law enforcement authorities should be made easier by member countries. Public and private sector personnel who report suspected bribery of foreign public officials on acceptable grounds and in good faith to the appropriate authorities should be shielded from any retaliation or discrimination.

### **3.2.2 Mutual Legal Assistance**

For criminal investigations or prosecutions, a state party may request legal help from another state party pursuant to domestic law and relevant treaties and agreements. A state party may use the legal help to initiate proceedings against juristic entity in non-criminal actions. If a state party requests further information or documents, a party must provide them immediately. In the event of dual criminality, conditional reciprocal legal help can be granted. According to the OECD agreement, the banks and financial establishments shall be mandated to keep proper records by the states parties their laws and regulations and require them readily available for examination and inquiry in the event of a corruption offence.<sup>292</sup>

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<sup>290</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.4

<sup>291</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.5

<sup>292</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art.9



### 3.2.3 OECD Recommendation on Public Procurement

The most vulnerable things to corruption in public entities is purchasing products, services and works. Bribery of officials participating in the bid evaluation, award process, payment of invoice, and inspection of the fulfilment of contractual obligation are just some examples of corrupt acts in the public procurement system. The direct costs of corruption are the low quality of goods, services and works, and higher costs. Reduction in foreign investment, distortion of competition and limited market access are the indirect costs of corruption in the public procurement systems. The Recommendations also discuss the integrity risks associated with the public procurement process, which are:

- (i) lack of needs assessment and market analysis
- (ii) poor procurement planning and budgeting
- (iii) tailor made technical specifications suitable for a specific company.
- (iv) use of non-competitive procurement procedure or abuse of procedures.
- (v) collusive bidding
- (vi) lack of sufficient notification of invitation to bid.
- (vii) conflict of interest or corruption in the bid evaluation process
- (viii) abuse of contractual obligation relating to quality, price and timing.
- (ix) lack of supervision leading to advance payment for the goods or services not supplied.

The OECD recommends the following guidelines to help keep public procurement free of corruption and to promote good governance and accountability:

1. **Integrity:** It is not enough to rely solely on the honesty of a public official to ensure the integrity of the public procurement system. Contracts for public procurement must include provisions for monitoring and enforcing compliance with integrity pacts by private sector contractors. Establishment of adequate whistleblowing procedures and prevention of victimisation would also mitigate the risks associated with public procurement.

2. **Transparency:** Transparency ensures level playing field in the business and promotes accountability and good governance in the public sector.
3. **Stakeholder participation:** Stake holder participation, increases transparency and integrity, boosts government accountability and fosters confidence in public institutions
4. **Accessibility:** Access to public procurement documents reduces opportunities for corruption and levels the playing field among companies.
5. **E-procurement:** Public authorities and businesses have less face-to-face engagement because of the use of technology. It also makes it simpler to spot instances of integrity violations, fraud, and other forms of corruption.
6. **Oversight and control:** It increases the performance and efficiency of the procurement system and support accountability.

### 3.2.4 OECD Recommendation on Public Integrity

In order to enhance the public integrity, reduce corruption and to foster public trust, OECD recommends the following:

1. A culture of integrity must be fostered across society to ensure that public interest is prioritised over private interest in the public sector.
2. When it comes to promoting public integrity and reducing corruption, management of the public sector needs to show its dedication.
3. In order to improve public integrity, the roles and responsibilities of public sector institutions should be specified.
4. An effective plan for safeguarding the public trust should be devised by government agencies.
5. A high standard of conduct should be set for public officials to adhere to public service principles, prioritise the public interest, and foster good governance.
6. There is a need for all three sectors like individual, civil society, and private sector to work together to maintain the public's sense of integrity.
7. Ethical and moral standards must be used in the selection or advancement of managers and the evaluation of leadership.

8. To avoid government favouritism and nepotism, promote public servants on the basis of their abilities rather than their connections.
9. Encourage employees to talk openly about mistakes, ethical difficulties, and concerns about integrity. Organizational efficiency, effectiveness, and legal compliance can all be improved by setting up a risk control management framework in the public sector.
10. Disciplinary actions against public officials who are accused of violating integrity standards must be handled in a fair, objective, and time-bound way.
11. The external regulatory authorities' ability to monitor and supervise public sector organisations makes it easier to hold them accountable.
12. Openness can be promoted and supported by including stakeholders in the design and implementation of public policy.

### **3.2.5 OECD Recommendation for Development Co-operation Actors on Managing the Risk of Corruption**

OECD's anti-corruption recommendation covers more ground than just procurement and includes sanctions by development partners for any and all forms of corruption that may occur. A reporting mechanism, financial control, and monitoring on the management of corruption concerns are also included. The OECD proposes that in order to deal with genuine instances of corruption and foster cooperation:

1. Codes of conduct for public officials should clearly outline what practises should be avoided and adopted in order to decrease corruption.
2. Provide appropriate human and monetary resources for anti-corruption measures so that personnel can do their duties in a confidential, objective and timely manner. Create a risk-free working atmosphere to encourage teamwork among employees.
3. It is important to educate staff members on ethics and anti-corruption practises, as well as establish their roles and responsibilities in the anti-corruption services. Corruption risk identification, assessment, and mitigation strategies that can prevent corruption will be taught as part of the programme.

4. Systematic and timely auditing and punishments must be carried out in order to fix the system's shortcomings. Communicate the findings of the investigation and the lessons gained to the staff in order to foster trust and decrease feelings of opacity.
5. Conduct a systematic evaluation of the corruption risks throughout the project lifecycle and a continuous management of anti-corruption measures.
6. Corrupt practises should be discouraged and detected in ODA (Official Development Assistance) funded projects. A method must be established to check that the individuals or organisations applying for ODA contracts have not been convicted of corruption offences. Contracting parties must exercise due diligence before ODA contracts can be awarded. Be on the lookout for unscrupulous practises by implementation partners and their subcontractors.
7. Ensure the protection of whistleblowers and avoid victimisation by implementing a whistleblowing procedure.
8. Corruption or misleading statements in the ODA fund application may result in sanctions such as contract cancellation, suspension, reimbursement or other civil or criminal actions being contained in ODA agreements.
9. Anti-corruption efforts will be more effective if there is greater openness and accountability.
10. Discourage facilitation payment.

The information in good faith and with sufficient reasons provided by the employees working in the public and commercial sectors to competent authorities regarding possible corruption by foreign public authorities should be protected from retaliatory actions by the member countries.

### **3.3 Transparency International**

Transparency International is a German non-governmental organisation (NGO) dedicated to fighting corruption. The transnational network, which was established in 1993, strives to strengthen integrity systems at the national and international levels and to combat corruption

by uniting a global coalition. It is Transparency International's mission to ensure that government procurement is more open and transparent. Efforts to counteract corruption include lowering public officials' discretionary power, reducing conflicts of interest, and strengthening the oversight mechanism's autonomy.<sup>293</sup>

To gauge “*the degree to which corruption is believed to occur among public officials and politicians,*” University of Passau Professor (Dr.) Johann Graf Lambsdorff created the Corruption Perceptions Index (CPI) in 1995.<sup>294</sup> According to the CPI's zero to ten scale, the most corrupt countries were given the lowest scores, while the least corrupt countries received the highest rankings.<sup>295</sup> Transparency International has released the CPI since 1995. The perception of corruption is gauged by the CPI, not its actual prevalence. The CPI is not a reliable indicator of levels of corruption across countries. CPI results are based on the survey conducted on those who work for international agencies and worldwide enterprise to obtain their views and perceptions.

As a means of avoiding corruption in public procurement contracts, Transparency International created Integrity Pacts (IPs). Contracting authorities and bidders sign integrity pacts to demonstrate their commitment to transparency and best practises. By establishing a level playing field, the integrity agreement provides increased public confidence and trust in public decision making. Bidders and public officials must not pay, solicit, demand, or receive bribes as part of the integrity accord. A third-party monitor is assigned to guarantee that the contracting process is operated in an open and honest manner, as collusion among bids is expressly forbidden under the law. Forfeiture of bid

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<sup>293</sup> Wang, H. & Rosenau, J.N. (2001, January-March). Transparency International and Corruption as an Issue of Global Governance. *Global Governance*, 7, 25-49. <https://www.jstor.org/stable/27800285>

<sup>294</sup> Werve, J.E. (2009, September 18). *Johann Lambsdorff Retires the Corruption Perceptions Index*, Global Integrity. <https://www.globalintegrity.org/2009/09/18/post-452/>

<sup>295</sup> *Supra* 173, at 741

security, cancellation or termination of the contract, accountability for damages, and blacklisting from future public contracts are all possible consequences of violating the integrity pact.

#### 4. Implementation of International Treaty Obligations by India

An overview UNCAC and OECD corruption offences and comparable crimes in India is given in the table below:

**Table 2.1**

#### **Indian Statutory provisions equivalent to UNCAC & OECD**

<b>UNCAC &amp; OECD Offences</b>	<b>India Equivalent</b>
<b>Bribery of National Public Officials</b>	
<b>UNCAC</b> Article 15 necessitates the state parties to criminalise the following acts, if they are committed intentionally: (a) The promise, tendering or giving of bribe to a public official. (b) The demand or receipt of bribe by a public official. The treaty intends to penalise both public and private officials for the offence of bribery.	Prevention of Corruption Act, 1988 Section 7: penalises the public official for the demand and acceptance of bribery.  Section 8 penalises the person who bribes the public official for an undue advantage.
<b>OECD</b>	
Does not deal with it	
<b>Bribery of Foreign Public Official</b>	
<b>UNCAC</b> Article 16(1) mandates states to charge felony, when committed purposefully, the promise, tendering or providing bribe to a foreign public official	There are no provisions on the inducement to foreign public officials in the Prevention of Corruption Act, 1988 or any other legislation in India. There are no provisions even permitting the investigation of bribery charges against corporates or any persons for bribing foreign public officials.
<b>OECD</b>	
Article 1: State Parties shall charge felony under domestic law, if any person purposely promise, tender, or give any undue monetary benefit to a foreign public official. Article 3 provides for criminal penalty and civil sanctions for the payment to foreign public officials.	
<b>Public Embezzlement</b>	
<b>UNCAC</b>	

Article 17 recommends that the State should penalise the embezzlement, exploitation, or other rerouting of assets by a public official who has been assigned with that asset.	Prevention of Corruption Act, 1988 Section 13 penalises public officials who deceitfully or unfairly embezzle or otherwise utilise for personal benefit any property handed over to him or any assets under his jurisdiction as a public servant or permits any person to do likewise. The aforesaid section clearly reflects the principles incorporated under Article 17 of UNCAC. The law classifies such an act as criminal misconduct. The Section criminalises the abuse of trust and responsibility placed on a public officer.
OECD	
No provision	
<b>Liability of Legal Entities</b>	
UNCAC	
Article 26 mandates states to establish liability of legal entities (such as corporations) for UNCAC offences in accordance with each state's legal principles. State shall establish proportionate and dissuasive criminal or civil sanctions.	
OECD	
Article 2 mandates that state shall establish legal liability on legal persons in its domestic law for kickback to foreign public official. Article 3(2) provides for the non-criminal sanctions of legal persons.	Prevention of Corruption Act, 1988 Section 9 holds the commercial organisation responsible if a person associated with the commercial organisation bribes a public official. As per Section 10, a person in charge of commercial organisation is also culpable of the crime, if it is demonstrated that the commercial organisation was responsible.
<b>Accomplices and Attempt</b>	
UNCAC	
Article 27 establishes culpability for involvement (accomplices) in a crime addressed in UNCAC and venture to perpetrate an UNCAC offence.	
OECD	
Article 1(2) requires the State Party to institute felony for involvement, and for attempts and connivance, corresponding to those concepts relate to domestic law.	Prevention of Corruption Act, 1988 Section 7 also criminalises the act of attempting to receive bribes. Section 15 – prescribes the punishment for attempt of criminal misconduct by public servants. No provision regarding participation in offence. Criminal Procedure Code, 1973 Section 306 states that the tender of pardon to accomplice. An accomplice is a competent witness to the crime. However, the accomplice must make a valid and full disclosure of the whole of the circumstances within his knowledge related to the offence.
<b>Conspiracy</b>	
UNCAC	
Conspiracy is not a compulsory or discretionary offence apart from Article 23 which provides for the conspiracy to perpetrate money laundering).	
OECD	
	Prevention of Corruption Act, 1988 Section 3- Central or State Government may appoint special Judges to try the following offences, namely:- (b) any conspiracy to perpetrate or any effort to

<p>Article 1(2) put in place crime of collusion to bribe a foreign official, identical to that of scheme to bribe public official in domestic law.</p>	<p>accomplish or any instigation of any offences under the Act.  Indian Penal Code, 1860  Section 120B of the Indian Penal Code provides for the punishment for criminal conspiracy. Section 109 and 110 of the IPC provides for punishment for abetment of the offence.</p>
<b>Books and Records Offences</b>	
<p>UNCAC</p>	<p>There is no provision in the Prevention of Corruption Act, 1988 for criminalizing the books and records offence.  Chapter IX of the Companies Act, 2013 requires to companies to keep books of account, explain the transactions effected and shall be subjected to inspection. The financial statement of the firm shall provide honest picture of the affairs of the firm. It also provides for the constitution of National Financial Reporting Authority to monitor and enforce the compliance of accounting and auditing standards. The Directors' Responsibility Statement to provide honest picture of the existing conditions of the company.</p>
<p>Article 12(3): does not call for state parties to make books and records wrongdoings as criminal offence but necessitates states to take needed actions to avert the manipulation and use of incorrect and sham books and records with intent to assist in the execution of UNCAC offences. Incorrect books and records plan includes creation off-the-books accounts, incorrectly classifying transactions, making fictitious transactions, designing or employing false documents, or improper, deliberate destruction of records.</p>	
<p>OECD  Article 8: Each state party to frame laws to regulate maintenance of books and records, financial disclosures, prohibit creation of off the book's accounts, recording non-existent expenditure, etc. State party shall be responsible for efficient civil, organizational, or criminal punishments for unlawful books and records wrongdoings.</p>	
<b>Foreign Public Official Taking a Bribe</b>	
<p>UNCAC</p>	<p>There are no provisions criminalizing taking of bribe by or giving bribe to foreign public official in Indian law.</p>
<p>Article 16(2): the request or taking of an inducement by a foreign public official should be an offence.</p>	
<p>OECD  No comparable provision.</p>	
<b>Giving a Bribe to Influence Peddling</b>	
<p>UNCAC</p>	<p>Section 7A of the Prevention of Corruption Act, 1988 – also stipulates that accepting undue advantage to induce public official by dishonest or unlawful means or by use of private influence is a punishable offence.</p>
<p>Article 18(a): assuring, extending or giving inducement to a public official to abuse his existent or presumed influence for the advantage of the bribe giver should be a criminal offence.</p>	
<p>OECD  Article 1(1) &amp; (4): makes the felony of the act of inducement of foreign public official.</p>	
<b>Accepting a Bribe to Influence Peddling</b>	
<p>UNCAC</p>	



Article 18(b): the solicitation or acceptance of a inducement by a public official for the sake of promising to embezzle his existent or presumed influence for the advantage of the bribe giver should be an offence.	Prevention of Corruption Act, 1988 Section 7, Explanation 2- “obtains” or “accepts” or “attempts to obtain” cover instances where a public servant, acquires or receives or solicit, <i>any undue advantage</i> for oneself or for someone, by misusing his capacity or by employing his command over other public servant.
OECD	
No comparable provision	
<b>Abuse of Public Function</b>	
UNCAC	Prevention of Corruption Act, 1988 Section 7, Explanation 2 also prescribes that if the public servant- acquire or receive or solicit any disproportionate advantage for oneself or for someone, by <i>abusing his position</i> or by employing his command over other public servant; or by other unethical means; is also an offence.
Article 19 states that the misuse of public tasks with a desire to obtain an improper advantage should be an offence.	
OECD	
No comparable provision	
<b>Civil Prosecution</b>	
UNCAC	There are no corresponding provisions under Indian law. While there are standards of bookkeeping and accounting under the Companies Act, 2013, there are no specific provisions in relation to corruption and bribery. The Companies Act, 2013 criminalises corporate fraud and misconduct. Section 134(8) of the Companies Act stipulate fine for the violation Section 134 of the Companies Act 2013.
Article 12 requires State Parties to take steps to reduce corruption within the private enterprise and in appropriate cases <i>interalia</i> provide for civil consequences for non-compliance with the procedures. Article 35 requires legislative provisions that allow the victims of the corrupt act to seek compensation from those responsible.	
OECD	
Article 8 states that State Parties shall put in motion honest record keeping and accounting procedures and failing which impose civil penalties for falsification of books and accounts.	
<b>Extra-territoriality</b>	
UNCAC	Prevention of Corruption Act, 1988 Section 1 states that the Act concerned about all citizens including those who reside outside of the country. However, offence is made out only when bribe is being paid to a public servant. Bribery to a foreign public official is not covered under the Prevention of Corruption Act. Section 3 and 4 of the IPC provides for the extraterritorial operation of the Code. However, only citizens are liable for the offences in any place without and beyond India. A company is not liable for the corruption committed outside India.
Article 42 requires that the legislations should cover offences committed by a national of the State even if it is outside the State.	
OECD	
Article 4 states that the State Parties should have jurisdiction over offences committed by its national even in foreign territory.	
<b>Protection of Whistleblower, witness, victims, and participants</b>	
UNCAC	Whistleblowers Protection Act, 2014 under the following sections prescribes protection for whistle blowers: Section 11 - Safeguards against victimisation by allowing the whistle blower to seek redress if he is being
Articles 32, 33, and 37 call for State Parties to take measures to protect witnesses, experts, victims, reporting persons, and persons who cooperate with the law enforcement agencies.	

OECD	victimised. Section 12 - Protection of witnesses and other persons by issuing directions to the police for their protection. Section 13 - Protection of identity of complainant is the obligation of the authorities. However, the Whistleblower Protection Act is not yet notified by the government. Section 177(9) of the Companies Act, 2013 and clause 49 of the listing agreement provides for the establishment of vigil mechanism.
<b>Immunities to Accused Person</b>	
UNCAC	Prevention of Corruption Act, 1988 Section 19 provides for the previous sanction of the public servant for prosecution. Section 197 of Cr.PC : The prosecution of a public servant is possible only if the requisite government has sanctioned the prosecution, in the event the crime was purported to have been accomplished while carrying out his duties.
Article 30 call for the State Parties to consider the protections accorded to the public official and its consequences upon a subsequent investigation.	
OECD	
No comparable provision	

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## **CHAPTER III**

### **CORPORATE GOVERNANCE AND COMPLIANCE**

*Corporate Governance is a system by which the business corporations are directed and controlled.*

*OECD*

Corporate governance refers to the rules and procedures by which an organisation is governed and managed. In order to accomplish this objective, corporate governance must ensure that the interests of all stakeholders are protected. Multinational corporations face a lot of competing interests that must be considered equally and balanced by the company.

This chapter focuses on the leadership's role in ensuring that corporate governance is followed. In addition, it emphasises the institutionalisation of integrity through anti-corruption programmes, compliance systems, and other tactics to combat corruption. The chapter covers a wide range of corporate governance topics, including internal controls, director independence, the audit committee, shareholder activism, and much more.

There is also an explanation of how stakeholder involvement can be utilised to combat corruption. Stakeholders who speak up against corruption and assume a risk for the greater good are known as whistleblowers. Preventive vigilance against corruption relies heavily on the work of a whistleblower. Whistleblowers are more likely to speak out against corruption if they know they will not face retaliation. The law of the land as well as the company practices must ensure that the identity of the whistleblower are protected without jeopardising their well-being or safety.

This chapter explains the methods that are essential for fulfilling stronger and more efficient corporate governance in any business or institution.

Focus on the corporate governance standards enacted by the Companies Act, 2013 is also detailed out in this chapter. Moreover, compliance as well as Indian public procurement process's corporate governance framework is also examined in herein.

These concepts are critical to the prevention of corruption through internal regulation and corrective action within the company. It is impossible to combat public corruption without changing the corporate culture. The tone set by executive and the checks and balances maintained by both internal and statutory auditors determine the company's behaviour. An oversight system like the whistleblower policy is also necessary to ensure compliance through an impartial and anonymous source.

## **1. Corporate Governance**

Improved operational transparency without compromising company secrets or strategy is what is meant by “Corporate Governance” in the context of business. Success in the marketplace depends on the company's conduct being both lawful and ethical. Corporate Governance, according to Commonwealth Association for Corporate Governance (CACG)<sup>1</sup> is essentially about leadership:

- leadership for honesty;
- leadership which is transparent and accountable.
- leadership with reliability; and
- leadership with integrity

Ethical, moral, and value-based corporate governance governs or controls corporations. It establishes the standards by which management is held accountable, controlled, and required to report.<sup>2</sup> It is about encouraging transparency, honesty, fairness, responsibility, and accountability. Recognizing

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<sup>1</sup> *Principles for Corporate Governance in the Commonwealth*, (1999, November). Commonwealth Association for Corporate Governance. [https://www.nfcg.in/UserFiles/cacg\\_guidlines.pdf](https://www.nfcg.in/UserFiles/cacg_guidlines.pdf)

<sup>2</sup> *A Handbook on Corporate Governance*. (2019). Institute of Directors. <https://www.independentdirectorsdatabank.in/pdf/partners/IOD/CORPORATE%20GOVERNANCE.pdf>

the rights of all stakeholders and fostering mutual cooperation are key objectives for the organisation.<sup>3</sup>

The OECD Principles on Corporate Governance see corporate governance as a two-way street. A limited liability corporation's relationships and patterns of behaviour are covered on the one hand. Therefore, corporate governance is the process by which management, shareholders, and a variety of other stakeholders collaborate to develop a company's overall strategy. On the other hand, public policy must support corporate governance as corporate strategy being developed inside a framework provided by a set of regulations.<sup>4</sup>

Every stakeholder, including both internal and external stakeholders, has a role to play in creating a successful company. A company's board of directors, owners, employees, and managers comprise its internal stakeholders. Investors, creditors/banks/financial institutions, and competitors are a few examples of external stakeholders. The rights and obligations of each stakeholder group in a corporation are demarcated by corporate governance.<sup>5</sup>

Controlling management's actions is a major responsibility for corporate governance, and it guarantees that managers are functioning in the prime interests of shareholders.<sup>6</sup> The principal implement auditing system to monitor the agent and to restore confidence and trust. Agent-principal conflicts can be minimised by setting an adequate incentive for the agent and suffering surveillance expenditures to check the agent's deviant behaviors.<sup>7</sup> The

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<sup>3</sup> Id. at 8

<sup>4</sup> Nestor, S., Yasui, T., & Guy, M.L. (n.d.). *The Relevance of Corporate Governance to Eurasian Transition Economies*, Organisation for Economic Co-operation and Development. Retrieved October 26, 2022, from

<https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1930716.pdf>

<sup>5</sup> Ho, S.S.M., & Wong, K.S. (2001). A Study of the Relationship Between Corporate Governance Structures and the Extent of Voluntary Disclosure. *Journal of International Accounting, Auditing & Taxation*, 10, 139.

<sup>6</sup> Id. at 143

<sup>7</sup> Jensen, M.C. & Meckling, W.H., (1976). Theory of the Firm: Managerial Behaviour Agency Costs and Ownership Structure. *Journal of Financial Economics*, 3, 305.

possibility of any potential conflict of interest among the various stakeholders in the corporate structure necessitates the need for corporate governance.<sup>8</sup>

Managing stakeholders, employees, consumers, and government is all part of corporate governance, which is based on policies and processes. It is imperative that these processes are substantiated by means of fundamentals such as accountability, transparency, and openness. It is up to the company's top executives to put these rules into action. The CEO is considered as role model by the workforce as he sets an example for them to follow. It is the tone set at the top of the organisation that directs everyone else to adopt ethical ideals, producing an ethical climate. The foundation for building a sound ethics and compliance framework for the entire firm is setting the correct tone at the top. When it comes to guaranteeing the adoption of particular organisational principles at all levels of a company, middle management is an important part of the equation. When it comes to setting a good example, auditors are the most important people to look out for. Auditors are tasked with ensuring that the company's management is aware of any irregularities. By deliberately mismanaging and failing to properly audit Satyam's finances, the company lost its entire value. PwC's inability to properly audit Satyam's accounts was also flagrant. It was first alleged that PwC relied on the management's information for their inability to catch the fraud, but this was later proven to be false. A two-year revocation of PwC's licence was issued after it was found guilty of charges.<sup>9</sup>

Corporate governance should focus on long-term business performance rather than shareholder value maximisation. No legislation or regulation can change a company's operations in a way that improves their performance for the benefit of all stakeholders. There must be a code of conduct and ethics embraced by the company, board, and employees, including the following elements:

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<sup>8</sup> Imam, M.O., & Malik, M. (2007). *Firm Performance and Corporate Governance Through Ownership Structure: Evidence from Bangladesh Stock Market*, ResearchGate. [https://www.researchgate.net/publication/228975119\\_Firm\\_performance\\_and\\_corporate\\_governance\\_through\\_ownership\\_structure\\_Evidence\\_from\\_Bangladesh\\_stock\\_market](https://www.researchgate.net/publication/228975119_Firm_performance_and_corporate_governance_through_ownership_structure_Evidence_from_Bangladesh_stock_market)

<sup>9</sup> Almeida, A. (2020, October 20). *Satyam Scam – The Story of India's Biggest Corporate Fraud!*. Trade Brains. <https://tradebrains.in/satyam-scam/>

- (i) Obligation to Society
- (ii) Obligation to Investors
- (iii) Obligation to Employees
- (iv) Obligation to Customers

The factors that determine ethical behaviour within an organisation are:

- (i) Employees are less likely to commit fraud if their bosses talk about the importance of ethics, honour their promises, interact with them, and model ethical behaviour.
- (ii) Employees' ethical conduct is influenced by the behaviour of their peers.
- (iii) Ethical business practises in the industry may be reflected in employee conduct.
- (iv) The moral climate of society is a critical component in deciding whether or not employees would engage in unethical behaviour.
- (v) The organisation must say that unethical conduct is not accepted and implement such a policy seriously.<sup>10</sup>

Good corporate governance goes far away from the policies and guidelines that state enforces. Ethical choices are relevant and are the first line of defence against corruption.

### **1.1 Reasons for the Growth of Corporate Governance:**

Capital market growth is directly linked to the quality and adequacy of corporate governance. Business governance has the added benefit of lowering social corruption by increasing the level of openness and accountability in corporate disclosures.

The factors that affect the quality of corporate governance are:

- (i) Integrity of the Management
- (ii) Efficiency of the Board

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<sup>10</sup> Taylor, H. (n.d.). *Association of Certified Fraud Examiners, Tone at the Top: How Management Can Prevent Fraud in the Workplace*, Retrieved October 26, 2022, from [https://www.academia.edu/11785958/TONE\\_AT\\_THE\\_TOP\\_HOW\\_MANAGEMENT\\_CAN\\_PREVENT\\_FRAUD\\_IN\\_THE\\_WORKPLACE\\_PRESENTED\\_BY\\_THE\\_ASSOCIATION\\_OF\\_CERTIFIED\\_FRAUD\\_EXAMINERS](https://www.academia.edu/11785958/TONE_AT_THE_TOP_HOW_MANAGEMENT_CAN_PREVENT_FRAUD_IN_THE_WORKPLACE_PRESENTED_BY_THE_ASSOCIATION_OF_CERTIFIED_FRAUD_EXAMINERS)

- (iii) Efficient information system
- (iv) Quality of corporate reporting
- (v) Commitment of the individual director towards his work
- (vi) Participation of the stakeholders in the Management.

An organisation's ability to flourish in its industry is enhanced when business ethics are being implemented. Corporate governance cannot be replaced by law, but legislation plays a complementary role in ensuring effective governance. Because the law specifies a minimal level of behaviour, simply following the rules does not guarantee success in business. The stakeholders are ultimately responsible for putting the corporate governance policies into action.

The accountability and responsibility of the stakeholders can be increased by adopting the following steps:

- (i) At the top, management should set an ethical tone by leading by example and walking the talk.
- (ii) The ethics policy, management philosophy, and simple compliance standards should all be specified in the code of conduct.
- (iii) A thorough background check on prospective hires is required by the organisation in order to assess their trustworthiness, moral character, public image, and commitment to the company.
- (iv) It is imperative that the organisation establishes clear job descriptions and performance goals for its personnel. To ensure that the goals are attainable, they should be reviewed on a regular basis.
- (v) Ethical training must be delivered to employees on an ongoing and continuous basis so that they can handle any compromising situations and identify and prevent any trouble spots. The training will be utilised to convey the principles, code of conduct, and expectations of the organisation.
- (vi) In order to prevent future ethical transgressions, the disciplinary procedures implemented must be consistent and sufficient.
- (vii) Frauds are usually discovered by a tip, hence a reliable hotline reporting system must be put in place within the organisation.



- (viii) Whistleblower protection policies must be established and communicated to encourage employees to present oneself and report wrongdoing. Companies should set up a 24-hour hotline staffed by people who have undergone extensive training.
- (ix) Maintaining whistleblower confidentiality and preventing reprisals against whistleblowers.
- (x) A standard operating process must be established for the examination of fraud charges to avoid and ascertain violations of the law.
- (xi) It is important to have a company culture of doing the “right thing.” Ensure that the company's culture emphasises doing the right thing at all times.<sup>11</sup>

After an investigation found that Ms. Chanda Kochhar had broken ICICI's code of conduct and failed to declare conflict of interest in the granting of loans to Videocon, the bank reaffirmed its ethical tone by terminating her employment as MD and CEO. Upon her loss of employment, she forfeited all of her current and prospective allotment like unpaid bonuses, increments, stock options, medical benefits, etc., as well as any future entitlements she may have accrued.<sup>12</sup>

## **1.2 Commitment from the Top**

Top-level commitment is one of the guidelines published under the Bribery Act, 2010 (UKBA) for the establishment and prevention of corruption. A commercial enterprise's management is obligated to prevent corruption by its employees. Bribery should never be tolerated in a society.<sup>13</sup> Since he or she is the company's top executive, the CEO has enormous influence over the culture and behaviour of the whole workforce.<sup>14</sup> Leadership, vision, and guidance are all sought from the CEO by the workforce. Leadership is built on trust, and

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<sup>11</sup> Id.

<sup>12</sup> ICICI Bank. (2019, January 30). *ICICI Bank statement on findings in the enquiry report of the Hon'ble Justice (Retd.) B.N.Srikrishna* [News Release]. <https://www.icicibank.com/managed-assets/docs/about-us/2019/icici-bank-statement-on-findings-in-enquiry-report.pdf>

<sup>13</sup> Ferguson, G. (2017). *Global Corruption: Law, Theory And Practise*, (2<sup>nd</sup> ed.). 2-18.

<sup>14</sup> Contreras, A., Dey, A., & Hill, A. (2020). Tone at the Top and the Communication of Corporate Values: Lost in Translation. *Seattle University Law Review*, 43, 497.

those in charge must maintain open lines of communication with all of the organization's constituents, both internal and external. The CEO's actions should demonstrate his dedication and responsibility for establishing the tone at the top of the organisation. It is imperative that senior management and executives walk the talk in both their professional and personal lives.<sup>15</sup> The Board of Directors serves as a role model for the company's ethical values. The ethical tone of the organisation is set by directors and senior management, and other stakeholders look to the top for help.<sup>16</sup> Because they are the major role models for ethical procedures, the directors' attitude, behaviour, and culture permeate the organisation.<sup>17</sup>

### **1.3 Tone at the Top**

Representatives of the organisation that maintain a professional and ethical demeanour are said to have “tone at the top”. The “tone at the top” suggests the ethical environment generated in the company by the leadership of the organisation. Managements’ tone will have cascading effect as the employees give careful attention to their managers' actions and demeanour.<sup>18</sup> The upper management sets the tone throughout the organisation by setting an example for their employees to follow. Executive management shapes the company's ethical atmosphere and culture by the decisions and actions they take.<sup>19</sup>

Directors are bound by a code of ethics that includes duties such as loyalty, caring, setting clear goals, being upfront about decisions, and accounting for all of their acts (accountability). Honesty, integrity, loyalty,

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<sup>15</sup> Dent, P. & Campbell, G. (n.d.). *Tone at the Top: The Critical and Misunderstood Trickle Down Anti-corruption Control*. Deloitte. Retrieved October 26, 2022, from [https://afptoronto.org/wp-content/uploads/2021/10/Tone-at-the-Top\\_Final\\_April\\_16.pdf](https://afptoronto.org/wp-content/uploads/2021/10/Tone-at-the-Top_Final_April_16.pdf)

<sup>16</sup> Schwartz, M.S., Dunfee, T.W., & Kline, M.J. (2005, April-May). Tone at the Top: An Ethics Code for Directors?. *Journal of Business Ethics*, 58, 79. <https://www.jstor.org/stable/25123502>

<sup>17</sup> Supra 2, at 126

<sup>18</sup> Supra 10

<sup>19</sup> Arel, B., Beaudoin, C.A., Cianci, A.M. (2012). The Impact of Ethical Leadership, the Internal Audit Function, and Moral Intensity on a Financial Reporting Decision. *Journal Business Ethics*, 109, 351.

respect, accountability, equity, and conformity with the law are among the most important ethical principles that directors should uphold.<sup>20</sup>

The tone at the top of an organisation should be one of complete candour and transparency. By enforcing strict compliance and a high level of surveillance, the regulators are able to minimise the opportunistic behaviour of the organization's personnel.<sup>21</sup>

Consistency of ethical values among the management statements, assertions, actions, and explanations is described as the tone at the top.<sup>22</sup> The organization's ethical culture is harmed by top management's inconsistent tone. Ethics must be universal, consistent, and cannot be applied in a case-by-case manner. The organization's leadership must create an ethical climate that is resistant to corruption and bribery. Creating, maintaining, and enforcing an effective compliance programme, as well as effective internal controls and channels of communication and training, are the foundations of any organisation.<sup>23</sup>

#### **1.4 Ethical Conduct**

An organization's long-term viability depends on its capacity to conduct its business ethically. An organization's reputation can be built by adhering to ethical practises and standards. The company increases a competitive advantage and eternal value by observing to its code of conduct. Ethical business practises can lead to both financial success and a peaceful connection with society. Employees who are committed to the company's ethical practises and principles are more likely to be content and productive in their work. Unlawful business practises diminish the company's brand value, which necessitates retributive measures.<sup>24</sup>

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<sup>20</sup> Supra 16, at 90

<sup>21</sup> Lail, B., MacGregor, J., Stuebs, M. & Thomasson, T.(2015, January). The Influence of Regulatory Approach on Tone at the Top. *Journal of Business Ethics*,126, 26. <https://www.jstor.org/stable/24702300>

<sup>22</sup> Staicu, A.M., Tatomir, R.I., & Linca, A.C.,(2013, March-April) Determinants and Consequences of “Tone at the Top” *International Journal of Advances in Management and Economics*,2, 76. <http://managementjournal.info/index.php/IJAME/article/view/259/248#>

<sup>23</sup> Supra 15

<sup>24</sup> Supra 2, at 123

## 1.5 Culture of Integrity

In the context of an organisation, corporate culture is a set of agreed norms and values that guide employees in their behaviour and attitudes.<sup>25</sup> An organization's ethical climate can be gleaned from the behaviour of its personnel and their responses to ethics and compliance training.<sup>26</sup>

The culture of an organisation should support ethical behaviour and adherence to the law.<sup>27</sup> There are six principles for anti-bribery programmes that have been established by the Ministry of Justice of the United Kingdom, and they emphasise the need of creating an environment that is free of corruption. Management at the highest levels of the organisation are encouraged to involve in bribery risk management and committed to preventing bribery by its employees.

A culture of integrity can be developed by an organisation by implementing the following strategies:

- (i) In order for employees to realize what is anticipated from them, the senior management must clearly state guiding ideals and commitments and allow employees to discuss them without fear of repercussion.
- (ii) Leaders must live up to the ideals they espouse and adhere to the norms they set forth.
- (iii) When it comes to planning, creating goals, allocating resources, and making crucial management decisions, the values must be incorporated into these processes.
- (iv) adequate checks and balance must be provided by the company to avert conflict of interest and the systems and process must reinforce the ideals and support objective decision-making.

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<sup>25</sup> Supra 14, at 505

<sup>26</sup> Supra 15

<sup>27</sup> United States Sentencing Commission Guidelines Manual 2018, s.8B2.1

- (v) In order for employees to make and implement ethical decisions, they must be given the opportunity to do so.<sup>28</sup>

### **1.6 Causes of Unethical Behaviour**

Ethical violations committed by employees in the workplace include fabrication and manipulation of financial data, conflict of interest, price fixing, and receiving bribes, favours, or inappropriate gifts.<sup>29</sup> The employees will be susceptible to perpetrate fraud in negative environment and some of the factors that create a pessimistic work environment are:

- (i) Lack of recognition for proper job performance
- (ii) Unreasonable financial targets or budget expectations
- (iii) No reward for appropriate behaviour or management does not care about behaviour
- (iv) Poor training
- (v) No promotional opportunities
- (vi) Less than competitive compensation
- (vii) Poor communication practices
- (viii) Unfair, unclear, or unequal division of organisational responsibilities.<sup>30</sup>

There are three major factors common in fraud cases and they are:

- (i) High-level executives and employees are preoccupied with achieving expectations, which creates an environment where fraud is more likely.
- (ii) The incentives provided to employees to engage in unethical, inappropriate, and criminal activity are a major factor in this.
- (iii) A crucial factor in fraud is the pressure to meet goals and objectives.<sup>31</sup>

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<sup>28</sup> Bird, R.C., & Park, S.K. (2016). The Domains of Corporate Counsel in an Era of Compliance. *American Business Law Journal*, 53, 203.

<sup>29</sup> Supra 10

<sup>30</sup> Id.

<sup>31</sup> Id.

Setting unattainable targets in order to maximise profit motivates employees to use unethical methods to get what they want. In order to accomplish their high-performance targets, organisations must apply sufficient internal controls to avert their employees from breaking the law.<sup>32</sup>

A corporate code of conduct or ethics is beneficial, but not adequate, in preventing corporate misbehaviour. The CEO or other senior executives may weaken or override the company's ethical standards. A company's culture and bad behaviour are shaped by the tone set by the CEO and the rest of the executive team.<sup>33</sup>

When the culture of an organisation is threatened by corrupt management acts, workers are encouraged to engage in misconduct and anti-competitive behaviour.<sup>34</sup> An informal set of rules and punishments are established by the organization's leaders. Internal enforcement procedures are rendered ineffective or non-existent when senior management is complicit in corrupt practises. A corporation can be severely punished if the internal enforcement procedures fail to reach the norm of due care. Internal enforcement methods are rendered ineffective, informal consequences are reduced, or are only window dressing when senior management is implicated in the misconduct. The threat made by the corporation to the company's employees to report inappropriate behaviour lacks credibility because top management may be held liable for it.<sup>35</sup>

The tone at the top is a critical component in the detection and deterrence of scam, fraud, and other corrupt financial practises. The three elements of fraud are:

- (i) Opportunity: opportunities for dishonesty include the ability to carry out and conceal the crime. Vendors can be established up and paid, for example. In the instance of Chanda Kochhar, she used her position as CEO

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<sup>32</sup> Supra 14, at 507

<sup>33</sup> Id. at 448

<sup>34</sup> Smith, L.E. (2014). Is Strict Liability the Answer in the Battle against Foreign Corporate Bribery. *Brooklyn Law Review*, 79, 1801.

<sup>35</sup> Khanna, V.S. (2003). Should the Behavior of Top Management Matter. *Georgetown Law Journal*, 91,1215.

and MD of ICICI to expedite the granting of multiple loans to Videocon, in which she had a conflict of interest because her husband.

- (ii) Pressure: the impetus to defraud. It could be for business reasons, for example. Mr. Raju, Satyam's founding CEO, stated that he committed the fraud in order to secure financing for the company and boost its stock price, which in turn led to a rise in the company's value<sup>36</sup> and
- (iii) Rationalization: justifying the deception. For example, for the benefit of the corporation.

These three factors lead an individual to engage in corrupt activities. Poor tone at the top is the major contributory factor to the fraud.<sup>37</sup>

The interest of the higher management in the wrongdoing compromises the effectiveness of the internal enforcement measures because:

- (i) few internal measures are made due to such involvement
- (ii) the enforcement measure possibly 'window dressing'
- (iii) the employees may not trust that the management would resort to the strict enforcement measures.<sup>38</sup>

### **1.7 Consequences of Unethical Behaviour**

Bribing foreign public authorities hurts a company's long-term interests.<sup>39</sup> A corporation suffers greater penalties when higher management is implicated in wrongdoing. Reasonableness of the compliance program will be doubted if the higher management is interested in the wrongdoing.<sup>40</sup>

Even when management has committed financial crime, there have been multiple occasions where they have attempted to cover up any fraud perpetrated by their staff. IL&FS's top management and independent directors kept the

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<sup>36</sup> Supra 9

<sup>37</sup> Supra 15, at 4

<sup>38</sup> Supra 35, at 1237

<sup>39</sup> Supra 34, at 1803

<sup>40</sup> Supra 35, at 1221

illegal acts going for a long time without bringing them to light, even though they should have done so in 2017.<sup>41</sup>

Yes bank provided loans to customers regardless of whether or not they could afford to pay them back. The risk management and strategy failed, and the independent directors were unable to deliver independent judgement to influence the situation. As a result, the audit committee chairman resigned, citing the fact that the bank is run by the management rather than the board of directors and that corporate governance has failed to a total extent. When briefing the board, the management team did not follow correct procedure.<sup>42</sup>

Ex-promoters of Ranbaxy, Fortis Healthcare, and Religare Enterprises Ltd. (REL) Shivinder and Malvinder Singh have been accused of stealing approximately \$2 billion from the company. They misappropriated INR 2387 crore from REL's funds and funnelled it to other companies.<sup>43</sup> However, despite the manipulation and inconsistencies highlighted in the audit report, upper management took no action because they were complicit in the plot. The Delhi Police's Economic Offences Wing unravelled the fraud and discovered falsified books of accounts and credits to shell firms managed, either directly or indirectly, by the Singh brothers.<sup>44</sup> The new management discovered the misuse of cash after retaining an outside forensic audit firm.<sup>45</sup>

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<sup>41</sup> Ram, B.J. (2019, June 9). IL&FS Fraud: Whistleblower Sought to Uncover it in 2017, but Top-brass Covered it up. *The Economic Times*. [https://economictimes.indiatimes.com/industry/banking/finance/banking/ilfs-fraud-whistleblower-sought-to-uncover-it-in-2017-but-top-brass-covered-it-up/articleshow/69711422.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/industry/banking/finance/banking/ilfs-fraud-whistleblower-sought-to-uncover-it-in-2017-but-top-brass-covered-it-up/articleshow/69711422.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>42</sup> Arora, M. (2020, January 10). Complete governance failure the reason to resign: Yes Bank Board member Uttam Prakash Agarwal. *The Economic Times*. <https://cfo.economictimes.indiatimes.com/news/complete-governance-failure-the-reason-to-resign-yes-bank-board-member-uttam-prakash-agarwal/73188579>

<sup>43</sup> Fernandes, K. (2021, April 20). Biggest Corporate Governance Failures in India, *The CSR Journal*. <https://thecsrjournal.in/corporate-governance-failures-india/>

<sup>44</sup> Pandey, M.C. (2019, October 11). Inside Story: How ex-promoters of Ranbaxy defrauded Religare of Rs 2,397 crore. *India Today*. <https://www.indiatoday.in/india/story/inside-story-how-ex-promoters-of-ranbaxy-defrauded-religare-of-rs-2-397-crore-1608453-2019-10-11>

<sup>45</sup> Aryan, A. (2019, October 11). Rs 740-cr fraud: Ranbaxy ex-promoters Malvinder, Shivinder Singh arrested. *Business Standard*. [https://www.business-standard.com/article/companies/eow-delhi-arrests-former-religare-promoter-shivinder-singh-119101001263\\_1.html](https://www.business-standard.com/article/companies/eow-delhi-arrests-former-religare-promoter-shivinder-singh-119101001263_1.html)



The sanctioning costs linked to the wrongdoings of top management increases as it

- (i) decreases the gathering of information
- (ii) increases monitoring costs
- (iii) increases other miscellaneous costs.<sup>46</sup>

The express effects of increased sanctions for the involvement of the senior management are:

- (i) Members of society believe that the culpable corporation should be penalised harshly, and the society attaches greater culpability to higher management when they are implicated in wrongdoing.
- (ii) For the sake of society, sanctions communicate that transgression is bad.<sup>47</sup>

### **1.8 Ways to Prevent Unethical Behaviour**

In the workplaces, the employees observe many forms of misconduct and they do not report these unethical conducts due to:

- (i) fear of reprisal from management and co-workers
- (ii) no coercive action will be taken even if misconduct is reported
- (iii) confidentiality of the reporting is not maintained, and the identity would be revealed, which may cause harassment to the employees
- (iv) employees are unsure whom to contact or report the suspicious or unethical conduct.<sup>48</sup>

Staff disregard for company policies is a more common cause of corruption than a lack of controls or systems. A company's culture become ineffective because of a lack of strong and consistent leadership. Financial reporting integrity is enhanced by the corporate culture or atmosphere established by the

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<sup>46</sup> Supra 35, at 1241

<sup>47</sup> Id. at 1249

<sup>48</sup> Supra 10

company's top management. The organisation can avoid financial crime by implementing the right thing at the right time.<sup>49</sup>

A positive work atmosphere would help to discourage the fraud and it can be created and maintained through:

- (i) Equal employment opportunities
- (ii) Appreciation and reward practices in line with objectives and results
- (iii) Professional training and compensation
- (iv) Collaborative decision-making policy.<sup>50</sup>

Employees' current and previous ethical behaviour shall be taken into account when deciding on leadership positions and promotions. Ethics and compliance-related objectives should be connected to a variable pay plan.<sup>51</sup> Performance-based remuneration for managers, incentive compensation contracts, and the company's internal control systems all have a role in the corporate outcome.<sup>52</sup>

A key factor that determines the moral values and behaviour of the organisation is the tone of the upper management.<sup>53</sup> In order to set the right attitude, the management has to follow the four vital steps:

- (i) Convey to the employees about what is anticipated from them
- (ii) Serve as an example
- (iii) Offer reliable and secured system to report the breaches
- (iv) Recognise integrity.<sup>54</sup>

It is most critical to lay down tone at the top in the following areas:

- (i) The responsibility to keep an eye out for and correct any non-compliance concerns within the organisation lies with the board and senior management. The senior management must be visible and proactive in their response to compliance issues affecting business

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<sup>49</sup> Supra 15

<sup>50</sup> Supra 10

<sup>51</sup> Supra 15

<sup>52</sup> Supra 14, at 509

<sup>53</sup> Id. at 509

<sup>54</sup> Supra 10

operations. In addition to the senior executives' oversight, the organisation must make effective use of cross-departmental resources to make it easier for compliance risks to be reported. The integrated team will also be given necessary external training.

- (ii) The board of directors to evaluate and approve compliance reports as part of the monitoring and assessment process. In addition to a quarterly assessment of compliance issues, senior management must give adequate cash and resources to strengthen compliance functions. Costs and reputational damage can be avoided by addressing compliance issues before they become a problem. The board of directors shall keep an eye out for business trends and issues and make sure that the organisation responds swiftly to any challenges that are discovered. A major responsibility of the Chief Compliance Officer is to keep tabs on industry hot spots and report back on the company's internal status.
- (iii) When it comes to communication, the board must not be a precursor to government legal action or any other unpleasant news. Employees to be made aware of the existing compliance status, unresolved issues, ongoing initiatives, and the need for continuous improvement. Messages from the board of directors should be brief but effective in conveying the importance of compliance to employees at every level of the organisation. A company's culture of compliance and openness can be established by putting the right tone at the top.<sup>55</sup>

If the board of directors and senior executives demonstrate active involvement in the compliance activities, then punitive actions and penalty risks can be significantly minimised.<sup>56</sup>

The controlling authority must guarantee that the organization's ethical aspirations are not just a declaration of intentions but are incorporated into the

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<sup>55</sup> Page, G.V., Waring, M.A., Kaiser, G.R., & Cornish, K. (2008). The Tone at the Top: Can it Mitigate C-Suit Personal Liability. *Food & Drug Law Journal*, 63, 723.

<sup>56</sup> *Id.* at 734

organization's actions and strategy. By observing and working with management, the board of directors is obligated to supervise the anti-bribery procedure and ensuring that the company's culture is not corrupted. Following are some of the things that the board of directors should keep an eye out for:

- (i) Anti-corruption compliance is supported by the organization's ethical culture through training and communication.
- (ii) Whistleblower hotlines have been strengthened to ensure that employees can raise compliance and ethics concerns without fear of reprisal.
- (iii) Anti-corruption policies, processes, and internal control mechanisms are evaluated and refined on a regular basis.
- (iv) The organization's anti-corruption compliance programme covers subcontractors, suppliers, customers, and business partners.
- (v) Organisation shall appoint ethics and compliance officer.
- (vi) Ethics and anti-corruption problems are frequently on the board's agenda.<sup>57</sup>

Establishment of code of conduct and ethical training positively influences ethical climate and behaviour within the organisation.<sup>58</sup> Apart from code of ethics, affirming statement about the importance of values and good culture by the CEO and senior management carries a weight.<sup>59</sup> However, the tone at the top may neutralise the code of ethics since the opposing signals obtained from the company leaders override the written code of conduct.<sup>60</sup>

## **1.9 Advantages of Managing Ethics in Workplace**

The advantages of following ethical principles at workplaces are:

- (a) significant progress to society
- (b) cultivate strong teamwork and increases productivity
- (c) supports growth of employees

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<sup>57</sup> Supra 15

<sup>58</sup> Gunz, S., & Thorne, L. (2015, January). Introduction to the Special Issue on Tone at the Top, *Journal of Business Ethics*, 126, 1. <https://www.jstor.org/stable/24702297>

<sup>59</sup> Supra 14, at 509

<sup>60</sup> Id. at 448 & 509

- (d) avoids punitive action
- (e) helps in strategic planning, quality management, and diversity management.

In order to avoid further penalties and lower fines, ethical programmes aim to detect and address issues and infractions early on.

An employee's understanding of the company's anticipated behaviour and actions helps to keep them from engaging in dishonesty. Whistleblower hotlines are used to find out if there is any wrongdoing going on in the company. Monitoring of payments, conflicts of interest, contract management, third parties, etc. prevents departures from the company's regulations.<sup>61</sup>

### **1.10 Tools to Assess the Tone at the Top**

The tone of the company can be assessed and reported using the following tools:

(a) Code of ethics: Code of conduct and anti-bribery policy issued by the board along with the organisational strategy establishes the tone at the top.

(b) Whistleblower Hotline: Hotline provides opportunity for the stakeholders to raise their concern. Employees should be persuaded to raise their concern without apprehension of retribution.

(b) Feedback: The organisation shall pay attention to everything happening around and understand how employees, customers, vendors, and other stakeholders perceive the organisation. Valuable insight to the company's reputation can be obtained through employee survey, customer feedback, individuals views about company on social media and company hotline feedback.

(c) Exit interview: Sometimes ethical issues may be a catalyst behind the decision to quit the job and exit interviews may be used as an opportunity to understand the culture of the organisation and specific unethical acts.

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<sup>61</sup> Soltes, E. (2018). Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms. *New York University Journal of Law & Business*, 14, 965.

(d) Site visits: Site visits can give hands on experience and opportunity to interact with lower-level employees.<sup>62</sup>

According to a recent study, benchmarking other firms' misconduct and assessing social media comments and criticism helps to identify the corporate ethos and tone at the top of the organisation.<sup>63</sup>

### **1.11 Mood in the Middle**

Creating a climate of trust among all levels of staff that the organisation aspires to accomplish what it does ethically is essential. The middle manager's lack of commitment to the company's ideals and ethics is immediately apparent to those working at lower levels.<sup>64</sup>

Prior to being communicated to the rest of the organisation, the voice from the top of an organisation must be translated into the voice from mid-level management. If middle managers are assigned inflexible sales, financial, and cost control goals, it will be tough to motivate them. And in certain cases, the top management does not realise that the middle management cannot reach the organization's unrelenting performance targets without compromising the organization's ethical values.<sup>65</sup>

The key behaviours that middle managers must implement for demonstrating and creating an ethical culture in order to communicate the same to the lower-level employees are:

- (i) Frequently talk about the integrity and commitment of an organisation;
- (ii) Foresee ethical conflicts;
- (iii) Recognise ethical issues;
- (iv) Ask questions when ethical acts are uncertain;

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<sup>62</sup> Supra 15

<sup>63</sup> Deloitte. (2013, April 11). 10 Ways to Measure the Tone at the Top. *The Wall Street Journal*. <https://deloitte.wsj.com/riskandcompliance/2013/04/11/10-ways-to-measure-the-tone-at-the-top/>

<sup>64</sup> Hanson, K. (2008, May 9). *Creating "Tone in The Middle"*. Markkula Center for Applied Ethics. <https://www.scu.edu/ethics/focus-areas/business-ethics/resources/ethics-and-the-middle-managertone-in-the-middle/>

<sup>65</sup> Id.

- (v) Make fair judgments coherent with organisational principles and ethics; and
- (vi) Report ethical concerns to the top managers.<sup>66</sup>

In order to reinforce ethical culture in the organisation and to motivate the middle managers, the top managers are required to take specific actions, some of them being:

- (i) Exhibit ethical behaviour as a leader by modelling it for your staff and encouraging them to do the same.
- (ii) Discuss often the company's principles and ethics.
- (iii) Inquire of mid-level management regarding ethical difficulties that arise in the course of work. Provide guidance on how to apply these ideals.
- (iv) Pay special attention to the ethical performance of middle managers, just as you do to their financial performance; and
- (v) Include ethical competence and commitment in the evaluation of middle managers' performance.<sup>67</sup>

The values and ideals that permeate the organisation serve as a reflection of the company's overall culture. Top management's ability to influence the company's ethical culture is more important than whether or not they articulate their commitment to it. Every day, the company's employees demonstrate its true ethical culture by their actions.<sup>68</sup>

As a link between corporate ethics and day-to-day operations, the middle management team serves as a vital link. Ethical values are put into practise by middle managers.

A stronger tone in the middle can be created by following steps:

- (i) Ethical decision making is important, and companies should help middle managers understand how they may either support or undermine it via

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<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Volkov, M. (2014, March 11). Mood in the Middle Versus Tone at the Top. *Volkov*. <https://blog.volkovlaw.com/2014/03/mood-in-the-middle-versus-tone-at-the-top/>

daily interactions with employees. Management should be trained to listen, give comments, and offer guidance to their people.

- (ii) It is important to express the company's policy in a way that is understandable to its employees in order to boost its relatability. Embracing diversity and having an open dialogue are key components of the code of conduct when used in the real world.
- (iii) Enable ethical decision-making by providing opportunities for employees to put their training into action.
- (iv) In order to keep employees from feeling isolated, it is important to provide a comfortable environment where they may confide in their co-workers. The organisation should offer a secure and welcoming environment for employees to openly discuss issues and work together to find solutions to problems.
- (v) Managers should be given opportunity to learn and be coached so they can lead by example and put the code of conduct into practise on a daily basis.<sup>69</sup>

## 1.12 Independent Director

SEBI report on corporate governance chaired by Mr. Uday Kotak (2017) captured the importance of the independent director as follows:

*“The institution of independent directors forms the backbone of the corporate governance framework worldwide and in India. Independent directors are expected to bring objectivity into the functioning of the board and improve its effectiveness. Independent directors are required to safeguard the interests of all stakeholders, particularly minority shareholders, balance the conflicting interest of the stakeholders and bring an objective view to the evaluation of the performance of the board and management.”*

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<sup>69</sup> Hames, M.E. (2015, December 22). *5 Practical Steps for Creating a Compliant Tone in the Middle*. LRN. [https://medium.com/@LRN\\_Insights/5-practical-steps-for-creating-a-compliant-tone-in-the-middle-2c65746f06fc](https://medium.com/@LRN_Insights/5-practical-steps-for-creating-a-compliant-tone-in-the-middle-2c65746f06fc)



Among the responsibilities, independent directors keep an eye on management's performance, create checks and balances, and safeguard the interests of minority shareholders.<sup>70</sup>

In the board meetings, the role of independent director is:

- (i) Give an impartial view on any issues coming within the purview of the board
- (ii) Ensure that there is no deceptive practise or unethical behaviour adopted by the board;
- (iii) Ensure compliance of company policy; and
- (iv) Safeguard the interest of the shareholders.<sup>71</sup>

A special resolution by the firm can reappoint an independent director for another five-year term in India, which is the maximum duration for which an independent director can be appointed. Independent director can be re-elected after three (3) years cooling off period. Appointment of one female director is mandatory for the listed and public corporations with a contributed capital of at least INR 100 (one hundred) crore or a turnover of INR 300 (three hundred) crores. At least one female independent director is needed for the top 1000 publicly traded companies, based on market capitalization.

### **1.13 Audit Committee**

In a company, audit committee is the most important pillar of corporate governance structure.<sup>72</sup> The Audit Committee is the corner stone of effective corporate governance process in any organisation.<sup>73</sup> Customarily Audit

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<sup>70</sup> Mukherjee, D., & Pandey, A. (2019, September). *The Liability Regime for Non-Executive and Independent Directors in India: A Case for Reform*. Vidhi Centre for Legal Policy. <https://vidhilegalpolicy.in/wp-content/uploads/2019/09/Final-Director-Liability-Report-September-19-2019.pdf>

<sup>71</sup> Gupta, B. (2020, March 4). *Understanding responsibilities and importance of independent director in a company*. TaxGuru. <https://taxguru.in/company-law/understanding-responsibilities-importance-independent-director-company.html>

<sup>72</sup> The Institute of Company Secretaries of India. (2014, August). *Board Committees - A Hand Book*. The Institute of Company Secretaries of India. <https://www.icsi.edu/media/webmodules/companiesact2013/BOARD%20COMMITTEES.pdf>

<sup>73</sup> Donohue, J. (2022, October 7). *Role of the Audit Committee: What it is & its most important functions*. Diligent. <https://insights.diligent.com/audit-committee/role-of-the-audit-committee-in-corporate-governance>

Committee has been included as essential component of corporate governance regulation. Raising the bar for corporate governance is one of the many responsibilities of the Audit Committee. The efficacy of the Audit Committee is critically dependent on its membership. The Audit Committee's membership and qualifications are defined in the bylaws and listing requirements.

Audit Committee being part of the Board, its composition is established by the overall organisation of the Board of Directors.<sup>74</sup> The accounting and financial process of the company is supervised by the Audit Committee established by the Board. To ensure that the company is operating consistent with all applicable laws, regulations and internal policies, the Audit Committee, a board-level subcommittee, is in charge of conducting regular audits. The audit process, financial risk management, and internal controls are all examined by the Audit Committee. The Audit Committee functions as a linkage between internal and external auditors, management, and the board of directors.

In order to improve corporate governance, it is not enough to simply form an Audit Committee. In order to effectively implement corporate governance mechanisms, regulators, professional bodies, and industry associations should collaborate.

The Audit Committee in the case of IL&FS failed to carry out any of its responsibilities. In 2017, the Audit Committee received a complaint from a whistleblower but did nothing to address it. It was determined that IL&FS' Audit Committee deliberately ignored warning indicators of impairment so that the company's financials could be presented in an optimistic light to potential investors.<sup>75</sup>

The independence and expertise of members in the Audit Committee is a sign of the company's commitment to corporate governance. Audit Committee ensures greater accountability by companies. It restores the confidence in financial reporting.

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<sup>74</sup> Klein, A. (2002, April). Economic Determinants of Audit Committee Independence. *The Accounting Review*, 77, 435-452.

<sup>75</sup> Supra 41

Members of an Audit Committee are only as good as the committee as a whole. However, if they possess the necessary skills and knowledge, individuals can contribute to improve corporate governance by putting forth their own opinions on management's financial reporting decisions and actions. Auditor appointments are decided by the Comptroller and Auditor General of India for Indian state-owned firms, whereas the shareholders decide for other companies. The Audit Committee's responsibilities with regard to external auditors, among other things, include assessment and evaluation of the auditor's independence as well as performance and audit process effectiveness, as well as the appointment, salary, and terms of the appointment of the listed entity's auditors.

#### **1.14 Purpose of Audit Committee**

As per the Cadbury Committee report, the effective operation of Audit Committee *interalia* brings the following benefits:

- (i) Creates an atmosphere of discipline and dominance which in turn reduces the prospect for fraud;
- (ii) Improve the quality of financial reporting;
- (iii) Strengthen the position of external and internal auditors by assuring their independence;

The Audit Committee aims to strengthen the internal audit and internal control measures followed by the company.

#### **1.15 Role of Audit Committee**

The responsibility of the Audit Committee *interalia* include:

- (i) Review the findings of the internal auditor's investigation with respect to doubtful fraud or distortion or non-observance of internal control mechanisms
- (ii) Review the functioning of the whistleblower mechanisms
- (iii) Supervise the sufficiency, credibility, and correctness of company's accounting practice and reporting about financial details
- (iv) Review the adequacy of internal audit function.

## 1.16 Internal Audit

Corporate governance relies heavily on auditing, which reduces agency costs by acting as a check and balance system and improving financial reporting. Internal auditing is a powerful instrument for achieving a company's goals.

Increasing communications between the four constituents of corporate governance, i.e., the board of directors, management, and internal and statutory audits are required for the good governance of the corporates. All other components have access to internal audit's resources.<sup>76</sup> The relevance of the internal audit in company governance cannot be overstated. Compliance, financial, operational, and strategic objectives can be achieved by examining the efficacy of governance, risk management and internal control mechanisms through internal audits.<sup>77</sup>

Internal auditors must be able to carry out their responsibilities without intervention from the management of the organisation. Assurance of the internal auditor's objectivity and independence is obtained through:

- (i) Internal auditor functionally accountable to the Audit Committee
- (ii) Selection of the Chief of Internal Audit of a company is authorized by the Audit Committee
- (iii) Audit Committee confirms the annual plan, structure, and budget of internal audit
- (iv) Nobody is permitted to influence the scope of audit, sampling, and annual report
- (v) Unlimited access to records, data, database, and other physical properties

Internal auditor shall uphold and apply the following principles:

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<sup>76</sup> Mihret, D.G., & Admassu, M.A. (2011, April). Reliance of External Auditors on Internal Audit Work: A Corporate Governance Perspective. *International Business Research*, 4, 67.

<sup>77</sup> The Institute of Internal Auditors. (n.d.). *IIA Position Paper, Internal Auditing's Role In Corporate Governance*. The Institute of Internal Auditors. Retrieved October 26, 2022, from <https://www.theiia.org/globalassets/documents/resources/internal-auditings-role-in-corporate-governance-may-2018/internal-auditings-role-in-corporate-governance.pdf>

- (i) To the extent mandated by law, the internal auditor must observe the requirements of integrity. There must be honesty, integrity, and accountability in all audits.
- (ii) There should be no conflict of interest among the internal auditor and the organisation, and the internal auditor should abstain from participating in any act that might compromise their competence to make an objective judgement. An internal auditor's report must contain all pertinent information that the auditor is conscious of.
- (iii) Continuous effort must be made to increase their skill, knowledge, effectiveness, and service quality.
- (iv) Employees are expected to maintain the secrecy of all facts gathered at the time of their work and not exploit it for personal advantage.<sup>78</sup>

The corporation employs internal auditors. Internal auditors directly accountable to the Audit Committee and give an independent report on the company's risk management and governance. Even though they are operationally subordinate to the Audit Committee, they are ultimately answerable to the CEO.

### **1.17 Checks and Balance**

The use of checks and balances helps to assure that the interests of individuals and society aren't getting in the way of productivity and efficiency. It is necessary to safeguard ethical judgments and acts. A checks and balances can be generated by educating people to supervise one another.<sup>79</sup>

Management oversees establishment of the procedures and policies that govern internal controls to guarantee that the goals of the organisation are met. This is where internal auditors come in. They review these rules and procedures and provide recommendations for improvement. A company's internal control mechanism aims to accomplish:

- (i) Effectiveness and efficiency of operation

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<sup>78</sup> Editor3. (2018, November 28). *Basic Principles of Internal Audit*. TaxGuru. <https://taxguru.in/chartered-accountant/basic-principles-internal-audit.html>

<sup>79</sup> Supra 13

- (ii) Authenticity of accounting
- (iii) Conformity with statutes and regulations.<sup>80</sup>

Internal auditing serves as a technique for speedy detection and correction of errors within an organisation. Correcting mistakes as soon as they are discovered helps to minimise their long-term consequences. The statutory auditor can utilize the internal audit report to decide the scope, timing, and character of the audit. As a result of the internal auditor's constant monitoring of employees' performance, they will be more aware, watchful, and honest. Committing of fraud through collusion can be prevented and detected since the internal auditor examines every transaction.

The functions of internal auditing cover the reviewing activities as well as assessing and reporting the efficiency and effectiveness of the internal control measures *interalia* including:

- (i) conformity with applicable laws
- (ii) custody and protection of assets
- (iii) reliability of accounting information
- (iv) appraisal of economic and efficient use of resources
- (v) organisational performance
- (vi) evaluation of corporate governance and make recommendation for its improvement and
- (vii) risk assessments.<sup>81</sup>

Internal auditor acts like a watch dog by taking care of the resources of the enterprise. Safeguard all the assets of the enterprise against all types of abuse and loss. Internal auditor enquires into the following facts:

- (i) That the assets have been truthfully and fairly valued
- (ii) Ownership and title of the assets are with the company
- (iii) Assets are in existence and in possession of the company

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<sup>80</sup> *Internal Control: Definition, Types, Principles, Components.* (n.d.). iEduNote. Retrieved October 26, 2022, from <https://www.iedunote.com/internal-control>

<sup>81</sup>, *Internal controls.* (n.d.). ACCA Think Ahead. Retrieved October 26, 2022, from <https://www.accaglobal.com/ca/en/student/exam-support-resources/fundamentals-exams-study-resources/f1/technical-articles/internal-controls.html>

(iv) No charge is created over assets except as shown in the balance sheet.

As a result of their work, internal auditors decide whether or not a firm is in conformity with all of the applicable laws, rules, and contracts. Auditors do asset verifications and risk assessments to protect assets from misuse, theft, fire, and other disasters. A company's internal auditors evaluate how effectively and efficiently the company's resources are used.

The purpose of internal control mechanism in an organisation is to ensure the following:

- (i) Recording of all transactions and that they are authorised properly
- (ii) Irregularities and errors are avoided
- (iii) Correct recording of the amounts, assets, and liabilities
- (iv) Assets are duly safeguarded.<sup>82</sup>

### **1.18 Audit Report**

The audit report summarises the findings and offers suggestions for improvement. An auditor's report provides a chance to draw management's attention to a problem and present a solution. Two purposes are served by the audit report:

- (i) To communicate
- (ii) To persuade and take necessary actions, if required

It is the auditor's report that conveys the true and fair financial statements to the company's stakeholders. The difficulties that need repair are brought to light by a dispassionate and objective auditor's assessment. Recognizing and addressing weaknesses revealed by an audit report is a valuable tool for management.

The audit report should have the following qualities:

- (i) In order for the audit report to be accurate, it needs to be founded on solid evidence. Observations in the audit report must be based on factual

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<sup>82</sup> Amoako, S. (2014, December 15). *Internal Auditor the Organization's Watchdog*. SSRN. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2538483](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538483)

evidence and made with objectivity. It has to be accurate and give management a sense of security.

- (ii) The auditor's intent should be conveyed in the audit report.
- (iii) The report should be concise, easy to read, and maintain a logical flow of ideas.
- (iv) It's important to include current information in the audit report so that management may take prompt action.<sup>83</sup>

Internal auditors make recommendations for the following:

- (i) Improving the corporate governance process
- (ii) Encourage integrity
- (iii) Effective administration of the organisational
- (iv) Ensuring accountability
- (v) Effective co-ordination of activities and communication of information among various stakeholders.<sup>84</sup>

### **1.19 External Audit**

External auditors are professional accountants. It is the role of an external auditor to provide a fair estimation of the company's statement of accounts to the stakeholders and users of these statements. External auditors, unlike internal auditors, have no stake in the company because they are third parties. For the sake of public trust, the International Auditing and Assurance Standards Board (IAASB) has established international standards for external auditors.<sup>85</sup>

The Audit Committee or other committees has no authority over the statutory auditor, and therefore cannot dictate the terms of its performance. The

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<sup>83</sup> Smith, J.L. (2010, June 1). Ensure Effective Quality Audit Reports. *Quality Magazine*. <https://www.qualitymag.com/articles/87347-ensure-effective-quality-audit-reports>

<sup>84</sup> Agarwal, A. (2018, February 7). *Recommendations in internal audit report: Are they required?*. LinkedIn. <https://www.linkedin.com/pulse/recommendations-internal-audit-report-required-manoj-agarwal/>

<sup>85</sup> The Institute of Internal Auditor.(n.d.). *Global Perspectives: Internal Audit and External Audit*. The Institute of Internal Auditor. Retrieved October 26, 2022, from <https://www.iiia.nl/SiteFiles/GPI-Distinctive-Roles-in-Organizational-Governance.pdf>



Companies Act, 2013 as well as other relevant statutes necessities performance of statutory audit.

It is the statutory auditors obligation to ensure conformity with applicable regulations and ethical standards by verifying the company's financial accounts. The reliability, accuracy, and legitimacy of the account statement is declared in the auditor's report.

### **1.20 Independence of Auditor**

Auditor is not obligated to validate the financial statements, but he should furnish a written statement on the findings of the auditing exercise. The principle of natural justice states "*Justice should not only be done but seen to be done.*" In the same way, the Auditor should appear to be independent to all rational people. All stakeholders must be able to see and believe in the independence of the organisation. An independent person's core values are based on objectivity and integrity. The accounting profession maintains its independence as follows:

- (i) Mental independence: the ability to act honestly and objectively in the face of external influences when one's mind is free of external pressures.
- (ii) Independence in appearance: There should be no facts or situations that would lead someone outside the audit to believe the auditor's professionalism, objectivity or integrity has been compromised.<sup>86</sup>

An auditor's independence is impeded by managerial control over the nomination of the Statutory Auditor and by high fees for non-auditory services. It is critical that the auditor's neutrality and independence are not jeopardised because of the remuneration he receives from the company for which he is functioning as an auditor.

Failing to perform the tasks of statutory and external auditors causes financial catastrophe for both the corporation and the government, as well as all

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<sup>86</sup> International Federation of Accountants. (2020). *Handbook of the International Code of Ethics for Professional Accountants*. International Federation of Accountants. [https://www.ifac.org/system/files/publications/files/IESBA-English-2020-IESBA-Handbook\\_Web-LOCKED.pdf](https://www.ifac.org/system/files/publications/files/IESBA-English-2020-IESBA-Handbook_Web-LOCKED.pdf)

other associated parties. Crises such as the one at Infrastructure Leasing and Financial Services Ltd. (IL&FS) have raised questions about auditors' abilities in such situations. Over-leverage of IL&FS as identified in the Reserve Bank of India inspection report was not highlighted, and auditors neglected to mention the negative cashflow as well as adverse key financial parameters. The failure of an audit is not the sole cause of a company's demise, but it does play a substantial role in its demise.<sup>87</sup>

### **1.21 Ethics and Values**

Steps to enforce culture and values in an organisation are:

- (i) A Chief Ethics Officer should be appointed to improve the code of conduct and internal control mechanisms, and to improve accountability for ethical behaviour through training and ethical practises.
- (ii) Keep a positive attitude in the middle to warrant that the tone established at the top is reflected in daily policies and practises.
- (iii) Rewarding good behaviour and penalising bad behaviour are two ways to put fair play into action.
- (iv) New techniques of conveying cultural values and keeping it entertaining are needed.<sup>88</sup>

### **1.22 Whistleblowing**

Whistleblowing and good corporate governance go hand in hand. In rare cases, an employee may step outside of the standard management channels to report any suspected malfeasance at work in a discreet manner. To make it easier for people to blow the whistle on wrongdoing, the company should establish an internal system or an external body (external whistleblowing).<sup>89</sup> Internal whistleblowing is the act of informing a designated authority or

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<sup>87</sup> Upadhyay, J.P. (2019, May 21). Inside the audit lapses that led to IL&FS crisis. *Mint*. <https://www.livemint.com/companies/news/inside-the-audit-lapses-that-led-to-il-fs-crisis-1558456079750.html>

<sup>88</sup> Deloitte. (2018, January 19). Corporate Culture: The Center of Strong Ethics and Compliance. *The Wall Street Journal*. <https://deloitte.wsj.com/cfo/2018/01/19/corporate-culture-the-center-of-strong-ethics-and-compliance/>

<sup>89</sup> *Board briefing: Whistleblowing and corporate governance*. (2014, February). Chartered Institute of Internal Auditors. <https://www.iiia.org.uk/resources/audit-committees/board-briefings/board-briefing-whistleblowing-and-corporate-governance/>

immediate superior of illegal conduct by an employee or by anybody else (such as a vendor, agent, business partner, etc.). An external whistleblower is one who informs the public or the media of an organization's illegal activities. Internal whistleblowing is a beneficial thing for the firm since it gives the organisation an opportunity to stop maladministration or illegality and work out the issues inside before they become public.<sup>90</sup> With safety valve procedures like whistleblowing, it is possible to foster a healthy corporate culture. Employees should have the right to reveal corporate misconduct if doing so benefits the public interest. Any attempt to conceal unlawful or unethical acts that harm the public, as well as current or previous activities, as well as those planned for the future, can be made public if it is in the public interest.

### **1.23 Prevention of Victimization**

Whistleblowers in India are protected by the country's legal framework, which recognises this requirement. Directors and employees of every publicly traded firm are required by law to be protected by a watchdog system.<sup>91</sup> The corporation must create a framework to protect whistleblowers from being persecuted for their work.<sup>92</sup> Protecting whistleblowers from retaliation is essential if the public is to be informed about cases of fraud and malpractice without putting themselves at risk. As a result, whistleblower anonymity is vital.<sup>93</sup>

The four key principles to be cognizant of while laying suitable whistleblowing schemes are:

- (i) safeguard and hide the identity the whistleblower;
- (ii) afford impartial hearing to the purported transgressor;
- (iii) guarantee swift legal judgment to determine regulatory and disclosure obligations; and

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<sup>90</sup> Singh, V.K. (2013, October). Whistle Blowers Policy Challenges and Solutions for India with Special Reference to Corporate Governance. *GNLU Journal of Law, Development and Politics*, 3, 5.

<sup>91</sup> *The Companies Act 2013*, s. 177(9) (In.).

<sup>92</sup> The Listing Agreement, cl.49

<sup>93</sup> Supra 90

(iv) provide instant remedial action.<sup>94</sup>

The Supreme Court in *Manjit Singh Khera v State of Maharashtra*<sup>95</sup> it was ruled that the identities of those who inform anti-corruption officials about corrupt deals made by bureaucrats cannot be given to the defendant. As a result of an anonymous tip about a public official acquiring unjustified wealth, the Anti-Corruption Bureau of Maharashtra launched an investigation and eventually brought criminal charges against the suspect. According to the accused, the original complaint must be provided for the sake of fair trial. The accused would not be harmed by not having his name made public, and so, this request was denied.

## **2. Corporate Governance Principles Implemented by *The Companies Act 2013***

Even though it varies in different jurisdictions, the corporate governance structure across the world is always evolving. 90 percent of nations surveyed by the OECD have corporate governance concepts in their legislation, according to the results of the poll.<sup>96</sup> In the year 2013, India's Company Law was also revised to better comply with corporate governance concepts.

Several stipulations of *the Companies Act 2013*, such as transparency, fairness, accountability, disclosure, and checks and balances, are included in the legislation.

### **2.1 Transparency**

E-governance allows a business to efficiently and transparently communicate information with all of its stakeholders. With the use of technology, the costs of disseminating information can be decreased while still

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<sup>94</sup> *Who can Hear the Whistle Blow? Whistleblowing and its Impact on Corporate Governance in India.* (2017, January 30). Cyril Amarchand Mangaldas. <https://corporate.cyrilamarchandblogs.com/2017/01/can-hear-whistle-blow-whistleblowing-impact-corporate-governance-india/>

<sup>95</sup> (2013) 9 SCC 276 (In.).

<sup>96</sup> Organisation for Economic Co-operation & Development. (2021)., *OECD Corporate Governance Factbook 2021*. Organisation for Economic Co-operation & Development. <https://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf>

ensuring that all relevant parties receive appropriate information in a transparent manner. The Companies Act facilitates e-governance in the following ways:

- (i) Keeping of books of accounts in electronic mode.<sup>97</sup>
- (ii) Electronic transmission of financial statements.<sup>98</sup>
- (iii) Publication of financial statements in company's website.<sup>99</sup>
- (iv) Sharing of notice of meetings via electronic mode.<sup>100</sup>
- (v) Conducting electronic voting at the permitted meeting.<sup>101</sup>
- (vi) Directors can take part in the meeting of the Board using video conferencing or new channels capable of video recording and keeping the proceedings allowed.<sup>102</sup>
- (vii) Dividend may be paid electronically.<sup>103</sup>

As trustees for shareholders, independent directors review the Board of Directors' performance. They have a duty to be aware of the company's operations and to examine their actions on pertinent matters. Stakeholder interests must be protected, which necessitates a transparent selection procedure for independent directors. The Companies Act provides for the fair selection of independent directors through the following sections:

- (i) The independent director of a corporation is a person of integrity and significant experience and knowledge. Managing Director, nominated director, or full-time director are all roles that an independent director cannot hold. Individuals who are related to a director or promoter of the company cannot be independent directors. No financial interest should exist between an independent director and the company. Family members of independent directors are prohibited from having any financial ties to the firm or from holding any positions of authority inside it.<sup>104</sup>

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<sup>97</sup> The Companies (Accounts) Rules 2014, rule 3(1)

<sup>98</sup> The Companies (Accounts) Rules 2014, rule 11

<sup>99</sup> *The Companies Act 2013*, s.136 (In.).

<sup>100</sup> *The Companies Act 2013*, s.101 (In.).

<sup>101</sup> *The Companies Act 2013*, s.108 (In.).

<sup>102</sup> *The Companies Act 2013*, s.173(2) (In.).

<sup>103</sup> *The Companies Act 2013*, s.123(5) (In.).

<sup>104</sup> *The Companies Act 2013*, s.149(6) (In.).

- (ii) If an independent director is reappointed, he or she will serve another term that is also limited to five years in duration. Re-appointment of an independent director after serving two terms in a row is subject to a three-year cooling-off period.<sup>105</sup>
- (iii) A code for independent directors provided.<sup>106</sup>
- (iv) Independent director may be appointed by the company from the panel or data bank maintained by Ministry of Corporate Affairs.<sup>107</sup>

There must be enough assurances from each independent director that the organisation has established a sound risk management system, including accurate and up-to-date financial information and sound accounting controls. All stakeholders, including minority shareholders, must be protected by independent board directors. The divergent interest of various stakeholders is balanced by the independent directors. When the interests of the firm as a whole are in jeopardy, the independent directors must mediate and arbitrate the problem. The corrupt behaviour to be identified by the independent director, and report to the proper authorities of violation of code conduct as well as ethical policy.

Independent directors have an uphill battle to maintain their autonomy because of the hefty fee they get. The Securities and Exchange Board of India's (SEBI) cap on director's sitting fees is sometimes bypassed through the payment of commission. Ex-bureaucrats are being appointed as independent directors as a strategy by the firms. Companies profit from both the expansion of their network and the reduction of the burden on present bureaucrats who can expect to have a job in the company when they retire.<sup>108</sup> The profit-based commission is left in place by the Companies Act. Due to the fact that independent directors are paid commissions based on the company's profits, this could invite conflict

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<sup>105</sup> *The Companies Act 2013*, s.149(10) & (11) (In.).

<sup>106</sup> *The Companies Act 2013*, schedule IV (In.).

<sup>107</sup> *The Companies Act 2013*, s.150(1) (In.).

<sup>108</sup> Datta, S. (2021, August 19). *Bad Corporate Governance: Are Independent Directors Truly Independent?*. Swarajya. <https://swarajyamag.com/business/bad-corporate-governance-are-independent-directors-truly-independent>

of interest.<sup>109</sup> This could lead to short-termism and a lack of critical thinking about the company's performance. Pay should be based on the independent director's ideals, time commitment, and performance, not on revenues.<sup>110</sup> Independent directors may be hindered or undermined by the payment of substantial convenience fees, like a golden shackle.<sup>111</sup>

Independent directors' impartiality has been called into doubt recently. The Supreme Court bench helmed by Chief Justice handled one of the corporate disputes, when Tata and Cyrus Mistry fell out in March 2021. The Tata-Mistry-Wadia saga exemplifies the flaws in the law that surround independent directors. The dismissal of independent directors is at the discretion of the firm's promoter, who maintains a majority share in the company. However, despite the fact that the Companies Act recommends for the engagement of an independent director, there are no effective safeguards in the law to assure or protect the director's independence. The termination of the independent director is not subject to a distinct regulatory system that ensures openness and safeguards their impartiality after their appointment.<sup>112</sup>

## 2.2 Fairness

The company must supply complete and accurate financial information, which the audit report delivers, for creditors and investors to make well-informed decisions. All information regarding the audited company, good or bad, must be reported by the auditors. Audit Committee participation at the AGM and the rotation of auditors enhance transparency in the selection process.

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<sup>109</sup> NovoJuris Legal. (2018, April 17). *India: Remuneration to Independent Director*. Mondaq. <https://www.mondaq.com/india/corporate-governance/692770/remuneration-to-independent-director>

<sup>110</sup> Chandela, S. (2021, June 20). *Strengthening the Statutory Regime for Independent Directors*. TaxGuru. <https://taxguru.in/company-law/strengthening-statutory-regime-independent-directors.html>

<sup>111</sup> Shah, P. (2021, August 17). *India Inc pampering independent directors with fat pay-cheques*. *Business Line*. <https://www.thehindubusinessline.com/markets/stock-markets/india-inc-pampering-independent-directors-with-fat-pay-cheques/article35945739.ece>

<sup>112</sup> Shreyashi, T. (2021, May 31). *Is an Independent Director Indeed Independent?*. *Deccan Herald*. <https://www.deccanherald.com/opinion/is-an-independent-director-indeed-independent-991857.html>

In the selection of the auditor, a vital role is played by the Audit Committee. The Audit Committee recommends the auditor to the board of directors<sup>113</sup> and their appointment is made at the AGM. The report of the board of directors shall give reasons for non-acceptance of the nomination given by Audit Committee.<sup>114</sup>

The Companies Act mandates the rotation of auditors for publicly traded companies after five years for individuals and 10 years for firms, regardless of the auditor's tenure. Auditor re-appointment is subject to a five-year cooling-off period.<sup>115</sup>

In order to certify independence and accountability of the auditors, provision of the following non-auditing services<sup>116</sup> by auditors are prohibited:

- (a) internal audit;
- (b) accounting and book keeping services;
- (c) investment advisory services;
- (d) management services;
- (e) implementation of any financial information system;
- (f) rendering of outsourced financial services;
- (g) investment banking services;
- (h) actuarial services; and
- (i) any other sort of services

Stringent penalties are imposed on the auditors for the contravention of their core functions<sup>117</sup> and thereby promote transparency in the accounting.

### **2.3 Accountability**

The board of directors is answerable to the shareholders and investors for its activities and decisions. Correspondingly, the board of directors holds the company's management accountable, and employees are held accountable to management.

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<sup>113</sup> *The Companies Act 2013*, s.177(4) (In.).

<sup>114</sup> *The Companies Act 2013*, s.177(8) (In.).

<sup>115</sup> *The Companies Act 2013*, s.139(2) (In.).

<sup>116</sup> *The Companies Act 2013*, s.144 (In.).

<sup>117</sup> *The Companies Act 2013*, s.147 (In.).



### 2.3.1 Accountability of Management

In India, the statutes governing various offences typically include a provision for ‘offences by companies.’ The statutory provisions state that:

- (i) When an offence is committed, everyone in authority and accountable for the actions of the company will be considered guilty and subject to penalty. A person's liability is limited if he or she can show that the crime was committed devoid of their knowledge or that they took reasonable steps to prevent it.
- (ii) As long as it can be shown that a director, manager, or officer of the firm was complicit, deliberate, or negligent in the crime, that person will be considered guilty of the crime and subject to the relevant punishment.<sup>118</sup>

If a director or officer is in command or liable for the company's operations, they have vicarious liability. In consequence of this vicarious liability, there is no need for directors to have actually committed any wrongdoing for making them liable. Directors are accountable for any wrongdoing that occurs because of their consent, connivance, or lack of diligence.<sup>119</sup>

The vicarious liability imposed by the Companies Act is on the ‘officer who is in default.’ The class of officers who are in default are:

- (i) Key managers and directors who work full-time
- (ii) Anyone who is tasked with keeping, filing, or distributing financial documents and who endorse, permits, or actively take part in any default or neglects to do so in a way that is intended to prevent it;
- (iii) Participation in board meetings without protesting to the contravention perpetrated by the organisation or when such contravention took place with the knowledge or connivance of director.
- (iv) A person associated with the transfer of shares of the company.<sup>120</sup>

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<sup>118</sup> Supra 70, at 21

<sup>119</sup> Id.

<sup>120</sup> *The Companies Act 2013*, s.2(60) (In.).

In *Sunil Bharti Mittal v CBI*<sup>121</sup> the Supreme Court held that an individual is responsible for the wrongdoing of an enterprise if the active involvement of the individual combined with criminal intent is proved and where the law itself specifies the legal responsibility of the directors and other officers.

### 2.3.2 Accountability of Audit Committee

The Audit Committee must serve the Board of Directors and their role is categorised in the following four categories:

#### 2.3.2.1 Review:

- (i) Monitor and review the autonomy and capability of auditor and efficacy of audit process<sup>122</sup>
- (ii) Review the competence of internal audit<sup>123</sup>
- (iii) Mandatorily assess the internal control deficiency letter issued by the statutory auditor<sup>124</sup>
- (iv) Mandatorily review the internal control weakness report issued by the internal auditor<sup>125</sup>
- (v) Mandatorily review the appointment, removal, and remuneration of Chief Internal Auditor<sup>126</sup>
- (vi) Review commercial statements prior to their presentation to the Board of Directors.<sup>127</sup>
- (vii) Evaluate the internal financial control.<sup>128</sup> Internal financial control means the rules and systems embraced by the company for prevention and detection of fraud and errors, timely preparation of financial information and correctness and totality of accounting records.<sup>129</sup>
- (viii) Review with the management of particulars reference to
  - (a) Issues to come in the director's responsibility statement<sup>130</sup>

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<sup>121</sup> (2015) AIR 923 (In.).

<sup>122</sup> *The Companies Act 2013*, s.177(4)(ii) (In.).

<sup>123</sup> The Listing Agreement, cl.49(II)(D)(7)

<sup>124</sup> The Listing Agreement, cl.49(II)(E)(3)

<sup>125</sup> The Listing Agreement, cl.49(II)(E)(4)

<sup>126</sup> The Listing Agreement, cl.49(II)(E)(5)

<sup>127</sup> *The Companies Act 2013*, s.177(5) (In.).

<sup>128</sup> *The Companies Act 2013*, s.177(4)(vii) (In.).

<sup>129</sup> *The Companies Act, 2013*, s.134(5) (In.).

<sup>130</sup> The Listing Agreement, cl.49(II)(D)(4)(a)

- (b) Changes in the accounting practises and policies<sup>131</sup>
- (c) Audit finding triggering the significant changes to the financial statements<sup>132</sup>
- (d) Conformity with listing and other legal requirements<sup>133</sup>
- (e) Recommendations in the draft audit report<sup>134</sup>
- (ix) Review the findings of internal investigations<sup>135</sup>
- (x) Review the functioning of the whistleblower mechanism<sup>136</sup>

#### 2.3.2.2 Approval

- (i) Approval of related party transactions<sup>137</sup>
- (ii) Fixation of fees of statutory auditors<sup>138</sup>

#### 2.3.2.3 Recommendation

- (i) Recommend selection, re-appointment, removal, or replacement of statutory auditor.<sup>139</sup>

#### 2.3.2.4 Other Functions

- (i) Carry out tasks disclosed in the scope of the audit committee<sup>140</sup>
- (ii) Ask for particulars from any employee<sup>141</sup>
- (iii) Procure outside legal or expert opinion<sup>142</sup>
- (iv) Inspect inter-corporate loans and investments<sup>143</sup>
- (v) Estimation of assets and undertakings of the company<sup>144</sup>
- (vi) Debate any issues with internal and statutory auditors<sup>145</sup>
- (vii) In order to answer the queries of shareholders, the chairperson of the audit committee shall attend the AGM<sup>146</sup>

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<sup>131</sup> The Listing Agreement, cl.49(II)(D)(4)(b)

<sup>132</sup> The Listing Agreement, cl.49(II)(D)(4)(d)

<sup>133</sup> The Listing Agreement, cl.49(II)(D)(4)(e)

<sup>134</sup> The Listing Agreement, cl. 49(II)(D)(4)(g)

<sup>135</sup> The Listing Agreement, cl.49(II)(D)(9)

<sup>136</sup> The Listing Agreement, cl.49(II)(D)(12)

<sup>137</sup> *The Companies Act 2013*, cl.177(4)(iv) (In.).

<sup>138</sup> The Listing Agreement, cl.49(II)(D)(3)

<sup>139</sup> The Listing Agreement, cl.49(II)(D)(2)

<sup>140</sup> The Listing Agreement, cl.49(II)(D)(13)

<sup>141</sup> The Listing Agreement, cl.49(II)(C)(2)

<sup>142</sup> The Listing Agreement, cl.49(II)(C)(3)

<sup>143</sup> *The Companies Act 2013*, s.177(4)(v) (In.).

<sup>144</sup> *The Companies Act 2013*, s.177(4)(vii) (In.).

<sup>145</sup> *The Companies Act 2013*, s.177(5) (In.).

<sup>146</sup> The Listing Agreement, cl.49(II)(A)(iv)

### 2.3.3 Accountability of Internal Auditor

An organisation institutes systematic internal control measure to:

- (i) deter and detect theft, fraud, and error
- (ii) safeguard its properties and resources
- (iii) ensure adherence to the company's policies
- (iv) guarantee full and correct accounting data
- (v) conduct business in an orderly and efficient manner.<sup>147</sup>

Risk management and the application of internal control practices can be evaluated by conducting an internal audit. It gives a critical assessment of the organization's operational effectiveness and operating efficiency.<sup>148</sup>

The board of directors to recommend a chartered accountant, or cost accountant or any other professional to conduct internal audit of the company.<sup>149</sup> Under the aegis of the internal auditor, Board of Directors and/or Audit Committee determine the scope, function, and technique of internal audits.<sup>150</sup>

The intrinsic weakness of internal control over financial reporting is:

- (i) Likelihood of collusion
- (ii) Unacceptable management override of control
- (iii) Substantial misstatement because of error or fraud may take place and not detected.<sup>151</sup>

### 2.3.4 Accountability of Statutory Auditor

The shareholders appoint statutory auditor in its annual general meeting.<sup>152</sup> The powers of the company auditor are as follows:

- (i) Right to examine the books of accounts and other relevant vouchers at all times

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<sup>147</sup> *The Companies Act 2013*, s.134(5) (In.).

<sup>148</sup> Ankitha.V.A., (2020, April 21). *Internal Audit as per Companies Act, 2013*. TaxGuru. <https://taxguru.in/company-law/internal-audit-companies-act-2013.html>

<sup>149</sup> *The Companies Act 2013*, s.138(1) (In.).

<sup>150</sup> *The Companies (Accounts) Rules 2014*, rule 13(2)

<sup>151</sup> *Supra* 148

<sup>152</sup> *The Companies Act 2013*, s.139(1) (In.).

- (ii) Right to require particulars and reason from the officials of the company
- (iii) Make inquiries into the credits and advances done by the company
- (iv) Investigate as to whether account books and financial statement is regular, accurate and not deceptive
- (v) Right to examine the accounts of all the subsidiaries in regard to the consolidation of financial statements.<sup>153</sup>

The auditor's job is to provide a report on the accounts he has studied, including whether or not they accurately portray the company's financial position, profits or losses, and cash flow for the year.<sup>154</sup>

It is prohibited for a statutory auditor to give internal audit services to a corporation or any of its holding companies or subsidiaries, either directly or indirectly.<sup>155</sup>

Minimum fine of 25000 rupees will be levied on the auditor who contravenes the statutory obligations concerning appointment, rotation, duties and powers, signing of audit report, or prohibited service. There will be a maximum fine of five lakh rupees for any violation of the company's auditing regulations by an auditor who fails to adhere to any of the above-mentioned obligations. If an auditor defrauds tax authority, creditors, shareholders, or the company then he or she is punishable with sentence for a term of one year and levied a minimum fine of one lakh rupees upto a maximum fine of 25 lakhs.<sup>156</sup> After conviction for deliberate deceit, the auditor must return any fees paid by the company and compensate any other person who was harmed by the deception damages, including the company, the statutory authorities, or any other person.<sup>157</sup>

The fiduciary relationship with the shareholders casts responsibility on the auditor to ensure that it conducts its investigations and issues reports with utmost care and regard. In the case of *Trisure India Ltd. v A.F. Ferguson*<sup>158</sup>, the

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<sup>153</sup> *The Companies Act 2013*, s.143(1) (In.).

<sup>154</sup> *The Companies Act 2013*, s.143(2) (In.).

<sup>155</sup> *The Companies Act 2013*, s.144 (In.).

<sup>156</sup> *The Companies Act 2013*, s.147(2) (In.).

<sup>157</sup> *The Companies Act 2013*, s.147(3) (In.).

<sup>158</sup> (1987) 61 Comp. Cas. 548 (Bombay).

Court took a very cautious stance on auditors' liability. The court outlined the primary goals of auditing as well as the responsibilities and tasks of the auditing professional. The purpose of the audit is to ascertain the company's true financial status as indicated by the financial statements. Management is responsible for putting together financial accounts, while the auditor provides an opinion on them. The responsibility of the auditor does not exonerate management of its own responsibilities and duties.

### **2.3.5 Accountability of Board of Directors**

The company's affairs are overseen, controlled, and directed by the Board of Directors. Directors serve on the Board of Directors and are entrusted with managing the business as a representative of the shareholders. Board of Directors are responsible for breach of trust if they mismanage the company's funds or break the company's bylaws.

The company's Board should operate bona fide for the sake of all of the company's stakeholders, advance the company's goals, and safeguard the environment.<sup>159</sup> The directors must apply due care, commitment, and skill, and unbiased judgement when performing their duties.<sup>160</sup> Directors shall not do or strive to do any act to obtain undue advantage for oneself, relatives, partners or associates<sup>161</sup> and shall avoid a situation which would involve direct or indirect conflict with the interest of the company.<sup>162</sup> Assignment of the office of the director is prohibited and it shall be considered void in the event of such assignment.<sup>163</sup> In order to ensure availability and accountability of the board, not less than one director of the company should be a resident in India.<sup>164</sup>

The Central government has the authority to nominate a director<sup>165</sup> and in the public interest it can approach tribunal<sup>166</sup> for removal of any directors of

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<sup>159</sup> *The Companies Act 2013*, s.166(2) (In.).

<sup>160</sup> *The Companies Act 2013*, s.166(3) (In.).

<sup>161</sup> *The Companies Act 2013*, s.166(5) (In.).

<sup>162</sup> *The Companies Act 2013*, s.166(4) (In.).

<sup>163</sup> *The Companies Act 2013*, s.166(6) (In.).

<sup>164</sup> *The Companies Act 2013*, s.149(3) (In.).

<sup>165</sup> *The Companies Act 2013*, s.149(7) (In.).

<sup>166</sup> *The Companies Act 2013*, s.241(2) (In.).

the company.<sup>167</sup> Despite that no provision in the articles of association of the company, the nominee directors can be appointed under the statutory powers.<sup>168</sup>

A minimum civil penalty of one lakh rupee extending upto five lakh rupees will be imposed on the directors for the violation their fiduciary duties.<sup>169</sup>

### **2.3.6 Accountability of Independent Directors**

Independent directors are non-executive directors who have no financial or material ties to the corporation other than their fees for sitting in a meeting. An independent director is a knowledgeable, experienced, and independent member of the board of directors who is tasked with overseeing and advising the board on risk management issues. Additionally, they help increase corporate responsibility, enhance corporate reputation, and maintain sound business practises by acting as watchdog in numerous committees that are established by a corporation. The independent director serves as a link between shareholders and management by promoting strong corporate governance by ensuring openness and accountability in the company.<sup>170</sup> Independent director function as a coach, mentor, and guide to the company.<sup>171</sup>

Organizational value is created by management, board members and audit committee members as well as internal and external auditors. The underlying cause of corruption can only be found by working together with regulators and other authorities. Financial reporting value chain, detection and prevention of fraud, and accountability are not specifically addressed by the Companies Act, or by the laws that govern it.<sup>172</sup>

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<sup>167</sup> *The Companies Act 2013*, s.242(2)(h) (In.).

<sup>168</sup> Garg, K. (2020, February 5). *Directors appointed by Central Government – what is their status*. TaxGuru. <https://taxguru.in/company-law/directors-appointed-central-government-status.html>

<sup>169</sup> *The Companies Act 2013*, s.166(7) (In.).

<sup>170</sup> Supra 71

<sup>171</sup> Bisht, M. (2020, April 12). *Independent Director under Companies Act 2013 and Rules*. TaxGuru. <https://taxguru.in/company-law/independent-director-companies-act-2013-rules.html>

<sup>172</sup> Haldia, A. (2021, July 29). Preventing corporate frauds: Focus on accountability of entire value chain, not the auditor alone. *The Economic Times*. <https://economictimes.indiatimes.com/news/company/corporate-trends/preventing-corporate-frauds-focus-on-accountability-of-entire-value-chain-not-the-auditor-alone/articleshow/84849104.cms?from=mdr>

## 2.4 Disclosure and Prevention of Conflict of Interest

The disclosure of information by company is by way of

1. Annual report
2. Annual General Meeting
3. Website

Conflicting interest with the company shall be disclosed by the directors. At the business's first board meeting, each director must disclose any personal concerns or interests they have in the company, including stock ownership.<sup>173</sup> The disclosure shall be made about the contract or proposed contract to be entered into:

- (i) in the event that a company where such director controls two (2) percent of the shares,
- (ii) a company in which such director is a promoter or CEO, or
- (iii) a firm or organisation where such director is a partner, member, or owner.

The interested director shall not participate in such board meeting.<sup>174</sup> The 'interest' shall not conflict with the duties as a director. The disclosure of interest includes financial interest as well any other benefit emanating from fiduciary duties or proximity relation.<sup>175</sup> The disclosure to the company is about a transaction specific disclosure.<sup>176</sup> Immediately after the award of the contract, a director must notify the board of directors of any concerns or interests he may have. If no disclosure is provided or the interested director participates in the board meeting, the contract or agreement is voidable at the company's choice.<sup>177</sup> The non-compliance of disclosure of interest by the director would invite penalty as well as imprisonment.<sup>178</sup> The director's office will be vacant if he or she conceal any interest in a contract or arrangement in contravention of section

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<sup>173</sup> *The Companies Act 2013*, s.184(1) (In.).

<sup>174</sup> *The Companies Act 2013*, s.184(2) (In.).

<sup>175</sup> *Mukkattukara Catholic Co. Ltd. v M V Thomas* (1997) AIR 51 (Kerala).

<sup>176</sup> Pingle, G.N. (2019, May 1). Checklist for Disclosure of Interest by Directors, *SCC Online blog*. <https://www.scconline.com/blog/post/2019/05/01/checklist-for-disclosure-of-interest-by-directors/>

<sup>177</sup> *The Companies Act 2013*, s.184(3) (In.).

<sup>178</sup> *The Companies Act 2013*, s.184(4) (In.).



184 of *the Companies Act 2013*.<sup>179</sup> Due to any ineligibility all the directors relinquish their office, the Central Government or the firm's promoter must appoint the requisite number of directors until the general body of the company appoints them.<sup>180</sup>

Every corporation must maintain separate records for all relevant contracts, arrangements, or transactions with linked parties.<sup>181</sup> Furthermore, the director shall abstain from any competing interest with the company's interests.<sup>182</sup> As part of its financial disclosure, a company must provide information of the salary paid to each director, which is subject to shareholder approval.

#### **2.4.1 Disclosure in Directors Report**

The Board of Directors' report must also be added in the yearly financial statement. It is essential that the board of directors' report contains information on the company's overall financial health, operations, and product and service offering. Auditors' reports will contain information on frauds that they've discovered.<sup>183</sup>

The director's responsibility statement<sup>184</sup> shall state that:

- (i) Accountants adhere to accounting standards when preparing the company's annual financial statements; accounting policies are implemented to provide a honest picture of the company's financial situation; and, in addition, adequate measures were taken to guarantee that the company's accounting records and assets were well-maintained and fraud and other irregularities were detected and stopped.
- (ii) Devising of annual financial statements on a continuing concern basis
- (iii) Administration of the company's internal financial controls

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<sup>179</sup> *The Companies Act 2013*, s.167(1)(c) (In.).

<sup>180</sup> *The Companies Act 2013*, s.167(3) (In.).

<sup>181</sup> *The Companies Act 2013*, s.189 (In.).

<sup>182</sup> *The Companies Act 2013*, s.166(4) (In.).

<sup>183</sup> *The Companies Act 2013*, s.134(3)(ca) (In.).

<sup>184</sup> *The Companies Act 2013*, s.134(3)(C) (In.).

(iv) Guarantee conformity with all applicable law through the implementation of adequate systems.<sup>185</sup>

The auditor's report shall be attached along with the financial statement<sup>186</sup>

SEBI has mandated that the listed companies to have an updated website. The listed companies shall *interalia* disclose the following information on their website:

A. Financial Disclosure

(i) Copy of annual report<sup>187</sup>

(ii) Separate audited financial statements of each subsidiary<sup>188</sup>

B. Stakeholder Relationship

(i) Email and name of person who can be contacted for grievances and queries<sup>189</sup>

(ii) Notice of voting through electronic means<sup>190</sup>

(iii) Notice of postal ballot<sup>191</sup>

(iv) Notice of general meeting<sup>192</sup>

C. Policies

(i) Details of establishment of vigil mechanism<sup>193</sup> and whistleblower policy<sup>194</sup>

(ii) Code of Conduct of Senior Management and Board of Directors<sup>195</sup>

D. Other

(i) Engagement terms of independent directors<sup>196</sup>

(ii) Structure of the numerous committees of the of the board of directors<sup>197</sup>

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<sup>185</sup> *The Companies Act 2013*, s.134(5) (In.).

<sup>186</sup> *The Companies Act 2013*, s.134(2) (In.).

<sup>187</sup> SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 24

<sup>188</sup> *The Companies Act 2013*, s.136(1) (In.).

<sup>189</sup> The Companies (Incorporation) Rules 2014, rule 26

<sup>190</sup> The Companies (Management and Administration) Rules 2014, rule 20

<sup>191</sup> The Companies (Management and Administration) Rules 2014, rule 22(4)

<sup>192</sup> The Companies (Management and Administration) Rules 2014, rule 18(3)(ix)

<sup>193</sup> *The Companies Act 2013*, s.177 (In.).

<sup>194</sup> SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 46

<sup>195</sup> SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 46

<sup>196</sup> *The Companies Act 2013*, s. 149 read with schedule V (In.)

<sup>197</sup> SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 46

(iii) Related party transactions<sup>198</sup>

Non-compliance by the firm or any officer with any requirement of *the Companies Act 2013* is punishable under Section 450 of the Act.

## **2.5 Checks and Balance:**

In order to prevent fraudulent practices, the independent directors shall have the following duties:

- (i) The corporation must have a whistleblower protection process in place that is both adequate to the company's needs and not adversely affecting the whistleblower's rights;<sup>199</sup>
- (ii) Report real or suspected fraud, dishonest behaviour and contravention of company ethics policy or code of conduct;<sup>200</sup>
- (iii) Act within his command and aid in safeguarding the genuine affairs of the company, employee, and shareholders,<sup>201</sup> and
- (iv) Not to disclose confidential information.<sup>202</sup>

At least one-third of the directors of every publicly traded business must be independent directors, as mandated by the Companies Act.<sup>203</sup> The impartiality of the board's decisions is ensured by the presence of independent directors, who act as a counterbalance to the company's executives. For accountability, openness, management effectiveness, strategic advice, and minority shareholder protection, independent directors play a critical role.<sup>204</sup>

Independent director is a person of integrity, bring requisite expertise and skill to the board<sup>205</sup> and acts in an impartial manner. No pecuniary relationship should be maintained with the company by the independent director.<sup>206</sup> He

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<sup>198</sup> SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 23

<sup>199</sup> *The Companies Act 2013*, Schedule IV(III)(10) (In.).

<sup>200</sup> *The Companies Act 2013*, Schedule IV(III)(11) (In.).

<sup>201</sup> *The Companies Act 2013*, Schedule IV(III)(12) (In.).

<sup>202</sup> *The Companies Act 2013*, Schedule IV(III)(13) (In.).

<sup>203</sup> *The Companies Act 2013*, s.149(4) (In.).

<sup>204</sup> *Supra* 70, at 27

<sup>205</sup> *The Companies Act 2013*, s.149(6)(a) (In.).

<sup>206</sup> *The Companies Act 2013*, s.149(6)(c) (In.).

performs vital task in resolving the conflicts among the company and shareholders.

Directors are exempt from liability for their judgments if the decisions fall under a “safe harbour” defined by the judiciary known as the “best judgement rule.” Objective, impartial and informed decisions are to be made by the directors recognising the best of the company.<sup>207</sup>

The Companies Act provides a safe harbour for independent directors. Non-executive directors, who are neither a promoter nor a member of the company's management, are only accountable for the company's activities or omissions that happened with their knowledge and approval, with connivance, or because they did not act diligently.<sup>208</sup> There were instances where an independent director's knowledge and consent were attributable to board processes or where the independent director had not complied scrupulously with SEBI LODR regulations in the conduct of his duties as an independent director.<sup>209</sup> The term “board of directors process” refers to the legal and behavioural characteristics of the board, such as the thoughtfulness with which decisions are made and the fulfilment of obligations to shareholders and the corporation.<sup>210</sup>

In the current regulatory framework, there are a number of issues that help to erode the independence of independent directors. Consequences that weaken the foundation of the concept of 'independence' can be found:

- (i) A general meeting of shareholders approves the board of directors' due diligence and selection of independent directors.<sup>211</sup> In order to reappoint

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<sup>207</sup> Grapsas, R., Holland, C.H., & Gregory, H.J. (2019, April 18). *Corporate Governance in the USA*, *Lexology Newsfeed*. Sidley. <https://www.lexology.com/library/detail.aspx?g=e295afc9-da23-4824-9025-9772e3438ebe>

<sup>208</sup> *The Companies Act 2013*, s.149(12) (In.).

<sup>209</sup> The SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 25(5)

<sup>210</sup> Ramachandran, R. (2020, September 20). Reviewing the Standard of Liability of Independent Directors, *The CBCL Blog*. <https://cbcl.nliu.ac.in/company-law/reviewing-the-standard-of-liability-of-independent-directors/>

<sup>211</sup> *The Companies Act 2013*, s.150 (In.).

an independent board member, a specific resolution must be passed at a shareholders' meeting.<sup>212</sup>

- (ii) A board vote is required to allow an independent director to receive sitting fees for taking part in board meetings, reimbursement of expenses, and profit-related commissions.<sup>213</sup> Non-executive directors, together with independent directors, must receive shareholder approval for any compensation endorsed by the company's board of directors.<sup>214</sup>
- (iii) Independent director can be ousted by way of ordinary resolution after hearing him.<sup>215</sup>

Controlling shareholders discharge a considerable position in the engagement, re-appointment, and dismissal of independent directors. The independent directors of the board are unable to carry out their duties effectively because of the aforementioned problems. The inability of an independent director to effectively oversee the board's performance is due to a lack of time, suitable resources, industry specific knowledge, and the ability to comprehend and analyse complicated material. Information provided, concealed, or disclosed before the independent directors has a significant impact on the independent director's independence and advising role.<sup>216</sup>

## **2.6 Class Action Suits**

A class action suit perhaps filed by a

- (a) member or
- (b) depositor

if they are of the view that the affairs or management of the company is performed in a way detrimental to

- (i) the interest of company or
- (ii) its members or depositors.<sup>217</sup>

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<sup>212</sup> *The Companies Act 2013*, s.149(10) (In.).

<sup>213</sup> *The Companies Act 2013*, s.197(7) (In.).

<sup>214</sup> The SEBI [Listing Obligations and Disclosure Requirements] Regulations 2015, regulation 17(6)(a)

<sup>215</sup> *The Companies Act 2013*, s.169(1) (In.).

<sup>216</sup> *Supra* 70, at 28

<sup>217</sup> *The Companies Act 2013*, s.245(1) (In.).

The acts of the company shall be within the boundaries of charter documents. Strictly speaking, the company must not withhold information from shareholders or lie to depositors.

An injured shareholder or depositor can file a variety of claims with the National Company Law Tribunal, including:

- (a) seeking injunctive orders restraining company from executing any act which is *ultra vires* of its charter documents,<sup>218</sup> applicable law<sup>219</sup> or actions contrary to adopted resolutions.<sup>220</sup>
- (b) Declare resolutions as void if they are obtained through misrepresentation or misstatements.<sup>221</sup>
- (c) Claim damages or other appropriate actions from directors, external advisors, auditors  
or any other person who made misleading statements, or who engaged in wrongful, unlawful, or fraudulent conduct, or suppression of material facts.<sup>222</sup>
- (d) Seek any other remedy.<sup>223</sup>

### 3. Compliance

The compliance program is a scheme of internal controls and procedures of an organisation to assure the public that the corporation is performing its best to proscribe contravention of laws.<sup>224</sup> In order to prevent their staff from breaking any applicable laws, rules, regulations, or standards, businesses implement a compliance programme. Compliance has a two-pronged focus:

- (i) Deterring violations of law
- (ii) Fostering positive norm within the company that the employees will follow applicable law, rules, and regulations.<sup>225</sup>

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<sup>218</sup> *The Companies Act 2013*, s.245(1)(a) &(b) (In.).

<sup>219</sup> *The Companies Act 2013*, s.245(1)(e) (In.).

<sup>220</sup> *The Companies Act 2013*, s.245(1)(f) (In.).

<sup>221</sup> *The Companies Act 2013*, s.245(1)(c) (In.).

<sup>222</sup> *The Companies Act 2013*, s.245(1)(g) (In.).

<sup>223</sup> *The Companies Act 2013*, s.245(1)(h) (In.).

<sup>224</sup> Baer, M.H. (2009)., Governing Corporate Compliance., *Boston College Law Review*, 50, 949.

<sup>225</sup> Haugh, T. (2018). The Power Few of Corporate Compliance. *Georgia Law Review*, 53, 129.

The corporate compliance function of an organisation involves assessment of the legal environment, deciding what strategies to be effected and creating those policies. Compliance effort also involves training of the employees about the company policies and importance of observing to the policies. Officers responsible for compliance regularly follow up and assesses employee education and training initiatives.<sup>226</sup> Board shall confirm fulfillment of provisions of applicable laws and internal policies, and initiate measures to achieve compliance by their group companies.<sup>227</sup>

Compliance comprises of two things:

- (i) Management commitment to do right thing and
- (ii) Management steps to make this happen.<sup>228</sup>

There are a number of ways an organisation can ensure compliance, including enforcing any applicable rules and regulations and enforcing its own internal standards. The primary objectives of compliance are:

- (i) To prevent misconduct
- (ii) To detect misconduct
- (iii) To align the corporate activities with regulations.<sup>229</sup>

Detection, prevention, and response are three compliance concepts. Organisation's compliance program must be intended to discover and deter unauthorized act as well as react to the red flags when they arise.<sup>230</sup> Corporate compliance program is a vital tool that helps companies deter and detect unlawful conduct by the employees. Compliance is used as key metric in the calculation of fine by regulatory authorities.<sup>231</sup> Compliance failure in an organisation leads to:

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<sup>226</sup> Supra 28, at 214

<sup>227</sup> Sidhu, K. (2009) Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal. *German Law Journal*, 10, 1343.

<sup>228</sup> Murphy, J.E. (2017). Policies in Conflict: Undermining Corporate Self-Policing. *Rutgers University Law Review*, 69, 422-427.

<sup>229</sup> Supra 61, at 974

<sup>230</sup> McConnell, R.D., Martin, J. & Simon, C. (2011). Plan Now or Pay Later: The Role of Compliance in Criminal Cases. *Houston Journal of International Law*, 33, 509.

<sup>231</sup> Id. at 512 & 513

- (i) Loss of reputation
- (ii) Damages in the form of fines, investigation expenses, and legal charges
- (iii) Diversion of management time and energy.<sup>232</sup>

Social norms generated by compliance program exerts pressures, through reputation cost or loss of friendship, on the individual for law abiding behaviour.<sup>233</sup> Organisations maintain compliance program out of fear of sanction, retribution, harm, or ridicule<sup>234</sup> and compel its employees to adhere to internal control norms.

With a view to have an efficacious compliance and ethics plan, the corporation shall:

- (i) be vigilant in preventing and detecting illicit activity
- (ii) Foster an organisational culture that
  - (a) promotes ethical behaviour
  - (b) has a strong belief in the rule of law
- (iii) Establish measures to diminish the possibility of criminal activity
- (iv) Adopt an excellent compliance and ethical programme and entrust it to a senior member of your organisation
- (v) via a successful training programme, communicate the required norms for ethical behaviour on a regular basis
- (vi) any individual who the organisation knows or should know, has engaged in criminal actions should not be given any discretionary or meaningful authority by the organisation
- (vii) Employees' unlawful behaviour should be monitored and audited, and the efficacy of compliance and ethics strategy should be evaluated on a regular basis through:
  - (a) suitable incentives for ethical performance
  - (b) appropriate penalties for criminal behaviour

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<sup>232</sup> id. at 510

<sup>233</sup> Supra 224, at 960

<sup>234</sup> Root, V. (2019). The Compliance Process. *Indiana Law Journal*, 94, 203.



- (viii) constantly enforce the ethics and compliance programme throughout the organisation
- (viii) respond to the illegal conduct and avoid future offences by modifying or revising the compliance programme, as appropriate.<sup>235</sup>

The four stages within compliance process that provides a framework for the evaluation of compliance failures within organisation are prevention, detection, investigation, and remediation.<sup>236</sup> The effective compliance program may be broken into:

- (i) Prevention: Prevention involves the action taken to avert compliance failures happening within the organisation. Some element of ‘prevention failure’ is found in all compliance failures. The deterrence phase is apprehensive about occasions of corporate wrongdoing where the organisation failed to conceive its responsibilities connected with prevention which resulted in occurring of wrongdoing.<sup>237</sup>
- (ii) Detection: A company's internal regulations designed to detect employee wrongdoing and potential hazards or errors that could hurt other stakeholders or the company itself are part of the detection stage.<sup>238</sup>
- (iii) Investigation: During this phase of the inquiry, internal company policies and practises are examined in order to identify whether or not a compliance failure has occurred and the extent of that failure. Facts uncovered in the investigation of a compliance failure enable the decision makers to make educated choices.<sup>239</sup>
- (iv) Remediation: The redressal phase provides an opportunity to the company to tackle the wrongdoing and address the compliance failure thoroughly and completely. It involves giving compensation to the victim for the harm caused and develop a robust internal control measures to prevent repetition of similar misconduct.<sup>240</sup>

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<sup>235</sup> US Sentencing Commission Guidelines Manual 2018, s.8B2.1

<sup>236</sup> Supra 234, at 211

<sup>237</sup> Id. at 220 & 221

<sup>238</sup> Id. at 222

<sup>239</sup> Id. at 224

<sup>240</sup> Id. at 226

A company's compliance programme should promote a compliance culture and make long-term efforts to counteract corruption. It is the goal of the organization's compliance programme to guarantee that all applicable laws, regulations, and cultural contexts in which the company operates are met. As a rule, a well-executed compliance programme should be able to detect, prevent, correct, and report misbehaviour.<sup>241</sup>

When designing and executing compliance procedures, companies should consider local customs, experiences of corruption, and varying legislation. Programs for ensuring compliance should not be adopted from one jurisdiction to another. Considering the language barrier and cultural variations that may hinder employees' comprehension and awareness of what constitutes corruption, adequate training should be provided.<sup>242</sup>

Educating and training employees is the first stage in guaranteeing observance of company's code of conduct, which is its primary tool or instrument. Employees should be familiar with the company's code of conduct, which serves as the foundation of any compliance programme. As a result of this training, all employees are expected to follow the organisational policies and procedures in day-to-day affairs. The focus of the compliance duty switches to monitoring once the initial stages of education and training are complete. Monitoring functions rapidly reveal whether or not an employee is abiding by the company's policies and any violations that have occurred.<sup>243</sup>

Ethical infrastructure of an organisation consists of three systems, i.e., formal system, informal system, and organisational climate<sup>244</sup> and they are briefly described below:

- (i) Formal System consists of

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<sup>241</sup> Gurkaynak, G., Kama, C.O., & Ergun, B. (2015). How to Establish and Operate an Anti-Corruption Compliance Program in Emerging Markets: The Turkish Example. *Turkish Commercial Law Review*, 1, 145.

<sup>242</sup> Id. at 151

<sup>243</sup> Supra 225, at 141&142

<sup>244</sup> Hess, D. (2016). Ethical Infrastructure and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence. *New York University Journal of Law & Business*, 12, 317.

- (a) Codes of conduct, training programmes, and performance requirements.
  - (b) Policies and processes relating to the monitoring of personnel and the reporting of misbehaviour
  - (c) organization's formal incentives and punishments.
- (ii) Informal systems include
- (a) informal communication, as well as the tone set by the leadership.
  - (b) Surveillance of an employee by their supervisors and colleagues,
  - (c) third type of sanction known as “informal sanctions,” such as peer pressure, shaming, and social isolation.
- (iii) The environment of the organisation determines the standards of behaviour expected of employees and the degree to which those standards are upheld by management.

When it comes to organisational atmosphere, formal systems lag well behind informal ones. Informal systems are more effective than formal ones because they reflect the real-world challenges faced by employees. The formal code of conduct is trumped by a competing message coming from the top or from the company's culture. A robust formal compliance programme that is at odds with the informal culture of the system or the organisation is a bad programme for compliance. The comprehensive strength of the ethical framework is determined by the consistency of these three systems.<sup>245</sup>

Ineffective compliance program wastes the resources of the company and lead to the institutionalisation of organisational misconduct. The goal of compliance and ethics scheme of an organisation shall:

- (i) Preclude a bad one from performing a bad thing
- (ii) Make sure that the company does not persuade a good individual to do a bad thing
- (iii) Set up an atmosphere that encourages any person to execute the right thing.<sup>246</sup>

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<sup>245</sup> Id. at 350

<sup>246</sup> Id. at 362

The ethical infrastructure of a company shall not only include formal system of compliance and ethics scheme but also take the subsequent steps:

- (i) Monitor periodically of informal communication, surveillance and sanctions
- (ii) Promote compliance and ethics program that supports informal systems
- (iii) Perception of the employee of the ethical climate of the organisation shall be periodically assessed.<sup>247</sup>

In order to assess the accomplishment of the prescribed goals, the compliance program requires assessments and monitoring. Termination, demotion, change in remuneration, etc are some of the procedures implemented by the company to ensure accountability of the individual in the event of departure from the company policies.<sup>248</sup>

The overall enforcement resources of the government are expanded by the compliance program, thereby increasing the capture of corporate crime and helps to deter wrongdoing. The corporate compliance officers, who possess bigger knowledge of the organisation, enforce the compliance programs, and deter the wrongdoing.<sup>249</sup>

A threshold step for implementation of effective compliance program for any company is risk assessment. Risk assessment helps a company better understand its business risks, such as government involvement, industry, products and services, customers, and third-party agents. Effective compliance programmes is key to risk assessment and hence compliance must be customised to the industry and the particular business linked with the organisation.<sup>250</sup>

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<sup>247</sup> Id. at 365

<sup>248</sup> Supra 61, at 984

<sup>249</sup> Supra 224, at 959

<sup>250</sup> Hamann, S. (2019). Effective Corporate Compliance: A Holistic Approach for the SEC and the DOJ. *Washington Law Review*, 94, 851.

### 3.1 Effective Compliance Program

A successful compliance programme guards an organisation by discovering and preventing illegal and unethical act and encourage observance with the organization's statutory and ethical responsibilities.<sup>251</sup> The fundamental elements that must be present in an efficient compliance program are:

- (i) Code of Ethics: In order to curtail criminal and improper conduct, an organisation shall establish standards of conduct and internal controls.<sup>252</sup> Code of conduct is the foundation for these controls, and it should address the relevant compliance risks of the organisation. The channels for reporting of misconduct and violations of the code shall be identified and the code shall provide the disciplinary action to be taken against the employees for the violations of the code. The company policies shall address the areas such as anti-corruption expectations, agent and vendor due diligence, conflict of interest, internal accounting practices, and retention of records.<sup>253</sup> All the employees of the company shall be provided with the code of conduct and business ethics. The code shall provide guidance to the employees for circumstances in which they encounter ethical dilemma. The company should identify the basic values such as honesty, integrity, and fairness in the conduct of ethical business.<sup>254</sup>
- (ii) Training and Education: All the employees of the company shall be trained on compliance and ethics programme and its various components, inclusive of the code of conduct, guidelines, and processes.<sup>255</sup> Corporate leadership shall oversee the compliance training program which will help to enhance the corporate culture. Every employee gets information through training and they know what is expected of them and it raises

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<sup>251</sup> Williford, K. & Small, D. (2013, January 25). *Establishing an Effective Compliance Program: An Overview to Protecting Your Organization*. Association of Corporate Counsel. <https://www.acc.com/resource-library/establishing-effective-compliance-program-overview-protecting-your-organization>

<sup>252</sup> United States Sentencing Commission Guidelines Manual 2018, s.8B2.1(b)(1)

<sup>253</sup> Supra 251

<sup>254</sup> Kathuria, S. (2009). Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules under the Federal Acquisition Regulation. *Public Contract Law Journal*,38, 803.<https://www.jstor.org/stable/25755739>

<sup>255</sup> Supra 251

awareness of the important laws and regulations for the company. Nature of the job and relevant areas of risk are to be considered while giving training to the individuals. An ongoing training shall be provided to all the employees of the company.<sup>256</sup> Ethical training of the employees shall create awareness of the following: (i) ethical values and principles behind everyday decisions (ii) company's code of ethics and its application (iii) procedures and channels for communication of ethical concerns and complaints and (iv) consequences of misconduct.<sup>257</sup>

- (iii) Leadership and Culture: The compliance programme shall be monitored and overseen by the organization's top management. The compliance program's day-to-day activities to be handled by a single person. Allowing compliance officers immediate access to their controlling authorities and allowing them regular reporting will ensure accountability. There must be sufficient resources for compliance professionals to carry out their duties effectively. Corporate leadership shall foster the culture of compliance and publicly reward compliant behaviour.<sup>258</sup> The company leadership shall lay down right ethical tone at the top and show their commitment to ethics based on their actions. Employee conduct will often reflect the company's culture.<sup>259</sup>
- (iv) Internal Control Process: The internal control set-up of the company shall provide for the following: (i) knowledgeable and ethical leadership (ii) exclusion of risky personnel from substantial decision making process (iii) periodic review of code of ethics, business practices, policies and procedures including internal audit and investigation for misconduct (iv) disciplinary action for improper conduct (v) whistleblowing mechanisms and prevention of victimisation of whistleblowers (vi) timely disclosure of the fraud to the government and cooperation with government agencies in the investigation process.<sup>260</sup>

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<sup>256</sup> Supra 250, at 870

<sup>257</sup> Supra 254, at 844

<sup>258</sup> Supra 251

<sup>259</sup> Supra 254, at 836

<sup>260</sup> Id. at 847 & 848

A compliance programme wouldn't be complete without monitoring and auditing procedures. Workplace surveillance, telephone and email monitoring, and on-site activity can all be used to keep tabs on an employee's every move. Using sting operations as a means of evaluating a company's compliance programme is possible. An independent audit helps to assess company's compliance with legal standards and the ethical atmosphere of the organisation. An effective compliance program requires adequate reporting mechanism, and the companies can implement hotlines for the anonymous reporting of the violations. Ample advertisement shall be given about the hotline mechanism and confidentiality of the callers must be protected while soliciting the relevant information. Availability and accessibility of the compliance staff shall be ensured through reporting of the violations. Internal investigation shall be conducted after any violations are reported, through independent and knowledgeable investigators to collect necessary information. Another key element of compliance mechanism is the whistleblower protection.<sup>261</sup> The whistleblowing mechanism serves as 'early warning system' of violations to enable the company to minimise the damage.<sup>262</sup>

- (v) Remedial Action: It is the responsibility of the corporation to disclose any violations, cooperate with law enforcement agencies, and publicly denounce any misconduct that is discovered during an inquiry or surveillance. Improvements in compliance programmes, efforts to prevent recurrence of wrongdoing, and risk assessment procedures shall be implemented.<sup>263</sup>
- (vi) Performance Incentives and Disciplinary Measures: Disciplinary and reward programmes must be appropriately implemented by an organisation. Depending on the behaviour, the reward or punitive actions should be adjusted accordingly.<sup>264</sup> Compliance should be portion of

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<sup>261</sup> Supra 250, at 871

<sup>262</sup> Supra 254, at 850

<sup>263</sup> Supra 250, at 872

<sup>264</sup> Supra 251

employee's performance review and connected to compensation.<sup>265</sup> All offenders shall be subject to disciplinary action regardless of their position within the company. A strong disciplinary policy can encourage ethical behaviour.<sup>266</sup>

- (vii) Exclude Bad Actors from Managerial Ranks: Exclusion from the ranks of significant authority and management for those who have engaged in illegal activities or engaged in behaviour conflicting with the company's compliance programme is mandated.<sup>267</sup>
- (viii) Risk Assessment: Periodic risk assessment helps to establish appropriate procedures, implement, or alter the effective compliance programme in order to control the possibility of unethical or improper conduct. It is necessary to evaluate audit results, compliance complaints, employee allegations, lawsuits, settlements, and the presence or adequacy of a programme covering a certain area as part of the risk assessment process.<sup>268</sup> Regular assessment of risk creates a comprehensive recognition of risks associated with business, products and services, customers, third party representatives, area of operation, and government interaction.<sup>269</sup>
- (ix) Third Party Issues: One of the challenges to compliance and ethics program is the non-compliance by business partners and hence third-party non-compliance must be integrated into the risk assessment. Compliance expectation from the business partners shall be communicated and strictly enforce penalties for the violations committed by the partners. Suppliers code conduct shall be instituted along with the company's general code of conduct. Due diligence process shall be embedded in the procurement and account payable operations of the company.<sup>270</sup>
- (x) Interconnected Elements: The company policies and systems are absurd
  - (i) bereft of employees who appreciate it, (ii) when there is no way to

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<sup>265</sup> Supra 250, at 871

<sup>266</sup> Supra 254, at 851

<sup>267</sup> Supra 251

<sup>268</sup> Id.

<sup>269</sup> Supra 250, at 867

<sup>270</sup> Supra 250, at 873



report violations or (iii) when non-compliant behaviour is incentivised in practice. Every component is necessary for the detection and prevention of harm and shared effort must be put by the resources and procedures.<sup>271</sup>

Three guiding principles to be considered by the companies while shaping ethical conduct are (i) appreciation of core human values, (ii) regard for local customs, and (iii) circumstances matters while determining ethical motives. Management ethics differs with cultures and recognising those cultures and changes is essential for ethical practices. Code of conduct must give enough opportunity for a manager to exercise his decision in circumstances demanding cultural sympathy. The following are guidelines to develop global ethical behaviour among the leadership:

- (i) Corporate principles and standards of behaviour must be regarded as inviolable. No matter where it operates, a company's ethical standards must be upheld.
- (ii) Design and implement conditions for supplier and customer engagement.
- (iii) Ethical standards and interpretations of ethical issues should be left in the hands of foreign businesses.
- (iv) Assist in efforts to decrease host country institutional corruption.
- (v) Resolve conflicts in an ethical and innovative manner.<sup>272</sup>

#### **4. Corporate Governance in Public Procurement**

The Parliament of India has not passed any legislation governing public procurement in India. Manuals for Procurement for Goods, 2017, Manual for Procurement of Works, 2019, and Manual for Procurement of Consultancy and Other Services, 2017 were issued by department of expenditure in accordance with the General Financial Rules, 2017 in order to improve transparency in the procurement process and reduce the scope for subjectivity. With the help of several government departments and PSUs, these guidelines promote key

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<sup>271</sup> Id. at 874

<sup>272</sup> Donaldson, T. (1996, September-October). Values in Tension: Ethics Away from Home. *Harvard Business Review*.

concepts such as openness, equity, responsibility, and efficiency while also promoting savings and fostering competitiveness. The procuring official might refer to the manuals' general guidelines as operating instructions. It improves the ease of conducting business with the government by bringing greater transparency and certainty to government processes. Public procurement procedures have been made more transparent and objective by additional rules from the Central Vigilance Commission (CVC).

#### **4.1 Manual for Procurement of Works 2019**

The Central Government attached supporting offices, public sector enterprises, local urban bodies, and other self-governing bodies substantially owned or supervised by or drawing monetary benefit from the Centre are among the bodies benefiting from the Manual for Procurement of Works 2019.<sup>273</sup> The Manual does not apply to state government departments or state public sector undertakings because they are not considered procurement entities by the Manual.

The Engineering, Procurement, and Construction (EPC) contract falls under the purview of the Manual for Procurement of Works, 2019 because it is a works contract. According to the Manual and CVC guidelines, procuring entities must follow all applicable rules and regulations when there is no law to control public procurement.<sup>274</sup>

Costs and the following five characteristics must be balanced in order for public procurement to be successful:<sup>275</sup>

- (i) Right price
- (ii) Right to quality
- (iii) Right time and place
- (iv) Right source
- (v) Right to quantity

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<sup>273</sup> Manual for Procurement of Works 2019, cl.1.3(iii)

<sup>274</sup> Manual for Procurement of Works 2019, cl.1.1(iv)

<sup>275</sup> Manual for Procurement of Works 2019, cl.1.4

All procuring entities shall abide the five fundamental principles of public procurement<sup>276</sup> and accountable for:

- (i) Transparency Principle: It is the duty of the procuring entity to maintain openness, fairness, equality, and competitiveness in public procurement. All prospective bidders will have access to the equal information simultaneously so that they are aware of and comprehend the bidding opportunities. It is the responsibility of the procuring bodies to guarantee that the bidding process is fair, open, and free of bias. The published tender documents must be strictly adhered to by public authorities, and a fair and transparent process must be followed at all times.<sup>277</sup>
- (ii) Professionalism Principle: Procurement officials are held accountable for ensuring that the procurement process is efficient and effective. It is expected that they will avoid inappropriate practises and use a reasonable and acceptable procurement approach in order to achieve the planned procurement aim in a cost-effective way. Quality, quantity, performance, and other criteria must be specified precisely in light of the purchasing entity's unique requirements.<sup>278</sup>
- (iii) Broader Obligation Principle: Preferential procurement from locally created goods and services is one of the government's broader goals, and the public procurement authority's conduct should support that goal.<sup>279</sup>
- (iv) Extended Legal Principle: When looking at the public procurement function from a larger perspective, it is the responsibility of the public procurement authority to follow fair play. Corruption prevention rules, such as the Right to Information Act, 2005 and the Prevention of Corruption Act, 1988 must be followed by the procuring authority.<sup>280</sup>
- (v) Public Accountability Principle: There must be considerations and needs assessed at every phase of procurement, which the procuring authority must

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<sup>276</sup> Manual for Procurement of Works 2019, cl.1.5

<sup>277</sup> Manual for Procurement of Works 2019, cl.4.0(i), appendix 1

<sup>278</sup> Manual for Procurement of Works 2019, cl.4.0(ii), appendix 1

<sup>279</sup> Manual for Procurement of Works 2019, cl.4.0(iii), appendix 1

<sup>280</sup> Manual for Procurement of Works 2019, cl.4.0(iv), appendix 1

document and weigh in order to make the final purchase choice. The procurement records should be saved and kept for future review.<sup>281</sup>

#### **4.1.1 Transparency**

An online and electronic Government e-Marketplace (GeM) has been built to provide end-to-end services, such as placing a supply order and paying the providers, to ensure transparency and efficiency. Purchasing large amounts of materials is also done through the use of reverse bidding and e-auction.<sup>282</sup>

Evaluation of Bid: Each offer should be reviewed in accordance with the tender document's specifications and in a manner that is both open and transparent. During the evaluation of the bids, tender conditions should not be ignored or relaxed. No bidder shall be given undue advantage over the other participating bidders or at the cost of Owner/Procuring Entity.<sup>283</sup> From the opening of the proposal up to the award of the contract, no bidder may approach the Owner/Procurement Entity about the bid. Any effort by the bidder to persuade the appraisal of the bid taints the entire process and results in the bid being rejected.<sup>284</sup>

Unresponsive Tender: If the basic requirement of the tender conditions like eligibility or qualification criteria is not met by the bidder, then it is treated as unresponsive, and the bid shall be rejected. Subsequent correction or withdrawal of non-confirming stipulation shall not make the offer responsive.<sup>285</sup>

Single bid: After examination, if the Owner/Procuring Entity doesn't receive enough offers, the contract perhaps given to the lone responsive bidder, provided that the quoted price is appropriate. Owner/Procuring Entity may re-tender or negotiate with the bidder depending on the conditions.<sup>286</sup>

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<sup>281</sup> Manual for Procurement of Works 2019, cl.4.0(v), appendix 1

<sup>282</sup> Manual for Procurement of Works 2019, cl.1.7(iii)

<sup>283</sup> Manual for Procurement of Works 2019, cl.5.1

<sup>284</sup> Manual for Procurement of Works 2019, cl.5.4.1

<sup>285</sup> Manual for Procurement of Works 2019, cl.5.4.2

<sup>286</sup> Manual for Procurement of Works 2019, cl.5.6.7

An open bidding process is used to pick a contractor, and the lowest-priced bidder wins the contract.<sup>287</sup>

#### **4.1.2 Fairness**

The tender documents shall be complete in and of itself and there be no room for misinterpretation. A prospective bidder needs to know exactly what procuring entity getting into in order to make a competitive offer.<sup>288</sup>

The procuring entity shall bear the risks relating to delay in handing over of land, environmental clearances, approval from local authorities, approval in respect of engineering plans and shifting of utilities.<sup>289</sup> Delays caused by or due to the purchasing entity, force majeure, and changes in the scope of work will warrant extensions of time for contract execution.<sup>290</sup> Adjustment of contract price as a consequence of price volatility must be granted in accordance with a predetermined formula during performance of the Contract.<sup>291</sup>

The procuring entity shall invite Expression of Interest (EoI) containing pre-qualification (PQ) applied for shortlisting of bidders and the supporting documents required for the said purpose. The eligibility criteria like past experience, technical capabilities, financial strength of the bidder, quality accreditations, licensing requirements, etc required must be clearly mentioned in the EoI.<sup>292</sup> Equal opportunity is given to all bidders to take part in the tender process.<sup>293</sup> EoI shall clearly specify the duration for which the PQ criteria is valid.<sup>294</sup> The norms adopted by the procuring entity shall be transparent, fair, maintain competition and avoid the risk of cartelisation.<sup>295</sup>

Clarification: During the review and appraisal of bids, the Owner/Procurement Entity may at its wisdom request clarification on the bid. The bidder will not

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<sup>287</sup> Manual for Procurement of Works 2019, cl.3.2.5(iv)

<sup>288</sup> Manual for Procurement of Works 2019, cl.4.1

<sup>289</sup> Manual for Procurement of Works 2019, cl.3.2.5(iii)

<sup>290</sup> Manual for Procurement of Works 2019, cl.3.2.5(vi)

<sup>291</sup> Manual for Procurement of Works 2019, cl.3.2.5(iv)

<sup>292</sup> Manual for Procurement of Works 2019, cl.3.3.5(iv)

<sup>293</sup> Manual for Procurement of Works 2019, cl.3.3.5(ii)

<sup>294</sup> Manual for Procurement of Works 2019, cl.3.3.6(vi)

<sup>295</sup> Manual for Procurement of Works 2019, cl.3.3.6(ii)

be able to obtain a post-bid explanation.<sup>296</sup> Bidders that meet the minimal requirements for eligibility will be given priority in the selection process.

It is permitted for the tenderer to make a representation if he believes the tender process has been skewed or that his techno commercial bid has been incorrectly rejected.<sup>297</sup>

Unexpected events may cause delays or interruptions in contract performance and assigning blame can be difficult at times. If the contract's responsibilities aren't met, the parties can choose from a variety of consequences, including financial penalties, extensions of time, or even termination for default. The procuring entity must assess all incidents and categorise of the delays as follows when assessing the contractor's application for extension of time:

- (a) Excusable Delays: Force Majeure, i.e., act of God, flood, abnormal weather, etc
- (b) Compensable Delays: General Conditions of Contract (GCC) to cover the events for which the procuring entity is responsible to make compensation.
- (c) Inexcusable Delays: Contractor to bear full burden for its own faults.
- (d) Concurrent Delays: When the delays caused by the contractor and the procuring entity overlap, an extension of time can be determined by charting each concurrent delay on the crucial path that contributes to the overall delay.<sup>298</sup>

After categorization of delay occurrences, the contractor's eligibility for an extension of time or monetary relief will be decided.<sup>299</sup>

Liquidated Damages and Incentives: Sparingly reward will be made for completing the work ahead of time, and those rewards will be fully specified in the tender documents. If the contractor misses a deadline, they would be accountable for liquidated damages up to the maximum amount stipulated in the

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<sup>296</sup> Manual for Procurement of Works 2019, cl.5.4.5

<sup>297</sup> Manual for Procurement of Works 2019, cl.5.5.2

<sup>298</sup> Manual for Procurement of Works 2019, cl.6.4.3(i)

<sup>299</sup> Manual for Procurement of Works 2019, cl.6.4.3(ii)

contract. In the tender documents, any omissions or commissions that could lead to fines should be clearly stated.<sup>300</sup>

Variation or Change Order: Variation order or Change order means (i) increase or reduction in quantum of work (ii) omission of work (iii) additional work (iv) alteration in the pattern or schedule of construction of any portion of the work (v) alteration in the quality or nature of the work (vi) change in levels, dimension, lines, and position of any part of the work. Procedure for variation instruction should be a part of the contract and EIC shall obtain prior approval of the Owner prior to the issuance of variation instruction except as otherwise provided in the special conditions of contract.<sup>301</sup> Contractor shall be given an opportunity to state his claim before EIC makes its recommendations to be given to the Owner.<sup>302</sup>

Time at Large: The Owner/Procuring Entity must extend the contract's completion period before the contract's expiration date. Unless otherwise stated in the contract, the Owner's right to levy liquidated damages or other remedies under the contract will not be affected by the extension of time. If the Owner does not clearly reserve its right under the contract wherever delay in the fulfilment of contractual obligations, it forfeits its right to remedies. When this occurs, the term "time at large" is used to describe the situation, and the contractor is granted ample time to complete its tasks.<sup>303</sup>

Extension of Time: There should be no delay in deciding on an Extension of Time (EOT) when fulfilling a contractual commitment; it should not be delayed until the end of a project. The EIC and the Owner shall work together to determine an interim EOT, which shall be conveyed to the contractor. This can be done at the conclusion of the project, if necessary.<sup>304</sup>

Price Variation: The benefit of rise and fall of material or labour cost, or other key input prices shall not be given to the contractor, where the period for

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<sup>300</sup> Manual for Procurement of Works 2019, cl.6.4.4

<sup>301</sup> Manual for Procurement of Works 2019, cl.6.5.1(i)

<sup>302</sup> Manual for Procurement of Works 2019, cl.6.5.1(iii)

<sup>303</sup> Manual for Procurement of Works 2019, cl.6.4.1

<sup>304</sup> Manual for Procurement of Works 2019, cl.6.4.5

completion of project work is eighteen months or less. The reduction in risk factor enables the contractor to submit a competitive price. Appropriate formulae shall be prescribed in the tender documents to adjust the rise or fall in price in respect of labour, oil, and other materials. In case of changes in law, regulation, or bylaws, after submission of the proposal, results in increase or decrease in the cost to the contractor then revision in pricing should reflect such change and the same shall be provided under the contract.<sup>305</sup>

Structuring of Contracts: The parties' ideal risk sharing ensures timely completion of the project without cost escalation. *“Responsibility for each risk shall be with the party best suited to handle it”* shall guide the construction of the contract. Reduction in the contractor's risk perception would lead to a more competitive price for the project.<sup>306</sup> Fair price variation clauses would reduce risk for both the contractor and the public sector organisation by mimicking market forces of price escalation and price decrease.<sup>307</sup>

#### **4.1.3 Accountability**

Sub-contracting: The contractor is responsible for all work done by subcontractors, even if the contract specifies that some work would be outsourced. Subcontracting without the approval of the owner/procuring entity would violate the provision of the contract. The subcontract price cannot be more than 10% of the entire value of the work. Subcontracting does not include employing workers, renting equipment, or purchasing supplies.<sup>308</sup>

Progress of the work shall be monitored per month to avoid time-over-run and to ensure the progress is in line with the planned and estimated timeline.<sup>309</sup> In order to guard the risk of front-loading, the billing schedule and payment shall be commensurate with the actual work done.<sup>310</sup>

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<sup>305</sup> Manual for Procurement of Works 2019, cl.6.5.6

<sup>306</sup> Manual for Procurement of Works 2019, cl.7.6.6(i)

<sup>307</sup> Manual for Procurement of Works 2019, cl.7.6.6(iv)

<sup>308</sup> Manual for Procurement of Works 2019, cl.6.1.6

<sup>309</sup> Manual for Procurement of Works 2019, cl.3.2.1(iii)

<sup>310</sup> Manual for Procurement of Works 2019, cl.3.2.1(vi)



#### **4.1.4 Conflict of Interest**

There shall be no conflict of interest between the participants of the bid evaluation committee and any of the bidders involved in the procurement process.<sup>311</sup>

#### **4.1.5 Checks and Balances**

To monitor and supervise the work and to coordinate with the contractor, a qualified firm must be selected through a transparent process.<sup>312</sup> The diligence process adopted by the procuring entity's engineer should be cross checked<sup>313</sup> and periodic audit shall be carried out to assess the tasks professionally.<sup>314</sup>

#### **4.1.6 Ethics and Value**

The information processed during the evaluation process should be kept private and should not be permitted to reach any unauthorised person.<sup>315</sup>

Procurement is prone to corruption and ethical risks and all bidders/contractors shall sign the integrity pact to ensure compliance with the code of integrity.<sup>316</sup>

The Integrity Pact, which is obligatory on both the procurement organisation and the sellers, ensures openness and ethical behaviour in all contract-related actions, from the pre-bid stage onward. Bidders are assured about their competition as none resorts to bribery in order to win the contract. Participants in the bidding procedure are required to have executed the Integrity Pact as a pre-requisite.<sup>317</sup>

Transgression of the integrity pact leads to the removal of the bidder from the participation list and would also be amenable for penal sanctions such as annulment of the contract and blacklisting.<sup>318</sup>

Ethical practise should be adhered to by the procuring authorities, consultants, bidders, and contractors involved in the bidding process.<sup>319</sup> They

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<sup>311</sup> Manual for Procurement of Works 2019, cl.5.6.10

<sup>312</sup> Manual for Procurement of Works 2019, cl.3.2.5(vii)

<sup>313</sup> Manual for Procurement of Works 2019, cl.3.2.5(xi)

<sup>314</sup> Manual for Procurement of Works 2019, cl.3.2.5(x)

<sup>315</sup> Manual for Procurement of Works 2019, cl.5.6.10

<sup>316</sup> Manual for Procurement of Works 2019, cl.7.2.1

<sup>317</sup> Manual for Procurement of Works 2019, cl.7.3

<sup>318</sup> Manual for Procurement of Works 2019, cl.7.2.1

<sup>319</sup> Manual for Procurement of Works 2019, cl.7.2.2

shall not indulge, either directly or indirectly, in any of the prohibited actions throughout the bidding process or execution stage:

- (i) Bribery: offering, soliciting, or accepting a bribe, gift, or incentive in exchange for an undue benefit or to persuade the bidding process or the performance of the contract.<sup>320</sup>
- (ii) Fraud: intentionally defraud the purchasing authority by making misleading representations or omitting important information.<sup>321</sup>
- (iii) Anti-competitive practice: Make the bid non-competitive and weaken the transparency and impartiality of the bidding process by indulging in collusion or bid-rigging or other anti-competitive practices.<sup>322</sup>
- (iv) Coercive practice: Influence the participation in the bidding process or contract execution by threatening or harming individuals or their property.<sup>323</sup>
- (v) Conflict: submitting more than one bid or participating in the consultant contract related to procurement with a bidder or any of its affiliates, or having personal, financial, or business ties to the purchasing authority.<sup>324</sup>
- (vi) Obstructive practice: Investigation into the allegation of corrupt practices is obstructed by destroying, altering or falsifying the evidences, or giving false statements, or intimidating, threatening or harassing any witness from disclosing the material evidences, or preventing the audit conducted by the procuring authority.<sup>325</sup>

At no point in the contracting process shall any party engage in unethical or corrupt behaviour. Among the Integrity Pact's most important components are:

- (a) No illicit gratification should be accepted by the procuring organisation, and all bids should be treated with fairness.<sup>326</sup>

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<sup>320</sup> Manual for Procurement of Works 2019, cl.7.2.2(i)

<sup>321</sup> Manual for Procurement of Works 2019, cl.7.2.2(ii)

<sup>322</sup> Manual for Procurement of Works 2019, cl.7.2.2(iii)

<sup>323</sup> Manual for Procurement of Works 2019, cl.7.2.2(iv)

<sup>324</sup> Manual for Procurement of Works 2019, cl.7.2.2(v)

<sup>325</sup> Manual for Procurement of Works 2019, cl.7.2.2(vi)

<sup>326</sup> Manual for Procurement of Works 2019, cl.7.3(i)

- (ii) In order to avoid any violation of the Indian Penal Code, 1860 or the Prevention of Corruption Act, 1988, offer no reward to procuring entity personnel.<sup>327</sup>
- (iii) There shall be no agreement or understanding between bidders to impair the competitiveness of the bidding process.<sup>328</sup>
- (iv) Foreign bidders must reveal information about their Indian agent, and the Indian bidder must reveal information about its foreign principals or partners.<sup>329</sup>
- (v) Disclose the payments, if any, made to the agents and intermediaries.<sup>330</sup>
- (vi) Disclose the past transgressions that may impinge anti-corruption principle.<sup>331</sup>
- (vii) Punitive sanction for any violation laid down in the agreement.<sup>332</sup>
- (viii) In consultation with CVC, the Independent External Monitors (IEMs) are appointed by the procuring entity. Compliance of the obligation under the Integrity Pact would be reviewed independently and objectively by IEM. Names and other details of the IEMs would be mentioned in the tender documents.<sup>333</sup>
- (ix) Integrity Pact format is part of the bid documents. Bid to be accompanied by duly signed integrity pact, otherwise it would be deemed as non-responsive bid and shall be disallowed forthwith.<sup>334</sup>

Failure of the procuring authority, consultants, bidders, and contractors to proactively reveal the conflict of interest or previous transgression of the code of integrity would amount to violation of the integrity pact.<sup>335</sup>

The procuring entity shall, in case of contravention of integrity pact, take the following actions:

- (i) forfeit the bid security or any other bond

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<sup>327</sup> Manual for Procurement of Works 2019, cl.7.3(ii)

<sup>328</sup> Manual for Procurement of Works 2019, cl.7.3(iii)

<sup>329</sup> Manual for Procurement of Works 2019, cl.7.3(v)

<sup>330</sup> Manual for Procurement of Works 2019, cl.7.3(vi)

<sup>331</sup> Manual for Procurement of Works 2019, cl.7.3(vii)

<sup>332</sup> Manual for Procurement of Works 2019, cl.7.3(viii)

<sup>333</sup> Manual for Procurement of Works 2019, cl.7.3(ix)

<sup>334</sup> Manual for Procurement of Works 2019, cl.7.3(x)

<sup>335</sup> Manual for Procurement of Works 2019, cl.7.2.3

- (ii) exclude the bidder from procurement process
- (iii) cancel the contract, and recover compensation and payments made, if any.
- (iv) debar or blacklist the contractor
- (v) initiate suitable civil or criminal proceedings against the responsible individuals

The actions will be without prejudice to any other remedy as per the bid documents or contract.<sup>336</sup>

#### **4.1.7 Risk Assessment**

The risk assessment during the pre-bid stage is as follows:

- Owner/Procuring Entity makes a prospective plan for undertaking the work.<sup>337</sup>
- The Preliminary Project Report (PPR) or Rough Cost Estimate is generated based on the land, site specifications, layout plan, and functional and space requirements. The PPR contains information about the project's history, scope, land availability, preliminary designs, cost-benefit analysis, cash flow, and funding sources and sources of funding, among other things.<sup>338</sup>
- In order to compile the Detailed Project Report (DPR) or Preliminary Estimate (PPR), a competent financial authority must approve the PPR or Rough Cost Estimate.<sup>339</sup>
- DPR ensures that all bidders have an equal opportunity to compete on an even playing field. It makes it quite clear what Engineering Services and Operations and Maintenance are responsible for. Cost estimates include not only the current estimated costs, but also the projected escalation costs, cash flow forecast, life cycle costs, and estimated completion dates for the project, as well as preliminary estimates for environmental impact assessments (EIAs), social impact assessments, and rehabilitation and resettlement.<sup>340</sup>

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<sup>336</sup> Manual for Procurement of Works 2019, cl.7.2.4

<sup>337</sup> Manual for Procurement of Works 2019, cl.2.1

<sup>338</sup> Manual for Procurement of Works 2019, cl.2.2

<sup>339</sup> Manual for Procurement of Works 2019, cl.2.3

<sup>340</sup> Manual for Procurement of Works 2019, cl.2.4

- After due examination of the DPR and preliminary estimate, the competent financial authority accords sanction.<sup>341</sup>
- Owner/Procurement Entity prepare a detailed cost estimate containing basis of the schedule of rates and accord technical sanction.<sup>342</sup>
- Ensures that proper funds are available to meet out the expenditure on the work.<sup>343</sup>

Disqualification: False or misleading representations, poor performance over the last five years, abandonment of work, contract recessions due to non-performance of the contractor, consistent litigation/arbitration awards against the contractor, financial failure due to bankruptcy and so on may disqualify a bidder despite they satisfy the eligibility conditions.<sup>344</sup>

The acquisition of land and the gaining of necessary legislative clearances are prerequisites to every project. To secure a contract, at least 90 percent of the land must be possessed, a No Objection Certificate (NOC) issued, and the necessary permits obtained.<sup>345</sup>

#### **4.2 Manual for Procurement of Goods 2017**

Public Sector Enterprises (PSE) and other self-governing bodies mostly owned or managed by or obtaining considerable financial support from the Central Government can use the Manual for Procurement of Goods in the same way as the Manual for Works does. Procurement activities can be handled by any support agency or outsourced or combined with another contract under the guidance of these rules. Purchases made from subsidiaries or joint ventures in which the purchasing entity holds a controlling position would not be subject to these standards.<sup>346</sup>

Total Cost of Ownership is a term used by the procurement entity to encompass the original acquisition cost of the item, in addition to the ongoing

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<sup>341</sup> Manual for Procurement of Works 2019, cl.2.5

<sup>342</sup> Manual for Procurement of Works 2019, cl.2.6

<sup>343</sup> Manual for Procurement of Works 2019, cl.2.7

<sup>344</sup> Manual for Procurement of Works 2019, cl.3.3.6 (iii)(h)

<sup>345</sup> Manual for Procurement of Works 2019, cl.7.6.5(iv)

<sup>346</sup> Manual for Procurement of Goods 2017, cl.1.3

costs of operation, maintenance, and disposal. Best value for money is possible through wide competition.<sup>347</sup>

For the purpose of promoting openness and accountability in public procurement, the Ministry of Electronics and Information Technology (MEIT) collaborated with the Department of Expenditure to create the Central Public Procurement Portal (CPPP). CPPP provides a single point of access to information on commodities purchased across different ministries, departments and CPSEs (Central Public Sector Enterprises). Procuring enterprises publish all tender inquiries and information, as well as open access to information on prequalification, bid materials, bidder registration, debarments, prequalification decisions, and contract awards.<sup>348</sup>

The RTI Act<sup>349</sup> mandates access to information and that all public authority must announce it. Prompt or proactive disclosure of information by public officials is necessary to ensure transparency and reduce the need for RTI applications<sup>350</sup> and every information shall be disseminated widely for the easy access of information by the public.<sup>351</sup> Guidelines for the *suo moto* disclosure<sup>352</sup> released by the central government mandates the disclosure of information relating to the publication of tender notices, inquiries, corrigendums, award of the contract, name of the supplier/contractor and the total amount for which procurement or works contracts are done. In order to publish information digitally, the data shall be accessible, and the website shall be devised accordingly. Information is to be presented in an effective and user-friendly manner on the website, with disclosures that are comprehensive, easily available, and independent of platform or technology.

As part of the procurement process, detailed specification to be built by the procuring entity to ensure level playing fields, best value, and open competition. A well-defined technical specification assures the quality of the

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<sup>347</sup> Manual for Procurement of Goods 2017, cl.1.6

<sup>348</sup> Manual for Procurement of Goods 2017, cl.1.9(ii)

<sup>349</sup> The Right to Information Act, 2005 s.4(1)(b)

<sup>350</sup> The Right to Information Act, 2005 s.4(2)

<sup>351</sup> *The Right to Information Act 2005*, s.4(3) (In.).

<sup>352</sup> Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training. (2013, April 15). OM No.1/6/2011-IR.

goods that are given. The specification provided by the procuring organisation should be clear, exact, and measurable in terms of technical, qualitative, and performance criteria.<sup>353</sup>

#### **4.2.1 Debarment of Suppliers**

Good contract performance and conformity with the procurement code of integrity are prerequisites for supplier registration. Bidders and suppliers that fail to meet the requirements of the procurement process will be excluded from future registration and participation.

A supplier's temporary debarment or suspension for poor performance is known as a holiday listing. Suppliers could be placed on a "vacation list" for up to a year if they consistently fail to meet their contractual obligations or fail to respond to a request for a quotation or bidding. The supplier's name remains on the list of suppliers; however, the supplier is not given the opportunity to make a proposal to the project.<sup>354</sup>

Employment of a public official within two years of retirement, with whom the supplier had a business relationship in an official capacity before retirement, would attract removal of suppliers' names from their registered vendor list for a period of one to two years. Disregarding contract terms and conditions, insolvency or bankruptcy, withdrawal from the bidding process following the opening of financial bids, and recommendations received from CBI or CVC, or other investigating agencies are other performance-related issues that justify removal from the supplier list.<sup>355</sup>

In the event of serious transgression of the code of integrity for public procurement, conviction under the Prevention of Corruption Act, 1988, suspicion of involvement in activity that is prejudicial to national security or doubtful loyalty to the country and in the public interest, the supplier may be

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<sup>353</sup> Manual for Procurement of Goods 2017, cl.2.2

<sup>354</sup> Manual for Procurement of Goods 2017, cl.3.5.2

<sup>355</sup> Manual for Procurement of Goods 2017, cl.3.5.3

banned or debarred from the procurement process for a period not exceeding three years.<sup>356</sup>

#### **4.2.2 Conflict of Interest among Bidders/Agents**

It would be anti-competitive for a bidder to have a conflict of interest with the other bidders, which would be detrimental for the procurement organisation. When two or more bidders or agents are engaged in conflict of interest, the bidder will be disqualified. The bidding process considers an offeror to be in conflict of interest with competing bidders when:

- (i) they have common controlling partner(s)
- (ii) bidder receives or has received any subsidy or financial stake, either directly or indirectly, from any other participating bidders
- (iii) they have same the legal representative for the purpose of bid
- (iv) they have, direct or indirect, correlation with each other that enables them to persuade the bid of another bidder or have access to the information about bid
- (v) multiple bid submission by the bidder
- (vi) in the formulation of the layout and technical aspects of the contract/bid, the bidder or its associates engaged as consultant
- (vii) the bidders have a common holding company then only one unit should bid. Bidders shall proactively disclose about such sister companies.<sup>357</sup>

#### **4.2.3 Right to be Heard**

A bidder can seek clarification if he apprehends that proposal was rejected because of an error in the procurement process. In the event that a bidder files a written protest, the procuring authority shall either delay the opening of commercial bids or respond to the bidder as quickly as possible.<sup>358</sup> As per the manual for procurement of goods, a reasonable time shall be given

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<sup>356</sup> Manual for Procurement of Goods 2017, cl.3.5.4

<sup>357</sup> Manual for Procurement of Goods 2017, cl.5.1.4(ix)

<sup>358</sup> Manual for Procurement of Goods 2017, cl.7.4.2



to all the bidders to submit a representation highlighting the grievances and an opportunity of being heard is given to the bidders prior to the opening of the commercial bid.

#### **4.2.4 Extension of Delivery**

The Liquidated Damages (LD) proposed to be levied on the supplier must be specifically mentioned in the letter while granting extension of time. The usage of the words “*without prejudice to the rights of the purchaser under the terms and conditions of the contract*” in the extension of time letter would not hold good as this does not constitute exercise of the decision to levy LD. It only states that all the choices provided in the contract would be open to the purchaser on the extended date of supply.<sup>359</sup>

#### **4.3 General Financial Rules 2017**

Transparency in the government's financial system and operations is enhanced by requiring everyone who deals with public money adhere to the General Financial Rules (GFRs). Fiscal management framework under the GFR provide flexibility to handle wide range of situations while assuring on-time delivery of service.

There are no exceptions to GFR, as it applies to all departments of the federal government. Unless there is a compelling cause, any dues to the government shall not be left outstanding.<sup>360</sup> Inappropriate spending from the public treasury should be avoided at all costs. It is the responsibility of every officer to confirm that financial order and rigorous economy are maintained while disbursing the public funds and

- (i) exercise vigilance equivalent to man of ordinary prudence in connection with outflow from public funds.
- (ii) no expenditure should be greater than the circumstance demands.
- (iii) ensure that no personal benefits, either directly or indirectly, are made out while sanctioning of expenditure from public fund.
- (iv) a particular person or a section of persons shall not be favoured in the course of disbursement from the public money unless (a) expenditure is in fulfilment

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<sup>359</sup> Manual for Procurement of Goods 2017, cl.9.7.4

<sup>360</sup> General Financial Rules 2017, rule 12

of a recognised custom or policy, and (b) assertion for the expenses could be executed in a court of law.<sup>361</sup>

Sourcing items and services for public use is dealt with in GFR Chapter VI. All bidders must be treated equally in the public procurement process if competition is to be encouraged. Transparent exercise of power vested in the public authority is required to promote efficiency and economy when it comes to public procurement. Procurement by the government must adhere to a fair, open, and reasonable process, and it must specify the quality and quantity of the items to be purchased.<sup>362</sup>

Anyone who is found guilty of an offence under the Prevention of Corruption Act, 1988 or who is found responsible for harming or endangering human life during the course of performing a public procurement contract will be barred from bidding on any future public procurement contracts for a period of three years at the most. In case of breach of integrity pact, the bidder including its successor will be precluded from the public procurement process for a period not exceeding two years.<sup>363</sup>

Publication of the tenders and award of contract in the Central Public Procurement Portal (CPPP) is compulsory for the Central Government and its affiliated subordinate offices, including autonomous institutions.<sup>364</sup> In order to make the complete bidding data available to potential bidders, the procuring authorities should make them available for download on their website and through CPPP. The full website address must be included in the advertisement, and no fees are charged for downloading tender materials from the website.<sup>365</sup> All Ministries/Departments must also receive all public procurement bids via the e-procurement site.<sup>366</sup>

Transparency, competition, and fairness are required in all government procurement in order to ensure that taxpayer moneys are used wisely. The tender documents shall clearly indicate eligibility and qualifications criteria of bidders,

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<sup>361</sup> General Financial Rules 2017, rule 21

<sup>362</sup> General Financial Rules 2017, rule 144

<sup>363</sup> General Financial Rules 2017, rule 151

<sup>364</sup> General Financial Rules 2017, rule 159

<sup>365</sup> General Financial Rules 2017, rule 161

<sup>366</sup> General Financial Rules 2017, rule 160

detailed description of the items, delivery dates, locations, quantity, and the main terms of the procurement process.<sup>367</sup> Interested bidders should be able to raise objections to the bidding process, bid conditions, and the rejection of their bids through a clause in the bid documents. The procurement entity shall communicate the reasons for refusal to give tender documents as well as the rejection of bid.<sup>368</sup> Sufficient window shall be given to the bidders for the preparation and presentation of proposal.<sup>369</sup> To enable the bidders to make meaningful bids, the broad-based specification for the items must be given without ambiguity.<sup>370</sup> No modification or alteration of the bid is permissible after expiry of the bid submission date.<sup>371</sup> Evaluation of the bids shall be grounded on the tender conditions and no additional terms shall be imported by the procuring authority during the evaluation of the bids.<sup>372</sup> Procuring authority is justified in rejecting all the bids when there is no active competition, bids are not substantially responsive, prices are substantially higher and the proposal does not meet the qualifying technical criteria.<sup>373</sup> The sole bid shall be accepted only when there is no ambiguity in the qualification criteria and the bid price is as per industry standards and reasonable.<sup>374</sup>

Like the Manual for Procurement of Works and Manual for Procurement of Goods, Rule 175 of the General Financial Rules provides for the code of integrity to be observed by the procuring entity.

The tender terms must be clear, explicit, and free of ambiguity. Indefinite or ambiguous liability should not be included in the tender.<sup>375</sup> It is possible to include a price-variation provision in contracts if the delivery duration is longer than 18 months.<sup>376</sup>

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<sup>367</sup> General Financial Rules 2017, rule 173(i)

<sup>368</sup> General Financial Rules 2017, rule 173(iv)

<sup>369</sup> General Financial Rules 2017, rule 173(vii)

<sup>370</sup> General Financial Rules 2017, rule 173(ix)

<sup>371</sup> General Financial Rules 2017, rule 173(xiii)

<sup>372</sup> General Financial Rules 2017, rule 173(xii)

<sup>373</sup> General Financial Rules 2017, rule 173(xix)

<sup>374</sup> General Financial Rules 2017, rule 173(xx)

<sup>375</sup> General financial Rules 2017, rule 225(i)

<sup>376</sup> General financial Rules 2017, rule 225(viii)(a)

#### **4.4 Department of Public Sector Enterprises Guidelines**

The Ministry of Industries and Heavy Industries & Public Enterprises issued a model set of Conduct, Discipline and Appeal (CDA) Rules<sup>377</sup> for adoption by Central Public Sector Enterprises (CPSEs) while framing their CDA Rules. The said CDA Rules were amended multiple times and the consolidated Rules<sup>378</sup> were issued to all CPSEs for references and guidance on 11<sup>th</sup> December 2017.

##### **4.4.1 Model Conduct, Discipline and Appeal (CDA) Rules**

All employees, with the exception of those covered by the Industrial Disputes Act of 1947 or casual employees, are subject to the CDA Rules. Each and every employee of CPSE is expected to perform themselves in conformity with the highest standards of ethics and morality while doing their jobs. In order to protect the public interest, every employee shall declare private interest conflicting with employees' public duties. Employee shall not discriminate and shall act with fairness and impartiality.<sup>379</sup> Every employee shall ensure integrity and high devotion to duty while discharging his/her official responsibilities.<sup>380</sup>

The misconduct as per CDA Rules *interalia* include the acts of omission and commission of the following:

- (i) dishonesty or fraud with regard to the property or business of CPSE or property of any other person inside the site of CPSE
- (ii) receiving or offering bribes or any unlawful gratification
- (iii) acquiring sponsorship, advertisements, gifts, etc from contractors, suppliers or other person having business relationship or formal dealings
- (iv) act detrimental to the interest of the company.<sup>381</sup>

Employees may not use their official position to acquire employment for close family members in an enterprise or corporation with which they are involved in official business. No contract will be approved for a corporation or

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<sup>377</sup> BPE OM No.2(121)/73-BPE(GM-I), (1974, April 26).

<sup>378</sup> No.15(07)/99-DPE-GM-VOL-III-FTS-2344 (2017, December 11).

<sup>379</sup> Model Conduct, Discipline & Appeal Rules 2017, rule 4(1)

<sup>380</sup> Model Conduct, Discipline & Appeal Rules 2017, rule 4(2)

<sup>381</sup> Model Conduct, Discipline & Appeal Rules 2017, rule 5

firm in which an employee's family member is working or has a stake in the contract.<sup>382</sup>

No gift shall be accepted by the staff of the CPSE or authorize any kin or any other person to do the same on his behalf. The gift includes free transport, boarding, lodging or any other pecuniary advantage or service. Lavish or frequent hospitality shall be avoided by the employees of CPSE from any individual or firm with which employee is having official dealings.<sup>383</sup> No pecuniary benefit shall be accepted by an officer of CPSE, without obtaining sanction of the competent authority, for any work performed by him for any public organization or private person.<sup>384</sup>

#### **4.5 Vigilance Manual 2017**

Organizations employ vigilance administration to identify abnormalities, determine out why they occur, and develop a method to prevent them from happening again. The organization's Chief Vigilance Officer (CVO) serves as a bridge between CVC and the organisation. The CVO is responsible for discipline, conducting surveillance, detection and punishing vigilance.<sup>385</sup> Vigilance activities help to enhance the competency and efficacy of management in an organisation.<sup>386</sup> The CVO aids the PSE's CEO in carrying out his or her responsibilities for the organization's efficiency, honesty, and openness.

##### **4.5.1 Preventive Vigilance Functions of CVO**

The aim of preventive vigilance is to identify, tackle and address the fundamental cause of corruption inside the organisation. The role of the CVO is primarily preventive in nature and the deterrent measures taken by the CVO are important since it reduces the occurrences of vigilance cases.<sup>387</sup> The preventive vigilance measures taken by CVO includes:

- (i) ascertain the practices and procedures which provide opportunity for corruption.

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<sup>382</sup> Model Conduct, Discipline & Appeal Rules 2017, rule 6

<sup>383</sup> Model Conduct, Discipline & Appeal Rules 2017, rule 12(1)

<sup>384</sup> Model Conduct, Discipline & Appeal Rules 2017, rule 13(4)

<sup>385</sup> The Vigilance Manual 2017, cl.1.1.4

<sup>386</sup> The Vigilance Manual 2017, cl.1.4.4

<sup>387</sup> The Vigilance Manual 2017, cl.2.12.2

- (ii) laydown adequate processes to make sure that discretionary powers exercised by the public officials are not arbitrary but exercised in accordance with laid down guidelines and in a reasonable and transparent manner.
- (iii) find out the areas susceptible to corruption and make sure that officials with integrity are assigned to those areas.
- (iv) develop and execute active whistleblower mechanism.
- (v) ensure observance of code of conduct by employees in relation to integrity covering gift, employment of relatives in private firm or doing private business, statement of assets and acquisitions, keep an eye on benami transactions and scrutinise immovable property transactions.
- (vi) based on activities of public servants, maintain the list of doubtful integrity and agreed list of suspected officials.
- (vii) ensure that public official with doubtful integrity are not posted in sensitive positions.<sup>388</sup>

#### **4.5.1 Surveillance and Detection by CVO**

Surprise inspections are carried out by the CVO on a regular basis in sensitive areas in order to detect instances of corruption or inappropriate acts by public officials. In order to conduct the surprise inspection, there is no need for prior clearance from the organization's chief executive. A yearly property return audit is also performed by CVO, and information about official misconduct or malpractice that has occurred or is on the verge of occurring is gathered.<sup>389</sup>

#### **Conclusion**

Corporate Governance is vital for any organisation. An ineffective and deficient system of Corporate Governance can be a reason to cast doubt on a company's operations and its profitability. Different combinations of legal and regulatory mechanisms, and codes and principles are employed in India at the time of handling corporate governance related issues. Because there are no national codes or principles based on the "comply or explain" structure in place in India, the country's corporate governance is governed by laws, regulations, and listing requirements. Internal controls, independence of directors, the audit

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<sup>388</sup> The Vigilance Manual 2017, cl.2.13

<sup>389</sup> The Vigilance Manual 2017, cl.2.15

committee, and shareholder activism have all been included into Indian law. However, despite adopting a robust legal framework, corporate corruption cases are not uncommon. There is a need for effective implementation of the laws at all levels to ensure that the corruption can be prevented effectually.

Corporate governance is made more successful by the leadership's motivation and impulsion, which are provided by the leadership. As part of the company's governance policy, management is responsible for creating an ethical culture throughout the organisation.

Corporate corruption affects everyone and not a victimless offence. It devastates the livelihood of other stakeholders who dependent upon the successful operation of the company. Good corporate governance not only boosts efficiency and profitability but is also an effective anti-corruption tool. For a corporation to be successful, its values and rules of conduct must be clearly defined by its board. In addition to securing the appointment of directors and auditors, shareholders play an important role in corporate governance. Media debates, public votes and private meetings of the shareholders can be instrumental as change agents to drive better corporate governance practices.

The condition of protecting the whistleblowers is also not very promising despite the regulations in place. The major problem is corruption is deep rooted in almost every department and office whether private or government. To be a whistleblower one requires immense strength to fight the powerful corrupt.

The fight against corruption requires not only robust laws but also effective implementation of the same. The failure to implementation anti-corruption strategies acts as a catalyst of corruption. The evil of corruption is deep rooted in the system, and it can be uprooted only when the top leaders, the middle management, employees, and the enforcement authorities come together to fight it.

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## **CHAPTER IV**

### **IMPLEMENTATION OF CORPORATE GOVERNANCE**

*“Corruption cannot be eliminated or even significantly reduced unless preventive measures are planned and implemented in a sustained and effective manner. Preventive action must include administrative, legal, social, economic and educative measures.”*

*Santhanam Committee Report, 1964*

The current chapter discusses the effectiveness of corporate governance policies and their ability in preventing corruption within a corporate organisation. This Chapter has been divided into several parts. The introduction focuses on the importance of the code of conduct and its significance in reduction of corruption within organisations. One section of this chapter analyses business ethics and vigil mechanism of various oil and gas companies. The corporate governance policies of the companies doing business of execution of EPC contract in the Indian oil and gas companies have been analysed in this chapter and the data was collected by way of questionnaires. The Chapter aims at answering the following questions.

1. Whether the corporate governance policies in the oil and gas sector help in preventing or reducing the corruption and foster competition?
2. Whether the Public Sector Undertakings (PSUs) in India doing business in oil and gas sector implement preventive vigilance mechanism in its letter and spirit?



This chapter identifies clauses in EPC Contracts of three PSUs in the oil and gas segment and whether they incorporate essential principles of corporate governance in the tenders floated by them.

This Chapter proposes exploratory evidence which shows a deep understanding of the corporate governance policies and their effectiveness in fraud prevention taking into consideration crucial information relating to code of conduct, business ethics, whistleblower policy and corporate governance policies adopted by various companies.

## **1. Introduction**

Corporate governance systems have evolved over centuries, more often as a measure against corporate frauds. Corporate governance includes a combination of various laws, regulations, listing rules and various policies of the Company.

Corporate governance is an effective fraud prevention technique. An appropriate corporate governance policy is vital in prevention of fraud.

Lack of knowledge in the crucial stage of the development or lesser attention may cause an obstruction in the crime prevention programme.<sup>1</sup> The policy makers shall consider the signs of corruption, places of corruption, unethical acts, or actors, support of the associates, influence for corruption, systems that assist corruption, reaction of the institution and satisfaction of the organisation to achieve success in the prevention of corruption.<sup>2</sup>

The essential strategy for the prevention of corruption is the broadening of accountability. Fair competition will also have effect on prevention of corrupt activities.<sup>3</sup>

The companies are mandated to adopt corporate governance principles as per clause 49 of the listing agreement and various other provisions of *the Companies Act 2013*. Generally, companies incorporate applicable laws and

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<sup>1</sup> Findlay, M., & Stewart, A. (1991). Implementing Corruption Prevention Strategies through Codes of Conduct. *Current Issues in Criminal Justice*, 3, 250.

<sup>2</sup> Id. at 254

<sup>3</sup> Id. at 256

regulations through their code of conduct and policies, as part of their corruption prevention programme. A formal, written code of conduct translates ethical and moral behaviour to be more perceptible and real. It requires the employees to fulfil the ethical criteria, comply with applicable laws, internal policies, and keep in mind the honesty and integrity while carrying out the contractual obligations and other activities of the company. It requires proper handling of conflict of interests between personal and professional relationships amongst other requirements and prohibitions.

The researcher will discuss and analyse the business ethics and vigil mechanisms adopted by various companies in the section below. The researcher will analyse and try to find out whether the business ethics and vigil mechanisms adopted by the various oil and gas companies in India are comprehensive enough. The researcher will try to find out whether these policies adopted by the Indian oil and gas companies are effective in the prevention of corruption.

## **2. Code of Conduct**

A code of conduct is drafted and implemented by the companies to regulate the activities of their employees during their employment. Code of conduct informs the employees the way they need to behave and act ethically, while they are performing their duties.

Code of conduct and ethics act as a control mechanism to add value addition to all the stakeholders by ensuring optimum utilisation of human and financial resources.<sup>4</sup> Code of conduct shall *interalia* address the conflict of interest, honest behaviour and ethical conduct, maintenance of confidentiality, fair dealing, legal and regulatory compliance, etc.<sup>5</sup> Apart from compliance, the goodwill resulting from adoption and implementation of code of business ethics provide economic gains to the organisation in the long run.

The listed companies are obligated by clause 49 of the listing agreement to devise a code of conduct for their Board of Directors and the senior

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<sup>4</sup> Balakrishnan, R. (2010). Formulating Code of Conduct & Ethics. *International In-House Counsel Journal*, 3, 1.

<sup>5</sup> Id. at 4

management. The company shall announce their code of conduct in their website. The annual report of the company shall annex a compliance declaration endorsed by the CEO of the Company. The conformity to the code of conduct shall be affirmed each year by the board of directors and the senior management personnel.

Codes of conduct are a mechanism adopted by companies to prevent corruption within their organisation. A code of conduct propounds official morality.<sup>6</sup>

Code of business conduct of an organisation directs employees to abide by the law and request support from the specified authorities either when employees are uncertain of the law or when they became conscious of breaches of law by someone else.<sup>7</sup>

Compliance violations arise from employees, agents, officers and directors of the company and it can be discovered through internal and statutory auditing, or because of whistleblowing that required procedures are not being observed appropriately. Company shall make prompt investigation of violations, enforce code of conduct, and make sure that implementation is constant across the company.<sup>8</sup>

Corruption and bribery flourishes on secrecy and pretence and a code of conduct alone may not be adequate to prevent corruption. Corrupt practise may exist behind the veil of a code of conduct.<sup>9</sup> There is a possibility that corruption may be deeply rooted in attitudes of the organisation and working culture.<sup>10</sup>

Training and education of code of conduct requires to be strengthened since the signature of the employees stating that they read and understood the

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<sup>6</sup> Supra 1, at 256

<sup>7</sup> Baer, M.H., (2009). Governing Corporate Compliance. *Boston College Law Review*, 50, 949.

<sup>8</sup> Bird, R.C., & Park, S.K. (2016). The Domains of Corporate Counsel in an Era of Compliance. *American Business Law Journal*, 53, 203.

<sup>9</sup> Supra 1, at 257

<sup>10</sup> Id. at 258

code is merely an administrative convenience masquerading as communication.<sup>11</sup>

In order to motivate the employees, the code of conduct shall place emphasis on workplace priorities, utility of the code, training and awareness programs. Implementation of the code of conduct shall not create an impression that it is another disciplinary tool to alter the conditions of employment unilaterally. Internal reporting procedures helps the organisation to gather the information and to monitor the progress of corruption prevention activities.<sup>12</sup>

### **3. Vigil Mechanism**

*The Companies Act 2013* mandates the establishment of vigil mechanism by the listed companies to report genuine concern of the employees.<sup>13</sup> The vigil mechanism established by the business shall be disclosed on its internet site and in the report of the Board. Adequate safeguards against victimisation shall be provided to the whistleblowers and direct contact to the Audit Committee shall be provided in extraordinary cases.<sup>14</sup>

Vigil mechanism is a means provided to the stakeholders to report corrupt behaviour, or suspected or genuine fraud, or contravention of code of conduct or any policy of the company.

### **Analysis of Business Ethics and Vigil Mechanism of Oil and Gas Companies**

In this part the business ethics adopted by multiple companies doing business in the oil and gas sector is analysed. The code of conduct, business ethics and vigil mechanism of Public Sector Undertakings in India, Project Management Consultant (PMC) company, private sector companies undertaking EPC Project works, multinational corporations doing EPC Contract business, supplier of goods to oil and gas industry, and oil and gas corporations in the Gulf Cooperation Council (GCC) countries are analysed to understand the corporate governance principles and vigil mechanisms adopted by them to

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<sup>11</sup> Id. at 261

<sup>12</sup> Id. at 261

<sup>13</sup> *The Companies Act 2013*, s.177(9) (In.).

<sup>14</sup> *The Companies Act 2013*, s.177(10) (In.).

prevent corruption in the award and execution of EPC Contract in the oil and gas sector. The list of companies taken for analysis is given in table 4.1 below:

**Table 4.1**  
**List of companies doing business in oil and gas sector**

Sr.No.	Company Name	Type of Company	Country of Origin	Nature of Business/Sector
1	IOCL	PSU	India	Oil & Gas Sector
2	ONGC	PSU	India	Oil & Gas Sector
3	EIL	PSU	India	PMC and EPC contractor in Oil & Gas Sector
4	PDO	State Owned	Oman	Oil & Gas Sector
5	Saudi Aramco	State Owned	KSA	Oil & Gas Sector
6	Tata Projects Ltd.	Private Ltd.	India	EPC Contractor in Oil & Gas Sector
7	Petrofac	Public Ltd.	England	EPC Contractor in Oil & Gas Sector
8	Siemens AG	Public Ltd.	Germany	Supplier of Equipment's in Energy Sector
9	McDermott	Public Ltd.	USA	EPC Contractor in Oil & Gas Sector

#### **4. Anti-bribery and Corruption Policy of Indian Oil Corporation Ltd.**

##### **(IOCL)**

IOCL is a Maharatna PSU doing business in the discipline of oil and gas, petrochemical, and unconventional energy sources. IOCL owns seventy one percent of downstream oil sector pipelines and more than thirty two percent of refining capacity in India, which accounts for half of the market share of petroleum products in India. It has subsidiary companies in UAE, Sri Lanka, Singapore, Netherlands Mauritius, Sweden, and USA.<sup>15</sup>

The following documents were perused to understand IOCL's commitment to deter and detect corruption:

(i) Code of Conduct for the Board Members and Senior Management Personnel<sup>16</sup>

(ii) Whistleblower Policy<sup>17</sup>

<sup>15</sup> <https://iocl.com/aboutus/profile.aspx>

<sup>16</sup> [https://iocl.com/download/Code\\_of\\_Conduct\\_for\\_Board\\_Members\\_&\\_SMP.pdf](https://iocl.com/download/Code_of_Conduct_for_Board_Members_&_SMP.pdf)

<sup>17</sup> [https://iocl.com/InvestorCenter/Whistle\\_Blower\\_policy.pdf](https://iocl.com/InvestorCenter/Whistle_Blower_policy.pdf)

#### **4.1. Anti-bribery Commitments**

a. Bribery and Corruption: - As per the whistleblower policy, ‘Improper Activity’ means any activity undertaken by an employee at the time of discharge of his authorised responsibilities, regardless of such act is within the sphere of employment, which is in contravention of any statute or code of conduct.<sup>18</sup> Improper Activity includes bribery, fraud or wilful omission to perform duty, theft of cash/goods/service, improper use of authority, authorising or receiving compensation for materials not collected or services not accomplished, taking benefit in violation of IOCL interest, etc.<sup>19</sup> The ethical conduct to be adhered by the members of the Board and senior management is provided in the code of conduct. The best interest of the corporation shall be maintained by every officer, and they shall act with high moral and ethical standards as well as honesty, integrity, and good faith.<sup>20</sup> Transparency and fairness in action in every decision-making process must be followed and conflict of interest should be avoided.<sup>21</sup>

b. Proscribed Activities: - Impartiality and competitiveness in business transaction shall not be compromised and officers shall not tie-up with anyone who has business relationship with company.<sup>22</sup> The officers of the company shall not do business with a relative, or with a firm where the officer or his family member is key managerial personnel or with a company where officer holds more than two per cent shares. In case of relative is a partner in a firm, prior approval of the Board shall be obtained to commence business relationship.<sup>23</sup> Any financial or personal interest shall be avoided in any business transaction pertaining to the company.<sup>24</sup> Officers are prohibited from holding any positions or job or business activities that would prejudicially affect the interest of the organisation.<sup>25</sup> Nobody shall misuse the assets of the company for personal gain or otherwise.<sup>26</sup>

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<sup>18</sup> The Whistleblower Policy, cl. 2(h)

<sup>19</sup> The Whistleblower Policy, cl. 3.5

<sup>20</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4 (i)

<sup>21</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4 (iii)

<sup>22</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4(vii)

<sup>23</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4(iv)

<sup>24</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4(v)

<sup>25</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4(viii)

<sup>26</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 12

- c. Relationship Building: - The code of conduct does not provide any guidance to the employees that needs to be followed for the building their relationship in the course of their employment.
- d. Extortion or Facilitation Payment: The code of conduct does not specifically address the facilitation payment since in India facilitation payment is considered as a criminal offence.
- e. Gift and Entertainment: - No officer shall seek, accept, offer, or make any gifts, illegal payments, donations, benefits, or remuneration, either directly or indirectly, which are calculated to get job or uncompetitive preferences in the pursuit of business.<sup>27</sup>

#### **4.2 Implementation**

- a. Training: - Code of conduct does not provide for the frequent training of the employees to educate awareness among the employees. It merely seeks an acknowledgement from the officers and a compliance reporting of code of conduct. It looks like a mere formality and there are no obligations to undergo regular training by the employees. Proactive measures need to be taken by the CVO and/or the HR Department for the frequent training of the employees on the importance of the corporate governance.
- b. Signature by Employee: - Acknowledgement of the receipt of the code as well as any amendments shall be done by all senior management personnel and Board Members.<sup>28</sup>
- c. Record Keeping: - The code of conduct does not give any guidance on any record keeping of the transactions. Standard operating procedures created by the company should mandatorily obligate the employee to keep the records of all activities, failing which appropriate disciplinary proceedings shall be taken against such employees.
- d. Compliance Committee: - Every officer of the company shall fulfil all applicable laws, regulations and guidelines.<sup>29</sup> Compliance of the code of conduct to be affirmed by all the members of the board and senior management personnel and the annual compliance report to send to the

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<sup>27</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 4(x)

<sup>28</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 13

<sup>29</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 10

- company secretary.<sup>30</sup> The code of conduct does not provide for the constitution of the compliance committee to review the status of compliance, non-compliance, if any, and take appropriate measures for imparting training to the employees to prevent future non-compliance.
- e. Internal & External Auditing: - The code of conduct fails to prescribe any measures for either internal or external auditing of the compliance of the organisation and its employees to the code of conduct.
- f. Monitoring & Due Diligence:- A duty is cast upon the independent director to report unethical practise, violation of code of conduct of company and suspected or actual fraud.<sup>31</sup> The Independent director has to ascertain and ensure functioning of adequate vigil mechanism and make sure that no detriment is caused to the individuals on account of the usage of the whistleblowing mechanisms.<sup>32</sup> On receipt of report from the competent authority, the Audit Committee shall have the authority to evaluate the decision or measures taken by the competent authority on the complaint of the whistleblower and the verdict of the Audit Committee shall be binding on corporation and employees.<sup>33</sup>
- g. Disciplinary Action: - Adequate and full disclosure of the conflict interest of the officers shall be disclosed to the company. Then disclosure shall include the interest of the immediate family members in the entity which has business dealing with IOCL.<sup>34</sup> The failure to make disclosure would attract disciplinary action against the officer.<sup>35</sup> Actions shall be initiated as per the CDA Rules for the violation of the code of conduct by board members or senior management.<sup>36</sup> Improper Activity shall be transferred to state agency for initiating suitable action in accordance with law, in case it is punishable under law. Disciplinary measures will be taken against the employee if the investigation reveals the existence of Improper Activity. In case of false or

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<sup>30</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 14

<sup>31</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 5.11

<sup>32</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 5.10

<sup>33</sup> The Whistleblower Policy, cl.8

<sup>34</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 6.1

<sup>35</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 6.4

<sup>36</sup> Code of Conduct for Board Members and Senior Management Personnel, rule 18.2



- vexatious disclosure then appropriate disciplinary action will be taken against whistleblower.<sup>37</sup>
- h. Communication: - Suspected employee has the right to be notified about the result of the investigation.<sup>38</sup> However, the policy does not contain a provision for intimating the whistleblower about the outcome of the complaint.
- i. Whistleblowing Facility: - A Functional Director of IOCL is the Competent Authority under the whistleblower policy.<sup>39</sup> Whistleblower policy provides procedures for its employees to inform their genuine apprehension about unethical behaviour.<sup>40</sup> A written complaint signed by the whistleblower can be given to the Competent Authority or it can be forwarded to the Chairman. Anonymous or pseudonymous complaints are not entertained as per the whistleblower policy. The complaint should disclose sufficient information about the Improper Activity and whistleblower should have knowledge of facts. Whistleblower is not expected to make any independent investigation prior to making of complaint. Any matter which is subject to enquiry under the Public Servants Inquiries Act, 1850 or the Commission of Inquiry Act, 1952 shall not be entertained by the corporation.<sup>41</sup>
- j. Victimization: - Competent Authority shall keep the name of the whistleblower confidential and shall not disclose unless necessary for the proper investigation. Whistleblower is entitled for protection against victimisation.<sup>42</sup> Identity of the suspected employee under investigation shall also be kept confidential.<sup>43</sup>
- k. Investigation: - If *prima facie* satisfied, the Competent Authority may direct appropriate investigating machinery to conduct investigation about the alleged Improper Activity.<sup>44</sup> Investigation officer shall have no conflict of interest and investigation shall be conducted in an objective and fair manner.<sup>45</sup> Suspected employee is not entitled for legal representation during

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<sup>37</sup> The Whistleblower Policy, cl.7

<sup>38</sup> The Whistleblower Policy, cl.4.9

<sup>39</sup> The Whistleblower Policy, cl.2(e)

<sup>40</sup> The Whistleblower Policy, cl.1.4

<sup>41</sup> The Whistleblower Policy, cl.3

<sup>42</sup> The Whistleblower Policy, cl.5.1

<sup>43</sup> The Whistleblower Policy, cl.5.2

<sup>44</sup> The Whistleblower Policy, cl.4.2

<sup>45</sup> The Whistleblower Policy, cl.4.3

the investigation.<sup>46</sup> Investigation report is to be submitted to the Competent Authority.

1. Grievances: - Whistleblower or suspected employee can approach Chairman of IOCL for redressing the grievances, if any, against Competent Authority and can approach the Audit Committee for grievances against actions taken by the Chairman. The findings of the Audit Committee shall be absolute and binding upon the whistleblower and on the suspected employee.<sup>47</sup>

#### **4.3 Lacunae**

Only employees are permitted to submit whistleblower complaints. Third party vendor or customers are not eligible to blow the whistle in case of demand of bribery. Only Code of Conduct for the Board Members and Senior Management Personnel is provided on the website. There is no separate vendor code of conduct framed and published on the website. The prohibition of anonymous complaint by the policy is not a good sign in the prevention of corruption. The Competent Authority under the whistleblower policy is functional director of IOCL. In all probabilities, such Competent Authority will not be independent and impartial.

#### **5. Anti-bribery and Corruption Policy of Oil and Natural Gas Corporation Ltd.**

The administrative control of Maharatna Oil and Natural Gas Corporation Ltd. (ONGC) vests with the Ministry of Petroleum and Natural Gas. ONGC supplies crude oil raw materials to IOCL, BPCL and HPCL to produce cooking gas, petrol, diesel, kerosene, etc. Hindustan Petroleum Corporation Limited (HPCL), Mangalore Refinery and Petrochemicals Limited (MRPL) and ONGC Videsh Ltd. are the subsidiaries of ONGC. It contributes around 75% of domestic production of crude oil and natural gas and owns and operates over 11,000 kms of pipelines in the country.<sup>48</sup>

A Study of the following documents was undertaken to understand the corporate governance commitments taken by ONGC:

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<sup>46</sup> The Whistleblower Policy, cl.4.6

<sup>47</sup> The Whistleblower Policy, cl.6

<sup>48</sup> <https://www.ongcindia.com/wps/wcm/connect/en/about-ongc/ongc-at-a-glance/corporate-profile/>

1. Code of Conduct for the Board Members and Senior Management Personnel<sup>49</sup>
2. ONGC Whistleblower Policy/Vigil Mechanism 2018<sup>50</sup>
3. Fraud Prevention Policy<sup>51</sup>
4. ONGC Conduct, Discipline and Appeal Rules, 1994<sup>52</sup>

### 5.1 Anti-bribery Commitments

a. Bribery and Corruption: The Directors and Senior Management shall act fairly, ethically, honestly and with integrity. They shall act in good faith and conduct themselves in a professional manner.<sup>53</sup> ONGC Fraud Prevention Policy refers fraud as a deliberate act concerning practice of deception to gain an unfair or illegitimate advantage.<sup>54</sup> Actions constituting fraud *inter alia* includes bribery, kickbacks and accepting or seeking anything of value from contractors and vendors.<sup>55</sup>

b. Proscribed Activities: - The Directors and Senior Management shall avoid situations which give rise to conflict of interest, avoid dealings with supplier or contractor with whom ONGC has business dealings, disclose any existing or potential conflict of interest situations, and shall not exploit ONGC property, information or position for personal benefit.<sup>56</sup> No employee shall influence his status, either directly or indirectly, to secure career for kith and kin and shall not

<sup>49</sup> [https://www.ongcindia.com/wps/wcm/connect/e9f997fc-f96b-4ca3-a626-45388c55ba1c/Amcobm.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-e9f997fc-f96b-4ca3-a626-45388c55ba1c-IznleUL#:~:text=Our%20corporate%20objective%20is%20to,148th%20meeting%20held%20on%202005.12](https://www.ongcindia.com/wps/wcm/connect/e9f997fc-f96b-4ca3-a626-45388c55ba1c/Amcobm.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-e9f997fc-f96b-4ca3-a626-45388c55ba1c-IznleUL#:~:text=Our%20corporate%20objective%20is%20to,148th%20meeting%20held%20on%202005.12)

<sup>50</sup> [https://www.ongcindia.com/wps/wcm/connect/5703d0df-3bc0-49f1-a459-a32cd48c307d/wb30052019.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-5703d0df-3bc0-49f1-a459-a32cd48c307d-mIthdfw#:~:text=3.1%20The%20Vigil%20\(Whistle%20Blower.of%20leak%20of%20unpubli shed%20price](https://www.ongcindia.com/wps/wcm/connect/5703d0df-3bc0-49f1-a459-a32cd48c307d/wb30052019.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-5703d0df-3bc0-49f1-a459-a32cd48c307d-mIthdfw#:~:text=3.1%20The%20Vigil%20(Whistle%20Blower.of%20leak%20of%20unpubli shed%20price)

<sup>51</sup> [https://www.ongcindia.com/wps/wcm/connect/d15510f5-7da5-4ff8-a1f1-ec05eb4d80d2/fraud130718.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-d15510f5-7da5-4ff8-a1f1-ec05eb4d80d2-mijp4Mz#:~:text=Awareness%20about%20fraud%20prevention%20shall,activities%20and%20that%20he%2Fshe](https://www.ongcindia.com/wps/wcm/connect/d15510f5-7da5-4ff8-a1f1-ec05eb4d80d2/fraud130718.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-d15510f5-7da5-4ff8-a1f1-ec05eb4d80d2-mijp4Mz#:~:text=Awareness%20about%20fraud%20prevention%20shall,activities%20and%20that%20he%2Fshe)

<sup>52</sup> [https://www.ongcindia.com/wps/wcm/connect/2cff6b5c-2ce9-46c1-9b53-6b50419ba3d6/CDA%2BRules.pdf?MOD=AJPERES&CONVERT\\_TO=url&CACHEID=ROOTWORKSPACE-2cff6b5c-2ce9-46c1-9b53-6b50419ba3d6-n9JOP-c](https://www.ongcindia.com/wps/wcm/connect/2cff6b5c-2ce9-46c1-9b53-6b50419ba3d6/CDA%2BRules.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-2cff6b5c-2ce9-46c1-9b53-6b50419ba3d6-n9JOP-c)

<sup>53</sup> ONGC Code of Conduct for the Board Members and Senior Management Personnel, cl.4

<sup>54</sup> ONGC Fraud Prevention Policy, cl.4

<sup>55</sup> ONGC Fraud Prevention Policy, cl.5

<sup>56</sup> ONGC Code of Conduct for the Board Members and Senior Management Personnel, cl.4

permit a family member to accept employment from a company with which he has official dealings or company has business relationship.<sup>57</sup> No employee shall accept extravagant hospitality or periodic hospitality from a person or company having formal dealing with it.<sup>58</sup>

c. Relationship Building: There is no enabling provision dealing with the building of relationships during the business activity.

d. Extortion or Facilitation Payment: Code of conduct does not address issue of prohibition of facilitation payment by its employees.

e. Gift and Entertainment: The Directors and Senior Management shall not accept or present any favours, donations, or comparable advantages, either directly or indirectly, to unjustifiably favour the commercial contracts detrimental to the interest of ONGC, except customary gifts given for nominal value.<sup>59</sup> No employee shall receive or allow his family member to receive any gift on his behalf including free transport, lodging, services, or any other pecuniary benefit.<sup>60</sup>

## **5.2 Implementation**

- a. Compliance Committee: In the conduct of business, all the applicable laws and regulations and shall be complied by the Board and Senior Management personnel. In case of conflict, the ethical and professional standards prescribed under the code of conduct shall prevail over applicable laws and regulations.<sup>61</sup> Independent Director shall assist in the enforcement of the corporate governance practices and uphold integrity and ethical standards.<sup>62</sup>
- b. Disciplinary Action: As per the relevant rules of ONGC, administrative, civil, or criminal action or closure of the complaint may be taken after completion of the investigation.<sup>63</sup> In case whistleblower makes a false or *mala fide* allegations then he shall be liable to suitable punitive action in consonance with the CDA Rules.<sup>64</sup>

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<sup>57</sup> ONGC Conduct, Discipline & Appeal Rules, cl.7

<sup>58</sup> ONGC Conduct, Discipline & Appeal Rules, cl.16(a)

<sup>59</sup> ONGC Code of Conduct for the Board Members and Senior Management Personnel, cl.6

<sup>60</sup> ONGC Conduct, Discipline & Appeal Rules, cl.16(a)

<sup>61</sup> ONGC Code of Conduct for the Board Members and Senior Management Personnel, cl.10

<sup>62</sup> ONGC Code of Conduct for the Board Members and Senior Management Personnel, schedule IV

<sup>63</sup> ONGC Fraud Prevention Policy, cl.6.2

<sup>64</sup> ONGC Whistleblower Policy, cl.11.2

- c. Whistleblowing Facilities: Employees, vendors, contractors, and any person doing business with ONGC is obligated to report suspected fraud or fraudulent activity through nodal officers. The responsibility to prevent fraudulent activity in the business transaction with ONGC is also cast upon the employees, vendors and contractors.<sup>65</sup> A written complaint can be given by a whistleblower about an unethical or improper activity.<sup>66</sup> Whistleblower shall not conduct any investigation on their own and they have no right to participate in the investigation process, except as authorised by the competent authority.<sup>67</sup> Anonymous or pseudonymous complaints will not be entertained by ONGC and all the information received as part of complaint or investigation shall be kept confidential.<sup>68</sup> The allegations disclosed in the complaint shall be disclosed to the suspected person and an opportunity to provide inputs shall be given to him during investigation.<sup>69</sup> Suspected person may engage an advocate at his own costs to defend him in the proceedings and shall have the right to discuss with any person in his desire.<sup>70</sup>
- d. Investigation: Fraud Risk Management Committee (FRMC) is a neutral fact-finding body which conducts investigation fairly and without presumption of guilt. The investigation report shall be given to Audit & Ethics Committee and the Board.<sup>71</sup>
- e. Victimisation: The identity of the whistleblower or any person assisting him shall be kept confidential.<sup>72</sup> Whistleblower shall be given adequate safeguards against victimisation and no discrimination, harassment, or unfair employment practises to be taken against him. Complete protection shall be given to the whistleblowers against retaliation, threat of termination or suspension, demotion, transfer, refusal of promotion, and disciplinary action.<sup>73</sup> In case any grievances, the whistleblower can approach the

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<sup>65</sup> ONGC Fraud Prevention Policy, cl.7

<sup>66</sup> ONGC Whistleblower Policy, cl.4.9

<sup>67</sup> ONGC Whistleblower Policy, cl.5.2

<sup>68</sup> ONGC Fraud Prevention Policy, cl.6.1

<sup>69</sup> ONGC Whistleblower Policy, cl.9.8

<sup>70</sup> ONGC Whistleblower Policy, cl.9.10

<sup>71</sup> ONGC Fraud Prevention Policy, cl.6.2

<sup>72</sup> ONGC Whistleblower Policy, cl.13.3

<sup>73</sup> ONGC Whistleblower Policy, cl.13.1

Chairman of the Audit Committee, who shall examine and propose appropriate action.<sup>74</sup>

- f. Preventive Vigilance Mechanism: The fraud prevention policy shall be integrated in the General Conditions of Contract to bind the bidders, vendors, service providers and consultants and prevent them from indulging in any fraudulent activities. The bidders shall certify that they shall adhere to ONGC fraud prevention policy and immediately appraise fraud or suspected fraudulent activity as soon as comes to their notice.<sup>75</sup>

### **5.3 Lacunae**

The code of conduct of ONGC does not provide for the training of its employees about the ethical policies to be followed by the employees in their day-to-day activities. The record keeping obligation of the employees is nowhere addressed in the policies. The requirement of internal and external auditing and monitoring and due diligence requirement is also not mentioned in the policies. The communication of the result of whistleblower complaint is conspicuously absent in the policy. Whistleblower is denied a fair chance to understand the outcome of the result of his complaint. Anonymous complaints are not entertained as per the whistleblower policy, which may be counterproductive.

### **6. Anti-bribery and Corruption Policy of Engineers India Ltd.**

Engineers India Ltd. (EIL) is a public sector undertaking established to provide engineering and other technical services for petroleum refineries and other business. EIL is a Navratna company coming under the Ministry of Petroleum and Natural Gas. EIL acts as a Project Management Consultant (PMC) for oil and gas sector projects, provides project services from 'concept to commissioning' and executes projects on Engineering, Procurement and Construction Management (EPCM) basis at site.

The following documents were analysed to take note of the steps taken by EIL to prevent corrupt practises in their business activities:

1. Whistleblower Policy<sup>76</sup>

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<sup>74</sup> ONGC Whistleblower Policy, cl.13.2

<sup>75</sup> ONGC Fraud Prevention Policy, cl.9

<sup>76</sup> <https://engineersindia.com/storage/2019/08/Whistel-Blower-Policy.pdf>

2. Code of Business Conduct and Ethics for Board Members and Senior Management<sup>77</sup>
3. The Engineers India Ltd. (Conduct) Rules 1971 & Discipline, Appeal and Certain Other Conditions of Service Rules<sup>78</sup> (hereinafter referred to as EIL CDA Rules)

### **6.1 Anti-bribery Commitments**

- a. **Bribery and Corruption**: The Board Members and Senior Management shall act with fairness, integrity, and honesty. They should value equality and uphold integrity and transparency in their activities.<sup>79</sup>
- b. **Proscribed Activities**: Board Members and Senior Management shall not solicit any commission, personal fees, or any other remuneration, either directly or indirectly, for transactions involving EIL.<sup>80</sup> Board Members shall not use rank for private benefits, avoid apparent conflict of interest and shall not enter into any transactions with a company in which they have commercial or private interest. They shall not associate themselves or invest in anyway with any seller or service provider or client of EIL.<sup>81</sup> No employee shall communicate any information, official paper, or any portion thereof, either directly or indirectly, to any employee or third party to whom he is not permitted to disseminate such communication or manuscript.<sup>82</sup>
- c. **Relationship Building**: Board Members and employees are prohibited from associating with clients and customers, except when on official duty. Board Members and employees are expected to make use of various official platforms and events to build rapport and liaison with existing and prospective clients.
- d. **Gift and Entertainment**: Board Member and Senior Management shall not accept any gifts or other benefits which would influence the business of the organisation or award of the contract to an agency.<sup>83</sup> No employee shall

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[https://engineersindia.com/storage/2019/01/96\\_Document\\_Code\\_of\\_Business\\_Conduct\\_and\\_Ethics\\_for\\_Board\\_Members\\_and\\_Sr\\_management.pdf](https://engineersindia.com/storage/2019/01/96_Document_Code_of_Business_Conduct_and_Ethics_for_Board_Members_and_Sr_management.pdf)

<sup>78</sup> [https://engineersindia.com/storage/2019/07/EIL-Conduct-Rules\\_1971-Discipline\\_Appeal-and-Certain-Other-Conditions-of-Service-Rules-for-Officers.pdf](https://engineersindia.com/storage/2019/07/EIL-Conduct-Rules_1971-Discipline_Appeal-and-Certain-Other-Conditions-of-Service-Rules-for-Officers.pdf)

<sup>79</sup> EIL Whistleblower Policy, cl.5

<sup>80</sup> EIL Whistleblower Policy, cl.6.7

<sup>81</sup> EIL Whistleblower Policy, cl.7.2.2

<sup>82</sup> EIL Conduct, Discipline & Appeal Rules, cl.11.1

<sup>83</sup> EIL Whistleblower Policy, cl.6.7

acknowledge or authorize any of his relative to accept any gift at his behest including free transport, lodging, boarding services or pecuniary benefits.<sup>84</sup>

## **6.2 Implementation**

- a. Training: Board Members and employees are expected to mandatorily undergo training on corporate governance, and various workshops organized by specialized training cells on municipal and international anti-corruption laws and provisions.
- b. Compliance Committee: All Board Members and Senior Management shall observe all applicable laws, rules and regulations relating to the business of EIL.<sup>85</sup>
- c. Internal & External Auditing: The activities of employees while fulfilling their official tasks are subject to internal and external auditing.
- d. Disciplinary Action: Any employee found engaged in activities unbecoming of the employee or carrying on prohibited activities has to pass through due process as per applicable Conduct Rules. Various major and minor offences are prescribed along with corresponding penalties.
- e. Whistleblowing Facilities and Protection: EIL whistleblower policy provide avenues for raising concern about the actions that are unlawful, incorrect financial reporting, revealing of unpublished price sensitive information, against company policy and serious improper business conduct.<sup>86</sup> Anonymous complaints will not be investigated by EIL and it encourages revealing of identity for the follow up actions. In case of malicious allegations, appropriate actions will be initiated against the whistleblower.<sup>87</sup> Complaints about the unethical or illegal conduct can be given to Audit Committee<sup>88</sup> and complainant will be given follow up on their concern.<sup>89</sup>
- f. Victimisation: EIL will not tolerate the victimisation or harassment of the complainant and the identity of the complaint shall be protected.<sup>90</sup>

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<sup>84</sup> EIL Conduct, Discipline & Appeal Rules, cl.13.1

<sup>85</sup> EIL Whistleblower Policy, cl. 6.4

<sup>86</sup> EIL Whistleblower Policy, cl.3

<sup>87</sup> EIL Whistleblower Policy, cl.4

<sup>88</sup> EIL Whistleblower Policy, cl.5

<sup>89</sup> EIL Whistleblower Policy, cl.6

<sup>90</sup> EIL Whistleblower Policy, cl.4



### 6.3 Lacunae

A separate code of conduct for the employees is not provided and hence obtaining of signature upon reading and understanding of policy is waived. The records to be maintained by the employees in their official duties are not mentioned in the policy. The code of ethics is silent about the prohibition of receipt of facilitation payment by the employees. Only employees are permitted to blow the whistle in case of genuine concerns and anonymous complaints are not entertained by EIL unless some serious issues are involved, and credibility is confirmed from attributable sources.

## 7. Anti-bribery and Corruption Policy of Petroleum Development Oman LLC

Government of Oman owns 60%, Royal Dutch Shell owns 34%, Total owns 4% and Partex owns 2% of shares in PDO. Most of the crude oil production and natural gas in Oman is delivered by PDO. PDO operates in one third of the geographical area of Oman and finds oil fields and develops them into productive assets.<sup>91</sup> The researcher analysed the PDO Code of Conduct<sup>92</sup> to understand about anti-corruption policies.

### 7.1 Anti-bribery Commitments

a. Bribery and Corruption: PDO employees shall not, directly or indirectly, offer or accept bribery in any form. PDO expects its employees to follow and adopt its core values-honesty, integrity, and respect. In its business relationship with contractors and suppliers, PDO expects fairness, integrity, and honesty. Transparent procedures will be used in the open and competitive bidding and all qualified contractor and suppliers will be given equal opportunity.

b. Proscribed Activities: Employees shall notify the conflict of interest with the interest of PDO and the employees' responsibility towards company. No employee shall take any advantage for their own benefit or profit of others during the transaction with third parties in the course of employment. PDO employees shall not disguise bribery as charitable donations. Anti-bribery policy applies to all transactions with foreign or domestic public official, or

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<sup>91</sup> <https://www.pdo.co.om/en/about/Pages/default.aspx> last seen on 16/05/21

<sup>92</sup> <https://www.pdo.co.om/SiteAssets/Miscellaneous/PDO Code of Conduct%20 CP 202.pdf>

private company or their employees. Decision of the employee shall not be influenced by personal or private considerations. All actual or perceived conflict of interest shall be declared by the employees. Pricing related information or any aspect of tender shall not be discussed or shared with competitors, supplier, and contractors. In any geographic markets, the employees shall not share information or sign up any deal or understanding with the competitors, customers, or contractors.

c. Extortion or Facilitation Payment: No employee shall, directly or indirectly, solicit, offer, accept, or pay bribes including facilitation payments, inducement, or other inappropriate payments, goods, or services for any reason. PDO also requires its business partners, representatives, agents, suppliers, and contractors to comply with its policies on the prevention of bribery, corruption, and facilitation payments.

d. Gift and Entertainment: PDO strictly prohibits employees to solicit gifts or hospitality in connection with their business activity. However, PDO acknowledges rare acceptance or offer of small favors or hospitality as a genuine support to good working relations. The favours or hospitality shall not persuade business management process. It shall not be recognized as a 'reward' for commercial dealings or otherwise inappropriate payment. PDO approved process must be followed while providing or accepting favors or entertainment to or from third parties. In any case no employee shall accept the following (i) cash or equivalents (ii) illegal gifts or hospitality (iii) loans (iv) personal services (v) favours or hospitality of inapt nature or at unacceptable venue (vi) events or dinners where business partner is not available (vii) favors or hospitality when important business determinations are being made. While accepting the gift, the employee should be knowledgeable about the possible conflict of interest.

## **7.2 Implementation**

a. Record Keeping: Transparency and integrity to be maintained in the accounting records of all PDO transactions. The financial statements and accounts of the company shall depict the true and correct records of all business transactions. Employees responsible for financial reporting or accounting must record accounts fairly reflecting all the transactions and

comply with applicable accounting principles. Internal controls and financial process must be operated in accordance with PDO guidelines and practices. Employees should promptly report the accounting frauds, irregularities in auditing or internal controls. Approved or carried out transaction must be truthfully documented in the books of accounts of the company. The actual assets must be compared with asset records at reasonable intervals.

b. Disciplinary Action: The breach of the code of conduct would attract punitive action against the employees, including dismissal from service. The damages resulting from the wrongdoing shall be recovered by the PDO from the delinquent employees.

c. Whistleblowing Facilities and Protection: PDO employees are obligated to report the suspected breach of the ethical principles. Employees are expected to follow whistleblower procedures to raise their concern by means of telephone, email, or in person. Appropriate disciplinary measures will be initiated against the whistleblower for the malicious reporting.

d. Victimisation: PDO will protect the whistleblower and shall not tolerate the retaliation or intimidation directed against the whistleblower. PDO will not accept discrimination in the workplace and would not welcome the humiliating, intimidating or hostile conduct or behaviour towards a person.

## **8. Anti-bribery and Corruption Policy of Saudi Arabian Oil Company (Saudi Aramco)**

Saudi Aramco (Saudi Arabian Oil Company) is a petroleum and natural gas company owned by Kingdom of Saudi Arabia. It is world's biggest company by revenue and owns and operates largest oil fields in onshore and offshore. It is a leading oil manufacturing company and owns second largest oil field.

The researcher analysed the Saudi Aramco Code of Business Conduct<sup>93</sup> to understand about anti-corruption policies of Saudi Aramco:

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<sup>93</sup> [https://www.aramco.com/-/media/downloads/who-we-are/our-governance/code\\_of\\_business\\_conduct-2.pdf?la=en&hash=92A6FC3DD51F4036E030BF83B6826D982BBDDF21](https://www.aramco.com/-/media/downloads/who-we-are/our-governance/code_of_business_conduct-2.pdf?la=en&hash=92A6FC3DD51F4036E030BF83B6826D982BBDDF21)

## **8.1 Anti-bribery Commitments**

a. **Bribery and Corruption:** The behaviour of the employees of Saudi Aramco shall be based on the values such as integrity, accountability, safety, and excellence. All the employees shall fulfil ethical commitments in conformity with code of business conduct in the business activity and always do the right thing. The employees shall act with integrity in all parts of the business and report suspected violations of law, policies, and code of conduct. Employees shall maintain respectful workplace, and they shall not harass, discriminate, or behave in hostile or intimidating manner.

b. **Proscribed Activities:** The employees are not permitted to enter into agreements with competitors that sets the price for customers or agree with competitors to use or refuse to use a particular company as a business partner. Business decisions shall not be made based on bribes or kickbacks. Employees of the company should never offer or accept bribe or kickback and report any issues regarding offer and acceptance of bribe or kickback. Company assets shall not be used for personal benefits or allow them to be used or sold by another without proper authorisation. Only authorised spokesperson shall communicate information to investor or media and no employee shall speak on behalf of the company. Employees shall not share the confidential information to outside personnel without proper authorisation or internally to anybody unless that person has legitimate need to know for business purpose. Every employee shall avoid conflict of personal interest with that of the company and divulge any potential conflict of interest. Employee shall not compete with the business of the company, or do business with company, its vendors, subcontractors, or customers. Employees are prohibited from acting as consultant or holding any position or engaging in any activity with the customers, vendors, contractors, or subcontractors of the company. No employee shall take advantage of company information, property, or opportunities for personal gain.

c. **Gift and Entertainment:** The employees shall offer or accept gift, meal, or entertainment only if it has a legitimate business purpose. It would not cause embarrassment to the company or employee, and it is not intended or viewed as bribe, kickback, or improper payment. Saudi Aramco recognises giving gift on

customary occasions, but it should be reasonable in value, legal and consistent with customary business practices.

## **8.2 Implementation**

- a. **Training**: Responsibility is cast on the employees to learn, recognize, and adhere to the code of business conduct. The employees are also expected to understand the laws and policies that apply to Saudi Aramco, report circumstances that breach the code of conduct and raise queries in case of lack of clarity about right things.
- b. **Record Keeping**: Accurate business records shall be maintained, and financial statement shall always be based on true and complete disclosures. Every record created or approved by the employee shall be complete, accurate and honest. Every employee shall record assets, transaction and funds accurately and shall not do any acts which will keep the funds or assets off the record for any reason.
- c. **Compliance Committee**: Every individual employed by the company are responsible to comply with applicable law, rules, and regulation.
- d. **Disciplinary Action**: Appropriate disciplinary action including dismissal from service shall be initiated against the employees who indulge in retaliatory practises.
- e. **Communication**: The employees are encouraged to ask questions, speak up about compliance, internal auditing, and business ethics.
- f. **Whistleblowing Facilities**: The whistleblower can raise the concerns through reporting channel or hotline. Supervisors and managers are obligated to listen to the apprehensions about prospective violations of the code of conduct, address it without retaliation and are accountable to act in accordance with the code and company values.
- g. **Victimisation**: Saudi Aramco shall not tolerate retaliation or discrimination, against any person for raising concern about corrupt practises and rendering help in the investigation process. The prohibited activities include harassment, humiliation, threatening, intimidation and negatively changing working conditions or responsibilities.

## 9. Anti-bribery and Corruption Policy of Tata Projects Ltd.

Tata Projects is industrial infrastructure company present in India and provide solution *interalia* for refineries, chemical process plants, water & waste management, etc. They execute mid and downstream projects including onshore field development, process plants, refinery expansion, and tank farms and terminals. Tata Projects holds the majority stake in a fabrication and engineering Hydrocarbon processing company Artson Engineering Ltd.

The researcher analysed the following documents to understand about anti-corruption policies of Tata Projects Ltd.

1. Tata Code of Conduct<sup>94</sup>
2. Whistleblower policy<sup>95</sup>
3. Anti-Fraud Policy<sup>96</sup>

### 9.1 Anti-bribery Commitments

a. **Bribery and Corruption:** Tata considers integrity as its core value and in its conduct, Tata will be fair, transparent, and honest. In its business operations, the company will observe to the highest moral and ethical standards. The employees, while representing the company, shall act with honesty, integrity, and professionalism, and satisfy the fair and ethical principles. The conduct of the employees shall be fair and transparent and make every endeavour to balance the interest of all stakeholders. Every person employed by the company, directly or indirectly, shall be responsible for his acts. As per the anti-fraud policy, the term fraud includes fraudulent financial reporting like alteration or forging of accounting documents or records, intentional concealment or misstatement of transactions, failure to record information accurately or completely and impropriety in handling of money or reporting or financial transactions.<sup>97</sup>

b. **Proscribed Activities:** The company does not allow any kind of bribery and corruption. In order to get undue business favours, the representatives of the company including employees, agents and intermediaries, shall not either

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<sup>94</sup> <https://www.tataproyects.com/images/download-files/TCOC.pdf>.

<sup>95</sup> [https://www.tataproyects.com/images/download-files/Whistle\\_Blower\\_Policy.pdf](https://www.tataproyects.com/images/download-files/Whistle_Blower_Policy.pdf) .

<sup>96</sup> [https://www.tataproyects.com/images/download-files/ANTI\\_FRAUD\\_POLICY.pdf](https://www.tataproyects.com/images/download-files/ANTI_FRAUD_POLICY.pdf)

<sup>97</sup> Tata Projects Anti-Fraud Policy, cl.4

directly or indirectly, receive or offer any unlawful or improper payments. The employee shall not take up any occupation outside the organisation which would establish a conflict of interest. The employees shall not take part in any business transactions or contract with a party who is associated with the company for any business purpose. No employee shall do any act which would lead to improper benefit, directly or to any member of his family. Company shall not enter into agreements which would distort competition, take part in cartels, or exchange inappropriate data with competitors. Company funds, estate or contributions shall not be offered to any political faction or candidate. In case of a conflict of interest, actual or potential, the concerned individual must report instantly of such conflict of interest.

c. Relationship Building: Company shall work with suppliers who share similar values and adopt comparable ethical standards.

d. Gift and Entertainment: The gifts or hospitality given or received should be modest and appropriate. The frequent offer or acceptance of gifts or hospitality, including entertainment and travel is not encouraged. Employees shall not do any activity which create the perception of conflict of interest, illicit payment, or preferential treatment. The employees shall not give or accept gifts in cash or gold, gift prohibited under applicable law, gifts in bribes, kickback, facilitation payment, promise of employment and gifts that is prohibited in gift givers or recipient's organisation. The public disclosure of the gift should not embarrass either the company or the giver.

## **9.2 Implementation**

- a. Record Keeping: In the internal or external communications, reports or financial statements, the employees shall not make any wilful omission or material misrepresentation. The assets of the company shall not be misused or misappropriated. Fair, accurate and timely disclosure of information shall be made to financial stakeholders and shall keep accurate records of all activities.
- b. Disciplinary Action: Appropriate disciplinary measures will be brought against the employee who indulges in retaliatory activities.
- c. Whistleblowing Facilities and Protection: Tata provide avenues for the employees, customers, suppliers, and stakeholders to raise their bona fide

apprehensions or report the instances of real or apprehended breaches of the code of conduct and unethical or improper activity. The concerns can be reported to immediate line manager, human resources department, designated ethics official, or helpline. Anonymous complaints shall not be entertained by the company and the complaint shall disclose the name of the whistleblower. All employees of the company and third parties are entitled to reveal disclosure under the policy.<sup>98</sup> The disclosure shall be addressed to the ethics counsellor of the company or Chairman of the Audit of Committee. The disclosure can be made through telephone, email, postal or directly submitted to the Complaints Committee. Disclosure can be made relating to the matters of any Tata group company. The whistleblowers are not required to investigate or determine appropriate corrective or remedial actions. They shall disclose reliable information and shall not take part in the undercover activities except as ordered by the ethics counsellor or audit committee or investigators. The investigating authorities shall adopt neutral fact-finding process. The suspected person shall have the right to seek advice from any person during investigation and may engage a counsel to represent him in the proceedings. Investigation shall be completed by the Complaints Committee within 60 days of receipt of complaint. The outcome of the investigation shall be informed to the suspected employee.

- d. **Victimisation:** Every employee in the company must be given dignity and respect and company does not accept any kind of harassment. Genuine whistleblower is given complete protection against unfair treatment. In case whistleblower abuses the process, appropriate disciplinary action will be taken against him. The company shall keep confidential about the identity of the whistleblower. Company condemns victimisation, discrimination, harassment, or any other unfair practises against the whistleblowers. Complete safeguard will be granted to the whistleblowers against retaliation, intimidation, threat of suspension or termination, refusal of promotion, transfer, demotion, and the like. The whistleblower can report the grievances to the audit committee chairman.

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<sup>98</sup> Tata Projects Whistleblower Policy, cl.4



- e. **Preventive Vigilance Mechanism:** Dispute resolution mechanism adopted by the company shall not negatively impact the interest of the company and stakeholder value.

### **9.3 Lacunae**

The policy does not indicate anything about the recurrent training to be given to the employees about the ethical policies and the requirement to comply with the business ethics. The company shall ensure that employees are conscious of the policy and acknowledge and commit themselves to follow the policies framed by the company. The policy does not address auditing of works and documents, monitoring of the employees and the due diligence procedure to be followed while dealing with business associates. Anonymous complaint is not encouraged by the company. Whistleblower is not appraised about the progress or outcome the complaint and denied an opportunity to know about the consequence of complaint.

## **10. Anti-bribery and Corruption Policy of Petrofac Limited**

Petrofac is a British EPC service provider company and it designs, build and maintain infrastructure for the oil and gas industries. It has executed projects for onshore and offshore oil and gas production facilities, as well as downstream processing in many countries all around the world. It provides EPC Contract support to its clients to unlock their onshore and offshore, greenfield and brownfield assets.

The researcher analysed the following documents to understand the anti-corruption policies of Petrofac:

1. Code of Conduct<sup>99</sup>
2. Standard for the Prevention of Bribery & Corruption<sup>100</sup>
3. Ethical, Social and Regulatory Risk Policy<sup>101</sup>

### **10.1 Anti-bribery Commitments**

- a. **Bribery and Corruption:** Bribery is offering or acceptance of financial or other benefit intended to influence the recipient of the benefit to act unfairly or

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<sup>99</sup> <https://www.petrofac.com/media/1478/code-of-conduct.pdf>

<sup>100</sup> [https://www.petrofac.com/media/2972/standard-for-the-prevention-of-bribery-corruption\\_2016\\_english.pdf](https://www.petrofac.com/media/2972/standard-for-the-prevention-of-bribery-corruption_2016_english.pdf)

<sup>101</sup> <https://www.petrofac.com/media/1471/ethical-social-and-regulatory-risk-policy.pdf>

improperly in the award of the business or in the execution of their duties. Corruption is the dishonest and fraudulent act by those in authority involving bribery. Petrofac expects all those who always work with Petrofac to act with integrity. In the conduct of business, all those who work with or for Petrofac shall conduct themselves with highest integrity and comply with all applicable laws. Everyone working with or for Petrofac, be it employees, subcontractors, suppliers, agents, or business partners are prohibited from giving or accepting any sum or other incentive to secure business advantage for Petrofac. Tendering process shall be free of bribery and corruption and transparent method shall be followed in the award of the contract.

b. Proscribed Activities: The employees shall not discuss any aspects of the tender with the competitors and barter details with other contenders to fix rates, cash flow or market shares. Competitor's information shall not be obtained through illegal means nor shall the employees use any competitor information received by mistake. Improperly obtained information shall not be accepted by the employees. Activities which induce conflict of interest shall be avoided by the employees. The financial, classified, or private information concerning Petrofac's business shall not be disclosed to any third party. Petrofac shall not pay for non-business travel expenses of any third party or accompanying person. No employee shall make or receive sums from any person who is not a party to the business transaction. The employees shall not make or receive payment to or from a jurisdiction unconnected to the business transaction. Overpayment from a third party or refund to a third party shall not be accepted by Petrofac.

c. Relationship Building: Constantly perform reputational, technical, and financial due diligence of the vendors.

d. Extortion or Facilitation Payment: Petrofac prohibits facilitation payment and in exceptional circumstances facilitation payment can be made only where personal safety is threatened. In case of demand for facilitation payment, complaint shall be registered with the local authority.

e. Gift and Entertainment: During the tender process, the employees of the company shall under no circumstances receive or extend any favours or entertainment from or to any third parties. No employees or business partners shall make, accept, or allow gifts or entertainment to influence business

decisions. A register shall be maintained to accurately record the gifts and entertainment. Charitable donations shall not be made on behalf of Petrofac in contravention of the applicable statutes, rules, or code of conduct. Gifts or entertainments shall not be acknowledged by the employees which would establish a conflict of interest with any business associate of the company. Any gift or entertainment given or received must not be (i) intended to influence business decision, (ii) part of repeated gift/entertainment given or received by the same individual or company and (iii) in the form of currency or its equivalents. Gift shall not be exchanged during the bidding process and a record shall be maintained in the gift register for compliance purpose. Gift of nominal value shall only be given to public officials.

## **10.2 Implementation**

- a. Training: The Standard for the Prevention of Bribery & Corruption provides for the educational support to the businesses for the compliance of laws. The employees as well as the third parties that work with or for Petrofac will be educated on anti-bribery and corruption standards. All employees and business associates shall complete the training related compliance within thirty days of enrolment. It is the responsibility of the hiring personnel to confirm accomplishment of anti-bribery and corruption training. Business or functional heads should monitor the training of employees and business partners within the time frame. Petrofac is committed to review periodically of ethical and regulatory risks and maintain transparent process in all aspects of operation.
- b. Record Keeping: Accurate books and records shall be kept and internal control measures to be followed by the employees to prevent unlawful usage of funds. The employees shall never falsify records or misrepresent facts and company funds shall be protected from misuse, loss, fraud, and theft. Ensure that correct invoices, bills, expense statements and claims are submitted on time. Maintain the documents pertaining to any meetings, conversation, or dealings with the competitors. Proper documentation shall be maintained about the political or charitable contributions, if any, given by Petrofac and it must be publicly disclosed. All tenders must be documented for the purpose of audit. If facilitation payment is required under any situations, then

it shall be truly recorded in the books and records of the company. The payment, if any, made for the visit of government official shall be accurately recorded to avoid any perception of undue influence. The company's account book shall depict accurate recording all financial transactions. The records of due diligence conducted, compliance related training and third-party compliance audit shall be maintained as part of compliance function. All gifts and entertainment received or presented shall be registered in the gifts and entertainment register maintained by compliance group.

- c. Monitoring & Due Diligence: Petrofac seeks an honest relationship with all associates established on fairness, trust, and respect. At the time of selection of contractors and suppliers, proper due diligence is conducted in an objective and transparent manner. If the internal due diligence highlights the need for additional investigation, then independent outsourced investigation shall be carried out. Third parties engaged by Petrofac shall act consistent with the laws and code of conduct and are encouraged to assert in case of breach of code of conduct. Proper due diligence shall be carried out prior to the grant of political or charitable donations. Appropriate due diligence shall be conducted to ensure that the agents or third parties who represent Petrofac are not engaged in any political activity. Petrofac funds shall not be allowed to be utilized either directly or indirectly, for any political contributions.
- d. Whistleblowing Facilities: Petrofac encourages everyone, whether or not an employee, to 'Speak Up' any concern about unethical activity or behaviour. Any violation or alleged violation of code of conduct can be intimated to the line manager, HR, Legal or compliance functions. Concern can be reported in 'Speak Up' lines which are accessible 24 hours a day, seven days a week. Concern can also be reported through email or weblink and the report is treated in confidence and will be thoroughly investigated. Confidentiality of the whistleblower will be safeguarded and will be notified about the progress of the investigation. Concerns can also be submitted anonymously.
- e. Victimisation: Reporting a concern or assisting in an investigation will not adversely impact the employee and retaliation will not be tolerated by Petrofac. Serious disciplinary action will be taken against one who

discriminate a person for initiating a complaint. Petrofac promotes a harassment free workplace.

- f. Preventive Vigilance Mechanism: All employees shall obey the local laws and in case of doubt as to follow the code of conduct or law, employees to follow the more stringent standard. The employees are obligated to report the loss or abuse of Petrofac's equipment or supplies. All the contracts with third parties shall contain a provision relating to the prevention of bribery and corruption and provide for audit of third-party with respect to implementation of anti-corruption measures.

## **11. Anti-bribery and Corruption Policy of Siemens AG**

Siemens AG is a German MNC and maker of equipment's for the energy, healthcare, and infrastructure companies. It manufactures steam turbines, turbo compressors, high-voltage switchgear, etc. It is the philosophy of Siemens founder Werner von Siemens that "*I will not sell the future for instant profit.*"

The researcher analysed the following documents to understand about anti-corruption policies of Siemens AG

1. Siemens Business Conduct Guidelines<sup>102</sup>
2. Sustainability in the Supply Chain<sup>103</sup>

### **11.1 Anti-bribery Commitments**

a. Bribery and Corruption: Siemens throw out all types of corruption and places integrity at the heart of every action. Corruption is the illegal or dishonest behaviour and includes fraud, embezzlement, favouritism, and nepotism. Code of conduct prohibits active and passive form of corruption and obligation is cast on the employees to report corrupt activities. Bribery is an act of promise, offer, or giving of money, donations, or other aids to a public official or private employees with a view to obtain improper advantages in the business activities.

b. Proscribed Activities: Siemens believes in fair competition and unfair means or methods shall not be used for the distortion of competition. Engagement of

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<sup>102</sup> <https://assets.new.siemens.com/siemens/assets/api/uuid:5c242542-e991-4b97-af63-090ad509be74/2019-sag-bcg-en.pdf>

<sup>103</sup> [https://portal.siemens.com/documents/4362010/5038001/CoC\\_Brochure\\_en.pdf/18042728-abc9-033d-c373-ca74fe3e4002](https://portal.siemens.com/documents/4362010/5038001/CoC_Brochure_en.pdf/18042728-abc9-033d-c373-ca74fe3e4002)

third parties for the payment of bribe and giving or acceptance of monetary payments or facilitation payments is prohibited by Siemens. Employees shall never enter into anti-competitive agreements like price agreements, market, customer or territory allocations, abuse of dominant positions and project agreement with competitors. No employee shall talk to any competitor about (i) prices, price components or other conditions, (ii) offers and tenders, (iii) conduct during tender or submission of bogus offers, (iv) corporate strategies or future market behaviour, (v) market, customer, and territory allocations, (vi) business opportunities and incoming tender, and (vii) capacities, production volumes or quotas. In the bidding process, the employees shall not get hold of confidential information from any person without reason or utilize it in an unauthorised manner. Employees shall not use confidential information from a previous employer. Employee shall not be influenced by personal interest when making business decisions. Employees shall anticipate and avoid conflict of interest situations and business decisions shall be taken in the best advantage of the company.

c. **Relationship Building**: Promotion of company's legitimate objective shall be kept in mind while granting sponsorships, donations, and charitable contributions. Business activity must be religiously and politically neutral and employees shall not offer or promise money to acquire unlawful business advantage or for other corrupt purposes. Sponsorships, donations, and charitable contributions shall be given only to strengthen the Siemens brand and its social commitments. Employees shall ensure that business associates stick to the values and compliance standards and incorporate a provision in the contract that the business partners fulfil the relevant rules and regulations. The code of conduct identifies certain red flags and every employee shall critically enquire and explain (i) discrepancies in records and payments (ii) non-acceptance of anti-corruption clauses in the contracts (iii) request pre-payment without reasonable business exigency (iv) demand cash payments or transfer funds to offshore accounts or third parties (v) high prices with great discounts or unjustifiably high profit margins (vi) contractual partners with questionable qualification or doubtful responsibilities (vii) apprehensive business arrangements or personal relationships and (viii) unusually high commission,

charges, favors, entertainment or hospitality. Appropriate due diligence of the business partners shall be conducted. Siemens forbids its business associates from engaging in acts of bribery, either directly or indirectly promise, offer, grant, or authorise to give anything of value to a public official or counter party to obtain an improper advantage for Siemens. National and international anti-trust laws to be complied by all business partners and shall not engage in fixing of prices, bid rigging, or sharing of market with competitors. Employees shall not maintain relationship, financial or otherwise, with the business partners to avoid conflict of interest.

d. Extortion or Facilitation Payment: Siemens prohibits facilitation payments.

e. Gift and Entertainment: Code of conduct prohibits giving or acceptance of excessive gifts, entertainment, travel expenses, inappropriate donations, and sponsorships. Gifts and hospitality to a reasonable extent are permitted and it shall not be intended to excessively induce recipient's decision making or look like improper influence. Employees shall not offer rewards or hospitality in lieu of business or other benefits. Gifts and hospitality must be in conformity with the relevant statutes and regulations and never give the appearance of dishonesty or inappropriateness. It shall be suitable in terms of value, position of the recipient and frequency to the occasion. Usage of third parties to influence of public officials or private individuals unlawfully or improperly is prohibited and the activities of the business partners shall be scrutinised and monitored.

## **11.2 Implementation**

a. Record Keeping: Siemens is committed to financial integrity and make accurate and truthful reporting to all stakeholders and government agencies. Employees shall ensure that books and accounts are made promptly in conformity with relevant rules and guidelines and provide complete, accurate and truthful information. All data, certificates and other materials collected shall be included in the accounts and records. Employees shall not use artificial structures or letterbox companies to gain tax advantages and provide transparent information about business activities to the tax authorities. All operations must be manifested properly for tax determinations. Payments to third parties shall be properly documented and provided for proper purpose. Accounts or funds shall be maintained for

legitimate purpose and make payments to third parties only for legal or legitimate purpose. Proper documentation to be ensured prior to making payment. Business partners of Siemens are expected to utilise funds or make payments for legitimate purpose and document the expenses made by them. The supporting documents for payments, expenditures, reimbursements, fees, commissions, etc are to be maintained by all business associates. Mentioning of one-line item in the invoices for the services performed is not adequate and the business rationale and nature of service shall be properly explained. Cash payments or equivalent gifts shall be avoided by third party intermediaries. Company's books and accounts shall record the gifts and hospitality correctly and in transparent manner.

- b. Compliance: Siemens believes that successful compliance is an ongoing process, and it should always build and adjust to the changing business environment and activities.
- c. Active communication: Siemens communicates to all its employees about the consequences of violation of law and failure to comply with business conduct. The consequences are damages to the reputation, brand, and market value. It also results in imposition of substantial fines, compensations, disgorgement of profit and blacklisting from public contracts.
- d. Whistleblowing Facilities: The employees can report the violation of the code of conduct to the managers, chief compliance officer, compliance or legal department, human resource personnel, "Tell Us" hotline, Siemens ombudsman, or employees' representative. Disclosure of misconduct can also be made anonymously. The investigation process undertaken by Siemens follows presumption of innocence and employee's representative can participate in the proceedings. Siemens also ask its business partners to implement grievance mechanism for anonymous reporting of misconduct as well as for the safety of the whistleblower. In order to uphold the integrity and transparency in business process, the internal and external stakeholders are requested to disclose misconduct by the company. The report can be submitted, in anonymous manner, either online or by telephone in up to 150 languages, at anytime from anywhere in the world, in a secure and reliable manner. The external agency operated call centre and website handles the



sensitive content of the incoming reports. The reports are forwarded to the Siemens compliance office for clarification. Potential compliance violation can also be communicated to external ombudsperson. All stakeholders can get in touch with this impartial person on a private or unidentified basis to report improper business practices of the company.

- e. Victimisation: Siemens protects the identity of the person who reports potential misconduct and protects them from retaliation and other negative impact.
- f. Preventive Vigilance Mechanism: The managers of the company shall create a trusting working environment and set a good example. Manager has a duty to issue instructions for the compliance with the applicable laws. Duty to monitor and ensure fulfilment of legal obligations also rests with the manager. Managers are duty bound to clearly communicate the importance of good conduct, consequence of misconduct and compliance with legal requirements. The agreement with third party intermediary shall contain compliance clause enabling preventive as well as incident audit by siemens.

## **12. Anti-bribery and Corruption Policy of McDermott International Inc.**

McDermott is an American MNC headquartered in Houston. McDermott provide engineering and construction solutions to the energy industry. It designs and build infrastructure solutions to transform and transport oil and gas products. The researcher analysed the Code of Conduct<sup>104</sup> to understand about anti-corruption policies of McDermott:

### **12.1 Anti-bribery Commitments**

a. Bribery and Corruption: Bribe is anything of value offered to get beneficial treatment or improper gain. Bribe includes cash or equivalents, entertainment, gifts, offer of employment, favours, and charitable, political, or industrial donations. Integrity is one of the basic values to be maintained by everyone. In all their actions, employees are required to maintain integrity and follow code of conduct, laws, regulations, and policies. Employees are expected to maintain firm adherence to legal and ethical conduct. McDermott team members are

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<sup>104</sup> <https://www.mcdermott.com/getmedia/cf8254d2-b60c-4771-a2f1-24347e742d8c/McDermott-Code-of-Business-Conduct-2020.pdf.aspx>

expected to do the right thing, communicate openly and honestly, take ownership and accountability and be transparent while making decisions. Obligation is cast upon the employee to speak up if misconduct is seen or suspected and take prompt and appropriate actions.

b. Proscribed Activities: Employees should never compromise McDermott values to go ahead, and success shall not be achieved through illegal or unethical activity. McDermott employees shall follow anti-corruption and anti-bribery policies while doing business. No employee shall present, pay, promise to give or receive anything of value, directly or indirectly, in their business actions. Employee shall build honest and transparent relationship with public officials and adhere to the highest ethical standards. Business shall be conducted in such a way that prevents corruption, bribery, and abuse of power. Conflict of interest shall be avoided, and employees shall not take up any work with a competitor or a company that has business relationship with McDermott or want to do business with McDermott. Employees should not make an investment with a competitor or a company that has business relationship with McDermott or want to do business with McDermott. Company does not encourage employees to give anything to influence a decision, anything that creates an obligation in return, anything that could embarrass McDermott, anything that could be excessive in the circumstances and anything that violate local custom or law. Fair competition and ethical business practices to be promoted and employees shall not make untrue statements about competitors. McDermott shall at no time execute any agreement or understanding, with the customer, supplier, competitor to fix prices for the services, split territories, marketplaces or clients, inhibit other company from come into the market, refusal to trade with customer and impede with competitive tendering process.

c. Relationship Building: Proper due diligence shall be conducted prior to signing of contract and regularly monitor work of third parties who is hired to represent McDermott.

d. Gift and Entertainment: McDermott prohibits making facilitation payment and giving gifts or entertainment to public officials. No employee shall give loans, gift certificate, gift cards and gift vouchers.

## 12.2 Implementation

- a. Training: Additional training shall be given to the employees in the event of breach of code of business conduct.
- b. Record Keeping: No employee shall indulge in creation of false documents or make false or misleading statements in the books of account. Any attempt to evade record keeping or payment to an unrelated party to the transaction, shipment to a country not related to one where payment initiated, and suspicious third-party transactions shall be communicated. Employees shall accurately describe, classify, and document the transactions. Employees shall not ever hinder, obstruct, or unlawfully persuade the audit or probe. No employee shall fabricate or make deceptive or evasive statements. Employees shall not make an effort to induce someone else to give deceptive or evasive information. Employees shall act honestly and accurately while preparing financial statement or expense report and at the time of approving inspection or records. Official records shall be retained, stored, and destroyed in compliance with legal regulations. No employee shall create unrevealed, clandestine, or unrecorded resources, charges, or assets. Employees shall never misreport or mischaracterise the information relating to the business transactions.
- c. Monitoring & Due Diligence: Exercise caution and perform due diligence in procurement process. Due diligence of third party shall be carried out of any third party who handle public officials on behalf of McDermott.
- d. Whistleblowing Facilities and Protection: If an employee sees or suspects violation of the code of conduct it shall be reported to protect the reputation of the company. The violations can be reported to the manager, human resource representative, corporate ethics & compliance team, or chief compliance officer. The reporting can be made either in person, or through email. The whistleblower will be asked to provide the location of the whistleblower, the details of the employees involved, incident location and other details to facilitate investigation. The whistleblower can remain anonymous while reporting and a secured log code will be provided to the

employee to check the status of the case and to provide answers to the clarifying questions the investigators may have.

e. Victimisation: The Company mandates all the employees to never retaliate or allow other to retaliate against any employee who raised concern about misconduct. McDermott does not allow any kind of retribution against the whistleblower who reports bona fide concern.

### 13. Lacunas in the Business Ethics and Vigilance Mechanism of Indian Companies

There is no policy mandating the persons work with or for the company to act with integrity and comply with applicable laws. The policy does not expressly prohibit employees from obtaining or disclosing competitor or customer information through illegal means.

The bribery and corruption activities prohibited by the companies in their code of conduct is given below in table 4.2. The table 4.2 shows as to whether the policy specifically address described items in their policy.

**Table 4.2**  
**Anti-bribery provisions in the code of conduct**

Description	IOCL	ONGC	EIL	Aramco	PDO	McDermott	Petrofac	Siemens	Tata
Fraud	Yes	Yes	No	No	No	No	No	Yes	Yes
Bribery	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
Embezzlement	No	No	No	No	No	No	No	Yes	No
Kickback	No	Yes	No	Yes	Yes	No	No	No	Yes
Bid Rigging	No	No	No	No	Yes	No	No	Yes	Yes
Price fixing	No	No	No	Yes	Yes	Yes	Yes	Yes	No
Lobbying	No	No	No	Yes	No	Yes	No	Yes	No
Cartel	No	No	No	No	No	No	No	No	Yes
Collusion	No	No	No	No	No	No	No	No	No
Solicitation	No	No	Yes	No	Yes	No	No	No	No
Facilitation payment	No	No	No	No	Yes	Yes	Yes	Yes	Yes
Dishonesty	No	No	No	No	No	No	No	No	No
Gifts and entertainment	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Theft	Yes	No	No	No	No	No	No	No	No

It is not specifically mentioned that the bribery includes act of offering, undertaking, or making or receiving of cash, favors, or other benefits to or from third parties with a view to obtain or grant improper advantages in the business activities. The code of conduct does not expressly address the prohibition of unfair means or methods for the distortion of competition and abuse of dominant position.

The ethical principles specifically mentioned in the code of conduct is given in table 4.3 below.

**Table 4.3**  
**Ethical principles mentioned in the code of conduct**

Description	IOCL	ONGC	EIL	Aramco	PDO	McDermott	Petrofac	Siemens	Tata
Honesty	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes
Integrity	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Good faith	Yes	Yes	No	No	No	No	No	No	No
Transparency and fairness in action	Yes	Yes	Yes	No	Yes	Yes	No	No	Yes
Improper use of Authority	Yes	No	No	No	No	No	No	No	Yes
Wilful omission	Yes	No	No	No	No	No	No	No	Yes
Conflict of interest	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Impartiality	Yes	No	No	No	No	No	No	No	No

Though fairness in action is mentioned in the code of conduct, the tender documents floated by the PSUs do not contain fair and transparent provisions. The abuse of dominance by PSUs are visible in the EPC Contract and the unfair contract terms are incorporated to the detriment of the Contractor. Unequal bargaining power coupled with unfair terms in the EPC Contract force Contractors to succumb to the demand of bribery or use unethical means to overcome the disadvantageous situations.

There is no provision in the policy which prohibits making or receipt of payment to or from a jurisdiction unconnected to the business transaction. Overpayment from a third party or refund to a third party is neither prohibited

nor mentioned anywhere in the policy. Keeping of accurate records of accounts and auditing of the same helps to prevent corruption. The table 4.4 given below indicates the record keeping requirements specifically addressed in the company policy.

**Table 4.4**  
**Record keeping requirements in the company policy**

Description	IOCL	ONGC	EIL	Aramco	PDO	McDermott	Petrofac	Siemens	Tata
Maintenance of accurate books and records	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Prohibit falsification of records	No	No	No	Yes	Yes	Yes	Yes	Yes	No
Prohibits misrepresentation of facts	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Mandates timely submission of claims	No	No	No	No	No	No	Yes	No	No
Documentation of political contribution	No	No	No	No	No	No	Yes	No	No
Recording of donation	No	No	No	No	No	No	Yes	No	No
Recording of charitable contributions	No	No	No	No	No	No	Yes	No	No
Recording of facilitation payments	No	No	No	No	No	No	Yes	No	No
Maintenance of gift and entertainment register	No	No	No	No	No	No	Yes	Yes	No
Details of payment made to public official site visit	No	No	No	No	No	No	Yes	No	No
Maintenance of training records	No	No	No	No	No	No	Yes	No	No
Maintenance of due diligence records	No	No	No	No	No	No	Yes	No	No
Third party compliance audit records	No	No	No	No	No	No	Yes	No	No
Prohibit keeping off the record funds or assets	No	No	No	Yes	Yes	No	No	Yes	No

The company does not give any guidance to its employees w.r.t keeping of correct and accurate records, nor does it prescribe what are all the documents to be maintained or kept in order to foster ethical practices. There is a possibility of disguising bribe as charitable or political contribution. The codes of conduct do not specifically prohibit receiving or providing facilities for the site visit of

public official and recording of the expenses incurred towards the same. The provision for compulsory training of employees or keeping records of imparting training is specifically omitted in the policies.

Companies tends to keep off the record money or assets for the illegal purposes and the business policy does not specifically prohibit the same. The business policy also does not prohibit employees from adopting any methodology for the purpose of evading of taxes. The codes of conduct do not prohibit employees from using artificial structures or letterbox companies to gain tax advantages and no mandate is given to provide transparent information about business activities to the tax authorities. The policies of the company should mandate that the employees shall not create any unrevealed, secret, or unreported funds, charges, or resources.

The red flags such as demand pre-payment without plausible business reasons, transfer funds to offshore accounts or third parties, unusually high commission, or service fee not in consonance with the services, suspicious business arrangements or personal relationships is not addressed and/or clarified in the code of conduct.

The business partner also plays crucial role in the prevention of corruption activities. The ethical policy followed in the business relationship with the business partners is given in table 4.5 below.

**Table 4.5**  
**Ethical policy followed with business partners**

Description	IOCL	ONGC	EIL	Aramco	PDO	McDermott	Petrofac	Siemens	Tata
Code of conduct applicable to Business Partners	No	No	No	No	Yes	No	Yes	No	No
Due diligence of Business Partners	No	No	No	No	No	Yes	Yes	Yes	No
Third Party Investigation of Business Partners	No	No	No	No	No	No	Yes	No	No
Prohibits granting sponsorships	No	No	No	No	No	No	No	Yes	No
Prohibits granting/receiving of donations	Yes	Yes	No	No	No	Yes	Yes	Yes	Yes
Prohibits charitable contributions	No	No	No	No	Yes	Yes	Yes	No	No

Mandatory to have anti-corruption clauses in the agreement	No	No	No	No	No	No	No	Yes	No
Prohibits pre-payment without plausible business reasons	No	No	No	No	No	No	No	Yes	No
Prohibits cash payments	No	No	No	No	No	No	No	Yes	No
Prohibits transfer funds to offshore accounts	No	No	No	No	No	No	No	Yes	No
Prohibits payments to Third party	No	No	No	No	No	No	Yes	Yes	No
Mention detailed description of services	No	No	No	No	No	No	No	Yes	No
Supporting documents for payments, expenditures, expenses, reimbursements, commissions, fees	No	No	No	No	No	No	No	Yes	No
No conflict of interest	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Prohibits abuse of dominant position	No	No	No	No	No	No	No	Yes	No

Compliance audit of the company as well as that of third-party vendors is not addressed in the policy. Reputational, technical, and financial due diligence of the third-party vendors, suppliers and customers is not explicitly stated in the policy. The Employees are not given guidance in case of doubt as to follow the code of conduct or law. In case of obligation to make payment, code does not insist employees to seek for proper documentation.

The vigil mechanism of the company should give confidence to the whistleblower about their safety, security, and delivery of justice. The whistleblower policy performs a vital role in the prevention of corrupt activities. The table 4.6 given below shows the steps taken by the companies to specifically address the descriptive items in their policy.

**Table 4.6  
Whistleblower policy**

Description	IOCL	ONGC	EIL	Aramco	PDO	McDermott	Petrofac	Siemens	Tata
Whistle blowing by employees	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Whistleblowing by business partners	No	Yes	No	No	No	No	Yes	No	Yes
Anonymous complaint	No	No	No	No	No	Yes	Yes	Yes	No
Hotline	No	No	No	Yes	Yes	No	Yes	Yes	Yes



email	No	No	No	No	Yes	Yes	Yes	Yes	Yes
web complaint	No	No	No	Yes	No	No	Yes	Yes	No
Independent agency handling for whistleblowing facility or investigation	No	No	No	No	No	No	No	Yes	Yes
Prevention of victimisation	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Confidentiality of whistleblower	Yes	Yes	Yes	No	No	No	Yes	Yes	Yes
Presumption of innocence in Investigation	No	Yes	No	No	No	No	No	Yes	No
Legal help during investigation	No	Yes	No	No	No	No	No	No	Yes
Third party help during investigation	No	Yes	No	No	No	No	No	No	Yes
Communication of outcome to whistleblower	No	No	Yes	No	No	Yes	Yes	No	No

As per the prevailing policy (except ONGC) only employees are eligible to give whistleblower complaints to the company and aggrieved business partner is denied opportunity to approach the company about the demand of bribe or other gratification by the public officials. There is no provision to give anonymous complaints to the organisation. The details of hotline, email, web complaint mechanism is neither available nor specifically mentioned in the policy. The internal employees are part of the committee who deals with the whistleblower complaint, and no independent or impartial third-party agent is appointed to receive or facilitate the complaint. Legal or third-party assistance during the investigation stage is denied. The whistleblower is not provided with the decision of the complaint and denied valuable right to know about the fate of his complaint. Whistleblower cannot take further actions or understand about the lacunae in the evidence in the absence of knowledge about the decision. The loss of confidence in the whistleblower mechanism discourages the potential complainant from blowing the whistle. In the absence of an effective whistleblower policy, the company losses an opportunity to prevent corrupt activities.

The Indian companies can adopt the good aspects of code of conduct and ethical policies of the companies such as Siemens, McDermott, and Petrofac.

## **Data Analysis and Interpretation**

### **13. Quantitative Questionnaire**

A questionnaire on a 5-point Likert scale was prepared to collect the primary data from the respondents. The questionnaire was prepared to collect data under five sub-heading, viz, corporate governance effectiveness, compliance, audit, change agents (business partners) and code of conduct.

The secondary source of data collection includes companies code of conduct, whistleblower policy, anti-fraud policy, fraud prevention policy, etc.

In order to identify the prevailing corporate policies and the implementation mechanism adopted by the companies to prevent and detect corruption in the oil and gas sector, opinion was elicited from employees working in the oil and gas companies and other industries.

The google form questionnaire was referred to the general counsels, middle management in legal department, company secretary cum compliance officer, head of internal audit, chief financial officer, business head and employees working in the department of human resources, information technology, supply chain management, contract management, project management, finance, corporate strategy, sales, estimation and proposal, and administration. The questionnaire was mailed to the respondents who are anticipated to speak and appreciate the questions, fill in the google form and submit. One of the limitations of questionnaire study is that it is very challenging to understand whether willing respondents are genuine representative. There is also possibility of omission or false replies.

The collection of data is a herculean task and complex since it requires disclosure of corrupt practices, and the employees are bound by confidentiality obligations. The respondents were requested to express their views and perception of the existing practises in the company.

### **14. Pilot Study**

Earlier to the conduct of comprehensive research, a small-scale preliminary analysis was conducted to assess the viability and to better the study design. The aim of pilot survey was to make the proposed questionnaire understandable to the members of target populations. The questionnaire went through a multiple change prior to the final distribution to the respondents. The

draft questionnaire was distributed to the general counsels, company secretary cum compliance officer, head of internal audit and employees in the information technology and legal department. The questionnaire was revised based on the valuable comments and suggestions received from the respondents.

### **15. Administration of the questionnaire**

The respondents were identified through industry contacts of the researcher and social media was used to effectively identify the respondents, communicate and collect the data. The Google form questionnaires were sent to the respondents through email, WhatsApp and LinkedIn and the responses were collected and processed further.

The questionnaire was emailed to the respondents in the month of January 2021 after suitable modifications carried out based on the pilot study. The copy of the questionnaire shared with the members of the population is annexed as **Appendix 4.1**. A covering letter explaining the nature and importance of the study, purpose of survey, importance of their response and assurance with respect to the strict confidentiality of the responses and the name of the respondents and the company. Copy of the covering letter issued to the respondents is annexed herewith as **Appendix 4.2**. The questionnaire was also sent to the respondents via WhatsApp and professional network LinkedIn. Telephonic as well as personal communication were made to motivate the respondents and to fill up the details.

### **16. Limitations of the Study**

Despite the best efforts made to collect the data from the respondents, the limitations noticeable in the study are:

1. The survey is majorly confined to the legal professionals working in the oil and gas and other industries. The randomly selected data does not represent the whole population.
2. Most of the respondents were not willing to share the information since it pertains to corrupt activities followed by the companies and the respondents were bound by the confidentiality obligations.
3. The questionnaire relates to corruption committed by the companies in which the respondents were working. It is a human tendency to hide corruption and illegal activities committed by them. There is every

possibility that the respondent might give false answers to protect himself as well the company in which he is working.

4. The questionnaire is subdivided into five sets of questions covering multiple departments (i) corporate governance effectiveness (ii) compliance (iii) audit (iv) change agents (business partners), and (v) code of conduct. No employee will be handling the job responsibilities of multiple departments. There is every possibility that respondent might answer the questions based on certain assumptions or his best judgment of the company practices. The assumptions by the respondents may not reflect the correct position of the company policies and practices.
5. The respondents understanding about corruption may be different in certain circumstances. An employee may not treat facilitation payment or obtaining competitor information through illegal means as corruption. An employee might consider swindling of company money by the employee would alone be treated as corruption. Hence, individual perception of corrupt practices of the respondents also impacts the answers to the questionnaire.
6. Tone at the top might influence the respondents to answer the questionnaire in particular manner.
7. Lack of knowledge about company policies and practices would render the respondent answer meaningless.
8. Lack of time to check and verify the factual position would also affect the effectiveness of questionnaire.
9. The casual attitude of the respondents while answering the questionnaire would lead to wrong answers.

## **17. Data Analysis**

The primary data collected were subjected to data analysis and interpretation to draw meaningful solutions to the research problem of the study. The data was analysed using the Statistical Package for Social Sciences (SPSS). The statistical tools such as, simple frequency distribution, descriptive statistics and multi-dimensional scaling were applied on the survey conducted among the

respondents. The results of the empirical evidence pertaining the simple frequency distribution were presented in Table 4.7.

**Table 4.7**  
**Demographic Characteristics of the Respondents**

Demographic Profile (N = 51)	Frequency	Percentage (%)
Type of Company		
PSU/State Owned	7	13.7
Public Ltd/Private Ltd	44	86.3
Industry		
Oil & Gas	24	47.1
Non – Oil & Gas	27	52.9

Table 4.7 indicates that majority of the respondents were from public and private limited companies followed by state owned or public sector undertakings. Majority of the respondents are hailing from Non-Oil and Gas type of industries rather than Oil and Gas industries.

**Table 4.8**

**Corporate Governances Practices - Descriptive Statistics, Test of Normality and Reliability Statistics**

Dimensions	Descriptive Statistics						Tests of Normality		Reliability Statistics			
	Mean		Std. Deviation	Variance	Skewness	Kurtosis	Kolmogorov-Smirnov <sup>a</sup>	Shapiro-Wilk	Item-Total Statistics		Cronbach's Alpha	
	Statistic	Std. Error	Statistic	Statistic	Statistic (Std. Error = 0.333)	Statistic (Std. Error = 0.656)	Statistic (df = 51)	Statistic (df = 51)	Corrected Item-Total Correlation	Squared Multiple Correlation		
<b>Corporate Governance Effectiveness (Preventive Vigilance Mechanism)</b>												
PVM1	4.255	0.128	0.913	0.834	-1.360	1.328	0.272*	0.723*	0.716	0.732	0.888	
PVM2	4.118	0.150	1.070	1.146	-1.261	0.799	0.280*	0.760*	0.813	0.843		
PVM3	4.098	0.146	1.044	1.090	-1.190	0.784	0.267*	0.785*	0.766	0.800		
PVM5	4.294	0.129	0.923	0.852	-1.427	2.154	0.307*	0.751*	0.542	0.463		
PVM6	4.510	0.081	0.579	0.335	-0.684	-0.489	0.351*	0.707*	0.522	0.465		
PVM7	4.412	0.113	0.804	0.647	-1.381	1.523	0.336*	0.721*	0.659	0.680		
PVM8	4.431	0.106	0.755	0.570	-0.918	-0.611	0.363*	0.709*	0.694	0.569		
PVM10	3.902	0.146	1.044	1.090	-0.785	-0.475	0.302*	0.795*	0.591	0.595		
<b>Compliance</b>												
COM1	4.098	0.123	0.878	0.770	-1.120	1.945	0.259*	0.812*	0.843	0.734		0.905
COM2	4.098	0.135	0.964	0.930	-0.899	0.551	0.257*	0.813*	0.882	0.815		
COM3	3.824	0.136	0.974	0.948	-0.442	-0.123	0.193*	0.863*	0.616	0.463		
COM4	4.137	0.119	0.849	0.721	-0.271	-1.570	0.277*	0.770*	0.808	0.794		
<b>Audit</b>												
AUD1	4.157	0.117	0.834	0.695	-0.523	-0.762	0.256*	0.816*	0.559	0.316	0.720	
AUD2	3.667	0.147	1.052	1.107	-0.461	-0.517	0.232*	0.887*	0.564	0.326		
AUD3	3.922	0.131	0.935	0.874	-0.451	-0.683	0.220*	0.856*	0.498	0.248		
<b>Change Agents</b>												
BUS1	4.255	0.122	0.868	0.754	-1.103	0.679	0.275*	0.774*	0.561	0.439	0.815	
BUS2	3.941	0.136	0.968	0.936	-0.706	-0.340	0.269*	0.831*	0.732	0.649		
BUS3	4.275	0.135	0.961	0.923	-1.152	0.270	0.324*	0.742*	0.660	0.535		
BUS4	4.098	0.109	0.781	0.610	-0.438	-0.453	0.234*	0.831*	0.456	0.303		
BUS5	4.216	0.106	0.757	0.573	-0.674	0.045	0.242*	0.808*	0.666	0.536		
BUS6	4.137	0.112	0.800	0.641	-0.500	-0.546	0.232*	0.825*	0.425	0.448		
<b>Code of Conduct</b>												
COC2	2.608	0.148	1.060	1.123	-0.190	-1.152	0.213*	0.868*	0.381	0.287	0.795	
COC3	1.980	0.147	1.049	1.100	0.907	0.146	0.237*	0.828*	0.543	0.431		
COC4	2.451	0.152	1.083	1.173	-0.016	-0.874	0.263*	0.861*	0.605	0.393		
COC5	2.824	0.114	0.817	0.668	-0.573	0.149	0.311*	0.835*	0.436	0.318		
COC6	1.961	0.131	0.937	0.878	0.384	-1.144	0.259*	0.817*	0.726	0.773		
COC7	2.137	0.131	0.939	0.881	0.018	-1.340	0.252*	0.822*	0.617	0.713		
a. Lilliefors Significance Correction; * Significance @ 5% Level												

The table 4.8 shows that Corporate Governance Effectiveness, Compliance, Audit, Change Agents and Code of Conduct aspects mean and standard deviation values are in robust measure and it indicates that the data is normally distributed. The test of normality indicates that the by Kolmogorov-Smirnov Test of normality and Shapiro-Wilk Test of Normality statistic values of both tests are the clear indication of normal distribution in the data collected from the respondents. Due to commonality in range and negative covariance

between the constructs, the items have been removed such as PVM 4, PVM 9 and COC 1. The Cronbach's Alpha reliability co-efficient was used to measure the consistency and reliability of the data and results proves that Cronbach's Alpha reliability co-efficient values for all the aspects such as, Corporate Governance Effectiveness, Compliance, Audit, Change Agents and Code of Conduct. The scale used in the instrument is more consistent and highly reliable.

### **18. Determinants of Corporate Governance Effectiveness in PSU/State Owned / Public Ltd / Private Ltd Employees**

The multiple regression analysis has been applied to explore the significant predictors of corporate governance effectiveness in different industries of the study area. The results are presented in Table 4.9.

Table 4.9 shows that results of multiple regression analysis with Ordinary Least Square Model to explore key determinants of Corporate Governance Effectiveness. The F-Value of 54.657 with df of 48 and P-Value of 0.000 proves that regression equation has significant influence of independent variables such as Change Agents and Compliance on Total Corporate Governance Effectiveness. The R<sup>2</sup> Value of 0.695 indicates that 68% of the variance in the dependent variables is explored by independent variables. Further, the result indicates that change agents and compliance aspects have higher positive and significant influence on corporate governance effectiveness whereas; audit and code of conduct do not have significant influence on total corporate governance effectiveness. Higher the compliance perception and change agents perception, higher is the corporate governance effectiveness in the study area.

**Table 4.9**

**Determinants of Corporate Governance Effectiveness Total Score**

Model	Variables	Model Summary <sup>c</sup>						Coefficients <sup>a</sup>			Collinearity Statistics		Durbin-Watson
		R	R <sup>2</sup>	Adj. R <sup>2</sup>	S.E	F-Value (df= 2, 48)	Sig.	Std. Coefficients Beta	t	Sig.	Tolerance	VIF	
2	Dependent Variable												
	Corporate Governance Effectiveness	0.834	0.695	0.682	0.381	54.657	0		***		***		1.724
	Independent Variables												
	(Constant)		1.405	0.167					1.405	0.167			
	<b>Change Agents</b>	<b>0.593</b>	<b>5.617</b>	<b>0</b>	<b>0.57</b>	<b>1.754</b>		<b>0.593</b>	<b>5.617</b>	<b>0.000*</b>	0.57	1.754	
	<b>Compliance</b>	<b>0.314</b>	<b>2.976</b>	<b>0.005</b>	<b>0.57</b>	<b>1.754</b>		<b>0.314</b>	<b>2.976</b>	<b>0.005*</b>	0.57	1.754	
	Audit	0.086	0.727	0.471	0.463	2.162		0.086	0.727	0.471	0.463	2.162	
	Code of Conduct	-0.068	-0.744	0.461	0.77	1.299		-0.068	-0.744	0.461	0.77	1.299	

a. Dependent Variable: Corporate Governance Effectiveness  
c. Predictors in the Model: (Constant), Change Agents, Compliance

**19. Multi-Dimensional Scaling Approach to Map Factorial Positions of determinants of Corporate Governance Effectiveness**

Multi-Dimensional Scaling Approach to Map Factorial Positions of determinants of Corporate Governance Effectiveness in order to understand the importance performance of different aspects of Corporate Social Responsibility. Public and Private Companies Capitalising on Determinants of Corporate Governance Practices Cluster Group -1 Capitalising on audit, code of conduct, change agents and compliance plays a vital role in the corporate governance effectiveness to make an effective business performance. The MDS output of green supply chain integration cluster group – 1 satisfies in terms of fit, Stress = 0.0000 and RSQ = 1.0000 and Stress = 0.00408 RSQ = 0.99996.



**High Performance / High Influential:** Change Agent and Compliance are considered to be a highly positioned the determinants in the applying Corporate Governance Effectiveness.

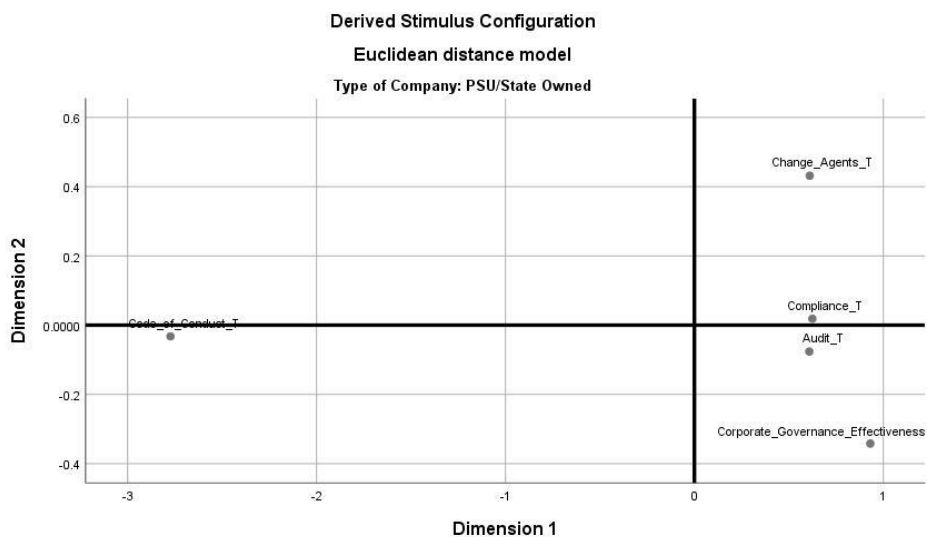
**Low Performance / High Influential:** Audit and Corporate Governance Effectiveness considered to be an important determinates business performance of the firm and it have highly influential of integration Public and Private sector employees in the Study area.

**Low Performance / Low Influential:** Code of Conduct was considered to be low influential dimension of integration Public and Private sector employees in the Study area. However, the dimension was not terribly pertinent at the time of analysis; they may play more important in the future. The Multidimensional scaling result explicated that 99.999% of relationship predicted between Corporate Governance aspects and Corporate Governance effectiveness dominant cluster groups.

**Graph 1**

**Public and Private Companies Capitalising on Determinants of Corporate Governance Practices**

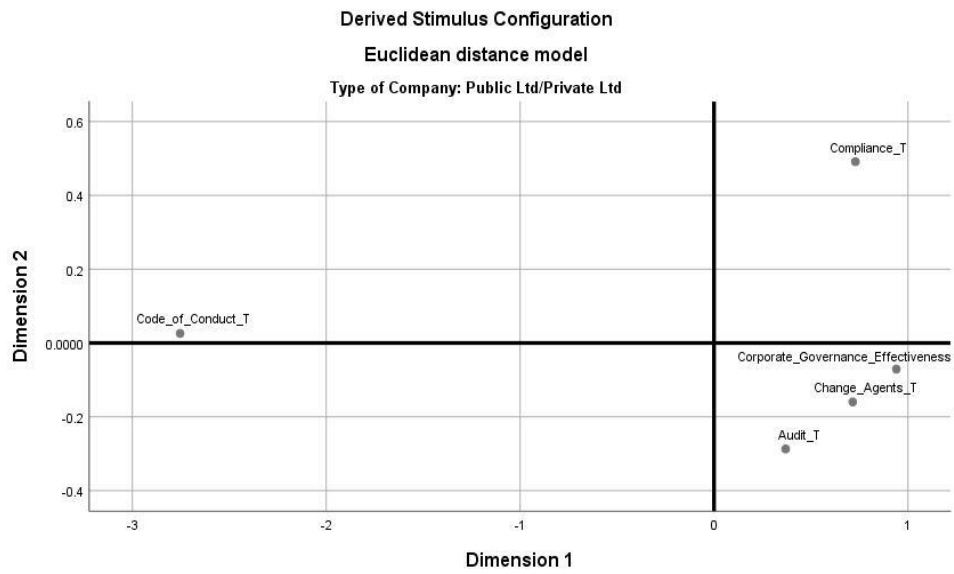
**PSU/State Owned**



For matrix

Stress = .00000    RSQ = 1.00000

## Public Ltd/Private Ltd



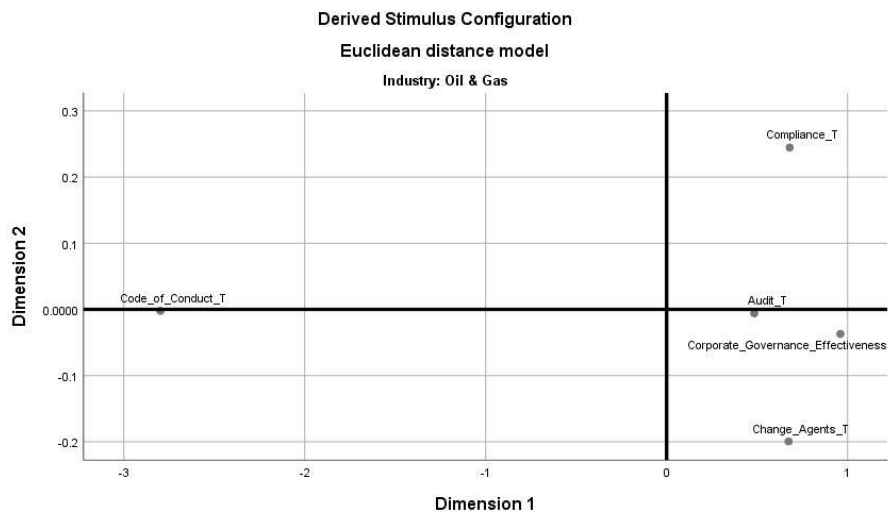
For matrix

Stress = .00408    RSQ = .99996

## Graph 2

**Nature of Industry (i.e., Oil & Gas and Other Industry Sectors)  
Capitalising on Determinants of Corporate Governance Practices**

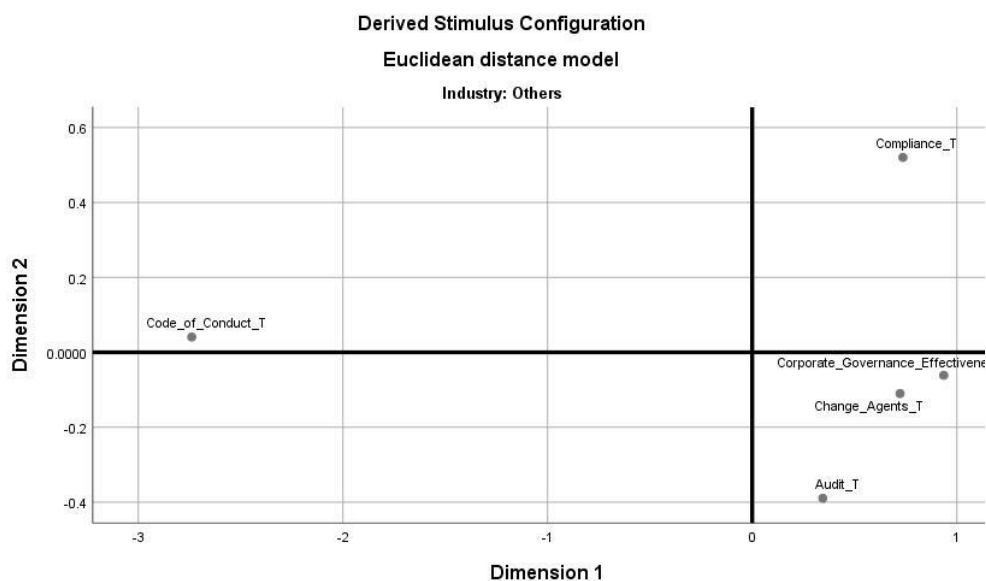
## Oil & Gas



For matrix

Stress = .00000    RSQ = 1.00000

## Other Sector



For matrix

Stress = .00157    RSQ = .99999

**High Performance / High Influential:** Compliance is considered to be a highly positioned determinants in applying the Corporate Governance Effectiveness.

**Low Performance / High Influential:** Audit, Corporate Governance Effectiveness and change agents are considered to be an important corporate governance effectiveness of the firm and it have highly influential of integration Oil and Gas industries in the Study area.

**Low Performance / Low Influential:** Code of Conduct was considered to be low influential dimension of integration Oil and Gas Industries and other industry employees in the Study area. However, the dimension was not terribly pertinent at the time of analysis; they may play more important in the future. The Multidimensional scaling result explicated that 99.999% of relationship predicted between Corporate Governance aspects and Corporate Governance effectiveness dominant cluster groups.

To conclude, the change agents and compliance are the major key determinants of corporate governance effectiveness in the different forms of

industries in the study area. The empirical evidence proves that compliance of practices and key adoption of change agents in the organisations drive the organisation towards better business performance.

## **20. RTI Information**

The researcher has filed application under the RTI Act to collect antibribery and corruption details from the PSUs doing business in the oil and gas sector.

a. Bharat Petroleum Corporation Ltd: BPCL refused to provide details of the total number of whistle blowers complaints received by it for contravention of anti-bribery and corruption laws during the period of last 10 years, i.e, 2010 to 2020.<sup>105</sup> BPCL cited that providing details of ten years are voluminous and would unreasonably distract the staff of the public authority and hence denied data under section 7(9) of the RTI Act, 2005. However, BPCL intimated that a vigil mechanism exists in the company to report genuine concerns and provides employees a framework to report improper activities.

There is no separate Code of Conduct applicable to all employees and BPCL is guided by the CDA rules & Standing Orders.<sup>106</sup> BPCL conducts frequent and ongoing compliance and corporate governance training program for its employees. There is no internal policy or monitoring mechanism to oversee the settlement of disputes with EPC Contractors, or customers. Company follows GCC, which deals with arbitration and does not give any guidance for the amicable settlement of disputes. BPCL has a comprehensive holiday listing policy and the same is available in the company website<sup>107</sup> and the vendors must follow clause 34 of the GCC.<sup>108</sup>

b. Engineers India Ltd: The Audit Committee of the EIL has not received any complaint alleging violation of anti-bribery and corruption laws occurred during the period of last 10 years, i.e, 2010 to 2020. The Vigilance Department also has not received any complaint under whistleblower policy for further

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<sup>105</sup> Letter No.BPCLD/R/E/21/00400/1. (2021, June 16).

<sup>106</sup> Letter no.BPCL/R/E/21/00485. (2021, July 12).

<sup>107</sup> <http://www.bharatpetroleum.in/pdf/holidaylistingpolicyfinal.pdf> m

<sup>108</sup> Letter no.BPCL/R/E/21/00485/1. (2021, July 13).

investigation during the period of last 10 years, i.e, 2010 to 2020.<sup>109</sup> EIL Conduct rules and Discipline Appeal rules are there and it was last amended in the year 2015. The company conducts training programs to help its employees to understand their responsibilities.<sup>110</sup> EIL has a policy requiring the Contractors or vendors to adopt ethics of highest standard and a very high degree of integrity, commitment and sincerity towards the work undertaken.<sup>111</sup>

c. Gas Authority of India Ltd: There are no whistleblowers complaints received by GAIL alleging violation of anti-bribery and corruption laws occurred between 2010 to 2020.<sup>112</sup>

d. Hindustan Petroleum Corporation Ltd: HPCL refused to provide whistleblowers complaints received by it citing safety of the complainant.<sup>113</sup> HPCL is having a Conduct, Discipline & Appeal Rules and the same was last amended on 04/11/2020. Certified Standing Orders are applicable for the non-management employees working within the organisation. HPCL conducts training based on the business requirement and development needs of the employees.<sup>114</sup> There is no separate policy available for the amicable settlement of the disputes and the provisions of the arbitration and conciliation clause in the HPCL tender govern the dispute resolution process. The vendors, contractors, and business partners are to comply with the contract requirements and there is no separate code of conduct applicable for the business partners.<sup>115</sup>

e. Indian Oil Corporation Ltd: IOCL has not received any whistleblowers complaints for contravention of anti-bribery and corruption laws during the period from 2010 to 2020.<sup>116</sup> There is no separate code of conduct applicable to the business partners and they are governed as per the clauses in the contract.<sup>117</sup> The code of conduct of IOCL are being regularly updated in compliance with new Rules, Regulations and Laws. IOCL conducts training programme

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<sup>109</sup> Letter No.8589-89-48-LET-1487-2021. (2021, June 16).

<sup>110</sup> Letter No.8589-89-48-LET-1492-2021. (2021, July 13).

<sup>111</sup> <https://enlist.eil.co.in/osems/>

<sup>112</sup> Letter No.GAIL/ND/RTI/Ravidasan.NS/E/00148/2021. (2021, June 16).

<sup>113</sup> Letter no.HPCL/CVO/VIG/RTI/HPCLD/R/E/21/00538/7037. (2021, June 18).

<sup>114</sup> Letter No.ER/RTI/DM. (2021, July 12).

<sup>115</sup> Letter No.HPCL/CPO/GPH/RTI/2021/06. (2021, July 12).

<sup>116</sup> Letter no.DP/6/21. (2021, June 8).

<sup>117</sup> Letter No.RTI/PLNG/IOC/13791/3432/E/1453. (2021, July 19).

depending upon the functional and developmental training needs of the employees.<sup>118</sup>

f. Mangalore Refineries and Petrochemicals Ltd: There are no whistleblowers complaints received by MRPL for contravention of anti-bribery and corruption laws during the period between 2010 to 2020. Company takes necessary measures to prevent the victimisation and company has not received any complaint related to victimisation of the whistleblower.<sup>119</sup> MRPL has a separate code of conduct applicable to all the employees and the same was last amended on 03/08/2019. Company conducts frequent and ongoing compliance and corporate governance training program for its employees. There is no separate policy for the settlement of disputes with business partners and the dispute resolution is carried out as per the contract terms and conditions, specific to each contract awarded by MRPL. There is no separate code of conduct applicable to the business partners. MRPL conducts proper due diligence whenever vendors or service providers are engaged.<sup>120</sup>

g. Oil and Natural Gas Corporation: ONGC has not provided any information on the pretext that at the moment company secretariat do not possess any separate details or data pertaining to violation anti-bribery and corruption laws in the award and execution of the EPC contract.<sup>121</sup>

### **Principles of Corporate Governance in EPC Contracts**

The tender documents floated by three major Indian PSUs for the execution of onshore and offshore EPC contracts are analysed to understand implementation of corporate governance policies in EPC Contracts. The following aspects are considered while analysing the EPC contracts in the Indian oil and gas industry:

- (i) Whether EPC Contracts take into consideration of the principles of corporate governance

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<sup>118</sup> Letter No. DP/6/21. (2021, July 1).

<sup>119</sup> Letter No.MRPL/RTI/E/21/1783. (2021, June 14).

<sup>120</sup> Letter No.MRPL/RTI/E/21/1835. (2021, July 13).

<sup>121</sup> Letter No.ONGC/DLI/RTI/2021/000897. (2021, July 7).

- (ii) Whether the principles of corporate governance are incorporated into the EPC Contract
- (iii) Whether PSUs abuse their dominant position while dealing with the EPC Contractor and
- (iv) Whether corporate governance principles are effectively implemented to prevent corruption at the pre-bid and execution stage of the EPC Contract

## **21. Hindustan Petroleum Corporation Limited (HPCL)**

The researcher has reviewed Bidding Document No.: AD/B016-504-PM-TN-9509/1014 floated by Project Management Consultant (PMC) M/s Engineers India Limited (EIL) for Residue Up-Gradation Facility (RUF) (EPCC-3 Package) of M/s Hindustan Petroleum Corporation Limited (HPCL), Visakh Refinery Modernization Project (VRMP) to assess the corporate governance principles incorporated in the tender documents.

### **21.1 Transparency**

- The detailed Invitation for Bid (IFB) along with qualification criteria was published in the Central Public Procurement Portal (CPPP) as well as in the EIL website for viewing and downloading of documents. Any amendment or addendum to the bid shall be hosted on the CPPP of Government of India<sup>122</sup> and the information will also be sent to the bidders on their email id.<sup>123</sup> The bid and other documents to substantiate the qualification criteria are to be submitted online in the CPPP (eProcurement portal) only.
- Pre-bid meeting is arranged to clarify the bidders' queries, if any, relating to scope of work, bidding documents, bidder qualification criteria, etc.<sup>124</sup> Any modification to the bidding document, after pre-bid meeting shall be notified to all the bidders through email.<sup>125</sup> The follow-up of the pre-bid meeting, shall be uploaded on the website.<sup>126</sup>

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<sup>122</sup> Instructions to Bidder, cl.7.2

<sup>123</sup> Instructions to Bidder, cl.7.4

<sup>124</sup> Invitation for Bid, cl.6.1

<sup>125</sup> Instructions to Bidder, cl.6.7

<sup>126</sup> Instructions to Bidder, cl.6.6

- The bidding process may be annulled at any point by the owner without any liability or accept or reject any bid.<sup>127</sup> The fee for the job done shall be made to the Contractors designated bank through electronic mode (e-payment).<sup>128</sup>

## 21.2 Fairness

- Bidders are given an opportunity to inspect the location to acclimatise themselves about the current facilities and environment and gather requisite information for the submission of bid. It was categorically mentioned that inadequacy of information or ignorance of site conditions will not be judged for additional claim or interruption in work.<sup>129</sup> The bidder is obliged to examine and satisfy about the character of the soil before presenting the tender and the contractor is not eligible to make any claim for changes in site conditions.<sup>130</sup> The researcher is of the view that it is impossible and rather impractical for the bidder to understand about the subsoil conditions unless it is tested, and soil data report is obtained. Moreover, the timeframe given for site inspection is very limited to enable the contractor to have clear understanding about the subsoil conditions. Any change in soil conditions would prejudicially affect the performance of the contractual obligation and lead to a dispute between the parties. The Owner has an upper hand and there is every possibility of misuse or abuse of the same.
- In the pre-bid meeting, only technical and commercial matters shall be examined and no deviations to the terms and conditions shall be taken for the bids submitted after pre-bid meeting.<sup>131</sup> Bids submitted with deviations may be liable for rejection at the discretion of EIL/Owner.<sup>132</sup>
- Owner will determine about the substantially responsive bid and any material deviation affecting significant manner the scope, quality, execution of work or unduly influence the competitiveness of other

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<sup>127</sup> Instructions to Bidder, cl.34.1

<sup>128</sup> General Terms & Conditions to the Works Contract, cl.7.6

<sup>129</sup> Instructions to Bidder, cl.3.1

<sup>130</sup> General Terms & Conditions of Works Contract, cl.3.1

<sup>131</sup> Instructions to Bidder, cl.6.2

<sup>132</sup> Instructions to Bidder, cl.6.8



bidders will be rejected.<sup>133</sup> A fair amount of discretion is given to the Owner/PMC to decide about the substantially responsive bid and there is a possibility of misuse of same. The Owner or PMC can include a bidder or reject bidders stating that the bid is not substantially responsive. Any vague term in the tender regarding mandatory bid qualification criteria would spoil the tender process and put the participation of the bidders in the tender process at the mercy of the Owner/PMC.

- The EIC may at any time alter, modify, or amend the plans or drawing given to the Contractor and the contractor shall continue to execute the works or supplies without entitlement to any extra compensation.<sup>134</sup> The Owner shall not take any unfair benefit of its own cause and unreasonably demand the Contractor to continue to perform the work without any further payment.
- The Owner undertakes no accountability for correctness of plans, drawings or other information provided as part of the bidding document and the contractor to assume thorough and independent survey ahead of performance of the work.<sup>135</sup> The contractor is not entitled for a change order if:
  - (i) Owner/EIC changes scope of supply or services prior to the approval of detailed design or engineering
  - (ii) At any time to fulfil the obligations under the contract, the changes in supply, service or work are necessary.<sup>136</sup>

The equilibrium prevalent at the time of submission of proposal is altered by the Owner and the Owner expects the Contractor to take responsibility at its own cost and risk. The vague term like ‘comply with the responsibilities under the contract’ gives unbridled discretion to the Owner to deny costs and time benefit to the Contractor.

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<sup>133</sup> Instructions to Bidder, cl.30

<sup>134</sup> Special Conditions of Contract, cl.5.7

<sup>135</sup> Special Conditions of Contract, cl.5.1

<sup>136</sup> Special Conditions of Contract, cl.9.3

- The work front/jobsite or free issue materials shall be entrusted to the contractor continuously in stages and the contractor shall only be eligible for extension of time for delay in handing over of work front or free issue material.<sup>137</sup> Contractor's entitlement for compensation for the delay attributable to Owner is denied.
- All surplus materials including scrap, wastages and unserviceable materials shall be entrusted to the Owner upon execution of the Project.<sup>138</sup> If the Contractor fail to return such surplus materials, then contractor shall be liable to make payment of cost of materials along with 15% overhead expenses.<sup>139</sup> In a lumpsum contract, the obligation of the contractor is to hand over the works and it is not required to hand over the surplus materials.
- The price adjustment is not considered as a levy of liquidated damages or a penalty under section 74 of the Indian Contract Act. Independent of price adjustments, the Owner is entitled for damages or compensation for breach or delay in completion of the work.<sup>140</sup> Public Sector Undertakings being a State should act reasonably and comply with all applicable laws. It should not invent new ways, means and concepts to circumvent the law of the land and impose unreasonable conditions in the contract for its benefit.
- It shall be believed to be settlement of full and final payment notwithstanding the conditional acceptance of payment or making a qualifying remarks or protest by the contractor at the time of acceptance of final bill payment.<sup>141</sup> Similarly, acceptance of any amount in respect of notified claim included in the final bill shall be considered to be full and final disbursement notwithstanding any qualifying remarks by the Contractor.<sup>142</sup> Generally, Owner obtains no claim certificate in their format to process the final bill and in order to protect the cashflow, the

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<sup>137</sup> Special Conditions of Contract, cl.12

<sup>138</sup> Special Conditions of Contract, cl.14.1.IX

<sup>139</sup> Special Conditions of Contract, cl.14.1.X

<sup>140</sup> Special Conditions of Contract, cl.23.7.1.4

<sup>141</sup> Special Conditions of Contract, cl.37.1

<sup>142</sup> Special Conditions of Contract, cl.37.2

Contractor will be forced to accept the money offered by the Owner. No Dues Certificate and acceptance of payment could be cited by the Owner as a preliminary objection during the dispute resolution process, if any, initiated by the Contractor. Owner takes advantage of the financial stress of the Contractor and forces to arrive at a settlement or uses the unreasonable clauses in the contract to the advantage of Owner.

- Any dispute, claim or controversy arising between the Parties under the contract shall be settled by arbitrator chosen by the Parties in compliance with *the Arbitration and Conciliation Act 1996 (A&C Act)*.<sup>143</sup>

### **21.3 Accountability**

- The bidders were asked to submit documentary proof in support of their qualification of technical criteria. The documentary proof shall include the relevant pages of the work orders or contract mentioning the scope of work referring to the pre-qualification of the bidder.<sup>144</sup> Complete authentic information and documentation to be presented by the bidder together with the bid. Owner reserves the right to interact directly with the bidder's client and bidder shall also facilitate the site visit of the referenced unit for the Owner, if considered necessary.<sup>145</sup> In order to authenticate the documents in support of bid qualification criteria, the bidders are required to submit documents either duly certified by statutory auditor or notarised by Notary Public or a Self-Certification signed by the CEO/ CFO/ Company Secretary/ any functional Director of Board of Directors along with the bid.<sup>146</sup> The self-certification is to ensure that pre-qualification documents are:
  - (i) submitted under the knowledge of CEO/ CFO/ Company Secretary/ any functional Director of Board of Directors
  - (ii) true, reliable, genuine, exact copy of its original
  - (iii) not be false/forged or fabricated.

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<sup>143</sup> Special Conditions of Contract, cl.99.1.2

<sup>144</sup> Invitation For Bid, cl.5.1.12

<sup>145</sup> Invitation For Bid, cl.5.1.13

<sup>146</sup> Invitation For Bid, cl.5.4.3

The signatory to the self-certification is personally responsible, if later, any of the records presented by the bidder are discovered to be false/forged or fabricated. The Owner is having the right to take any action against the signatory or the bidder company including for criminal breach of trust, cheating, fraud, and putting company on the holiday/blacklist for future business with Owner. The copy of the self-certification to be submitted by the bidder is attached herewith as **Appendix 4.3.**

- A commitment from the Chief Executive of the bidder shall be submitted stating that its board shall monitor the project schedule and all actions to arrest the delays at the appropriate moment. Such strategic plan will also be provided to the Owner.<sup>147</sup>
- Member of the consortium or unincorporated joint venture shall be jointly and severally accountable for the execution of the scope of work under the contract. A consortium member shall neither entitled for an extension of time for the performance of the work nor additional compensation for the failure to perform or withdrawal of a consortium member.<sup>148</sup> The contract will be treated as single works contract and the consortium shall be jointly and severally accountable for the faithful performance of the works.<sup>149</sup>
- Composite Performance Bank Guarantee (CPBG) is to be submitted by the successful bidder to the Owner within the period indicated in the Contract and failure to do so would result in forfeiture of the earnest money deposit besides being the liability for damages.<sup>150</sup> The CPBG shall be of 10% of the contract value<sup>151</sup> and shall be valid up to a period of three months beyond defect liability period.<sup>152</sup> Retention money of 10% of the contract value shall be retained from the running account

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<sup>147</sup> Invitations to Bidder, cl.31.5.4

<sup>148</sup> Invitation For Bid, cl.5.3.3

<sup>149</sup> Invitations to Bidder, cl.35.3

<sup>150</sup> Invitations to Bidder, cl.14.6

<sup>151</sup> Special Conditions of Contract, cl.4.1

<sup>152</sup> Special Conditions of Contract, cl.4.1.1

bills and final bill of the Contractor to satisfy damages or defect liability arise during the defect liability period.<sup>153</sup>

- If any subcontractor is to be engaged for any part of the work, then it is obliged to demonstrate prior proven experience of the subcontractor for the approval of Owner/PMC.<sup>154</sup> The contractor can propose new vendors to EIL for approval<sup>155</sup> and contractor shall exclusively accountable for the quality and speedy implementation of the works by the subcontractor.<sup>156</sup> All materials and equipment to be delivered under the contract shall be procured from the approved vendors.<sup>157</sup> The contractor shall undertake all tests, analysis and inspections prior to supply of materials to the Owner.<sup>158</sup> The suitability, sufficiency and accessibility of the source of supply and suitability of the materials available from such sources shall be satisfied by the Contractor independently.<sup>159</sup>
- Permission of the Engineer in Charge shall be taken prior to the implementation of any deviations to the approved works.<sup>160</sup> Assignment or subcontracting of work cannot be done without prior written consent of the Owner.<sup>161</sup> The contractor shall remain exclusively responsible for all acts, lapses, and failure of the subcontractor.<sup>162</sup> The contract does not specifically mention about the quantum of works to be subcontracted to a third party, which enables the Contractor to subcontract maximum work instead of performing by itself, which may reduce the quality of the work as noticed in the Satyendra Dubey murder case. Moreover, the discretion to approve the subcontractor can be misused or abused by the PMC to select a particular subcontractor for the execution of the work. The quantum of works/ scope of work permitted to be subcontracted should be clearly spelt out at NIT stage only. This will enable EPC

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<sup>153</sup> General Terms & Conditions of Works Contract, cl.7.c

<sup>154</sup> Invitations to Bidder, cl.31.2

<sup>155</sup> General Terms & Conditions of Works Contract, cl.5.c.3

<sup>156</sup> General Terms & Conditions of Works Contract, cl.5.c.4

<sup>157</sup> Special Conditions of Contract, cl.16

<sup>158</sup> Special Conditions of Contract, cl.17.1

<sup>159</sup> Special Conditions of Contract, cl.17.6

<sup>160</sup> General Terms & Conditions to the Works Contract, cl.3.12

<sup>161</sup> General Terms & Conditions to the Works Contract, cl.3.17

<sup>162</sup> Special Conditions of Contract, cl.25.2

Contractor to assess its position and submit a list of its vendors for pre-qualification.

- The EIC shall review the Quality Assurance Programme established and maintained by the contractor. The contractor shall, through an approved Third-Party Inspection (TPI) agency, carry out the inspection of the imported equipment's and materials.<sup>163</sup> The works shall be scrutinised by EIC at any time wherever in progress and closely monitor the progress the work.<sup>164</sup> The Contractor shall provide all assistance to EIC for conducting frequent tests of all works performed.<sup>165</sup>
- The contractor shall provide guarantee for the works and rectify or replace any damage or defect at his own cost throughout the defect liability period.<sup>166</sup> The responsibility to make payment of all statutory levies, wherever applicable, lies with the Contractor.<sup>167</sup> The contract provides for the levy of price adjustment for the delay in completion of the work.<sup>168</sup> The right of the Owner to discount the price shall in addition to any other remedy available in the agreement including the right of termination.<sup>169</sup>
- The contractor shall cooperate with other contractors engaged at site and whenever required work in association or in proximity with other contractors. Harmonious working between the contractor and Owner and other contractors shall be ensured during the execution of the contract.<sup>170</sup> The contract does not provide for any remedy available to the contractor in case the contractor suffers any delay on account of such cooperation with other contractors engaged at site. Also, the contract does not specifically provide for any remedy available to the contractor in case delay/damage is caused for reasons solely attributable to such other contractors engaged at site.

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<sup>163</sup> Special Conditions of Contract, cl.23.10

<sup>164</sup> General Terms & Conditions of Works Contract, cl.5.g.1

<sup>165</sup> General Terms & Conditions of Works Contract, cl.5.i.1

<sup>166</sup> General Terms & Conditions to the Works Contract, cl.5.n

<sup>167</sup> General Terms & Conditions of Works Contract, cl.7.d

<sup>168</sup> General Terms & Conditions of Works Contract, cl.10

<sup>169</sup> Special Conditions of Contract, cl.23.7.1

<sup>170</sup> Special Conditions of Contract, cl.23.1.8

## 21.4 Conflict of Interest

- Submission of multiple bids by the bidder either directly or indirectly is prohibited. Submission of alternative bids are also not acceptable.<sup>171</sup> The affiliates of the bidder are not allowed to submit a individual bid directly or indirectly and submission of separate bid by the affiliate will result in disqualification of the bidders.<sup>172</sup> To avoid conflict of interest, the process licensors are not eligible to quote for the package for which they are the process licensors.<sup>173</sup> Notice Inviting Tender (NIT) should also spell out conditions regarding horizontal mergers of various bidders, parent company and subsidiary company and whether they will be permitted to bid together, from point of view of competition law.
- The bid submission letter to be sent by the bidder must clearly state that none of the Directors of HPCL was employed with bidder in the last two years immediately preceding the date of submission of bid, and if employed, previous permission was obtained from the HPCL.

## 21.5 Compliance

- Bidder is requested to submit compliance of bid requirement in form E along with techno commercial bid. The bidder has to fully agree to comply without any alteration, variation or reservation of all technical, commercial and other terms of the tendering document. The copy of the compliance declaration to be submitted by the bidder is attached herewith as **Appendix 4.4**.
- The Contractor shall indemnify the Owner for the losses and claims emanating from the failure to follow to the relevant laws and safety and security regulations.<sup>174</sup>
- The Contractor shall pay the minimum wages applicable to the site to all the employees including that of the employees hired by the subcontractors.<sup>175</sup> Contractor shall be accountable for the fulfilment of

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<sup>171</sup> Instructions to Bidder, cl.16

<sup>172</sup> Invitation For Bid, cl.5.3

<sup>173</sup> Invitation For Bid, cl.8.14

<sup>174</sup> General Terms & Conditions of Works Contract, cl.3.15

<sup>175</sup> General Terms & Conditions to the Works Contract, cl.6.a.2

all labour laws applicable from time to time and liable for any grievances that may occur in this regard.<sup>176</sup> The Contractor shall indemnify the Owner for all the costs, damages, and levies arising out of breach of all applicable laws including municipal laws and regulations.<sup>177</sup> Before undertaking any work inside the Owner premises, the contractor shall obey all Health, Safety and Environment (HSE) specifications issued by the Project Management Consultant (PMC) and Owner work permit and safety procedure to be followed.<sup>178</sup>

### **21.6 Checks and Balances**

- Government agencies shall have the authority to examine and audit the Contract and works and the contractor shall extend full cooperation in this regard.<sup>179</sup>

### **21.7 Ethics and Value**

- Integrity pact in the form attached in the bid documents shall be presented by all the bidders together with the bid, failing which their bid will not be considered for evaluation.<sup>180</sup> The Owner makes the following commitments as per the integrity pact:
  - (i) not to make demand or accept, either directly or indirectly, any bribe, gift, considerations, or reward in exchange for a reward during bidding process including bid assessment and execution of the contract.<sup>181</sup>
  - (ii) equality in treatment of all bidders and provide same information to all the bidders.<sup>182</sup>
  - (iii) in case of misconduct, take disciplinary proceedings the against the officials.<sup>183</sup>
  - (iv) exclude all known prejudiced persons from the bidding process.<sup>184</sup>

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<sup>176</sup> General Terms & Conditions to the Works Contract, cl.6.e.3

<sup>177</sup> Special Conditions of Contract, cl.63.1

<sup>178</sup> Special Conditions of Contract, cl.98.1

<sup>179</sup> General Terms & Conditions of Works Contract, cl.8.b

<sup>180</sup> Invitation For Bid, cl.8.15

<sup>181</sup> Integrity Pact, cl. 1.1

<sup>182</sup> Integrity Pact, cl.1.2

<sup>183</sup> Integrity Pact, cl.2

<sup>184</sup> Integrity Pact, cl.2.1



- (v) take criminal actions for the violation of anti-corruption laws.<sup>185</sup>
- The bidders commit themselves to take *interalia* the following measures to prevent corrupt practices during pre-bid as well as post contract stage:
  - (i) not to offer, either directly or indirectly, any bribe, gift, reward, or considerations to obtain any advantage or favour during the bidding process, bid evaluation or execution of the contract.<sup>186</sup>
  - (ii) disclose payment, if any, made to the agents or intermediaries in connection with the bid.<sup>187</sup>
  - (iii) not to collude with any parties to damage the fairness and transparency of the bidding process, bid estimation or execution of the contract.<sup>188</sup>
  - (iv) bid information shall not be used improperly for personal gain or any competitive advantage.<sup>189</sup>
  - (v) disclose details about
    - (a) whether any employee of bidder is a relative of Owner
    - (b) whether any relative of an officer Owner has any financial relationship with bidder.<sup>190</sup>
- The bidder shall also disclose any transgressions that occurred within last three years, with any corporation in any state in relation to any corrupt practices.<sup>191</sup> A bidder may be disqualified from the bidding process or during the performance of the contract for any incorrect statement about previous transgression.<sup>192</sup> The integrity pact provides sanctions for its violations, *interalia* including, calling off pre-bid negotiations, forfeiture of performance bonds, cancel the contract, debar the bidder from joining in future bidding process, etc.<sup>193</sup> Independent External Monitors (IEMs) are appointed to independently and

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<sup>185</sup> Integrity Pact, cl.2.2

<sup>186</sup> Integrity Pact, cl.3.1

<sup>187</sup> Integrity Pact, cl.3.4

<sup>188</sup> Integrity Pact, cl.3.7

<sup>189</sup> Integrity Pact, cl.3.9

<sup>190</sup> Integrity Pact, cl.3.12

<sup>191</sup> Integrity Pact, cl.4.1

<sup>192</sup> Integrity Pact, cl.4.2

<sup>193</sup> Integrity Pact, cl.6

objectively review the compliance of obligations by the parties under the integrity pact.<sup>194</sup>

- The bidders will be disqualified, if they indulge in any form of canvassing either directly or through any agency.<sup>195</sup> Bidders are debarred from bidding process if they are involved in the cartel formation.<sup>196</sup>
- Owner ensures that no agent is engaged in the transaction and the Owner shall directly deal with the contractor.<sup>197</sup> Bidder is required to issue a certificate stating that no agent is involved in the bidding process and no fee is payable in India or out of the country in relation to the contract. Copy of the declaration to be presented by the bidder together with the bid is attached herewith as **Appendix 4.5**.
- The bidders shall follow highest level of ethics during the award or performance of the contract. Bidder shall not make any false statements to persuade the award of the contract to the disadvantage of Owner or commit any collusive practices impacting free and open competition.<sup>198</sup> The bidder shall not engage in any fraudulent practices<sup>199</sup> and provide correct and complete information/documents to the Owner for the evaluation of bid.<sup>200</sup> If the submission of the false or forged documents comes to the knowledge of the Owner then the Owner shall have the right to:
  - (i) terminate the Contract<sup>201</sup>
  - (ii) forfeiture of CPBG/security deposit<sup>202</sup>
  - (iii) forfeit the balance amount due to the Contractor/bidder<sup>203</sup>

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<sup>194</sup> Integrity Pact, cl.8

<sup>195</sup> Invitation For Bid, cl.8.12

<sup>196</sup> Invitation For Bid, cl.8.11

<sup>197</sup> Instructions to Bidder, cl.13.1

<sup>198</sup> Instructions to Bidder, cl.40.1

<sup>199</sup> Instructions to Bidder, cl.40.2

<sup>200</sup> Instructions to Bidder, cl.40.3

<sup>201</sup> Instructions to Bidder, cl.40.4

<sup>202</sup> Instructions to Bidder, cl.40.4

<sup>203</sup> Instructions to Bidder, cl.40.5

(iv) put the bidder/contractor on blacklist/ negative/holiday list of the Owner/PMC and prohibiting them from potential business with Owner/PMC for a certain period.<sup>204</sup>

- The contractor shall adhere to highest level of ethics during performance of the contract.<sup>205</sup> Owner may put an end to the contract, if later discovered that contractor has indulged in corrupt or fraudulent practises while contending for the contract.<sup>206</sup> If EIC is of the opinion that a person working in the project is guilty of misconduct, then the contractor shall remove such person(s) from employment.<sup>207</sup>

### **21.8 Risk Assessment**

- The bidders are required to submit self-certificate asserting that they are not in receivership, insolvency or similar proceedings and the failure to do so would result in disqualification of the bidder.<sup>208</sup> If during the bid evaluation process, any of the bidders are on the holiday/ suspension/ banning list of the of HPCL or EIL then their bid shall not be considered.<sup>209</sup> Bidders are requested to submit an undertaking stating that they are not in holiday list of other companies.<sup>210</sup> Copy of the Declaration of Blacklisting/ Holiday Listing to be submitted by the bidder is attached herewith as **Appendix 4.6**.

### **22. Indian Oil Corporation Limited (IOCL)**

The researcher has reviewed the Bidding Document No. IBCE-6373-C00-PJM-TEN-EPCC-01A floated by Project Management Consultant (PMC) M/s Toyo Engineering Private Ltd. (Toyo) for New Atmospheric & Vaccum Distillation Unit (AVU) And Allied Facilities of M/s Indian Oil Corporation Limited (IOCL), for Barauni Refinery Capacity Expansion to gain and develop an understanding about the principles of corporate governance incorporated in the bid document.

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<sup>204</sup> Instructions to Bidder, cl.40.6

<sup>205</sup> Special Conditions of Contract, cl.77.2

<sup>206</sup> Special Conditions of Contract, cl.77.3

<sup>207</sup> Special Conditions of Contract, cl.28.1

<sup>208</sup> Invitation For Bid, cl.8.8

<sup>209</sup> Invitation For Bid, cl.8.9

<sup>210</sup> Invitation For Bid, cl.8.16

## 22.1 Transparency

- Notice Inviting Tender (NIT) was issued by Toyo and the bidder who satisfies the Bidder Qualification Criteria (BQC)<sup>211</sup> can provide a quote for the Project by way of e-bidding in website [www.iocletenders.nic.in](http://www.iocletenders.nic.in).<sup>212</sup> Any addendum or corrigendum will be issued on the website and no individual notification will be issued in the press.<sup>213</sup>
- Any clarification or queries or information in relation to bidding documents shall be intimated in writing to Owner two days prior to the pre-bid meeting.<sup>214</sup> All technical and commercial concerns shall be examined in a pre-bid meeting so as to facilitate the bidder to present their proposal without any deviations to the bid conditions.<sup>215</sup> No deviation shall be accepted after pre-bid meeting.<sup>216</sup> The replies to the pre-bid queries and the conclusions arrived at the meeting shall be uploaded in the IOCL e-tendering portal.<sup>217</sup>
- The bidder shall make a visit and assess the project site to obtain the relevant information for the preparation of the bid.<sup>218</sup> All payments due to the Contractor shall be paid through bank transfer.<sup>219</sup> The competitiveness in the public procurement process is achieved by following equity and transparency by the Owner.<sup>220</sup>

## 22.2 Fairness

- The Owner does not warrant the correctness of the bid documents and the contractor is presumed to have evaluated all the matters related to the execution of the work or supply of materials.<sup>221</sup> Responsibility is cast upon the contractor to pursue all approvals by issuing notice including notices for the delay in handing over of work front, utilities, and free issue

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<sup>211</sup> Notice Inviting Tender, Part C, cl.12

<sup>212</sup> Notice Inviting Tender, Part C, cl.13

<sup>213</sup> Notice Inviting Tender, Part D (xxiii)

<sup>214</sup> Instructions to Bidders, cl.5.3

<sup>215</sup> Instructions to Bidders, cl.5.2

<sup>216</sup> Instructions to Bidders, cl.5.7

<sup>217</sup> Instructions to Bidders, cl.5.5

<sup>218</sup> Instructions to Bidders, cl.5.8

<sup>219</sup> General Conditions of Contract, cl.6.5.1.0

<sup>220</sup> Instructions to Bidders, cl.11.1

<sup>221</sup> General Conditions of Contract, cl.2.2.1.0

materials. The contract provides for deemed approval if there is no reply within 10 days of notice and the contractor can seek extension of time for the delay in handing over of work front, utilities, and free issue materials. However, such deemed approval must be further approved by the Executive Director (ED).<sup>222</sup> The Contractor is not entitled to seek extension of time for the time taken by ED for the approval of documents.<sup>223</sup> The denial of cost escalation for the fault of the owner as well as refusal to grant extension of time for the time taken for the approval of documents by ED is unfair. Each step of the approval process, at every level, should be time bound so that the project is not delayed, and the contractor does not have to incur loss in the absence of any fault of its own. Any such loss/cost incurred by the contractor due to no fault, ultimately results in picking up cost and consequently, decreasing of the profits.

- The Owner's hold up<sup>224</sup> such as delay in providing the work front, utility, material, drawing, specification approval, etc shall allow the contractor for extension of time for accomplishment of work.<sup>225</sup> The extension of time will be considered only when delay arising out of Owner's hold up continues beyond 15 days' notice given by the contractor and it affects the critical path of the Project.<sup>226</sup> The extension of time shall be exclusive right and the contractor shall not be eligible for any payment in connection with extended stay or otherwise.<sup>227</sup> The denial of compensation for the act of Owner is unreasonable, unfair, and arbitrary exercise of power by the Owner.
- At any time, the EIC shall be entitled to amend or alter or modify the plans, drawings, design, or specification relating to the work and the contractor shall perform the work without entitlement to any additional remuneration or price.<sup>228</sup> The change order provisions inapplicable if (a) the Owner or EIC requires change in the work prior to the endorsement of detailed design

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<sup>222</sup> General Conditions of Contract, cl.2.2.1.1

<sup>223</sup> General Conditions of Contract, cl.2.2.1.3

<sup>224</sup> General Conditions of Contract, cl.4.3.8.1

<sup>225</sup> General Conditions of Contract, cl.4.3.7.0

<sup>226</sup> General Conditions of Contract, cl.4.3.8.2

<sup>227</sup> General Conditions of Contract, cl.4.3.10.0

<sup>228</sup> General Conditions of Contract, cl.2.4.1.0

or engineering to satisfy the specifications mentioned in the Contract or (b) change in work is necessary for the contractor to conform to the requirements of the contract or contractor responsibilities under the contract.<sup>229</sup> The process appears to be flawed as the bid price was determined for a scope of work fixed prior to award of contract. There should be a fixed quantum of altering scope, beyond which contractor should be compensated.

- The Owner shall hand over the work front sequentially in stages to meet the requirements of the work.<sup>230</sup> The failure to hand over the land by the Owner within ten days' notice by the Contractor would enable the Contractor to claim extension of time.<sup>231</sup> Also, the standby allowance is not payable to the contractor for
  - (i) delay by Owner in providing front/supplies/utilities/documents
  - (ii) approval or disapproval from the Owner is delayed, and
  - (iii) delay in progress of the work for a cause not attributable to the Contractor.

The Contractor waives its right to receive compensation and shall only be entitled to time extension for the execution of the work. The prolongation or extended stay costs is specifically excluded in the contract.<sup>232</sup> It is unfair for the Owner to forbid compensation for the impediments and consequences caused by it.

- Notwithstanding any provisions contained in law, after presentation of the final bill, the Contractor shall not lodge any claim including a claim of quantum meruit. The contractor relinquishes and waives all claims against the Owner after submission of the final bill.<sup>233</sup> Irrespective of the qualifying remarks or protest made by the Contractor at the time of acceptance of any amount under final bill shall be deemed to be in complete satisfaction of all payments due to the contractor.<sup>234</sup> With respect to the notified claim, the

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<sup>229</sup> General Conditions of Contract, cl.2.6.6.0

<sup>230</sup> General Conditions of Contract, cl.2.10.1.0

<sup>231</sup> General Conditions of Contract, cl.2.10.3.0

<sup>232</sup> General Conditions of Contract, cl.2.9.1.0

<sup>233</sup> General Conditions of Contract, cl.6.6.4.0

<sup>234</sup> General Conditions of Contract, cl.6.7.1.0

acceptance of any amount paid by the Owner shall be deemed to be through settlement of all claims irrespective of any protest or qualifying remarks imposed by the contractor at the time of acceptance of the amount. The contract shall stand satisfied and extinguished in relation to the demands of the contractor.<sup>235</sup>

- Disputes arising out of notified claim included in the final bill shall only be referred to arbitration.<sup>236</sup> The disputes of differences relating to the following matters are excluded from the scope of the arbitration agreement.

- (i) Whether the claim requested for reference to arbitration is a notified claim or not?
- (ii) Whether the notified claim is incorporated in the final bill as per the contract.

The arbitral tribunal has no authority to consider the above issues and such excepted matters shall be referred to the General Manager of the Owner or his nominee.<sup>237</sup> The sole arbitrator shall be selected by the contractor within 30 (thirty) days from the panel of three arbitrators proposed by the Owner, failing which the Owner shall appoint the arbitrator.<sup>238</sup>

The Owner has drafted the contract arbitrarily and has no intention to refer all the disputes arising between the Parties to arbitration. There is always possibility of the Owner raising a preliminary dispute under section 16 of the A&C Act before the tribunal that the claim in question is not a notified claim and hence, not arbitrable. The intent was, therefore, not to settle the dispute amicably through established process of law. The Owner also usurps into the power of the tribunal to rule on its jurisdiction under section 16 of the A&C Act which contains the doctrine of competence-competence. The employee of the Owner is given the responsibility to decide about the notified claim which violates Schedule V of the A&C Act, thereby excluding independence and impartiality in the dispute resolution process. Moreover, the contractor is forced to select a sole arbitrator from the panel of three arbitrators proposed

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<sup>235</sup> General Conditions of Contract, cl.6.7.2.0

<sup>236</sup> General Conditions of Contract, cl.9.0.1.0

<sup>237</sup> General Conditions of Contract, cl.9.0.2.0

<sup>238</sup> General Conditions of Contract, cl.9.0.1.1

by the Owner. There is no broad-based panel proposed by the Owner and the qualification, experience and selection criteria is also not disclosed to the contractor. The dispute resolution clause provided in the contract is unfair, arbitrary, and unreasonable.

### **22.3 Accountability**

- The bidder has to submit the certificate issued by the CEO/CFO stating that DLP is completed, and no claim is received from the client on account of performance of the plant or equipment which is referred in the bid to support BQC.<sup>239</sup> All documents in support of BQC shall be self-certified and submitted along with the bid.<sup>240</sup> The CEO/ CFO/ Company Secretary of the bidder shall submit a self-certification and declaration stating that the documents pertaining to BQC genuine, authentic, real, and correct copy of its original and none of the documents are fabricated, forged or false. The signatory shall be responsible in case of any documents are found to be false, fabricated or forged and the Owner shall have the right to take action against the signatory including for criminal breach of trust, cheating or fraud. A copy of the Self Certification and Declaration is attached herewith as **Appendix 4.7**.
- As part of its bid, the bidder required to furnish Earnest Money Deposit (EMD).<sup>241</sup> In order to guarantee the due performance of the Contract and for securing the discharge of liabilities under the Contract, the Contactor shall provide an unconditional bank guarantee equal to ten per cent of the contract price.<sup>242</sup> The validity of the bank guarantee shall be not less than three months after the expiration of defect liability period.<sup>243</sup>
- In case of consortium, the MOU between the bidders shall clearly define the scope and obligation of each member including that of the leader.<sup>244</sup> All the members of the consortium of joint venture bidder shall be jointly and severally liable to the Owner for satisfaction of the conditions of the

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<sup>239</sup> Notice Inviting Tender, Part C, cl.12.3.2

<sup>240</sup> Notice Inviting Tender, Part D (xi)

<sup>241</sup> Instructions to Bidders, cl.19.1

<sup>242</sup> General Conditions of Contract, cl.2.1.1.0

<sup>243</sup> General Conditions of Contract, cl.2.1.2.0

<sup>244</sup> Notice Inviting Tender, Part C, cl.12.7.3.2



contract.<sup>245</sup> Submission of forged documents would lead to rejection of bids as well as forfeiture of EMD and debarring of the bidder from future bidding.<sup>246</sup>

- The bidder shall submit an integrity pact along with the bid and the bid will be rejected in the absence of the same.<sup>247</sup> Any violation of the integrity pact would not be subject matter of arbitration.<sup>248</sup> Owner promises itself to initiate all deeds to avoid corruption and treat all bidders with equity and reason. If any of its employees are involved in a conduct which is in violation of anti-bribery laws then the Owner shall intimate the Chief Vigilance Officer besides initiating disciplinary action.<sup>249</sup> The Owner shall provide the same information to all bidders and endeavour to exclude persons with questionable integrity from the tendering process.<sup>250</sup> Necessary measures shall be set down by the bidder to avoid corruption and shall not, directly or indirectly, offer, promise or give any material or other benefit to the employees of the Owner. The contractor shall not do any act which will restrict competitiveness or indulge in cartelisation during bidding process. Bidders shall disclose the engagement of agents, if any, and all payment made or committed to be made to the agents in connection with or on the pretext of the award of the Contract.<sup>251</sup> Bidder shall disclose the previous transgressions that have taken place in the last 3 years and any incorrect statement in that regard would lead disqualification from the tendering process.<sup>252</sup>
- The contractor is permitted to engage a subcontractor who has prior proven experience of similar work,<sup>253</sup> however, activities which shall be performed directly by the contractor are clearly mentioned in the bid document.<sup>254</sup>

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<sup>245</sup> Instructions to Bidders, cl.12.6

<sup>246</sup> Notice Inviting Tender, Part D (xii)

<sup>247</sup> Instructions to Bidders, cl.11.2

<sup>248</sup> Instructions to Bidders, cl.11.3

<sup>249</sup> Integrity Pact, art.1.2

<sup>250</sup> Integrity Agreement, art.1

<sup>251</sup> Integrity Agreement, art.2

<sup>252</sup> Integrity Agreement, art.5

<sup>253</sup> Instructions to Bidders, cl.13.2

<sup>254</sup> Instructions to Bidders, cl.13.5.1

- Before the supply of material, the contractor shall undertake all requisite tests, analysis and inspections and the results thereof shall be recorded or reported or certified.<sup>255</sup>
- Any slippage in the mechanical completion would attract price adjustment and the lump sum price shall be subject to variation by way of discount.<sup>256</sup> The price adjustment shall not be treated as a penalty under section 74 of the Indian Contract Act, 1872 and Owner retain its right to claim damages independently of price adjustment.<sup>257</sup>
- No assignment or subcontract of the whole of or part of the work is permissible without prior written consent of the EIC.<sup>258</sup> The contractor shall exclusively remain responsible to the Owner for all acts, lapses, or defaults of subcontractor.<sup>259</sup> The contractor shall correct, rectify, or replace the defective materials or works during the defect liability period.<sup>260</sup>

#### **22.4 Conflict of Interest**

- A Consultant or an affiliate company who is engaged as consultant for the same project is ineligible to submit its bid for the same project.<sup>261</sup> No bidder shall either directly (as a sole bidder or as a consortium member) or indirectly (as a subcontractor) submit more than one bid.<sup>262</sup>
- The letter to be presented to the Owner along with the bid shall state that the bidder has not employed any Directors of IOCL during the period of 2 (two) years prior the date hereof and if employed, it has obtained previous permission of IOCL.

#### **22.5 Compliance**

- While performing the works, the contractor shall obey and fulfil all laws, rules, regulations, and orders and indemnify the Owner for the breach of any applicable laws.<sup>263</sup>

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<sup>255</sup> General Conditions of Contract, cl.3.0.6.1

<sup>256</sup> General Conditions of Contract, cl.4.4.1.0

<sup>257</sup> General Conditions of Contract, cl.4.4.5.0

<sup>258</sup> General Conditions of Contract, cl.4.9.1.0

<sup>259</sup> General Conditions of Contract, cl.4.9.2.0

<sup>260</sup> General Conditions of Contract, cl.5.4.1.0

<sup>261</sup> Notice Inviting Tender, Part D (i)(c)

<sup>262</sup> Instructions to Bidders, cl.22

<sup>263</sup> Instructions to Bidders, cl.14.8

## 22.6 Checks and Balances

- The capacity and capability of the bidder shall be assessed by the Owner or PMC using in-house information and past performance.<sup>264</sup>

## 22.7 Ethics and Value

- If the bidders are associated in cartel then their bid will not be reckoned for appraisal and their bid will not be entertained for evaluation and they will be debarred from bidding in the future.<sup>265</sup> If the bidder is engaged in any form of canvassing either directly or through any agency then it will be disqualified.<sup>266</sup> The bid shall be rejected if the bidder makes any attempts to influence the Owner or PMC during the bid evaluation process or at the time of award of the contract.<sup>267</sup> The Owner shall have the right to put an end to the contract, if the contractor or any person hired by him offers or makes any gratification or other inducement for any purpose in relation to the contract.<sup>268</sup>
- Complete and correct information's are to be provided by the bidders for the proper evaluation of the bid. Owner may reject the bid in addition to the forfeiture of the Earnest Money, if the bidder is found to have submitted false, forged or fabricated documents or concealed or misrepresented the facts.<sup>269</sup> The bidder may also be placed on the holiday list or the Owner shall be authorised to remove the bidder from the approved vendors list and in case of award of contract, it shall be liable for termination.<sup>270</sup> Highest standard of ethics shall be observed during the performance of the contract.<sup>271</sup> If the corrupt or fraudulent practices of the contractor are discovered subsequently then the Owner may terminate the contract.<sup>272</sup>
- A self-declaration to be provided by the bidder asserting that they are not under any holiday list, or a blacklist proclaimed by the Owner, public sector organisations or department of the State or Central Government. The details

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<sup>264</sup> Notice Inviting Tender, Part D xiii

<sup>265</sup> Instructions to Bidders, cl.2

<sup>266</sup> Notice Inviting Tender, Part D (xvii)

<sup>267</sup> Instructions to Bidders, cl.28.2

<sup>268</sup> General Conditions of Contract, cl.7.0.1.0 (vi)

<sup>269</sup> Special Conditions of Contract, cl.15.1

<sup>270</sup> Instructions to Bidders, cl.16.5(ii)

<sup>271</sup> Special Conditions of Contract, cl.15.2

<sup>272</sup> Special Conditions of Contract, cl.15.3

pertaining to any inquiry in relation to the corrupt or fraudulent practices that are pending against it are to be disclosed by the bidder. The Owner may reject the bid in case of a false declaration or suppression of information and may forfeit the Earnest Money or bank guarantee or remove the bidder from the approved vendor list, place them on the holiday list and in case of award of contract, the same shall be open for termination.<sup>273</sup>

- In the opinion of EIC, if any agent, consultant, or employee of the contractor is guilty of misconduct then the contractor shall forthwith remove such person from employment.<sup>274</sup>

### **22.8 Risk Assessment**

- Audited balance sheet as along with the profit and loss account to be offered by the bidder to fulfill the financial criteria stipulated in the tender document.<sup>275</sup> Bid submitted by the bidders who are in the holiday / suspension / banning list / negative list of IOCL or MoPNG (Ministry of Petroleum and Natural Gas) shall not be counted for the bid opening or estimation or award.<sup>276</sup> Along with the bid, a self-certificate asserting that the bidder is not in bankruptcy or court receivership shall be submitted.<sup>277</sup>

## **23. Oil and Natural Gas Corporation Limited (ONGC)**

In order to assess the corporate governance principles embedded in the EPC Contract, the researcher reviewed the Tender Document No. MR/ES/MM/C7ADP/03/P851C18004/2018 floated by ONGC for Cluster-7 Additional Development Project.

### **23.1 Transparency**

- The bid was invited through e-procurement site<sup>278</sup> and the amendments and addendums also notified through ONGC e-procurement website.<sup>279</sup> The bidders shall send clarifications in the pre-bid process only through e-procurement portal and clarifications shall be restricted to technical

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<sup>273</sup> Instructions to Bidders, cl.16.8

<sup>274</sup> General Conditions of Contract, cl.9.11.1.0

<sup>275</sup> Notice Inviting Tender, Part C, cl.12.4.1

<sup>276</sup> Notice Inviting Tender, Part D (i)(a)

<sup>277</sup> Notice Inviting Tender, Part D (i)(b)

<sup>278</sup> Invitation for Bids, cl.1

<sup>279</sup> Instructions to Bidders, cl.8.2

specifications, scope of work, special conditions of contract and the Company shall not allow any queries pertaining to GCC and other standard provision of the bid document.<sup>280</sup> Bidder may visit site and assess the site conditions and environments to acquire knowledge required for the submission of the bid.<sup>281</sup>

### **23.2 Fairness**

- All disagreements or conflicts or questions derive from or in relation with the contract shall be resolved as per the laws of India.<sup>282</sup> The dispute can be referred by the Parties to the OEC (Outside Expert Committee) constituted by Chairman and Managing Director (CMD) of ONGC<sup>283</sup> and upon constitution of OEC, the members of OEC shall give declaration of independence and impartiality.<sup>284</sup> No party is permitted to appoint any advocate or consultant, or advisor or agent and the Parties shall be represented by their inhouse employees.<sup>285</sup> The OEC shall give its recommendations within 90 days of its first meeting<sup>286</sup> and the recommendations of OEC are not binding on parties.<sup>287</sup> Arbitration can be invoked by the Parties by issuing invocation notice to the other party.<sup>288</sup> No party shall be entitled to claim either pre-reference or pendente-lite interest and claim of such interest shall be considered void. While deciding the dispute the arbitral tribunal shall not award pre-reference or pendente-lite interest.<sup>289</sup> The legitimate right of the Contractor to claim interest is being denied by the Owner in an unfair manner.
- No standby charges for extension of time will be granted even if the delay in construction schedule is encountered or additional costs is incurred to fulfil the requirements of the Company including liaising or coordination with other contractors.<sup>290</sup>

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<sup>280</sup> Invitation for Bids, cl.7.1

<sup>281</sup> Instructions to Bidders, cl.5.1.1

<sup>282</sup> General Conditions of Contract, cl.1.3.1

<sup>283</sup> General Conditions of Contract, cl.1.3.2.2

<sup>284</sup> General Conditions of Contract, cl.1.3.2.5

<sup>285</sup> General Conditions of Contract, cl.1.3.2.11

<sup>286</sup> General Conditions of Contract, cl.1.3.2.15

<sup>287</sup> General Conditions of Contract, cl.1.3.2.20

<sup>288</sup> General Conditions of Contract, cl.1.3.3.2

<sup>289</sup> General Conditions of Contract, cl.1.3.3.7

<sup>290</sup> General Conditions of Contract, cl.5.3.5

- The Contractor is entitled for the sole remedy of extension of time and not entitled for additional compensation even if the performance of work by Contractor is suspended by the Company for its convenience.<sup>291</sup>

### **23.3 Accountability**

- Consortium members are jointly and severally liable to perform the obligations under the contract.<sup>292</sup>
- Bid security to be submitted by the bidder along with the proposal. Upon notification of the award, the winning bidder shall submit performance guarantee.<sup>293</sup> Within fifteen days of release of notice of award, the Contractor shall submit an irrevocable and unconditional performance guarantee valid up to schedule completion date.<sup>294</sup>
- Prior written confirmation of the Company shall be secured for the assignment or subcontracting of the work and such assignment shall not release the duties and commitments of the contractor in the contract.<sup>295</sup>
- The contractor shall give warranty that the executed work is free from all defects, faults and workmanship and the warranty shall be for a period of 12 (twelve) months from the date of supply of completion certificate.<sup>296</sup>
- Time is essence of the contract, and the contractor shall pay liquidated damages for the failure to carry out the work by the scheduled completion date.<sup>297</sup>

### **23.4 Conflict of Interest**

- The bidders shall not employ any serving employee of the Company or any ex-employee within one year after retirement or resignation or severance of service without prior permission of Company. The Company may refuse to deal with the bidder who employs any serving or ex-employee of the Company.<sup>298</sup>

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<sup>291</sup> General Conditions of Contract, cl.8.2.2

<sup>292</sup> Instructions to Bidders, cl.3.7

<sup>293</sup> Instructions to Bidders, cl.28

<sup>294</sup> General Conditions of Contract, cl.3.3.1(a)

<sup>295</sup> General Conditions of Contract, cl.5.2.1

<sup>296</sup> General Conditions of Contract, cl.6.1.1

<sup>297</sup> General Conditions of Contract, cl.6.3.2

<sup>298</sup> Instructions to Bidders, cl.29

- A firm which provides goods for the Project and any of their affiliates are disqualified to provide consulting service for the same Project. Similarly, a firm providing consulting service for the preparation and execution of the Project and any of its affiliates are disqualified from bidding for the Project.<sup>299</sup>

### **23.5 Compliance**

- The contractor shall fulfil all relevant statutes, rules and regulations and shall indemnify the Company for any actions brought against it for the violation of any applicable laws.<sup>300</sup> The contractor shall observe all Health, Safety and Environment (HSE) related requirements while performing its obligation under the contract<sup>301</sup> and once in three months submit a safety report.<sup>302</sup>

### **23.6 Checks and Balances**

- The company shall engage Third Party Inspection (TPI) agency or Certification Agency (CA) for the inspection of the work during execution of the project.<sup>303</sup> TPI and CA shall carry out Project Quality Assurance Audit during execution of the Project.<sup>304</sup>
- In order to carry out tests or inspection, entry to the work site and all places where the work is being accomplished by the Contractor shall be given to the Company or its authorised representative.<sup>305</sup> Prior to the covering up of the work or put out of view, the Contractor shall provide reasonable notice and opportunity to examine and measure the work.<sup>306</sup>
- The contractor shall submit daily and weekly progress reports to the Company for monitoring the progress of the project. The monthly report submitted by the contractor shall map all activities against the baseline schedule to indicate the original schedule and the present status of the project.<sup>307</sup>

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<sup>299</sup> General Conditions of Contract, cl.5.2.5

<sup>300</sup> General Conditions of Contract, cl.5.20.1

<sup>301</sup> General Conditions of Contract, cl.10.1

<sup>302</sup> General Conditions of Contract, cl.10.5.1

<sup>303</sup> General Conditions of Contract, cl.5.1.6

<sup>304</sup> General Conditions of Contract, cl.5.1.6.1

<sup>305</sup> General Conditions of Contract, cl.5.9.5

<sup>306</sup> General Conditions of Contract, cl.5.9.6.1

<sup>307</sup> General Conditions of Contract, cl.11.1

### 23.7 Ethics and Value

- The contractor shall not engage any consultant or agent in connection with the project in India or abroad.<sup>308</sup> The foreign bidders shall disclose the details of the agents, if any, engaged by the bidder for any service in connection with the project. The commission paid to the agent shall be minimum and commensurate with the services performed.<sup>309</sup> Any effort by the bidder to persuade the bidding process would lead to rejection of the bid.<sup>310</sup>
- The bidder shall offer a certificate asserting that they are not related any of the Directors of ONGC.<sup>311</sup> The bidder shall also submit a duly signed Integrity Pact along with the bid.<sup>312</sup>
- The Company may verify the genuineness of the documents submitted by the bidder and if found that false or forged documents are presented to meet the pre-qualification criteria then ONGC shall immediately reject the bid or terminate the contract.<sup>313</sup> An undertaking certifying the authenticity of all the documents presented along with the bid shall be submitted by the bidder.<sup>314</sup> ONGC's Fraud Prevention Policy shall be observed to by the bidder and shall certify that they have read the policy and shall not engage in any fraudulent practise.<sup>315</sup>
- Submission of forged documents would lead to rejection of the bid or cancellation or termination of the contract and forfeiture of EMD/SD/PBG submitted by the bidder.<sup>316</sup>
- The Company does itself pursue all measures to stop corruption and treat all bidders with equity and reason. All known prejudiced persons will be excluded from the tender process.<sup>317</sup> As a corruption preventive measure, the Contractor will not, directly or indirectly, give or promise any material or immaterial benefit to any of the employees of the Company. The contractor

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<sup>308</sup> General Conditions of Contract, cl.1.4.1(b)

<sup>309</sup> Instructions to Bidders, cl.12.10

<sup>310</sup> Instructions to Bidders, cl.24.2

<sup>311</sup> Instructions to Bidders, cl.30

<sup>312</sup> Instructions to Bidders, cl.34.1

<sup>313</sup> Instructions to Bidders, cl.46

<sup>314</sup> Instructions to Bidders, cl.46.1

<sup>315</sup> Instructions to Bidders, cl.48

<sup>316</sup> General Conditions of Contract, cl.18

<sup>317</sup> Integrity Pact, s.1



would not commit any violation under the anti-corruption laws and disclose payments, if any, made to the agents.<sup>318</sup> If the bidders committed any transgression, then company is permitted to disqualify the bidder or terminate the contract.<sup>319</sup>The previous transgression occurred within the last 3 years shall be declared by the bidder and the bidder would be disqualified in case of incorrect statement.<sup>320</sup> The Independent External Monitor (IEM) appointed under the Pact can give only non-binding recommendations.<sup>321</sup>

## **24. Analysis of Implementation of Corporate Governance under EPC Contracts**

A party to a contract can only factor the risks and benefits known to them on the date of its execution. The parties do not envision to execute a contract in relation to an unknown fact or situation that they could not foresee. The contractual relationship between the Parties is based on the general understanding and expectation of an equitable sharing of the foreseeable risks and benefits. The cooperation, trust and compromise is *sine qua non* for the performance of obligations by the Parties in the agreed manner or within the specified time. The contract should allocate for certain specific risks that could be anticipated at the time of proposal and toe the line on the basis that the contract terms were not intended for reaping of substantial benefits by solely one party to the Contract.

### **24.1 Reasonable Expectation of Profit**

The contractor cannot be expected to include and factor in all the risk scenarios prior to submission of the proposal. The contract price is generally arrived at by the contractor by taking into consideration the factors existing at the time of making the proposal, such as cost of materials, labour, deployment of plant and machinery, time to be taken, energy required and the costs associated with compliance, etc. It is relevant to note that a reasonable expectation of profit is implied when a contractor undertakes the performance of work under a works contract and the contractor's loss must be rewarded by

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<sup>318</sup> Integrity Pact, s.2

<sup>319</sup> Integrity Pact, s.3

<sup>320</sup> Integrity Pact, s.5

<sup>321</sup> Integrity Pact, s.8

way of compensation if the loss suffered cannot be attributed to the contractor's fault or breach. The contract should be interpreted rationally to give business efficacy. The Supreme Court has in the case of *A.T. Brij Paul Singh v State of Gujarat*<sup>322</sup> observed as follows:

*“10. ... And the second reason to reject the contention is that ordinarily a Contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.”*

It would thus, be unreasonable for the Owner to abuse its position of dominance and deny a legitimate claim of the contractor in connection with the work done for and under the contract. Also, general duty of good faith and spirit of fair play would require the Owner to help the contractor remedy their problems. The Owner shall not derive an unfair advantage and abuse its rights by insisting on strict adherence to the onerous words of the contract. Such one sided clauses often have the effect of the EPC contractor picking up the additional costs, instead of making profit. Picking up costs not attributable to it and especially, for the project of another party defeats the very purpose of business.

#### **24.2 Fairness and Reasonableness in Public Contract**

The Public Sector Undertakings (PSUs) perform public functions and hence is an instrumentality of State. PSUs are supposed to function in a reasonable way, with due authority and within the powers conferred upon it under law. Test of reasonableness and public interest to be satisfied by the EPC Contract executed by a PSU. The contract of adhesion executed by the contractor shall not be arbitrary, unreasonable or against public policy. The standard form of contract should be fair and must abide by the principle of good faith. The inequality in bargaining power of the Contractor during execution of

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<sup>322</sup> (1984) 4 SCC 59 (In.).

the standard form of contract shall not be abused to gain unfair advantage. The contract of adhesion which does not satisfy the test of reasonableness and gives arbitrary power to the Owner should be declared void.

Every action of the State shall be contingent upon the rule of law and informed by reason. If an action of the State, including in the matter of sign up for contracts, fails to meet the test of reasonableness then the same should be deemed unreasonable.<sup>323</sup>

The Supreme Court of India in *Kumari Shrilekha Vidyarthi and Others v State Of U.P and Others*<sup>324</sup> held as follows

*“The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the preamble. Therefore, total exclusion of Article 14 non-arbitrariness which is basic to rule of law from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.”*

The Supreme Court in Para 28 of the judgment observed that:

*“The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The*

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<sup>323</sup> *Mahabir Auto Stores & Ors v Indian Oil Corporation & Ors* (1990) AIR 1031 (In.).

<sup>324</sup> (1991) 1 SCC 212 (In.).

*requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.”*

Even in contractual matters, the State has the duty to act fairly, justly, and reasonably. Regardless of the variety of its roles, the State shall satisfy fairness in action and non-arbitrariness.

The State shall consider public good and public interest in all their actions under the contract or during performance of obligations under the constitution or law and any unfair, unjust, and unreasonable act would violate Article 14 of the Constitution of India.<sup>325</sup> The State and its instrumentalities is obligated to act in a fair and transparent manner. It cannot act arbitrarily in dealings with private parties.<sup>326</sup> The State and its agencies in their business dealings, in the sphere of contracts, are not exempt from the inherent duty to act fairly. The State or its instrumentalities shall not discard their character or obligation to act in a fair manner in their contractual relationship with private parties.<sup>327</sup>

A fair and reasonable contract should provide for the entitlement of revision in the price as well as the time schedule, on happening of any of the ensuing events:

- (i) Delay in providing lay down area, free issue materials, drawings, documents, permits, permissions etc;
- (ii) In case of arising from a latent defect attributable to the lay down area or the site, which any contractor with relevant experience and knowledge couldn't have found out and the same impedes the work and obligations of the contractor;

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<sup>325</sup> *ABL International Ltd. v Export Credit Guarantee Corporation of India* (2004) 3 SCC 553 (In.).

<sup>326</sup> *Indsil Hydro Power & Manganese Ltd. (S) v State of Kerala & Ors (S)* (2019) SCC Online 1194 (In.).

<sup>327</sup> *Unitech Ltd. v Telangana State Industrial Infrastructure Corporation* (2021) SCC Online 99 (In.).

- (iii) Direct prevention of the work by the Owner by events such as delayed submission of the documents under the contract, or in respect of default or breach by the Owner;
- (iv) delay triggered owing to any act or omission of the other contractors working at site or on account of interface with such other contractors;
- (v) changes in law;
- (vi) any errors, discrepancies or omissions contained in the documents provided by Owner or change in the documents;
- (vii) Any other delay which is directly attributable to the Owner;
- (viii) Acceleration or suspension of the contractor's performance and obligations ordered by the Owner; and/or
- (ix) In case of a defect arising in a work of the other contractor (not belonging to contractor group), on which the work of contractor is dependent.

Additionally, the obligation of warranty or indemnity set forth in the EPC contract should not apply to:

- (a) Defects resulting from the inadequacy, mistake or omissions in the drawings, data or technical requirements supplied by the Owner, and more generally, any defects resulting from an external defective element not caused, attributable to or performed by the contractor.
- (b) The deterioration of the work due to the negligence or faulty supervision or upkeep or on account of incorrect operation or use, which is not in conformity with the technical requirements set out in the contract.
- (c) Defects resulting from the modifications or repairs performed by the Owner or third parties.
- (d) Incidents resulting from cases of Force Majeure as defined under the contract.
- (e) Any damage/loss arising out of any cause attributable to the Owner or third parties.
- (f) Any defect which is traceable to the other services rendered on the work by Owner.
- (g) Normal wear and tear.

- (h) Any defects or loss arising after the end of defects liability period specified in the contract.

### **24.3 Fairness and *Indian Contract Act 1872***

The outcome of the contract is not the concern of the contract act. The parties are allowed to act according to their wish, without committing any contravention of the phrases of the contract. The general doctrine of good faith is not applicable to the contractual arrangements.<sup>328</sup> In the EPC Contract, the Project Owner excludes the responsibility for their negligence or breach of contract. The substantive unfairness can be noticed in the EPC Contract wherein one-sided, unfair, and unconscionable clauses are incorporated. There are no general provisions in the *Indian Contract Act 1872* which enable the courts to declare the terms as void on the reason of being unfair, unconscionable or unreasonable and give relief to the weaker party.

One Hundred and Third (103<sup>rd</sup>) report of the Law Commission of India recommended amendment to the Indian Contract Act by incorporating the following:

*"Section 67A : (1) Where the court, on the terms of the contract or on the evidence adduced by the parties, comes to the conclusion that the contract or any part of it is unconscionable, it may refuse to enforce the contract or the part that it holds to be unconscionable.*

*(2) Without prejudice to the generality of the provisions of this section, a contract or part of it is deemed to be unconscionable if it exempts any party thereto from- (a) the liability for willful breach of the contract, or (b) the consequences of negligence."*

However, the above recommendation does not deal with unfair contracts but addresses unconscionable terms. There is no guideline provided based on which the court has to decide about the unconscionability.

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<sup>328</sup> Mohan, M.P.R., & Jain, A. (2020). Exclusion Clauses Under the Indian Contract Law: A Need to Account for Unreasonableness. *NUJS Law Review*, 13, 4.  
<http://nujlawreview.org/wp-content/uploads/2021/01/13-4-Mohan-Jain-Exclusion-Clauses-Under-The-Indian-Contract-Law-NUJS-Law-Review.pdf>

The contracting parties should honour their promises unless such performance is exempt under the Contract Act or any other law.<sup>329</sup> A duty is cast upon the parties to discharge the contract and the failure to fulfil the obligations are treated as breach of contract. The obligations under section 37 of the Contract Act would be irrelevant if party is allowed to exclude liability for the breach of contract and would amount to exclusion of section 37 of the Contract Act.<sup>330</sup> Damages for breach of contract is one of the fundamental principles of Contract Act and its sanctity cannot be nullified. The Project Owner cannot misuse or abuse its dominance to exclude the liability for the breach of contract.

Freedom of contract not acknowledged in India and the incident of any contract shall be consistent with the provisions of the Contract Act.<sup>331</sup> Where a provision of the Contract Act does not contain expression like “*in the absence of any special contract*” or “*in the absence of any contract to the contrary*”, provisions of the Contract Act are mandatory. Throughout the Contract Act, whenever the legislature envisioned that the provisions of the Act should be enforced only in the absence of a contract between the parties they have said so (see sections 163, 171, 174, 202, 219, 221, 230).

#### **24.4 Dispute Resolution**

Generally, it is requirement to submit no deviation bids by all the bidders in the tenders floated by the PSUs for the supply of goods or works contract or service contract. Without any choice, bidders accept the IOCL General Conditions of Contract (GCC) while bidding for the project. When the contractor wishes to invoke dispute resolution mechanism in an IOCL Contract, IOCL vehemently takes any one of the following pleadings either to delay or stall the arbitration proceedings:

1. Dispute is not a *notified claim* and included in the final bill

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<sup>329</sup> *The Indian Contract Act 1872, s.37 (In.)*.

<sup>330</sup> *Supra 328*

<sup>331</sup> *The Indian Contract Act 1872, s.1 (In.)*.

2. General Manager of IOCL has to decide about the excepted matters, i.e., notified claim. The Arbitration Act does not apply to the proceedings before General Manager.
3. Matters to be decided by General Manager are specifically excluded from the scope of the arbitral tribunal.
4. Arbitral tribunal shall refrain from proceedings with arbitration unless the General Manager decides about the excepted matters, and
5. Sole arbitrator has to be selected by the contractor from the panel of three arbitrators nominated by IOCL.

It is worth to note that (i) The panel of arbitrators or their qualification is not mentioned in the tender documents (ii) the criteria for selection of arbitrators is not mentioned in the tender documents (iii) There is no broad-based panel shared by IOCL and nomination of three arbitrators happens from the retired PSU employees, and (iv) General Manager is not defined under the Contract.

The Supreme Court of India upheld the contractual provision which enables the General Manager of IOCL to decide about the 'Notified Claims' and reference of dispute to arbitration.<sup>332</sup> The supreme court held that arbitration clause to be strictly construed and party autonomy is the backbone of arbitration. It is pre-requisite for the contractor to include the notified claim in the final bill to refer a dispute to arbitration. The arbitral tribunal shall not commence arbitration proceedings unless the General Manager determines about excepted matter like notified claim under the contract.

Supreme Court has decided the validity of the excepted matters clause based on the party autonomy and it was not tested on the touchstone of fairness, reasonableness, or public policy. In the light of the supreme court judgment, it is very difficult to proceed with any arbitration against IOCL or other PSUs since majority PSUs incorporate such excepted matters in the contract to suit their convenience. The decision of the supreme court does not foster the alternative dispute resolution mechanism preached and propagated by India and other international communities. India cannot claim the status of arbitration friendly

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<sup>332</sup> *Indian Oil Corporation Ltd. v NCC Ltd.* (2022) LiveLaw 616 (In.).



nation as long as the public procurement contracts incorporates provision for excepted matters and decision by its own employees.

Moreover, the contractor is at a position of disadvantage in the event any dispute arising with the Owner as the arbitral tribunal cannot decide about fairness or arbitrariness of a clause in a contract. Arbitral tribunal is constituted as per the provision of the contract and hence cannot declare a clause in the contract or any part of it as void or invalid. The arbitral tribunal cannot determine that contract gives arbitrary power to the Owner or exercises its rights in breach of Article 14 of the Constitution of India. In private law there is no scope for applying the doctrine of arbitrariness.<sup>333</sup> Fairness in action is ensured by the doctrine of fairness. It cannot be invoked to vary, alter or amend the explicit terms of the contract among the parties, even though the contract is regulated by legal provisions.<sup>334</sup> In a contract freely executed with state, there is no possibility to invoke the doctrine of fairness and reasonableness for the purpose of altering the terms of the contracts.<sup>335</sup> An arbitrator is constrained by the terms of the contract and has no power to invoke Article 14 of the Constitution or public law principle while making an award.<sup>336</sup> The judgments of the Supreme Court and various high courts indicate that an EPC Contractor cannot challenge the terms of the contract as arbitrary or unfair before the arbitral tribunal and the contractor will have to wait till the dispute reaches the High Court or Supreme Court to invoke the principles of public law. There is very limited scope for the contractor to directly approach High Court or Supreme Court considering the alternative remedy of arbitration embedded in the contract. The Owner thus, abuses its dominant position and incorporates unfair terms in the contract and hence, there is an urgent requirement to enact an Unfair Contract Terms Act in India to prevent the abuse of the position of

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<sup>333</sup> *Kesar Enterprises. v Union of India & Ors* (1994) SCC Online 337 (Delhi).

<sup>334</sup> *Assistant Excise Commissioner & Ors v Issac Peter & Ors* (1994) 4 SCC 104 (In.).

<sup>335</sup> *Oil and Natural Gas Corporation Ltd., Mumbai v M/s Streamline Shipping Co. Pvt. Ltd.* (2002) AIR 420 (Bombay).

<sup>336</sup> *Board of Control for Cricket in India v Deccan Chronicle Holdings Ltd.* (2021) SCC Online 834 (Bombay).

dominance by the State and its instrumentalities in the public procurement contracts.

The arbitrator who has been confined within the contours of a contract having unfair or one-sided terms, is bound to render his award within such contours. The EPC Contracts explicitly provide that the decision of engineer-in-charge with respect to certain execution aspects of the contract are final and binding, which indicates that the arbitrator cannot look into or decide upon those clauses. These 'excepted matter' may also include the decision of the engineer-in-charge or the Owner as to reason for delay, quantum of damages, etc which form the bone of contention in EPC contracts. Certain PSU contracts go to the extent of even mentioning that a list of specified matters in the General Conditions of Contract will not be arbitrable and any deviations to a given list of clauses (often mentioned in Instruction to Bidders or RFQ) will not be entertained and disputes as to those will not be arbitrable. The contractor, therefore, has limited and restricted right to challenge the unfair and unreasonable clauses in the EPC Contract as 'opposed to public policy' since the Indian Contract Act does not define the word public policy. A workable explanation of the term 'public policy' shall be deemed to be as included in Section 23 of the *Indian Contract 1872* or like the explanation given in Section 34 of the A&C Act. The Contract Act should extend its reach to vest the power on the arbitrator to interpret the contract at the touchstone of 'public policy' and incorporate a provision like Section 16 (1) of the A&C Act to enable the tribunal to declare the clause under the relevant contract as void or invalid.

#### **24.5 Contingent Contract**

The variation order clause contained in the EPC Contract is nothing but an implied contingent contract. The variation order provision incorporated in the EPC contract indicates that the parties to engage in continuing cooperation over a long period of time. This gives rise to an implied agreement on the part of the Owner to cooperate and balance the business and contractual relationship. The Owner has an implied obligation to cooperate with the contractor in case an imbalance is caused or contributed by an event which was not anticipated by the parties at the time of concluding the contract.

The Owner has to fulfil its reciprocal obligation by making supplementary compensation for the performance of additional obligations by the Contractor during the lifecycle of the contract, which was not foreseen at the time of entering the contract.

If, after the effective date of the EPC contract, there is any change to any applicable law including any ordinance, legislation, executive order, circular, judicial order, etc and such change results in an increase or decrease in the cost to the contractor for performing its obligations under the EPC contract or the same impacts the time schedule then the Parties shall agree to a revision in pricing and allow for the extension of the time for the completion of the work.

#### **24.6 Price Adjustment or Price Reduction**

The price adjustment or price reduction clause in an EPC Contract would fall within the scope of Section 74 of the Indian Contract Act.<sup>337</sup> In anticipation of an attempt that would be made to contract out section 74, the statute extended the provision in reference to ‘*a sum named in the contract*’ to include ‘*any other stipulation by way of penalty.*’ Section 74 requires that there has to be a sum named or that the ‘*contract contains any other stipulation by way of penalty.*’ The Supreme Court of India in *Fateh Chand v Balkishan Dass*<sup>338</sup> held in Para 14 of the judgment that:

*“The expression if the contract contains any other stipulation by way of penalty widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an*

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<sup>337</sup> **Section 74. Compensation of breach of contract where penalty stipulated for**

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation : A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Explanation : When any person enters into any bail bond, recognisance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

<sup>338</sup> (1963) AIR 1405 (In.).

*amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression contract contains any other stipulation by way of penalty is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.”*

The price reduction of Rs.10000/ per day was held be in nature of penalty in *Punj Lloyd Ltd. v Hindustan Petroleum Corporation Ltd.*<sup>339</sup> The price reduction was considered as liquidated damages by the Delhi High Court in *Engineers India Ltd. v Tema India Ltd.*<sup>340</sup>

It is, hence, noticed that the price adjustment or price reduction clause in the EPC contract in fact amounts to a ‘stipulation by way of penalty’ and Section 73 and 74 of the Indian Contract Act are to be applied while granting reasonable compensation for breach of contract.

#### **24.7 Appointment of Arbitrators**

If any dispute, disagreement, or difference emerge among the parties or their representatives in connection with construction, interpretation, meaning, effect, operation of the Contract or breach thereof, then the same shall be resolved by arbitration and the award made by the arbitral tribunal shall be absolute. Both the parties be given equal authority to select a mutually acceptable independent arbitrator and an officer of one party cannot be unilaterally permitted appoint an arbitrator.

The Supreme Court in *Voestalpine Schienen Gmbh v Delhi Metro Rail Corporation Limited*<sup>341</sup> considered the issue of appointment of arbitrators from the five names proposed by DMRC. The Supreme Court highlighted the adverse

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<sup>339</sup> (2015) SCC Online 752 (Bombay).

<sup>340</sup> (2016) SCC Online (Delhi).

<sup>341</sup> (2017) 4 SCC 665 (In.).

consequences of selection of arbitrators from the persons nominated by DMRC. No free choice was given to a party to nominate an arbitrator from the entire panel prepared by DMRC but only a limited choice was given to the party. Therefore, there was room for suspicion created in the minds of the other side that the DMRC might have picked up its own favourites. Supreme Court held that:

*“Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise, panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.”*

In *SMS Ltd. v Rail Vikas Nigam Limited*<sup>342</sup> the petitioner invoked arbitration, appointed a retired High Court judge as its arbitrator and thereafter, requested the respondent to appoint its arbitrator. The respondent protested to the nominee and in its place offered its purported ‘Broad-Based Panel of Proposed Arbitrators’ comprising of thirty-seven names for the selection of the petitioner. Many of the panel members nominated, except eight persons, are onetime employees of organizations like Border Road Organization, NHPC, CPWD etc. The Delhi High Court held that such a panel was not broad-based and nominated an arbitrator.

In *Central Organisation for Railway Electrification v ECI-SPIC-SMO-MCML (JV)*<sup>343</sup> the Supreme Court directed the selection of arbitrators from the panel of four retired officers nominated by the appellant. However, the three-

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<sup>342</sup> (2020) SCC Online 77 (Delhi).

<sup>343</sup> (2019) SCC Online 1635 (In.).

judge bench headed by Justice Rohinton F. Nariman disagreed with the above judgment and requested the Hon'ble Chief Justice of India to constitute a larger bench to look into the correctness of the judgment.<sup>344</sup>

## **25. Conclusion**

Corruption has a scarring influence on public trust and on the legality of public and private organizations. Corruption ruins the national economy. One way of addressing corruption in companies is through adopting internal measures establishing strong corporate governance within companies. Corporate governance is not only a tool to enhance efficiency and access to capital, but also an effective tool to check corruption within a company. A strong corporate governance policy ensures that there is transparency and accountability in the affairs of a company's activities. Corporate governance requires adopting moral and ethical ways of carrying out the company's activities.

In India, *the Companies Act 2013* through Section 138, Section 149, Section 177, Section 188, and Section 245 requires companies to adopt to corporate governance in various ways. The listed companies, as per clause 40 of the Listing Agreement, are obligated to devise a code of conduct for its Directors and other senior management personnel. *The Companies Act 2013* has taken a step forward from SEBI's Clause 49 of listing agreement by introducing various provisions in the Act which promotes implementation of corporate governance in a way that even unlisted public companies are covered by the Act.

The companies incorporate and adopt these regulations and laws through their code of conduct and policies. The companies have adopted whistleblower policies and policy against victimisation. The code of conduct prohibits their employees from receiving or offering gifts, donations, illegal payments. Implementation of the code of conduct in its letter and spirit is to be ensured by the organisation apart from adopting a comprehensive code of

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<sup>344</sup> *Union of India v M/s Tania Constructions Limited* (2021) SLP (C) No(s). 12670/2020 (In.)

conduct. Mere existence of written code is not sufficient and an infrastructure supporting the enforcement is required to ensure commitment of the company to implement such code of conduct.

As observed above, even EPC contracts fail to adhere to the basic principle of corporate governance i.e., transparency, fairness and accountability. Majority of the EPC contracts today, are highly slanted towards favouring the Employer/Owner and the contractor has no option but to accept or leave it. Most of the clauses incorporated in the EPC contracts deny the contractor the right to adequate compensation even in case of enhancement of the scope of work or for delays for reasons attributable to the Owner. The contractor is denied its lawful claims to compensation even if the Owner fails to fulfil its reciprocal obligations viz. handing over work front or free issue material. Such clauses are highly unfair and detrimental to the interest of the contractor. Moreover, the EPC contracts instead of specifically providing a clause for levying liquidated damages, incorporate a clause for price adjustment. Thus, the Employer/Owner instead of complying with the applicable laws, have invented new means and ways to circumvent the law of the land. The analysis of these clauses by the researcher, therefore, makes it evident that the Employer/Owner clearly abuses its dominant position while dealing with the contractor.

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## **CHAPTER V**

### **CORRUPTION IN THE ENGINEERING, PROCUREMENT AND CONSTRUCTION (EPC) CONTRACTS**

*Corruption is the enemy of development and of good governance. It must be got rid of. Both the government and the people at large must come together to achieve this national objective.*

*Pratibha Patil  
Former President of India*

#### **1. Introduction**

In India, Corruption has prevailed since times immemorial in one or the other form. It is an issue that adversely impacts the nation's economy. The primary reason behind corporate corruption is lack of effective management in organisation. The situation of Engineering Procurement and Construction (EPC) Contracts is no different. Bribery, embezzlement, kickbacks, tender manipulation, and fraud are some of the corrupt practices observed in the EPC Contracts. EPC Contract involve several stages and how these stages are handled to make them vulnerable to corruption is discussed in this chapter. In pre-bid or post bid stages of EPC Contract, corruption can be noticed. The PSUs have taken several measures by modifying the EPC contract clauses to tackle corruption. Despite the efforts of the PSUs, the corruption still prevails in majority of EPC contracts.

The chapter majorly analyses the EPC Contracts in the Oil and Gas segment in India. Construction of oil and gas facilities consume substantial time and costs, and EPC contract is one of the models used by the Project Owner for the development of the same. There are certain inbuilt provisions in the tender documents to ensure transparency and fairness in the tendering process.



However, there is every likelihood of abuse or misuse of the discretion by the public authorities to favour a bidder discarding the public interest. The chapter identifies the various possible means through which public officials and bidders try to circumvent the law and contract to gain business, unlawfully. The researcher analyses situations where corruption takes place at pre-bid and post-bid stage of the EPC contract. The researcher analyses each stage of EPC Contract to identify the scope of corruption at each stage. The measures taken in tender documents to curb corruption and ensure the efficacy of the EPC contract in the prevention and detection of the corrupt practices are analysed in this chapter. It tries to identify and analyse the provisions in the EPC Contract that build public trust and enhances public involvement in the government bid process. The role of judiciary in the prevention of corrupt practises, creation of a level playing field for all bidders and encouraging competitiveness by ensuring fairness and reasonableness in the government dealings is also discussed in this chapter. This chapter also addresses the limitations and lacunae persisting in the system and makes suggestions to fill in the gaps.

## **2. Stages of EPC Contract**

Upstream, midstream, and downstream are the major sectors in the hydrocarbon industry.<sup>1</sup> Upstream segment contains exploration and production of hydrocarbon, midstream segment deals with transport and storage of petroleum products, and downstream involves in turning oil and gas into finished commodities for the supply to buyers.<sup>2</sup>

The Engineering, Procurement and Construction (EPC) contract is one of the multiple models used for the development of facilities. These types of contracts are used in large and complex infrastructure project contracts. These contracts can be further divided into different types based on the payment models, or the additional works required. However, across the globe an EPC

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<sup>1</sup> *Upstream (petroleum industry)*. (n.d.). Wikipedia. Retrieved October 27, 2022, from [https://en.wikipedia.org/wiki/Upstream\\_\(petroleum\\_industry\)](https://en.wikipedia.org/wiki/Upstream_(petroleum_industry))

<sup>2</sup> *Upstream? Midstream? Downstream? What's The Difference?*. (n.d.). Energy HQ. Retrieved October 27, 2022, from <https://energyhq.com/2017/04/upstream-midstream-downstream-whats-the-difference/>

Contract and its underlying principles form the contractual and legal basis for the execution of complex infrastructure projects. Some of the industries that use such EPC contracts are the hydrocarbon sector, electricity generation, metals and mining industry and the infrastructure industry in general.

Colloquially, the party who invites bids for the execution of the project is known as the Owner, Employer, Contracting Authority or Procurement Entity. And the party who is awarded the bid and executes the EPC Contract is known as the EPC Contractor.

Most of the EPC Contracts are executed for the economisation of natural resources and to secure wealth in terms of money and time invested. These natural resources are primarily owned by the nation in whose territory they are located. However, the extraction and development of such natural resources, is outsourced to private companies. Since, the natural resources are public property and any development involves public money and interest, the outsourcing of any activity relating to such natural resources needs to be done in an equitable and judicious manner.

There are several stakeholders involved in an EPC Contract, but the primary beneficiary of an EPC Contract is the general public. Hence, the exercise of discretion in the execution of such EPC Contracts should be fair and reasonable. Furthermore, these EPC Contracts involve large amounts of public money and finance, and to ensure that the finance is utilised for legitimate reasons, oversight over such contracts is also crucial. In most cases, these EPC Contracts are executed between state parties and private organizations and the state enterprises are bound by law to follow the principles of fairness and reasonableness. At different stages, the state parties exercise discretion in the tender, award, and execution of EPC Contracts by private parties. However, in several cases such discretion is misused, and parties use corrupt means to influence such discretion to the disadvantage of public interest. The Owner should consider the efficiency of the bidder and capability to accomplish the

work fairly while awarding the contract<sup>3</sup> and the conduct of the party should generate confidence in the mind of the Owner.<sup>4</sup>

Therefore, in public interest, it becomes important to monitor the activities of all the parties involved in the EPC Contract and ensure that they conform with the ethical practices specified by the authorities. Governments have passed legislations and appointed bodies to investigate and prosecute any allegations of corruption and unethical behaviour by any of the stakeholders.

The chapter herein discusses how the discretion exercised by the Owner and its agents can be mis-utilized and influenced by interested parties against the larger public interest and competition in the market and industry.

Generally, Owner hires the services of Project Management Consultant (PMC) to improve the efficiency and complete the project within time and with minimum number of errors. PMC has access to sensitive and critical information relating to the project and it has technical control over the conduct of the project. It is the Owner who defines the Pre-Qualifications (PQ) in consultation with PMC, and then the PMC solicits responses to the PQ from interested contractors and licensors, assess the responses, and shortlists the contractor or licensor based on responses. This is followed by the PMC drafting the detailed tender/Invitation to Bid (ITB) for submission of bids by contractor or licensor. The PMC then evaluates the bids against various parameters like lowest cost, experience, and qualifications. The PMC also has the authority to respond to pre-bid queries and to accept or reject deviations proposed by the bidders. Once the PMC evaluates the bids, the PMC then recommends to the Owner which contractor or licensor should be awarded the job. As a consultant for the project, PMC acts as the bridge between the Owner and the contractor or licensor, to evaluate, reject/ approve the work done by the contractor or licensor, to approve/reject change orders, escalation costs, extension of time,

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<sup>3</sup> *Prabhudasbhai Bhikabhai Patel v State of Gujarat* 7 Ors (1981) AIR 117 (Gujarat).

<sup>4</sup> *Rajasthan Cooperative Dairy Federation Ltd. v Mahalaxmi Migrate Marketing Service Pvt. Ltd. & Ors.* (1996) 10 SCC 405 (In.).

review the Running Account (RA) Bills, Final Bills, and interpret contract documents in case of ambiguity.

Hence, both the Owner and the PMC are expected to exercise their discretion fairly and avoid taking advantage of their discretion to unfairly give one bidder an edge over other bidder.

EPC Contracts deliver significant value to the Project Owner, and they enable the Owner to manage the risks effectively. It helps the contractor to innovate and unlock efficiencies within their areas of expertise.<sup>5</sup> The EPC Contractor is accountable for the activities such as designing, engineering, procurement, construction, and commissioning. It is advantageous to the project Owner as it provides firm price unless the Owner issues a change order to the work.<sup>6</sup> The variation in the market does not impact the performance EPC Contract as the amount payable to contractor are fixed based on the achievement of milestones prescribed under the contract.<sup>7</sup> The contract completion date is also fixed at the beginning of the work. The Owner is bestowed with the right to levy liquidated damages to compensate himself for the losses arising due to the late completion.

### **3. Measures Taken to Curb Corruption in the EPC Contract**

Generally, the following measures are taken in the tender documents to deter and detect corruption, and to enhance integrity and uphold the transparency in the bidding process.

#### **3.1 Compliance Declaration**

The Invitation to Bid (ITB) document requires the bidders to submit a declaration of compliance to the Owner along with bid. Some of the declarations to be submitted by the bidders interalia include:

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<sup>5</sup> Busby, N. (n.d.). The Art of Selecting the Right EPC Contractor, *Burns McDonnell*. Retrieved October 27, 2022, from <https://blog.burnsmcd.com/the-art-of-selecting-the-right-epc-contractor>

<sup>6</sup> Eryiğit, B. (2020, June 15). *EPC Contracts In The Energy Sector*, Mondaq. <https://www.mondaq.com/turkey/energy-law/383098/epc-contracts-in-the-energy-sector>

<sup>7</sup> Id.

- (i) Bidder is currently or three years preceding to the submission of the bid has not been put on government department declared blacklist or by any PSUs (Public Sector Undertakings), in India or abroad, for any fraudulent or corrupt practices.
- (ii) There is no pending enquiry against bidder or any of its executives or employees, or its affiliates by the Government Department or by any PSUs, in India or abroad, for any fraudulent or corrupt practises.
- (iii) Bidder or any officers, owners, or key personnel have not been investigated for, charged with, convicted of or a party to a settlement for any allegation of fraud, bribery, or corrupt activities.
- (iv) Undertaking to comply with all laws applicable to the project and shall not violate any laws prohibiting money laundering or corrupt practices applicable to bidder, its subsidiary and to their respective parent companies in every jurisdiction.

The Owner has the right to disallow the bid or cancel the Contract, if the contender is (a) put on blacklist or holiday list, or (b) if any enquiry is pending or results in conviction or settlement of any fraudulent or corrupt practises or (c) if the bidder gives a false declaration or suppresses information in relation thereto. The bank guarantee or the Earnest Money Deposit may be forfeited by the Owner to compensate the losses incurred by it.

### **3.2 Self-Declaration**

The CEO/CFO/Company Secretary of the bidder shall issue a certificate stating the pre-qualification documents submitted along with the proposal are genuine true copies of the original documents. This requirement is mandated to prevent fraudulent practices by submitting forged documents to satisfy pre-qualification requirements prescribed under the invitation to bid. Self-certification of the documents by the highest officer of the bidder would function as a disincentive mechanism to prevent corrupt practises in the tender process.

### 3.3 Integrity Pact

Transparency International launched Integrity Pact with the objective of safeguarding public procurement from corruption.<sup>8</sup> Transparency and fairness in the tender process is ensured by the Integrity Pact. The Central Vigilance Commission (CVC), which was established under the patronage of Union Finance Ministry, has directed all Public Sector Undertakings (PSUs) to do continuous endeavours to realise the purpose and spirit of the Integrity Pact. The invitation to bid pertaining to the EPC Contract mandates execution of Integrity Pact among the Owner and the prospective bidder to ensure integrity and as a tool for avoidance of corruption.<sup>9</sup> The Integrity Pact, demands obligation from the bidder during any pre-bid as well as post bid stage for the prevention of corrupt or unfair practices. The grievances relating to the pre-qualification and/or other bidding process shall be decided in accordance with the Integrity Pact. It is suitably signed by the authorised representative of the bidder shall be presented together with the bid proposal. The grievances relating to the pre-qualification and/or other tender process shall be decided in accordance with the Integrity Pact.

### 3.4 Conflict of Interest

In order to guarantee the transparency in the tendering process, the following terms are incorporated to prevent conflict of interest:

- (i) Declarations are obtained from the bidder to ensure that the key decision makers of the bidding entity are not connected to the Owner and/or key managerial person of the Owner is not a director of the bidder firm and/or bidding entity partner is not a key managerial person or relative of the Owner.
- (ii) The tender documents prohibit hiring, employment, engagement as a consultant, procure services of, or allow acquisition of any ownership interest of the contractor or any of its affiliates of any current or former

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<sup>8</sup> Verma, S. (2011, July). Integrity Pacts and Public Procurement Reforms in India: From Incremental Steps to a Rigorous Bid-Protest System. *Practical Lawyer*, S-21.

<sup>9</sup> *Integrity Pact and IEMS*. (n.d.). Bharat Electronics. Retrieved October 27, 2022, from <http://www.bel-india.in/ContentPage.aspx?MIId=27&CIId=4195&LIId=1&link=4195>

employees of Owner who held key managerial position with the Owner. The bidder shall not engage the former employees of the Owner within two years from the date of cessation of employment. Any violation of conflict-of-interest provisions shall be deemed as substantial breach of the contract enabling termination of the contract for cause and/or seek damages or any other remedy in accordance with law and contract.

- (iii) If the services of a consultant are obtained for any services preceding the execution of the project, then the consultant or its related parties are disqualified from providing any subsequent services, supply goods or perform any works related to the project for which initial assignment was given to the consultant firm.
- (iv) Bid documents identify and prohibit certain persons having bias from bidding including the process licensor and any of its affiliates. Encouraging participation of process licensors directly or indirectly through their affiliates (having common ultimate control) would lead to potential conflict of interest and unfair competitive advantage.

### **3.5 Multiple or alternative bids**

Permitting multiple bids from any party either directly or indirectly will vitiate the tendering process and obscure the level playing field between bidders. The Instruction to the Bidders (ITB) provides for the forfeiture of EMD or rejection of the proposal in case of submission of multiple or alternative bids.

Despite the incorporation of the above provisions in the tender documents, there are many instances of corruption in the bidding process, award of EPC Contract and during execution of the project.

## **4. Opportunities for Corruption at Various Stages of EPC Contract**

There is a possibility of corrupt practices at every stage of the EPC Projects on different scales. The corrupt practises *interalia* can be found in the following stages of EPC Contract.

## 4.1 Planning Stage

The project is identified by the parties such as owner of the project, investor or financier, public authority who certifies the project and the contractor. A crucial role is being performed by these parties in the method of operation and construction of the project. A project may be selected by corrupt means by these parties for their unlawful benefit or profit.<sup>10</sup> Project may be planned for some extraneous consideration and not based on priority or availability of financial resources. Sometimes a high value project (white elephant) may be planned against the interest of the poor. Effective project screening is necessary to align the planned investment with real development needs. If there is no adequate and independent screening of infrastructure projects, then it would result in ‘white elephant’ projects, i.e., projects having negative rate of return and high capital costs. The three types of white elephant projects identified by World Bank<sup>11</sup> are:

- (i) Development of road or airport infrastructure projects in excess capacity and with no traffic necessity.
- (ii) Projects such as construction of hospital or school with no budget for the operation of the service; and
- (iii) Investment of capital expenditure that are seldom finished and occasionally not even began but employed as a tool to access the funds.

In the year 2011, in Angola a project was awarded for the construction of a bridge to connect an isolated area without connecting roads, and the bridge was not leading to any place. In another instance, a project for the expansion of power generation capacity was planned in Angola and it did not match with the investment in power transmission and distribution to the end users. Similarly, in Uganda, road construction contract money was partially siphoned off and it was utilized for patronage expenses. Majority of the development projects were seldom accomplished.

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<sup>10</sup> *How Corruption Occurs*. (n.d.). Global Infrastructure Anti-Corruption Centre. Retrieved October 27, 2022, from (Apr.10, 2020), <https://giacentre.org/how-corruption-occurs/>

<sup>11</sup> Wells, J. (2015, March). Corruption in the Construction of Public Infrastructure: Critical Issues in Project Preparation, *U4*, 8, 18. <https://www.u4.no/publications/corruption-in-the-construction-of-public-infrastructure-critical-issues-in-project-preparation-1.pdf>



The viability of the project will be assessed by the project financiers and other stakeholders such as owner of the project, investment agency, and consultants who advice the parties on the project feasibility. The interested parties' resort to bribery or fraud for influencing the funding arrangement. The cost of its construction in relation to the project may be inflated by a company which is both an investor and construction contractor for the project by adding its share capital investment. The contractor may wrongly induce other investors by creating an impression that reasonable market price factored in the contract price and equity is purchased by the contractor through its own sources.<sup>12</sup>

#### **4.2 Design Stage**

Project Owner, architect, design consultant and the planning permission issuing authorities are involved in the planning level of the project. The opportunity to misuse or abuse of authority can be noticed in the following situations:

- A public official may be bribed to accord sanction for the project or for approval of the design despite non-fulfilment of applicable building rules and regulations.
- A bidder may offer illegal gratifications to project owner or project management consultant to favour the bidder among other competitors by stipulating a favourable design.
- Sometimes the project owner may participate in the corrupt design. Architect or PMC engaged by the project owner may carry out corrupt design without knowledge of project owner.<sup>13</sup>
- Consultants may be hired to over design and overprice the project. Bribes may be given to obtain the favourable environment impact assessment approval.
- As a condition precedent for sanctioning the project, public official may demand illegal gratification. A stake in the earnings of the project Owner or Contractor or cash payments may be demanded by the public officials

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<sup>12</sup> Supra 10

<sup>13</sup> Id.

or the employ of his business entities to offer services or resources to the project Owner.

- Technology possessed by a particular bidder may be specified despite the availability of other preferable and cheaper technologies. Forcing a specified technology would result in elimination of certain bidders from the tendering process for their failure satisfy bid qualification criteria or proposal may be rejected as noncompliant.
- Bribery may be used a tool for obtaining planning permission or for the approval of the project design which does not satisfy basic principles.<sup>14</sup>

### **4.3 Prequalification Stage**

Tendering as well as pre-qualification process demands interaction between the bidder, PMC and project owner. The selection of the contractor is an important aspect in the infrastructure project. The tender documents prescribe the pre-qualification procedure to identify the bidders qualified to execute the project. The pre-qualification criteria and supporting documents sought by the Owner and/or PMC perform a key role in the choice of the potential contractor for the EPC Contract. The prequalification criteria are to be satisfied by the contractor as per the tender conditions. The misuse and/or abuse of position by the PMC/Owner in the preparation of pre-qualification documents may lead to the selection of bidder of their choice for the project. The preparation and evaluation of Request for Quotation (RFQ)/ITB/PQ can also facilitate an ineligible bidder to become eligible to bid for the project. A prospective contractor may influence the Owner to lower/alter the pre-qualification criteria to suit such a contractor and allow them to qualify and participate in the tender process, when otherwise they would have been ineligible under the original and fair pre-qualification criteria.

The Project Owner or PMC might receive illegal gratification from a bidder to illegally disqualify any other bidder at pre-qualification stage. Disqualification of a bidder would be effected, without assigning any reasons or on artificial grounds. Unfair advantage at pre-qualification stage is given to

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<sup>14</sup> Id.

the corruptly favoured bidder because of disqualification of several potential winners.<sup>15</sup>

Public Sector Undertakings (PSUs) while inviting tenders should give paramount consideration to the public interest. There should be equality in the process and all the eligible and qualified persons shall be treated equally by the Government or public authorities in the tender process.<sup>16</sup> The tender conditions cannot be waived at the discretion of the public authority. However, the relaxation of tender conditions can be allowed to accomplish the objectives demonstrated in Part IV of Constitution of India.<sup>17</sup> Notwithstanding the above there should be a balance between the aspirations of the government and the equal and fair treatment of all bidders.

The Government while discharging its contractual competency under Article 298 or 299 of Constitution of India shall adhere to the principle of *equality before law* and *equal protection of the laws*.<sup>18</sup> When the Government is trading with the public, they should exercise fairness and equality. The Government cannot pick and choose individuals while entering into contractual relationships and the State shall not arbitrarily discriminate any person in any transactions disregarding the rule of law.<sup>19</sup> The price difference between two bidders is not the decisive factor in deciding the public interest involved in the commercial transaction of the State or public authority.<sup>20</sup>

The government should also consider quality and the competence of a contractor while awarding tenders. Hence, the government prescribes certain pre-qualification requirements regarding the technical and financial competence of the bidders. Once the government decides upon the pre-qualification requirements, they should strictly adhere to it, so that the most appropriate

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<sup>15</sup> Id.

<sup>16</sup> *GVPREL-MEE (J.V.) v Government of Andhra Pradesh & Ors.* (2006) AIR 169 (Andhra Pradesh).

<sup>17</sup> *Goldstone Exports Limited & Ors. v Government of Andhra Pradesh and Ors.* (2003) 1 ALD 336 (Andhra Pradesh).

<sup>18</sup> *Goldstone Exports Limited & Ors. v Government of Andhra Pradesh & Ors.* (2003) 1 ALD 336 (Andhra Pradesh).

<sup>19</sup> *Raunaq International Ltd. v IVR Constructions* (1998) 3 S.C.R. 421 (In.).

<sup>20</sup> *Goldstone Exports Limited & Ors v Government of Andhra Pradesh & Ors.* (2003) 1 ALD 336 (Andhra Pradesh).

bidder is selected to perform the project. However, when certain bidders or the government do not adhere to the pre-qualification requirements, the bidders who are at a disadvantaged position are compelled to seek recourse against such actions.

At the Pre-qualification stage, the grievance redressal procedures for the aggrieved bidders in India in relation to government contracts is to either approach Independent External Monitors (IEM) under the Integrity Pact or seek judicial review before the courts. However, there is lack of clarity of procedure and finality of the decisions of the IEMs. Therefore, recourse to the judiciary is the most common action taken by aggrieved bidders.

The role played by the judiciary to prevent the abuse of bidding process and deter corrupt practises by mandating strict adherence to pre-qualification requirements is discussed below.

The Government of Andhra Pradesh invited tenders from empanelled contractors for the improvement of irrigation facilities in the State. The non-acceptance of the proposal offered by the petitioner, based on the withdrawal letter submitted by the joint venture partner was challenged in *GVPREL-MEE (J.V.) v Government of Andhra Pradesh and Ors.*<sup>21</sup> The High Court of Andhra Pradesh held that essential pre-qualification condition prescribed under the tender documents was to be strictly construed to prevent the unguided and arbitrary use of power by the employer to favour someone.<sup>22</sup> The joint venture became non-existent on withdrawal of the sole partner and the High Court upheld the state action since the petitioner did not individually satisfy the pre-qualification criteria to submit the bid. Therefore, the contractors are also supposed to strictly abide by the prerequisites specified in the bid, so that they can be considered for the project. A contractor should be allowed to bid only if the contractor has satisfied all the conditions under the PQ.

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<sup>21</sup> (2006) AIR 169 (Andhra Pradesh).

<sup>22</sup> *GVPREL-MEE (J.V.) v Government of Andhra Pradesh & Ors.* (2006) AIR 169 (Andhra Pradesh).

The decision of the Sardar Sarovar Construction Advisory Committee denying pre-qualification of the petitioner joint venture for the World Bank funded Sardar Sarovar (Narmada) Project in Gujarat was challenged in *Asia Foundations & Constructions Ltd. v State of Gujarat*.<sup>23</sup> The High Court of Gujarat did not agree with the view of the Advocate General that the application submitted by the petitioner was un-responsive and held that Committee failed to apply their mind while deciding about the pre-qualification criteria. The Committee proceeded on imprecise information without seeking any clarification or necessary related information from the petitioner. The act of the government was against public policy since all the eligible bidders were not given equal opportunity to compete for the execution of the project. The state decision to disqualify the bidder was set aside as the same is vitiated and bad in law.

From the above judicial precedents, it is obvious that the commitment to be fair and transparent is endowed on both the tendering agency as well as the bidders. The bidders shall not be allowed to bypass any requirements under the PQ and all the bidders who have been pre-qualified shall be given equal consideration before the tender is awarded.

However, there are instances when the PQ requirements contain immaterial factors that they disqualify even competent bidders, and the courts in India have interfered to ensure that all the competent bidders are allowed to participate, thereby creating a competitive bidding process for projects.

A joint venture consortium's application for pre-qualification was rejected by Government of Gujarat as 'non-responsive' on the ground of not providing of complete information and submission of incomplete documents.<sup>24</sup> The Gujarat High Court held that the public authorities entirely discarded the appropriate and material aspects and, immaterial consideration were factored during the course of pre-qualification of the bidder. The exercise of discretion

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<sup>23</sup> (1987) 2 GLH 510 (Gujarat).

<sup>24</sup> *Chahal Engg. & Construction Company Pvt. Ltd. v State of Gujarat* (1986) GLH 527 (Gujarat).

cannot be said to be reasonable since the World Bank advice was not taken into consideration by the employer.

The exclusion of the petitioner from the NTPC bid relating to Steam Generator packages was questioned before the High Court of Delhi in *Ansaldo Caldaie Boilers India Pvt. Ltd. v Union of India & Another*.<sup>25</sup> The petitioner alleged malafides as NTPC made attempt to eliminate the petitioner from the tender process at the behest of former Chairman of NTPC who is working with the competitor. The petitioner alleged that the competitor misused his influence to get the all the documents submitted by the petitioner in the bidding process and attempt is being made to get the petitioner out of the fray. The Delhi High Court observed in para 14 of the judgment that:

*“We are in the age of commercial espionage, it cannot be ruled out that information flowed to the competitor from an insider. Where the insider is located or what is his identity is anybody's guess at this stage. However, suspicion cannot be made a basis for arriving at such a conclusion.”*

The Hon'ble Court did not examine the allegation since the individual against whom allegation is made was not arrayed as a party to the proceedings. The allegations are personal in nature and a person cannot be condemned unheard. The court did not take cognizance of the allegation, but it was termed as an argument of prejudice. The order which denied participation of the petitioner in the bidding process was invalidated by the High Court and the petitioner was permitted to participate in the tender process.

#### **4.4 Waiver of Pre-qualification Criteria after Tender Notice**

Rule of law mandates that the pre-qualification criteria prescribed and stipulated in the bidding process must be strictly adhered to by parties. Once the condition precedent for the submission of the bid is published then it is natural that only those who satisfy the pre-qualification criteria would participate in the tender process. Waiver of pre-qualification criteria at a later stage of the tender

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<sup>25</sup> (2011) SCC Online 1101 (Delhi).

process is an indicator of favouritism and nepotism, which undermines the constitutional values and is against rule of law. Tender process should maintain its sanctity at the time of evaluation of bids and arbitrary exercise of power should be avoided to encourage any bidder. There should not be any discrimination and Owner should not relax pre-qualification criteria after tender notice. The power to waive or relax pre-qualification conditions, if any, shall be exercised in a fair and reasonable manner.

Law expects that the tender conditions issued by the state, or its agencies will be strictly adhered and complied. State agencies cannot pick and choose a bidder according to their whims and manipulate awarding of contracts. Suspicion in the mind of the bidder shall not be created by the state and all its action shall be fair and transparent.<sup>26</sup>

An award of contract to bidder, who failed to fulfill pre-qualification standards specified in the bid documents as published in the newspaper was challenged in *Ramana Dayaram Shetty v International Airport Authority of India and Ors.*<sup>27</sup> The Supreme Court observed that public authority at its will cannot deviate from the tender condition without reasonable justification, and there should be fairness in action and equality of opportunity in governmental activities. State should not have arbitrarily accepted the tender which denied equal opportunity to the similarly situated person in the tendering for the contract.

The High Court of Andhra Pradesh in *N. Dolendra Prasad v Government of Andhra Pradesh and Ors.*<sup>28</sup> held that relaxation of essential pre-qualification criteria after invitation and submission of bid is an arbitrary exercise of power. It would amount to malice in law to shortlist and select bidders after waiver of essential pre-qualification condition. State, its corporation and instrumentalities have the public duty to act in a fair and reasonable manner in their transactions.

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<sup>26</sup> *West Bengal Electricity Board v Patel Engineering Co., Ltd.* (2001) 1 SCR 352 (In.).

<sup>27</sup> (1979) AIR 1628 (In.).

<sup>28</sup> (2005) 1 ALD 545 (Andhra Pradesh).

In many instances the courts have permitted the exercise of discretionary power by the Owner instead of strict interpretation of the tender conditions. Such a departure, while uncommon, should be avoided by all the wings of the government. The extension of time period for bid submission for the Buxar Thermal Power Project after expiry of the date fixed in last amendment date was questioned before the High Court of Patna in *Larsen & Toubro Ltd. v Sjn Thermal (P) Ltd., and Others*.<sup>29</sup> The Petitioner contended that the extension of bid submission date after expiry of the period violates tender norms and takes away the sanctity of the tender. The Court held that it is not unreasonable to defer the time for submission of the bid and the Wednesbury principle of unreasonableness is not attracted. Level playing field is given to all the bidders or prospective bidders without any discrimination and the sanctity of the tender was not affected. The High Court observed that by extending the bid submission date, public interest is served by increasing participation and encouraging competitiveness. When the price bid was opened based on the High Court order, the petitioner was successful, and the contract was awarded to L&T.

#### **4.5 Abuse of Process During Pre-bid Stage**

The non-registration of Expression of Interest (EOI) by the petitioners for Andhra Pradesh Micro Irrigation Project (APMIP) by the Technical Evaluation Expert Team was challenged in *Godavari Polymers Pvt. Ltd v Agricultural Products Commissioner and Principal Secretary, Agriculture and Co-operation (Horti) Department and Ors.*<sup>30</sup> The High Court of Andhra Pradesh made the following observations regarding the principle of transparency and rule of law:

*“Principle of Transparency is an adjunct to Doctrine of fairness. Fairness requires proper treatment of the individual by public authority by known principles of law. Every person who approaches public authorities must know by what rules, regulations, provisions of law or instructions, he would be*

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<sup>29</sup> (2019) SCC Online 589 (Patna).

<sup>30</sup> (2004) 1 ALD 783 (Andhra Pradesh).



*governed. In a way transparency in the governance and fairness in Government dealings are essential to democracy to curb nepotism, corruption, and parochialism. It does not however mean that the Government at all times and in all situations must go on advertising what they are going to do. In the very nature of State Administration, it is conceded by all thinkers, the political, executive and bureaucracy should have sufficient discretion in dealing with men and material to subserve public interest. In matters relating to economic issues, Government has a right to 'trial and error' as long as both are bonafide and within the authority.”*

The High Court ruled that the petitioners did not satisfy the essential criteria laid down in EOI and the decision of non-inclusion of petitioners did not suffer from any arbitrariness or unreasonableness.

Therefore, any discretion exercised while awarding tenders should be exercised with sound judgment and fairness. Bidders are also expected to comply with the PQ and are at times reproached for initiating to legal processes and halting the progress of the project. Despite, the need for the government to exercise its discretion to its satisfaction, time and again, the highest courts of the country have also observed that any discretion exercised should be non-arbitrary, fair, and equitable. Bhagwati, J., in *Erusian Equipment and Chemicals Ltd. v State of West Bengal*<sup>31</sup> summed up the legal position as follows:

*“The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licenses etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was*

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<sup>31</sup> (1975) AIR 266 (In.).

*based on some valid principle which in itself was not irrational, unreasonable or discriminatory”*

In *Ramana Dayaram Shetty v International Airport Authority of India and Ors.*<sup>32</sup> the Supreme Court of India ruled that:

*“The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory”*

The PQ stage is extremely crucial as it is the basis on which it is decided if a party can even be allowed to bid or not. HPCL Rajasthan Refinery Limited (Owner/HRRL) invited bids for crude storage tanks including tank pads and associated civil works at Rajasthan Refinery complex at Pachpadra (package-5).<sup>33</sup> The Invitation for Bid (IFB), as per clause 5.4.2, prohibited submission of separate bids by affiliates either directly or indirectly.<sup>34</sup> One of the Indian prospective bidder submitted a single bid, as per the IFB, relying upon pre-qualification of its controlling overseas subsidiary wherein it holds 70% of the shares. Bid documents provide for the submission of the Parent Company Guarantee (PCG). As per the PCG format, the parent company is fastened with the liability execute the works in case of failure of the subsidiary to accomplish its commitments under the agreement. The bid document does not state that a parent company and its subsidiary would be treated as a separate entity. The

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<sup>32</sup> (1979) AIR 1628 (In.).

<sup>33</sup> Bidding Document No. DC/B224-323-MA-T-6001/4

<sup>34</sup> Clause 5.4.2: Parties who are affiliates of one another can decide which Affiliate will make a bid. Only one affiliate may submit a bid. Two or more affiliates are not permitted to make separate bids directly or indirectly. If two or more affiliates submit separate bids, then all of them shall be summarily rejected. However, up to two affiliates may make a joint bid as a Consortium, and in which case the conditions applicable to a consortium shall apply to them.

bidder in support of its claim submitted that the experience of subsidiaries would be construable as experience of the holding company.<sup>35</sup> However the PMC rejected the bid submitted by the bidder on the ground that the bidder has to meet the pre-qualification criteria on its own and cannot rely upon the pre-qualification of its overseas subsidiary. In this case, the PMC exercised its discretion, beyond the terms of the tender documents and proceeded with the tender process, as the disqualified bidder did not challenge the order of the PMC.

Public interest requires adherence to the rules and conditions of the bid documents.<sup>36</sup> There needs to be a balance between the protection of public interests, equitable discretion, independence of the authorities to select the bidder and minimal intervention by the courts. The pulse of fair play is non-arbitrariness by the state, which is the basic requirement of Article 14 of Constitution of India.<sup>37</sup>

Courts cannot look for implied terms in the contract and it should be interpreted as per its explicit terms.<sup>38</sup> The decision taken by the employer as to whether a term in the Notice Inviting Tender is essential or not should be respected. The inherent power of the employer to make deviation shall be applied to all bidders including probable bidders.<sup>39</sup> Therefore, notwithstanding the necessity to strictly abide by the PQ requirements, the Employer still has the discretion to disregard certain immaterial considerations, provided that such discretion has not been exercised to favour one party over others.

The Supreme Court of India in *I.R Coelho v State of Tamil Nadu*<sup>40</sup> held that the principle of level playing field encompassed in Article 19(1)(g) of Constitution of India is subject to public interest. Discriminatory or inequitable treatment would vitiate the principle of level playing field and to serve larger

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<sup>35</sup> *M/s CRCC Corporation Ltd. v Metro Link Express for Gandhinagar & Ahmedabad (MEGA) Company Ltd.* (2017) 8 SCC 282 (In.).

<sup>36</sup> *W.B SEB v Patel Engineering Company Ltd.*, (2001) 2 SCC 451 (In.).

<sup>37</sup> *Union of India v International Trading Co.*, (2003) 5 SCC 437 (In.).

<sup>38</sup> *Nabha Power Limited v Punjab State Power Corporation Ltd.*, (2018) 11 SC. 508 (In.).

<sup>39</sup> *Poddar Steel Corporation v Ganesh Engineering Works*, (1991) 3 SCC 273 (In.).

<sup>40</sup> (2007) AIR 861 (In.).

public interest, competitors who are similarly placed should be allowed to bid. Hence, bidders often recourse to the judiciary to ensure that there is equal treatment between all the competitors, but the courts are cautious to take action in executive and administrative since they also have the duty to maintain the balance between all the wings of the state.

The Supreme Court of India in *Jagdish Mandal v State of Orissa*<sup>41</sup> held that the courts should not interfere in administrative actions, if the answers are negative for the following two questions:

1. Whether the procedure implemented, or selection made is arbitrary, mala fide and/or irrational.
2. Whether public interest is affected.

If the award of the contract is legitimate and in public interest, then the court shall not interfere even for non-compliance of the procedure or incorrect appraisal or in case of disadvantage to a bidder.

#### **4.6. Bidding Stage**

A bidder may resort to payment of illegal gratification to a public official to get favourite treatment during the bidding process, or to manipulate the tender evaluation.<sup>42</sup> The following situations describe the potential opportunities available for corruption in the bidding stage:

- The project Owner may privately open the tenders received by it to understand bidders' prices and other critical tender components.
- In order to favour a bidder in exchange for a kickback, the project Owner or PMC may leak the confidential details and thereby give an unfair advantage to a bidder. In order to secure the award of the contract, the bidder might reduce its price in the proposal.
- The public authority might engineer the bid estimation including technical evaluation as a result of which the contract is awarded to bidder who gives kickback. Lack of competition is ensured by the ensured by the public official who invites tender. The public authority may adopt tender procedures to make it devoid of competition.

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<sup>41</sup> (2007) 14 SCC 517 (In.).

<sup>42</sup> Supra 10

- False reasons such as emergency, special technology of the tenderer, national security, etc may be given for the direct award of the contract.
- Political donations may be offered by a tenderer in return for winning a contract or to obtain preferential treatment.
- International pressure may also vitiate tender process. A developed nation may persuade an underdeveloped country during competitive bidding process to award the project in favour of a company from the developed country, despite not being the lowest or best option. The force strategies include offering of aid, weapons or assist government's effort to join up an international organisation, etc.

During the pre-qualification of the bidder or at subcontract level also corruption can occur.<sup>43</sup> The corrupt practises during the bidding stages are identified and discussed underneath.

#### **4.6.1 Bid Rigging**

Competing parties collude with each other and decide the winner of a bid and the others submit uncompetitive bids.

The return of price bid by Maharashtra State Power Generation Company was challenged in *Shapoorji Pallonji and Company Ltd. and Ors. v Maharashtra State Power Generation Co. Ltd. and Ors.*<sup>44</sup> Bid documents specifically stated that no bidder shall submit more than one bid and in case of submission of more than one bid, all the bids will be rejected. The High Court of Bombay did not accept the contention of the petitioner that bid condition does not prohibit one of the consortium members joining as consortium member of another bidder. The High Court further held that consortium members have to submit bid as a unit and a consortium member cannot submit another bid.

The Chhattisgarh High Court in the *Indure Private Limited v Chhattisgarh State Power Generation Company Ltd. and Ors*<sup>45</sup> considered the question, whether elimination of Techno-Commercial proposal of the petitioner

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<sup>43</sup> Id.

<sup>44</sup> WP (Lodging) No. 1125 of 2009

<sup>45</sup> (2010) Comp. LR 1 (Chhattisgarh).

owing to dual consortium involvement was unfair and arbitrary. The High Court held that a competitive bid shall be responsive, fair, and non-collusive. Any act of the bidder, direct or indirect, which eliminates or reduces fair competition would amount to bid rigging and is against public policy. The contention of the petitioner that the Invitation to Bid does not prohibit dual or multiple submission of bid was rejected by the Court and it ruled that the principle of '*level playing field*' and '*legal certainty*' is applicable to the tender. Permitting a consortium partner to submit more than one bid through dual or multiple consortium agreement would amount to cartelization. Considering the irrevocable nature of the consortium agreement, a consortium partner cannot enter into further consortium agreement for the project unless earlier agreement is cancelled. Execution of subsequent consortium agreement is bad in law. The participation in a tender through dual or multiple consortiums would enable a consortium partner to know about the price bid of the consortium partner and it would demolish competitiveness. The interpretation of the tender documents should foster the purpose of fair competition and the court ruled that the exclusion of the proposal upon finding it to be non-responsive by the employer is neither arbitrary nor unreasonable.

#### **4.6.2 Cartelisation**

Group of industries may come together to fix the prices for the goods and services. Markets may be shared by the bidders by colluding with each other. The cartel formed by the bidders in a particular sector might decide the winner of the project or a firm amount of turnover. All the bidders will preselect the winner and other bidders will offer higher price than the pre-selected bidder. The losers' fee arrangement may also be agreed by the bidders. Instead of selecting a pre-determined winner or fixation of prices, the bidders will be submitting a competitive bid after including the cost for preparation of bid of other bidders. The losing bidders' costs connected with the preparation of the proposal will be compensated by the winner by equally dividing the fixed sum. The cost associated with the preparation of the bid is unknowingly borne by the project owner. Similarly, the lowest possible costs of materials will be fixed by the material

suppliers while making supply to the project owner. The bid prices will be kept higher during tendering process without genuine competition.<sup>46</sup>

#### **4.6.3 Appointment of Agent**

The bribe giver may make direct payment to the final receiver who is required to commit the dishonest act. However, intermediaries are used for making payment of bribery to make it more complicated to identify that a bribe has been paid. A company bidding for a contract appoints an agent to conceal the disbursement of a bribery to a public official or project Owner. An agency agreement is executed between the company and agent purported to deliver appropriate facilities. The consideration mentioned in the agreement may not commensurate with the quantity of the service, or an exaggerated or bogus services will be mentioned in the agreement. The fee paid is grossly more than the fair price of the services which the agent is committed to provide under the agreement. The consideration under the contract may be a fraction of the contract value and the success fee will be paid to an agent upon awarded of the contract to the company. The project Owner or the public official who dishonestly agreed to ensure winning of the contract to the company would receive payment from the agent. Often the consideration may be paid in a foreign country bank account or transactions will be made in different currencies.<sup>47</sup>

Companies nowadays engage middlemen by paying ‘commission’ to grease the wheels and to get the business.<sup>48</sup> An EPC Contractor may execute a sham agency or retainer or service agreement in the guise of assisting them in the promotion of the company and/or preparation of bid. The agent or service provider may not even have relevant expertise or manpower for the intended service to be performed under the agency/service agreement. The agency or service agreement is intended to cloak the payments of bribe to the project Owner or their employees. Sometimes, the agency or service provider agreements are also executed on a ‘success fee’ basis. Contractor may appoint an agent to bribe

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<sup>46</sup> Supra 10

<sup>47</sup> Id.

<sup>48</sup> Millions in bribes, 'success fees' and a free car for a fixer: Rolls' Royce murky past revealed. (2017, January 24). *The Telegraph*. <https://business.financialpost.com/news/millions-in-bribes-success-fees-and-a-free-car-for-a-fixer-rolls-royce-murky-past-revealed>

the employees of Owner to leak the price sensitive information of the competitor to get favourable award of the project.

Halliburton, a former subsidiary of Kellogg, Brown & Root LLC (KBR) pleaded guilty to the FCPA anti-bribery violation charges in February 2009. In order to secure four Nigerian contracts during the period 1995 to 2004, valued at approximately \$6 billion, for the construction of liquified natural gas manufacturing facility at Bonney Island, KBR along with its joint venture associates gave bribery worth \$182 million to the public officials. Outside consultants were engaged to funnel this bribery and the consultancy contracts were executed by the joint venture through a shell company floated in Portuguese. No American nationals were appointed by KBR in the shell companies to shield itself from the liabilities arising out of FCPA violations. KBR agreed to pay criminal fine worth 402 million USD and disgorgement of profit worth 177 million USD. A monitor was assigned for a period of three (3) years, as part of settlement, to check the compliance of FCPA obligations.<sup>49</sup>

Unaoil, is a Monaco based company incorporated in the British Virgin Islands, and it functioned as an intermediary between companies engaged in EPC Contract business and the leadership of politically volatile territories by providing local expertise and contacts.<sup>50</sup> Energy majors like Rolls-Royce, Honeywell, Halliburton, FMC Technologies, Samsung, Hyundai, Man Turbo, Petrofac and Eni also gained favourable treatment as a consequence of instigation by Unaoil.<sup>51</sup> Corruption thrives in politically or socially volatile territories and the corporates indulge in corrupt practises to expand their business operations in the territories rich in natural resources.

Investigations under FCPA were started against the former executives of Unaoil for their roles in the payment of bribery to the public officials in Congo,

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<sup>49</sup> Hunter, R. J. Jr., Mest, D., & Shannon, J. (2011). A Focus on the Foreign Corrupt Practices Act (FCPA): Siemens and Halliburton Revisited as Indicators of Corporate Culture. *Atlantic Law Journal*, 13, 60.

<sup>50</sup> Fawthrop, A. (2020, January 23). *An overview of the global corruption probe into energy consultancy Unaoil*. NS Energy. <https://www.nsenergybusiness.com/features/unaoil-investigation/>

<sup>51</sup> Id.



Syria, Iraq, Kazakhstan, Libya, Algeria, Iran, Angola, Libya, and Azerbaijan.<sup>52</sup> Unaoil executives pleaded guilty for their conspiracy to aid payoff in the interest of companies for getting contracts and the sentencing was pronounced by the Federal Court in Houston.<sup>53</sup>

Similarly, the DOJ framed charges against SBM Offshore NV, a Netherland corporation and its subsidiary SBM Offshore USA Inc charged with the violation of the FCPA for its business relating to offshore oil drilling equipment. As part of deferred prosecution agreement, SBM settled to pay criminal penalty of 238 million USD.<sup>54</sup> SBM also reached an out of court settlement payment of US\$ 240 million with the Dutch Prosecutors Office (Openbaar Ministerie) in connection with sales representative expenditures incurred during 2007 to 2011, in Angola, Brazil and Equatorial Guinea.<sup>55</sup> Criminal penalties in excess of US\$475 million were paid worldwide by SBM.<sup>56</sup> An FCPA investigation was also initiated against SBM executives for bribing Brazil's Petrobras and two state owner energy firms in Africa.<sup>57</sup> Two executives of SBM were send to prison for 36 months and a fine of USD 150,000 was imposed in connection with bribery of foreign public officials.<sup>58</sup>

The UK Serious Fraud Office (SFO), initiated prosecution against erstwhile Unaoil executives and sales head of SBM Offshore NV for allegedly

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<sup>52</sup> Department of Justice. (2019, October 13). *Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials*, Department of Justice [Press Release]. <https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials>

<sup>53</sup> Cassin, R.L. (2019, October 30). DOJ: Unaoil bosses have pleaded guilty to FCPA conspiracy. *The FCPA Blog*. <https://fcpublog.com/2019/10/30/doj-unaoil-bosses-have-pleaded-guilty-to-fcpa-conspiracy/>

<sup>54</sup> Department of Justice. (2017, November 29). *SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries*, Department of Justice [Press Release]. <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>

<sup>55</sup> SBM Offshore achieves settlement with Dutch Public Prosecutor's Office over alleged improper payments. United States Department of Justice closes out the matter. <https://www.sbmoffshore.com/?press-release=sbm-offshore-achieves-settlement-dutch-public-prosecutors-office-alleged-improper-payments-united-states-department-justice-closes-matter>

<sup>56</sup> Supra 54

<sup>57</sup> Supra 53

<sup>58</sup> Department of Justice. (2018, September 28). *Oil Services CEO and Executive Sentenced to Prison for Roles in Foreign Bribery Scheme*, Department of Justice [Press Release]. <https://www.justice.gov/opa/pr/oil-services-ceo-and-executive-sentenced-prison-roles-foreign-bribery-scheme>

colluding to get oil projects by paying kickbacks to Iraqi public officials.<sup>59</sup> In order to restructure the economy, after the fall of Saddam Hussein, the Iraqi Oil Ministry planned a huge increase in oil production capacity. SBM Offshore and Leighton Offshore paid kickbacks worth USD 6 million through Unaoil for award of USD 800 million contract. Unaoil earned a commission as well as a subcontract for securing the Contract by illegal means.<sup>60</sup> The greedy and heartless executives conspired to exploit a nation affected by tyranny to win the business, and pocket money. After a marathon 19 days deliberation, the jury at Southwark Crown Court, held two former managers of Unaoil guilty and convicted them.<sup>61</sup> Former Vice President at SBM Offshore was also held guilty of one count of conspiracy to provide fraudulent payments and he has been sentenced to three years. Jury will conduct retrial of another SBM executive later since it was not able reach a verdict.<sup>62</sup> In the wake of corruption allegations Leighton Holdings changed its name in 2015 as CIMIC Group Ltd.<sup>63</sup> Australian police arrested former COO of Leighton for providing misleading information in connection with the Unaoil bribery investigation. Investigators identified that \$77.5 million were paid to the Iraqi public officials through third party contractors.<sup>64</sup>

TechnipFMC Plc and its subsidiary Technip USA Inc colluded with Keppel Offshore and Marine Ltd. (KOM) and others to pay commission to Brazilian government officials to benefit a commercial contract with Petrobrass. Technip also paid the bribe through Unaoil to secure contracts in Iraq. Technip

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<sup>59</sup> Ridley, K. (2020, January 24). Unaoil paid \$6 million in bribes for Iraqi oil contracts, London court hears. *Reuters*. <https://www.reuters.com/article/uk-britain-unaoil-corruption-idUKKBN1ZM2US>

<sup>60</sup> Serious Fraud Office. (2020, July 23). *Former Unaoil executive sentenced to five years for bribery in post-occupation Iraq* [News Releases]. <https://www.sfo.gov.uk/2020/07/23/former-unaoil-executive-sentenced-to-five-years-for-bribery-in-post-occupation-iraq/>

<sup>61</sup> Ridley, K. (2020, July 13) Former Unaoil managers convicted in Britain of Iraq bribery. *Reuters*. <https://www.reuters.com/article/us-britain-unaoil-corruption-idUSKCN24E11Q>

<sup>62</sup> Sun, M. (2020, July 30). Second Former Unaoil Manager Sentenced in U.K. Bribery Case. *The Wall Street Journal*. <https://www.wsj.com/articles/second-former-unaoil-manager-sentenced-in-u-k-bribery-case-11596141228>

<sup>63</sup> Wiggins, J. (2015, March 20). Leighton to change name to CIMIC in wake of corruption allegations. *Financial Review*. <https://www.afr.com/markets/business/leighton-to-change-name-to-cimic-in-wake-of-corruption-allegations-20150320-1m40j3>

<sup>64</sup> *Australian police arrest Leighton executive in Unaoil bribery case*. (2021, January 12). ethixbase. <https://ethixbase.com/australia-australian-police-arrest-leighton-executive-in-unaoil-bribery-case>

settled to give penalty of USD 296 million to resolve the foreign bribery charges and KOM paid a fine of \$422 million.<sup>65</sup>

Rolls-Royce Plc, paid bribery worth USD 11 million to public authorities in Thailand, USD 9.2 million to Brazilian public officials, USD 5.4 million in Kazakhstan, USD 7.8 million to Azerbaijan public authorities, USD 2.4 million bribery to Angolan and Iraqi public officials to prevent blacklisting of the company.<sup>66</sup> Pursuant to the Deferred Prosecution Agreement (DPA), Rolls-Royce decided to pay criminal penalty of USD 170 million to settle FCPA violations.<sup>67</sup>

The Central Bureau of Investigation (CBI) in India also filed a First Information Report (FIR)<sup>68</sup> against Rolls-Royce, Rolls Royce India Pvt Ltd., Aashmore Pvt Ltd., Shri. Ashok Patni and others for violations of Indian Penal Code, Section 120-B, and Sections 13(2) r/w 13(1)(d), 7 and 8 of the Prevention of Corruption Act (PC Act) 1988. The five year-long probe initiated as soon as the Ministry of Defence (MoD) got a document asserting Rolls-Royce's corruption. The MoD dispatched the message to the CBI who then probed the case. The Company had rewarded INR 77 crores bribery through an agent to obtain public sector contracts with Oil and Natural Gas Corporation Ltd (ONGC), Gas Authority of India Ltd. (GAIL), and Hindustan Aeronautics Ltd (HAL). The FIR alleged that Rolls Royce also paid 10% to 11.3% commission to Shri Ashok Patni, which was paid as kickbacks to unknown officials for securing the HAL purchase orders (POs) worth INR 4700 crores during the period from 2000 to 2013. The CBI enquiry revealed that the commission was paid to Ashmore Pvt Ltd. to secure 73 POs worth INR 29.81 Crores for procurement of spare parts for the engines. Rolls Royce paid INR 28.09 crores commission for securing the 68

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<sup>65</sup> Department of Justice. (2019, January 25). *TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Penalties to Resolve Foreign Bribery Case* [Press Release]. <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>

<sup>66</sup> Department of Justice. (2017, January 17). *Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case* [Press Release]. <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>

<sup>67</sup>Id.

<sup>68</sup> FIR No. RAC AC1 2019 A00004. (2019, July 29).

POs from GAIL for procuring spare parts for the engines during the period 2007-2010.

Thus, the above cases prove the fact that engagement of an agent to obtain the EPC Contract is one of the most commonly used methods to undermine the bidding process.

#### **4.6.4 Conflict of Interest**

Impartial judgment would be affected in case public authority clandestinely holds ownership in a tenderer or hold a position of a director in a tenderer. Corruption or conflict of interest might cause favouritism while making decision by a public official.<sup>69</sup> The Owner of the Project may select the contractor without considering the conflict of interest provisions which may prejudicially affect the competition, e.g., selection of an EPC Contractor who is an associate company or related party of the licensor and/or the Project Management Consultant (PMC).

The concept of a conflict of interest is objective in nature and it does not matter that the parties concerned acted in good faith. The mere fact that there is potential of conflict of interest is enough to exclude a bidder from the tendering process.

The judgment of the Supreme Court of India in *Vidharba Irrigation Development Corporation v Anoj Kumar Garwala*<sup>70</sup> repeated and reiterated the settled position that the Owner/employer of a project who is the drafter of the bid document, is the ideal person to recognize and appreciate its needs and interpret its documents. The Courts must defer to this understanding unless there is malafide or perversity in the understanding or appreciation or application of the terms of the tender conditions. Nevertheless, there is a possibility that there might exist a conflict of interest between the parties who have prepared the tender documents and the parties who are bidding for that same tender. And such conflict of interest should be avoided to guarantee level playing field for every bidder.

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<sup>69</sup> Supra 10

<sup>70</sup> (2019) SCC Online 89 (In.).

The Central Vigilance Commission (CVC) in India has issued guidelines and advisories to ensure transparency and avoid a conflict of interest. A consultant who was hired to provide consultancy service to a Public Sector Undertaking (PSU) in a tendering process is ineligible to provide goods, works, or services associated to the project mentioned in the consultancy assignment.<sup>71</sup> The disqualification is applicable not only to the consultants but also to its affiliates. A consultant engaged by the PSU shall act professionally, follow business ethics and is accountable to the employer for the service rendered.<sup>72</sup> Conflict of interest shall be avoided while discharging obligations by the consultant and primacy shall be given to the interest of the employer.<sup>73</sup> The Consultant should not be hired or engaged for any services, in case of conflict among consulting activities and supplies, performance of works or services not related to consultancy and relationship with employer staff.<sup>74</sup> The PSU and the Consultant should comply with instructions of the Government of India, guidelines issued by CVC, General Financial Rules (GFR) 2017, Manual for Procurement of Goods 2017 and Manual for Procurement of Works 2019.<sup>75</sup> The Integrity Pact should be strictly followed not only by the bidder, but also by all stakeholders of the project, including consultants to the project. The Integrity Pact is incorporated into the contracts to maintain transparency, fairness, efficiency, economy, and equal opportunity to all the bidders.<sup>76</sup> The Owner should not give any competitive advantage to one contractor over others and shall disseminate equal information to all the contractors to guarantee transparency and objective standard in the tender process.<sup>77</sup>

The Manual for Procurement of Goods 2017 stipulates that conflict of interest is detrimental to the interest of Owner and would lead to anti-competitive practises. It provides for the disqualification of the bidder in case of interest conflicting that of the Owner. As per the definition given in the

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<sup>71</sup> Central Vigilance Commission Office Order No.75/12/04. (2004, December 24).

<sup>72</sup> Central Vigilance Commission Office Order No.01/01/17. (2017, January 23).

<sup>73</sup> Id.

<sup>74</sup> Central Vigilance Commission Office Order No.08/06/11. (2011, June 24).

<sup>75</sup> Supra 72

<sup>76</sup> Id.

<sup>77</sup> Supra 74

Manual, bidding entity would be said to have conflict of interest in a procurement contract, if an affiliate or itself involved in the execution of a related consultancy service.<sup>78</sup> Obligation is cast upon the bidders to *suo-moto* proactively assert any conflict of interest.<sup>79</sup>

Hindustan Petroleum Corporation Ltd. (“HPCL”) invited bids for tender of the Project of Residue Up-gradation Facility (RUF) EPCC-3 Package<sup>80</sup> (“Tender”) to enhance its refining capacity at Visakh Refinery, Vishakhapatnam, India (“Project”). As per the Notice for Invitation for Bids (IFB), the Process Licensors were debarred from submitting a proposal for the package for which they provide technical know-how.<sup>81</sup> The Integrity Pact, which forms part of the Tender Documents, requires HPCL to treat all bidders alike and mandates that it shall not do any act which would give advantage to

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<sup>78</sup> Manual for Procurement of Goods 2017, cl. 5.1.4 (ix)  
Conflict of Interest among Bidders/Agents

A bidder shall not have conflict of interest with other bidders. Such conflict of interest can lead to anti-competitive practices to the detriment of Procuring Entity’s interests. The bidder found to have a conflict of interest shall be disqualified. A bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if:

- a) they have controlling partner (s) in common; or
- b) they receive or have received any direct or indirect subsidy/financial stake from any of them; or
- c) they have the same legal representative/agent for purposes of this bid; or
- d) they have relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another bidder; or
- e) bidder participates in more than one bid in this bidding process. Participation by a bidder in more than one Bid will result in the disqualification of all bids in which the parties are involved. However, this does not limit the inclusion of the components/sub-assembly/assemblies from one bidding manufacturer in more than one bid.
- f) in cases of agents quoting<sup>22</sup> in offshore procurements, on behalf of their principal manufacturers, one agent cannot represent two manufacturers or quote on their behalf in a particular tender enquiry. One manufacturer can also authorise only one agent/dealer. There can be only one bid from the following:
  - 1. The principal manufacturer directly or through one Indian agent on his behalf; and
  - 2. Indian/foreign agent on behalf of only one principal.
- g) a Bidder or any of its affiliates participated as a consultant in the preparation of the design or technical specifications of the contract that is the subject of the Bid;
- h) in case of a holding company having more than one independently manufacturing units, or more than one unit having common business ownership/management, only one unit should quote. Similar restrictions would apply to closely related sister companies. Bidders must proactively declare such sister/common business/ management units in same/similar line of business.

<sup>79</sup> Manual for Procurement of Goods 2017, cl.3.2.3

<sup>80</sup> Bidding Document No.: AD/B016-504-PM-TN-9509/1014

<sup>81</sup> Invitation For Bids, cl.8.14: “Process Licensors providing know-how are not eligible to quote for the execution of the same Package for which they are Process Licensors to avoid conflict of Interest.”

any particular bidder over others.<sup>82</sup> Prevention of corruption as well as unfair practises during pre-bid or post the award of contract is guaranteed by HPCL.<sup>83</sup> The Integrity Pact also provides for the exclusion of all known prejudiced persons.<sup>84</sup> However, an affiliate of the process licensor submitted a bid for the Project in consortium with another company and the same was objected by another bidder citing encouragement of participation of process licensors directly or indirectly through their affiliates would lead to potential conflict of interest and unfair competitive advantage. HPCL confirmed the conflict-of-interest provision and rejected the bid submitted by the affiliate of the process licensor.

No contractor can effectively be disqualified by an implied conflict of interest provision in the tender documents. Conflict of Interest provisions should also flow down to the subcontractors to prevent any form of bid rigging. The Owner must incorporate a term in the bid document to the effect that the sub-contracts which the contractor may enter into with other agencies must contain an identical provision to the main contract. Bid documents shall make it mandatory for the sub-contractors to sign the Integrity Pact and undertakings similar to those in the main contract. Moreover, the bid documents should contain conditions to disqualify all the bidders in case of conflict of interest by virtue of having been a subcontractor in respect of any part of the same project.

#### **4.6.5 Multiple or Alternative Bid Submission**

The Contractor shall be permitted to submit only one proposal either individually or in association with others.<sup>85</sup> The submission of multiple or alternative bids by the same company through different subsidiary/affiliates shall not be permitted.

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<sup>82</sup> Integrity Pact, cl.1.2: “The Buyer will during the pre-contract stage, treat all Bidders alike, and will provide to all Bidders the same information and will not provide any such information to any particular Bidder which could afford an advantage to that particular Bidder in comparison to other Bidder.”

<sup>83</sup> Integrity Pact, cl.3

<sup>84</sup> Integrity Pact, cl.2.1: “The Buyer will exclude from the process all known prejudiced persons.”

<sup>85</sup> Supra 74

The bids for Gujarat State Highway Project, funded by the World Bank, were unsealed in the presence of all the participating bidders and all of them came to know about bid price and their standing in the order. Thereafter, Superintending Engineering requested confirmation of the bid price from all the participating bidders considering change in Bill of Quantities (BOQ) after submission of proposals. However, the petitioner rectified the bid price in the original bid as well as in the addendum while giving confirmation of the bid price. The rejection of the bid on the ground of multiple bid submission was challenged in *Patel Engineering Ltd v State of Gujarat*.<sup>86</sup> The High Court held that it would be unjust to permit the petitioner to choose, at its sweet will, of the prices quoted in the original bid price or in the addendum. Reduction of the price by way of confirmation would unfairly affect the other bidders and it would amount to an unfair practice.

#### **4.6.6 Fixing of Milestone Payment**

Contractor and the employees of the owner may collude, and a favourable milestone payment schedule is fixed to plough the money in the initial stage of the project itself without much work being done by the EPC contractor. In case of termination of the Contract for any reasons, then project Owner is at a loss since the milestone payment is made without performance of corresponding works. The project Owner may not get competitive bid price in the retendering process considering the balance scope of work.

#### **4.6.7 OPEX and CAPEX**

Owner may include a vague condition of clubbing Operational expenditure (OPEX) and Capital expenditure (CAPEX) while deciding the winner. Some EPC contractor may even give a fancy OPEX figure in the proposal to get the award of the Project. The OPEX criteria will be identified at a later stage only or parties will collude to change the OPEX criteria by way of change order. The EPC contract may not either provide for a liquidated damage

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<sup>86</sup> (2004) 3 GCD 2188 (Gujarat).



for not satisfying OPEX criteria or nominal damages will be given for the violation of OPEX criteria.

#### **4.7 Execution Stage**

The project owner, project management consultant, contractor, suppliers, and subcontractors are involved in project execution. The corrupt practises involved during the execution stage can be further classified into:

- 4.7.1 Procurement of goods: Major chunk of the costs of project is incurred for the procurement of the goods. The procurement of goods is not free from corruption.
- 4.7.2 Change Order or Variation Order: At the starting of the contract itself, the price for the execution of the contract is fixed and no increase in costs would be payable to the EPC Contractor. However, the change order mechanism may be used as a tool to enhance the contract value. While offering the bribe for getting the project, the bidder might have persuaded project Owner or PMC and reached to an understanding that the expenses associated with the bribe would be deceptively claimed through variation order mechanism in the course of performance of the project. The recouping of cost associated with the bribe may be deferred by the contractor as a measure of concealment since competitiveness is seldom checked for variations. The variation order submitted post-contract award attracts fewer inspection and limelight than tenders. Bribery may be used as tool by the contractor to persuade the project owner or PMC to accommodate a variation order benefiting material enhancement in the sphere of activity of the contractor at an inflated price.<sup>87</sup>
- 4.7.3 Measurement, Certifying and Quality Check: There is every possibility of corruption during the measurement, certification, and quality check of the project work. A contractor may persuade works inspector or EIC through bribery to certify defective or unreal work. An EIC may be

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<sup>87</sup> Supra10

bribed by contractor to issue a payment certificate, which is not properly due.<sup>88</sup>

- 4.7.4 Performance Guarantee: The performance guarantee and OPEX assured during the proposal stage may not be achieved during commissioning of the Project. Non-achievement of performance guarantee may be due to multiple factors including defective feed supplied by Owner. This also gives a chance for corruption.
- 4.7.5 Levy of Liquidated Damages: An extension of time application may be submitted by the contractor citing the cause of the delay is solely attributable to the owner despite the delay being triggered by the contractor. Extension of time for a period greater than the genuine delay event supporting the claim will be demanded by the contractor. Bribery may be used as a means to induce the EIC to give extension of time. The quantity surveyor or EIC may be induced by the contractor through bribery to certify timesheets or work schedules.<sup>89</sup> Based on the recommendation of EIC, the project owner may not levy Liquidated Damages for the delay in project completion. Parties may arrive at a settlement to impose nil damages or nominal damages for the delay in completion of the project.
- 4.7.6 Warranty: There is a possibility that the goods supplied, and the work performed may not satisfy the contractual requirement during its Defect Liability Period (DLP). At times, the Owner might without intimating the contractor do the repair works during the DLP.
- 4.7.7 Settlement of the Dispute: Parties may settle the dispute without resorting to the dispute resolution mechanism as provided under the contract since it is time consuming. The phrase ‘time is money’ is used as a ruse to conceal the corrupt practises by the project Owner and the EPC Contractor. There are no good governance practises available in the industry to decide about the settlement of disputes, highlighting the advantages of time and opportunity cost.

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<sup>88</sup> Id.

<sup>89</sup> Id.

4.7.8 Localisation Requirement: Certain contracts specify localisation requirements. There is a possibility that EPC contractor contravenes these provisions with the silent acceptance of the Owner.

4.7.9 Subcontract: A subcontractor may be used as a channel to pay bribe. False services may be added under the scope of subcontract in exchange for a definite reward. No service will be rendered by the subcontractor or value of services will not be adequate in return for the subcontract consideration. The remainder of the payment will be used by the subcontractor for corrupt practises.<sup>90</sup> During the execution stage of the EPC Contract, actual execution of the work is being subcontracted to small insignificant subcontractors who are not at all competent to perform the project and guarantee quality of the work. It is pertinent to note that Satyendra Dubey was murdered since he made a complaint to the Prime Minister about the flouting of National Highways Authority of India's subcontracting and quality control rules in the Golden Quadrilateral project.<sup>91</sup>

In the absence of privity of contract, main contract terms do not bind the subcontractor. A subcontractor is bound only when such provision is executed in the subcontract by the contractor. There is no automatic incorporation of the main contract terms and conditions in the subcontract. The subcontractor is not constrained by the principles of trust or agency.

#### **4.8. Opportunities for Extortion of Money by Public Official**

The instances given below indicates that there is a possibility and/or opportunity for misuse or abuse of discretionary power or authority by public officials to their advantage and seek uncalled demands

##### **4.8.1 Approval of documents and certification**

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<sup>90</sup> Supra 10

<sup>91</sup> 6 yrs on, 3 petty thieves convicted for murder of NHAI whistleblower. (2010, March 23). *The Times of India*. <https://timesofindia.indiatimes.com/india/6-yrs-on-3-petty-thieves-convicted-for-murder-of-NHAI-whistleblower/articleshow/5714023.cms>

- Delays/rejections in approval of critical documents, citing illogical reasons, which in turn delays deliveries of equipment to site and hence delay the project completion schedule.
- Delays/rejections in approval of survey reports, drawings, etc which would delay the project completion schedule
- Delays in engaging the inspectors for certifying the work, ultimately delays the completion of work. Such issues do not have contractual support / provisions.
- For certification of the required performance guarantees at the time of commissioning.
- To certify completion of a milestone that is linked to liquidated damages / major payment.
- Delay in certification of works and thereby delay in invoicing and creating bad cash flows for Contractor.
- Approving of changes to work processes, execution methodologies or sourcing of materials necessitated out of changed situations during execution (e.g., raw material shortages, embargos, site hinderances, force majeure etc) without deterioration of project performance parameters as required under the contract (e.g., achieving performance schedule, safety & operability, and operating costs of the plant).
- Creating administrative hurdles and delaying processes for workers Gate pass/ Police verification/ Security checks/ Medical checks, etc.
- Owner appoints Certifying Agency (CA) for the quality checks of the works as well as the services performed by the Contractor. CA makes visit of the sites, yards, and vendor premises for assessing the quality of the materials and equipment prior to the despatch of the same. CA might point out minor punch points or other issues to deny approval of the material or equipment unless his favourable demands are met.

#### 4.8.2 Change Order

- Owners delay in approval of reasonable deviations (procurement from reputed manufacturers / suppliers), in turn delay the delivery of such equipment to site and hence project schedule.

- Approval of stand by time due to interface issues with other contractors or clients works.
- Project Owner may delay settlement of tenable change order and force Contractor's to negotiate which may lead to Contractor's budging on Project Owner's uncalled for demands.
- Ask Contractor to take up out of scope works without settling Variation order, which were a scope gap during tendering stage.
- Delay in approving the cost associated with the Owner initiated change order or making of *ad hoc* payment for the disputed costs claim for the Owner initiated change orders.

#### 4.8.3 Approval of Vendor

- As per the Contract, the contractor is permitted to source materials from the vendors approved by the project Owner or EIC. There is a possibility of nominating sole sourcing vendor for the procurement of materials. Sole vendor may be appointed without following a just and transparent procedure.
- Negotiating a procurement contract with sole approved vendor for supply of materials does not involve open competitive process. Project Owner or EIC may delay or deny the approval of additional vendor proposed by the contractor citing frivolous reasons.
- In cases where vendors regret or do not quote, additional vendors are needed to enable Contractor to have competitive offers. Project Owner may not allow additional vendors which effectively leads to single vendor situation which is not a fair situation to Contractor.
- Some Owners push / recommend the Vendors for critical equipment. Such Vendors are in touch with Owner representatives / decision makers and extend favours.
- Rejecting placement of purchase order on approved vendor for the critical equipment stating that approved vendor does not satisfy performance track records, or mandate the vendor to satisfy new performance criteria or cite other frivolous reasons.

- One of the initial milestones for payment to the contractor is approval of the purchase specification. It is mandatory for placing purchase orders on vendors for supply of materials including long lead items and the delay in approval would prejudicially affect the project schedule. EIC or Owner might delay the approval of purchase specification citing minor mistakes.
- Giving preference to local vendors is part of the EPC Contract, e.g, In-Kingdom Total Value Add (IKTVA) in KSA and In Country Value (ICV) in Oman. Contractor has to submit necessary documents to PMC or Owner to satisfy the bid equalisation process and for the approval of vendors. PMC or Owner may misuse or abuse its position and deny approval unless contractor concedes to his demands.

#### 4.8.4 Bank Guarantee

- EPC Contract requires the Contractor to submit Performance Bank Guarantee (PBG) to the satisfaction of the Owner. The bank guarantee charges vary from bank to bank and the contractor might wish to arrange PBG from a bank which is commercially viable for the project and its relationship with the banker. Owner may refuse to accept the PBG citing his discretion and propose procurement of PBG from a bank of his choice which would prejudicially affect the commercial interest of the contractor.

#### 4.8.5 Defect Liability Period

- The starting date of the defect liability period (DLP) in an EPC Contract would be linked to project owner activity like issuance of Provisional Acceptance Certificate (PAC). Project owner or EIC may delay issuance of such certificate citing frivolous reasons to extend the DLP. The extension of DLP would prejudicially affect the contractor to incur additional costs for the extended period, delay in getting retention money, extension of PBG, etc.

#### 4.8.6 Procurement of Materials

- Project Owner may insist on false rejection of material (quoting frivolous grounds / good engineering practices) after delivery at project site which

may force Contractor to settle the case with Project Owner to avoid project delay liquidated damages.

- Timely delivery of materials and equipment are required to adhere to the work schedule and any delay in supply would attract liquidated damages (LD). The public officials might insist for kickback from the contractor to grant import permit for bringing materials or equipment into the country.

#### 4.8.7 Punch Points

- Unless the contractor pays bribe, agent of the Owner may refuse or delay or put additional conditions or punch points not being specifically part of contract to provide a certificate of acceptance or certify disbursement which is owed to the contractor.

#### 4.8.8 Owner or PMC Fault

- In a situation where due to errors or changes or delays by EIC, EIC may know that the contractor is entitled for a variation order yet refuse to issue the same fearing that issuance of variation order could expose the EIC for dereliction or infringement of contract resulting in a claim by the Owner.
- Owner may pressurise EIC to refuse the extension of time or EIC may not to approve it in the expectation of acquiring potential job from the Owner.
- Delay in providing work fronts and creating interface issues with other Contractors.

#### 4.8.9 Miscellaneous

- A project Owner may allege defective performance of the work by the contractor and/or deduct false or exaggerated amounts from the invoice of the contractor alleging delay in completion of the project.
- The project Owner may impose liquidated damages, encash bank guarantee, or hold back the retention amount citing false or exaggerated claims. Payment due to a contractor may be delayed dishonestly by the Owner.
- Upon instruction from the Owner, a legitimate time extension claim may be rejected by the Engineer-in-Charge (EIC) or recommend imposition of

liquidated damages which are not contractually required from the contractor.

- While finalising the project schedule, Project Owner do not agree to list all the obligations to be fulfilled by Owner with realistic timelines (including delivery of Free Issue Materials). This in turn puts contractor in a disadvantageous situation contractually.
- Through subjective interpretations of the contractual provisions, Owner tries to harass contractor, indirectly hinting at other expectations.
- Project Owner takes advantage of onerous clauses to force Contractor to pay bribe. (Eg: “the decision of the EIC shall be final and binding on the contractor” and “EIC, at its sole discretion, may reject the vendor without giving any reasons thereof”)
- Project Owner may threaten to suspend the contractor’s works or threaten to terminate the contract quoting (untrue) safety grounds.
- Relying on generic clauses to deny genuine claims (e.g. (i) contractor is aware of all the conditions while entering into the Contract, (ii) in case of discrepancy, it should have been pointed at the bidding stage, (iii) this is a fixed price Contract and all risks are with contractor).
- Ignoring Concurrent delays by Project Owner thereby placing entire responsibility of delays on Contractor.
- EPC Contract runs for a longer period and in this globalised economy, there is a possibility of change in the constitution of the contractor (merger & acquisition, demerger, etc) in a legally permissible manner. However, Owner may refuse to accept change in constitution or management and threaten to terminate the contract. Also, seek favours to carry out changes the records like TDS, PAN, GST, etc in the records.
- There is no mandatory obligation on the part of the project Owner to give the contract to techno commercial L1 bidder. The project Owner may wish to negotiate with bidders even after opening of tender. This gives an opportunity to the Owner to seek favours for the award of the EPC contract. However, Indian PSUs award contract based on L1 price and not otherwise.



#### 4.9 Other Forms of Fraud

A substantial extra cost may be added falsely to the contractual claim as a negotiation margin by the contractor. Despite knowing that contractor's actual entitlement is less than the sum claimed, contractor would prefer a large variation claim. A false or exaggerated claim may be presented by the contractor notwithstanding the contractor suffering no loss or expense during the execution of the project. A contractor may allege that Owner is responsible for a particular event while submitting the extra cost claim and suppress records which causes prejudice to the claim of the contractor including delay attributable to the subcontractor. False records such as incorrect time sheets, programmes, bills, etc might be submitted, with or without collusion of public officials, by the contractor to supports its claim.

There is possibility of fraud by collusion between contractor, EIC and Owner. The following situations depict the collusive fraud:

- Evaluation and classification of imported items is to be done for the calculation of the import duty. Import duty varies from one classification to another. As similarities exist in classifications, a public official/ EIC may take bribe and classify an imported material as one which has less import duty and causing loss to exchequer.
- In case of theft of costly goods from project sites, the concerned public official may take bribe in exchange of hiking the value and quantity of stolen goods for claiming insurance.
- EIC or representative of Owner may take bribe for incorporating lesser quality goods in project, with an arrangement to place repeat order on the delinquent vendor/contractor.
- EIC may take bribe from contractor for giving an interpretation of contractual provisions in favour of contractor, thereby advising the project Owner to give extra time, cost advantage, other allowances to the otherwise defaulting contractor.
- During test runs, the EIC may take bribe to approve false reports either finding fault with work of contractor or hiding fault of the contractor's work.

- EIC/ Project owner may take bribe from contractor to extend various timelines in contract for convenience of the contractor, e.g., notified claims, force majeure event claim period.
- EIC / Project Owner may take bribe from a bidder to qualify a non-eligible bidder, declare entire tendering process as null, extend timelines for submission of bid or change criteria.

The above cited few examples depict the methods of corruption prevailing in public procurement. Importance shall be given to the procedures regulating the public procurement since there is extreme possibility of creeping corrupt practises in many ways.

### **5. Exercise of Discretionary Power**

Public officials are urged to get involved in several fields of societal life and are expected to resolve the day-to-day crises. A flexible approach is required to handle such complex situations along with bestowing public official with appropriate discretionary powers.<sup>92</sup> Discretion is the authority of the public official to make decisions using reason and judgment in particular facts or situations.<sup>93</sup> In the words of Lord Halsbury in *Susannah Sharp v Wakefield* 1891 AC 173<sup>94</sup>

*“Discretion means when it is said that something is to be within discretion of authorities that something is to be done according to the rules of justice, not according to private opinion and according to law and not humour. It is to be, not arbitrary, vague and beneficial, but legal and regular and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.”*

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<sup>92</sup> ICAC. (2020, December). *Guidelines on the Exercise Of Discretionary Powers*. ICAC. <https://www.icac.mu/wp-content/uploads/2020/12/Guidelines-on-the-Exercise-of-Discretionary-Powers.pdf>

<sup>93</sup> Id. at 2

<sup>94</sup> More, H. (2019, December 9). *Judicial Review of Administrative Action*. The Fact Factor. <https://thefactfactor.com/tag/susannah-sharp-v-wakefield-1891-ac-173/>

Public official shall use their intellect, judgment and expertise while taking decisions to award public procurement contract. Considering the vague or indefinite statutory provisions, the public authority is compelled to exercise discretionary power on ad hoc basis.<sup>95</sup> The reasons for conferring discretionary power to a public official is:

- (i) Public official is called upon to handle complex and varying nature of problems and the comprehension of the same within the existing rules is very difficult.
- (ii) Absence of precedence and emergence of new problems makes implementation of common rules difficult.
- (iii) It is impossible to anticipate every single problem and the public official is expected to solve the issues notwithstanding lack of exact rules pertinent to the circumstance.
- (iv) Mechanical application of rules would cause injustice as the situations vary from case to case.<sup>96</sup>

For effective governance, discretionary powers are essential and such power should be applied suitably, promptly, fairly, objectively, bona fide, without prejudice and as per the requirements of law.<sup>97</sup>

## **6. Exercise of Discretionary Power under EPC Contract**

The researcher has reviewed the Bidding Document No. IBCE-6373-C00-PJM-TEN-EPCC-01A floated by Project Management Consultant (PMC) M/s Toyo Engineering Private Ltd. (Toyo) for New Atmospheric & Vacuum Distillation Unit (AVU) and Allied Facilities of M/s Indian Oil Corporation Limited (IOCL), for Barauni Refinery Capacity Expansion to understand about the discretionary power granted to Owner as well as PMC or Engineer-in-Charge (EIC).

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<sup>95</sup> Arun. (n.d.). *Administrative Powers and Discretionary Powers*. Legal Service India. Retrieved October 27, 2022, from <http://www.legalserviceindia.com/legal/article-67-administrative-powers-and-discretionary-powers.html>

<sup>96</sup> Id.

<sup>97</sup> Supra 92, at 4

During the pre-bid stage, the Owner or PMC may exercise their discretionary in the following circumstances:

- The bid submission period may be extended by PMC in its discretion.<sup>98</sup>
- PMC or Owner may at its discretion ask for further documents or information from the bidder to satisfy about the substantially responsive bid.<sup>99</sup>
- PMC or Owner may its discretion allow or discard the bids and cancel the tender without any obligation to the bidders.<sup>100</sup>
- Owner may at its discretion revoke the disqualification or holiday listing punishment imposed on the bidder or contractor for its incorrect statement w.r.t previous transgression for anti-corruption activity.<sup>101</sup>

During the execution stage, the Owner or PMC may exercise their discretionary power in the following circumstances:

- At any time the Owner may rescind the contract at its discretion for any cause whatsoever.<sup>102</sup>
- EIC or Owner may at any time at its discretion suspend the work or supplies and responsibility is fastened on the contractor to protect and secure the work and materials at its costs.<sup>103</sup>
- Only EIC or Owner has the right to suspend the work for force majeure reasons and the contractor is not given any right of suspension even for prolonged force majeure event. No compensation is payable to the contractor for the suspension arising out of force majeure events.<sup>104</sup>
- Additional lands near worksite may be allocated at its convenience by the Owner to the contractor for performance of the work.<sup>105</sup>
- EIC may occasionally or at any time direct the contractor to perform any work relative to the performance of work or to any matter affecting the

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<sup>98</sup> Instructions to Bidders, cl.24.3

<sup>99</sup> Instructions to Bidders, cl.30.1

<sup>100</sup> Instructions to Bidders, cl.36.1

<sup>101</sup> Integrity Agreement, art.5

<sup>102</sup> General Conditions of Contract, cl.2.7.1.0

<sup>103</sup> General Conditions of Contract, cl.2.8.1.0

<sup>104</sup> General Conditions of Contract, cl.2.8.2.0

<sup>105</sup> General Conditions of Contract, cl.3.7.1.0

contract or arising therefrom. The contractor shall perform the work without compensation from the owner.<sup>106</sup>

- EIC may at its discretion ask contractor to employ additional manpower and machinery for the acceleration of the work and the final determination of EIC shall be binding on the contractor.<sup>107</sup>
- EIC may appoint any subcontractor at the expense and risk of the contractor to achieve the necessary progress of the work.<sup>108</sup>
- EIC may at its discretion accept any work or supply made in contrast to the requirements due to any unforeseen circumstances like force majeure, disruption, suspension, and any reason whatsoever.<sup>109</sup>
- Discretionary power vests with the Owner to continue with the contract in case of re-constitution of the firm or company (contractor).<sup>110</sup>
- Owner may at its discretion increase or decrease the scope of work.<sup>111</sup>
- Surplus project materials shall be disposed by the Owner at its sole discretion without any recourse to the contractor.<sup>112</sup>
- Owner or PMC may in its discretion accept the performance test.<sup>113</sup>
- The materials, design and workmanship shall satisfy EIC and the direction given by EIC w.r.t standard/specification/code of practice shall be conclusive on the contractor.<sup>114</sup>
- Whenever an ambiguity, doubt, inconsistency in the agreement, rectification of an mistake, or making good, the determination made by EIC is binding on the Contractor.<sup>115</sup>

The above list mentions some of the discretionary powers exercised by Owner or PMC during the execution of the EPC Contract. There are multiple situations that would arise in day to day activities during performance of EPC Contract which require approval of Owner or PMC. World over, the exercise of

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<sup>106</sup> General Conditions of Contract, cl.4.0.2.0

<sup>107</sup> General Conditions of Contract, cl.4.8.3.0

<sup>108</sup> General Conditions of Contract, cl.4.8.4.0

<sup>109</sup> General Conditions of Contract, cl.6.3.4.0

<sup>110</sup> General Conditions of Contract, cl.7.0.1.0

<sup>111</sup> Special Conditions of Contract, cl.5.3

<sup>112</sup> Special Conditions of Contract, cl.14

<sup>113</sup> Annexure A-X(ii), cl.5

<sup>114</sup> General Conditions of Contract, cl.2.0.1.5

<sup>115</sup> General Conditions of Contract, cl.2.0.1.8

discretionary powers is being abused.<sup>116</sup> It is a notable saying that “*absolute power corrupts absolutely*”. Consequently, wider the discretion, the prospects for abuse is greater.

The checks and balances are adequately required to mitigate or reduce the risks of malpractice during the exercise of discretionary power by public officials in fulfilment of their public duties. Public officials while exercising discretionary power shall act in good faith and perform their duties impartially.<sup>117</sup> There should be a post decisional assessment process to guarantee that public authority exercises its discretionary power in accordance with law and inside the boundaries prescribed under legal.<sup>118</sup>

The public official *interalia* to pay attention to the following at the time of application of discretionary powers:

- (i) Transparency: Guidelines, standards, and policies, adopted for taking the decision shall be made available to the affected person or entity.
- (ii) Managerial process: Decisions are to be guided by the rules of transparency, fairness, and accountability.
- (iii) Justification for taking decision and for variance: Accountability and procedural fairness requires written justification for the decision.
- (iv) Record Keeping: Maintenance of records helps in the enhancement of accountability and transparent decision-making.
- (v) Ethical Responsibility: Ethical code facilitates to decrease prospective misuse of authority.<sup>119</sup>

## **7. Elimination of Corruption**

Zero corruption is not a realistic goal as it is not a newly developed virus that can be treated with right combination of treatments. National culture cannot

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<sup>116</sup> Singh, H. (2018, June 8). Discretionary powers used by public functionaries will define how India is governed. *The Economic Times*. <https://economictimes.indiatimes.com/blogs/et-commentary/discretionary-powers-used-by-public-functionaries-will-define-how-india-is-governed/>

<sup>117</sup> Supra 92, at 2

<sup>118</sup> Supra 95

<sup>119</sup> Supra 92, at 13 & 14

be blamed for corruption as it is widespread and existed for thousands of years. Corruption is deep rooted, complex, age old and highly resilient. Corruption will not be eradicated unless humans turn into angels.<sup>120</sup> Ethical universalism remain ideal even in more developed countries as government favouritism and personal connection is an imminent threat and often causes worry.<sup>121</sup> Corruption is the part of the system, which is spread everywhere and cannot be eradicated completely.<sup>122</sup>

Lack of ethics or knowledge does not lead to corruption, but it is a method selected by the people when they have few better options. For most of the people, corruption is a method to achieve desired results and if individuals got an option, they may not have chosen corruption to make progress. Millions of dollars are spent all around the world every year attempting to eliminate corrupt practices but so far it is persistently widespread. People will continue to spend their hard-earned resources to fight the menace of corruption until they understand why people hire corruption. Instantly one dishonest person is beaten, more emerge in that spot. Corruption cannot be eradicated completely from society but restricting corrupt practices guide us to certainty and consequently enhances faith and transparency.<sup>123</sup>

## **8. Siemens Efforts to Curb Corruption**

A culture of corruption was pervasive in Siemens and their project calculation sheet frequently reflected a term ‘useful money’ which employees understood to mean bribes. Cash desks were maintained at Siemens offices to enable the personnel to pull out money at a time up to 1 million euro.<sup>124</sup> Post slips

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<sup>120</sup> Wathne, C. (2021). Understanding corruption and how to curb it: A synthesis of latest thinking. *U4*, 3, 5. <https://www.u4.no/publications/understanding-corruption-and-how-to-curb-it.pdf>

<sup>121</sup> Pippidi, A.M. (2016, January). The Quest for Good Governance Learning from Virtuous Circles. *Journal of Democracy*, 27, 95. <https://journalofdemocracy.org/wp-content/uploads/2016/01/Mungiu-pippidi-27-1.pdf>

<sup>122</sup> Corruption is part of the system, cannot eliminate 100%: Maharashtra DGP. (2021, February 26). *Punekar News*. <https://www.punekarnews.in/corruption-is-part-of-the-system-cannot-eliminate-100-maharashtra-dgp/>

<sup>123</sup> Christensen, C., Ojomo, E., & Dillon, K.(2019, April 3). *Can corruption ever be eliminated in the world? Boss Tweed and Napster show a counterintuitive path forward*. Ted. <https://ideas.ted.com/can-corruption-ever-be-eliminated-in-the-world-boss-tweed-and-napster-show-a-counterintuitive-path-forward/>

<sup>124</sup> Supra 49, at 77.

were utilized to disguise the identity of the person who approve corrupt payments.<sup>125</sup> Bogus companies and covert ‘*slush funds*’ were created by Siemens to acquire business and disguise bribery. Intermediaries such as third-party agents or consultants were used for handing over of illegitimate expenses to the final recipient.<sup>126</sup> The methods adopted by Siemens and its subsidiaries to conceal the widespread corruption also include:

- a) Engagement of former employees to funnel the bribes
- b) Execution of Consultant agreements after Siemens won the relevant project and corrupt payments were disguised as consultant fees.
- c) Limiting the scope of audit in relation to consultant payments
- d) Changing the title of the agreements to avoid review by company lawyers.
- e) Authorisation of payments through single signatures contrary to company policy
- f) In the internal balance sheets, the accumulated profits were reserved as liabilities to enable the company to make corrupt payments.<sup>127</sup>

The corrupt practises indulged by Siemens resulted in a total bribery payment of over \$1.4 billion during the period from 2001 to 2007.<sup>128</sup> The Siemens’ scheme began to unravel in the raid carried out by the Public Prosecutor’s office in Munich, Germany in November 2006, which resulted in the arrest of members of senior management. Thereafter, Siemens disclosed to the United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC) about the Foreign Corrupt Practises Act, 1977 (FCPA) violations and initiated a global investigation of its internal practices.

Siemens paid five hundred and ninety-six (596) million euro to authorities in Germany towards the expenses associated with legal proceedings. In USA federal court, Siemens pleaded guilty for FCPA violations and paid a fine of \$450 million and in addition to that it agreed to \$350 million in disgorgement

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<sup>125</sup> Sidhu, K. (2009). Anti-Corruption Compliance Standards in the Aftermath of the Siemens Scandal. *German Law Journal*, 10, 1343.

<sup>126</sup> Id. at 1347

<sup>127</sup> Schroeder, M.R., & Haedicke, S.J. (2009, March). *The Foreign Corrupt Practices Act: Two Recent Cases Set New Records, Teach Old Lessons*. Jones Walker. <https://www.joneswalker.com/images/content/8/3/v2/834/1375.pdf>

<sup>128</sup> Supra 49, at 78



of profits. In connection with the investigation of violation of anti-corruption laws, it also paid legal fees and expenses amounting to more than € 950 million and the total costs incurred by Siemens was more than €2 billion.<sup>129</sup> Siemens also paid additional income tax of € 443 million for the fiscal year 2000-2006 for the violation of Fiscal Code of Germany.<sup>130</sup>

The legal proceedings against Siemens AG created awareness among the Board of Directors and Managers that violation of criminal law jeopardizes the survival of the company besides individual criminal liability.<sup>131</sup>

### **8.1 Compliance Measures Taken by Siemens**

Siemens started radically improving its internal compliance mechanism aftermath of raid in its offices in November 2006 pursuant to bribery allegations. Company established a robust and ethical ‘tone at the top’ environment in the workplaces and set up a coherent internal compliance system. Onetime Interpol official was appointed to head the investigation unit examining the internal compliance and they interviewed 1750 employees in 34 countries as part of investigation besides reviewing more than fourteen million documents. All over the world, Siemens deployed more than five hundred officers to look after compliance functions, appointed external ombudsman, created online compliance helpdesk and a 24-hour compliance hotline. Anti-corruption training was given to international workforce, revived its anti-corruption policies, created an expanded internal reporting mechanism besides setting up of an internal compliance process which is regularly audited by corporate finance team. Siemens replaced the several corrupt senior managers and the responsibility of compliance at the board level were entrusted to a general counsel.<sup>132</sup> Ultimately the anti-bribery concerns were determined without the requirement of a proper criminal prosecution.

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<sup>129</sup> Supra 125, at 1344

<sup>130</sup> Id. at 1345

<sup>131</sup> Id. at 1343

<sup>132</sup> Id. at 1349

## 9. Prevention and Detection of Corruption

Human by nature is greedy and hence it is not possible to have 100% corruption free society. Corruption cannot be eradicated; we can only contain the problem and control it. In a vibrant economy, there is higher chances of being corrupt or being required to offer a bribe. Coordination and cooperation are the two factors to combat corruption. Greater coordination among the public officials especially law enforcement officers is required, and measures shall be taken to train the officials and maintain a strong network for rooting out corruption. Cooperation among the law enforcement officers of different countries is required to prevent people from taking benefit of loopholes in the system. There should a global adaptation of an effective anti-corruption measures and the effectiveness of the law enforcement depends upon the cooperation and collaboration of different jurisdictions. In the absence of the cooperation the corrupt would find ways and loopholes in the system to hide their activities.<sup>133</sup>

No assertion is made by anyone that it is possible to eliminate corruption. However, it is believed that checking and controlling of corruption helps to minimize its bad effects. The leadership must show its dedication to accomplish the needed reforms and demonstrate firmness and political will to fight corruption as it involves difficult decisions.<sup>134</sup>

As a corporate sustainability initiative, the Global Compact leaders' summit adopted the 10<sup>th</sup> principle against corruption in 2004: "*Businesses should work against corruption in all its forms, including extortion and bribery.*" The objective 10th principle is to proactively develop internal control measures to address corruption.<sup>135</sup> Huguette Labelle Chair, Transparency International and Member, UN Global Compact Board in his forward to

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<sup>133</sup> Bo-gyung, K. (2019, September 15). Corruption cannot be eradicated, only contained and controlled. *The Korea Herald*. <http://www.koreaherald.com/view.php?ud=20190915000095>

<sup>134</sup> Myint, U. (2000, December). Corruption: Causes, Consequences and Cures. *Asia-Pacific Development Journal*, 7, 54. <https://unescape.org/sites/default/d8files/apdj-7-2-2-Myint.pdf>

<sup>135</sup> *Business against Corruption: a framework for action*. (2011, May). UN Global Compact Office. [https://d306pr3pise04h.cloudfront.net/docs/news\\_events%2F8.1%2Fbac\\_fin.pdf](https://d306pr3pise04h.cloudfront.net/docs/news_events%2F8.1%2Fbac_fin.pdf)

Reporting Guidance on the 10th Principle against Corruption<sup>136</sup> stated about transparency in the following lines:

*“Transparency is a first line defence against corruption. Through transparency, organizations can communicate to stakeholders and the public their values and policies and how they are being translated into action. Transparency sets a tone of openness, accessibility, and accountability, building confidence among stakeholders that they are treated in an equitable and responsible manner. Transparency of commitment to values and openness about policies and processes will not only enhance a company’s reputation but act as a substantial deterrent to those wishing to act corruptly.”*

The heart of company’s commitment to the UN Global Compact is submission of an annual Communication on Progress (COP) which provide information to its stakeholders. Awareness among the employees increases on reporting of anticorruption and it helps to discipline and control the management. Proactive reporting of anti-corruption increases the reputation of the organisation in the society and marketplace. The COP is centred on ideas of accountability, transparency, and constant advancement of performance. The organisations shall adhere to guidelines on the following categories:

- (i) Commitment and Policy: Organisations shall publicly state its pledge to counter corruption and comply with all applicable laws including anti-corruption. Risk assessment of corruption to be done to minimise the risk and develop policies to address potential areas of corruption.
- (ii) Implementation: All employees shall be communicated and trained on the anti-corruption commitment. Tone at the top shall be clear to the employees to counter corruption. Anti-corruption measures are to be consistently implemented as an internal checks and balance measures. The

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<sup>136</sup> Reporting Guidance on the 10th Principle against Corruption. (2009, December). UN Global Compact Office. [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2FAnti-Corruption%2FUNGC\\_AntiCorruptionReporting.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FAnti-Corruption%2FUNGC_AntiCorruptionReporting.pdf)

responsibilities for handling multiple functions like contracts, placing order, receiving goods, invoicing and payment shall be given to different individuals or departments. Before engaging a business partner proper due diligence to be carried out and review their integrity. Whistleblowing mechanism to be implemented to enable the employees to report their corruption concern without the fear of victimisation.

- (iii) Monitoring: Leadership shall review monitoring and improvement process. Continuous development of anti-corruption program is required to address the changing risks.<sup>137</sup>

In order to end the debarment or early termination of debarment, the World Bank Group (WBG) requires establishment and execution of a reliable compliance mechanism.<sup>138</sup> The WBG integrity compliance program *interalia* provide for the

- (i) Prohibition of misconduct in the code of conduct of the company
- (ii) Strong ethical leadership committed to compliance with the law.
- (iii) Internal Policies: Internal policies shall provide for (a) the due diligence of the employees, (b) prohibit facilitation payment, (c) maintenance of appropriate records, (d) establish controls over gifts, hospitality and entertainment, and (e) restrict employment of former public officials, etc.
- (iv) Business Partners: Conduct due diligence of business partners, make proper documentation of the relationship, pay justifiable remuneration through *bona fide* channels for the legitimate services, monitor and oversee the services, and seek reciprocal commitment of compliance from business partner.
- (v) Internal Control Measures: Establish and maintain counterbalance mechanism over accounting, fiscal, and record keeping systems.
- (vi) Employees shall be communicated about the internal policies and give effective training.

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<sup>137</sup> Id.

<sup>138</sup> *Summary of World Bank Group Integrity Compliance Guidelines*. (n.d.). The World Bank. Retrieved October 27, 2022, from <https://www.worldbank.org/content/dam/documents/sanctions/other-documents/sanctions-board/Summary%20of%20Integrity%20Compliance%20Guidelines.pdf>

- (vii) Establish whistleblowing channels to report breaches and periodically review the code of conduct.
- (viii) Investigate the misconduct when encountered or reported or discovered.

EPC Contracts themselves are drafted in a judicious manner and the terms distribute risk and liability among the parties. In the process of tendering and awarding the EPC Contracts, the Employer exercises extensive discretion, and more often than not, such discretion is abused. Such abuse is evident through the above instances and examples. The courts have also observed the need for the fairness and equity by governments or their agencies in the tendering process. In *Tata Cellular v Union of India*,<sup>139</sup> the Supreme Court held that the Government should exercise fair play in the freedom of contract and there shall not be any bias or malafides in the ruling to allow the bid or grant the contract. The *wednesbury* principle of reasonableness is applicable for the tender process and it must be free from arbitrariness. Rule of law and the principle of “*level playing field*” demands ‘*legal certainty*’ should be incorporated in the tender conditions to prevent unequal or discriminatory treatment.<sup>140</sup>

The opportunities for corruption are greater in the EPC Contract since it gives excessive discretion to the Owner. Such opportunities can be reduced by minimising discretion and maximising transparency and accountability. The use of integrity pacts helps in promoting transparency and creates confidence of the community in the public service contracts. Integrity pact makes sure that the parties to the contract does not compensate, offer, insist, take bribes, or connive with the rival to get the contract. It also provides for the independent and impartial monitoring process to ensure accountability in the transaction. Bidders shall disclose engagement of agents and payment of commission or similar expenses in connection with the contract. The failure to disclose or false disclosure by the bidders will attract sanctions, which *interalia* include forfeiture of bid bond, performance bond, blacklisting for future contracts, termination of the contract, etc. Bidders are encouraged to make disclosure on

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<sup>139</sup> (1994) 6 SCC 651 (In.).

<sup>140</sup> *Reliance Energy Ltd. & Anr. v Maharashtra State Road Development Corpn. Ltd. & Ors.* (2007) 8 SCC 1 (In.).

the assurance that competitors in the project would also do. Hence, both the Owner and the Project Management Consultant (PMC) are expected to exercise their discretion fairly and avoid taking advantage of their discretion to unfairly give one bidder an edge over other bidder.

The Government of India has carried out various measures to tackle corruption and enhance integrity and accountability of state enterprises and uphold its commitment towards 'Zero Tolerance against Corruption.' The steps taken by the government *ineralia* include:

- (i) Implementation of E-tendering in public procurements
- (ii) Introduction of Government e-Marketplace (GeM) for public procurement
- (iii) Introduction of e-Governance
- (iv) CVC issued instructions to CPSUs to adopt Integrity Pact in public procurement.
- (v) The Prevention of Corruption Act, 1988 has been amended and vicarious liability is cast on the responsible persons of corporations for offering bribe with their authority or participation.
- (vi) RTI requests and first appeals can be filed through web browser, i.e., RTI online in URL [www.rtionline.gov.in](http://www.rtionline.gov.in).<sup>141</sup>

## **10. Conclusion**

The governments of different countries have passed laws for the oversight, regulation of the bidding process and enabled investigative agencies to prosecute in case of misuse of the discretion and violation of any laws. Despite, the presence of laws, there have been several transgressions by companies wherein they have indulged in corrupt practices to obtain government contracts. Therefore, there is a need to put stricter rules in place. The researcher is of the view that following principles, need to be reinforced into the tendering process:

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<sup>141</sup> *Eradication of Corruption*. (2019, December 4). Press Information Bureau, Government of India, Ministry of Personnel, Public Grievances & Pensions.  
<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1594893>

- a. **Integrity:** As an anti-corruption tool, the Integrity Pact casts suitable responsibilities on the Owner as well as the bidder. Integrity Pact should build public trust, prevent corruption, ensure fair evaluation of the bid, guarantee transparency and competition in the award of the government contracts. An effective dispute resolution mechanism should be afforded to the dissatisfied bidders in the Integrity Pact. Steps should be taken to reduce the delays in the Independent External Monitor (IEM) redressal of grievances and its effectiveness. Participating bidders should add value to the bidding process. Integrity Pacts need to be strictly enforced and any violation of the Integrity Pact should attract penal action for all persons involved, including the government officials. A stipulation ought to be incorporated in the bid documents mandating the prime contractor to obtain commitment from the subcontractor similar to the main Integrity Pact and present it to Owner at the time of signing of the Contract. Adopting project specific whistleblower policies and Integrity Pacts would reduce the corrupt practises in the execution of the EPC Contracts. These steps are necessary to ensure fair competition, reduce opportunities for corruption, level the playing field for businesses, and companies who have committed the integrity breaches to be excluded from the bidding process. The exercise of discretionary powers by public official during execution of EPC contract is inevitable. The culture of ethics shall be created in the company which will enable the employees to handle the situations of abuse or misuse of discretionary power by public official. The tone at the top should be clear to the employees while reacting to the uncalled demands from the public officials.
- b. **Transparency:** All information regarding the tender process should be available in the public domain. The flow of public funds should be visible to the general public and independent audit services should be engaged to audit the project financials at regular intervals.
- c. **Access to public procurement contracts:** Wide-spread advertisements of tenders and enabling participation by companies of all sizes will create a competitive environment, reducing the possibility of corruption.

- d. **E-procurement:** Digitization of procurement and the use of Artificial Intelligence to exercise discretion will remove the human element from the selection process. It helps to detect irregularities; any breach of integrity and helps to increase transparency. In the case of Artificial Intelligence, the software should be standardized and protected from hacking.
- e. **Oversight and control:** All the measures taken to tackle corruption and the abuse of discretion would be futile without oversight. Accountability is essential to curb corruption. Governments must aim at establishing a scheme of checks and balances to guarantee that all the stakeholders comply with the regulatory and ethical norms. While, the courts ensure that the executive branch of the government does not act beyond its powers, any challenge before the courts involves a lot of time and investment. Hence, there should be an internal and independent mechanism of oversight to guarantee that all the decisions in the tendering process were free from bias and arbitrariness. The doctrines of ‘natural justice’ and ‘rule of law’ should be the guiding factors of such oversight.
- f. **Agent or Service Provider:** There should be strict scrutiny of agency or service provider agreements and the nature of services performed by them. The payment for the agent or service provider should be commensurate with the services provided. Every endeavour shall be taken to assess the manpower to be deployed by the agent or service provider to render the service under the agreement.
- g. **Tender Document:** The EPC Contract shall contain fair and reasonable clauses instead of unilateral clauses favouring project Owner. Incorporate a term in the bid document to the effect that the subcontracts which the EPC contractor may enter into with other agencies must contain an identical provision to the main contract. Owner shall satisfy the compliance requirements before approval of the subcontractor to ensure that subcontractor bound by the terms of the main contractor.
- h. **Due Diligence of PMC:** Developing and utilizing in house capabilities by Owner so as to carry out an independent parallel or prior process/ studies and arriving at conclusion so as to verify the veracity of PMC’s report by comparing the in-house report and PMC’s report. Systematic and periodic



audit by third parties to confirm the veracity of PMC's reports. Stringent provisions for approving modifications to tender or contract with contractor or licensor, after the PMC has awarded it to the contractor or licensor. Fix a limit for enhancing or descoping work which can be permitted by PMC. There shall be a systematic and periodic audit by third parties to ascertain the actual requirement of modifications permitted by the PMC. Leverage technology by using monitoring software, project management software and compliance software. Adopt stringent clauses describing in detail the possible conflicts of interest and limit award or allocation of work to affiliates or subsidiaries of PMC or process licensor.

The above measures are not a comprehensive list to reduce corruption in the industry. However, they can be the first step to bring down the prevalence of corruption. Government contracts deal in public money and should be subject to high levels of scrutiny by the government, but also by the general public. Therefore, the general public should be made aware of the presence of such corrupt practices and the measures that can be taken to curb the corruption. Awareness of any kind has the capability of permeating beyond barriers and might even be the cause of change.

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## **CHAPTER VI**

### **CIVIL ENFORCEMENT ACTIONS AGAINST CORPORATE CORRUPTION**

*Without strong watchdog institutions, impunity becomes the very foundation upon which systems of corruption are built. And if impunity is not demolished, all efforts to bring an end to corruption are in vain.*

*Rigoberta Menchú, Nobel Prize laureate*

#### **1. Introduction**

In this globalised economy, corruption has spread into multiple jurisdictions. Cooperation and assistance between international communities is necessary for the proper enforcement of the laws to prevent corrupt practices. Presently the government regulations and law enforcement stretch forth beyond state borders, and compliance with economic sanctions and anti-corruption laws has become an integral part of doing business. This chapter identifies and briefly discusses the various enforcement actions taken against the corrupt practices of multinational companies in their business activities. The prevention and detection of corporate corruption requires involvement of enforcement authorities and judicial bodies to conduct investigation and trial of the crime. This chapter identifies and discusses the enforcement mechanism prevalent in USA, UK, and India. In maintaining the rule of law, the responsibility played by the instrumentalities of the state like judiciary, prosecution and investing agencies are identified in this chapter. It analyses and compares the deterrent effect of criminal and civil enforcement actions taken to prevent the menace

of corruption. This chapter also discusses about the sanctions imposed by the World Bank for the corrupt activities in the projects funded by it.

Conceptually, criminal law stares at subjective *mens rea* element and the thrust is directed at the evil. On the other hand, civil law is concerned with safeguarding of legal rights, compensation for losses, and thereby looks at objective liability. Civil law thrusts on compensation whereas criminal law is punitive and non-utilitarian. Criminal law is worried with the menace to society and civil law is bothered about the losses suffered by individuals.<sup>1</sup>

Here, the chapter highlights the victims of corporate corruption and proposes possible solutions for their compensation. Damages suffered by victims of corruption must be restored by civil enforcement. Indian law, on the other hand, only provides for criminal remedies against corruption, which frequently fail to operate as an efficient deterrent. In India, foreign corporations have participated in corrupt activities, and this chapter aims to explore the notion of civil enforcement under FCPA and how it has successfully acted.

This chapter also discusses and analyses the various enforcement actions taken against EPC Contractors at the global level. The Chapter addresses the enforcement mechanism adopted by US and that of UK. The World Bank's penalties are discussed in one section, and the Indian judicial system is also examined, which argues for the requirement of an alternative enforcement mechanism in order to combat corporate corruption. This chapter also focuses on anti-corruption measures and their implementation. There have been several instances of corruption inside India's borders, but Indian laws have been unable to stop or prosecute these actions, and an overseas jurisdiction has assured that the businesses that perpetrated such offences are adequately punished. According to the study, the shortcomings in the Indian legislation have a negative influence on the nation's financial system and competitiveness. It aims to provide policymakers with insights

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<sup>1</sup> Newkirk, T.C. (1998, September 19). *Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the U.S. Securities Laws*. U.S. Securities and Exchanges Commission. <https://www.sec.gov/news/speech/speecharchive/1998/spch222.htm>

and guidance on how to use civil enforcement tools in India to fight corporate corruption.

## 2. Corruption not a Victimless Crime

Corruption corrodes public confidence in the government's ability to manage its finances. Taking bribes is a felony that has repercussions. Individuals are harmed when public monies are squandered by unscrupulous officials. The cost of corruption is measured in lost chances and dashed dreams across decades.<sup>2</sup> Integrity of political, financial, and regulatory agencies are being undermined by corruption.<sup>3</sup> As per World Economic Forum, there has been a 10% estimated increase in the cost of doing business due to corruption.<sup>4</sup> A wide range of activities are included in the corruption like paying of bribe by a multinational company to win a contract to build a highway or demanding of bribe by a public official to issue a license. It is the taxpayer or customer who ultimately bears the costs for the same.<sup>5</sup> Corruption causes disadvantage to honest businesses that miss out on government contracts. Corruption has a destructive power on government, the condition of life, and even the rule of law. Bribery and corruption have a wide range of victims, and the expenses of bribes that are included in the price tag are borne by taxpayers.<sup>6</sup> The crime of corporate corruption does not go unpunished. Some of the millions of victims include women, children, and men in vulnerable situations.

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<sup>2</sup> Fedotov, Y. (2016, June 10). Corruption not victimless crime. *New Straits Times*.

<https://www.nst.com.my/news/2016/06/150898/corruption-not-victimless-crime>

<sup>3</sup> *Is Bribery a victimless crime?*. (2018, March 27). FCCD. <https://fcced.com/is-bribery-a-victimless-crime/#:~:text=Rationalising%20bribery%20as%20a%20victimless,achieving%20personal%20or%20business%20goals.&text=There%20are%20classic%20examples%20of,the%20monopoly%20of%20natural%20resources>

<sup>4</sup> *Boosting Integrity Fighting Corruption*. (n.d.). CleanGovBiz. Retrieved October 27, 2022, from <https://www.oecd.org/competition/50350066.pdf>

<sup>5</sup> Id.

<sup>6</sup> Bistrong, R. (2014, September 11). *The Illusion of No Victims: The Final Component of "Rationalizing Bribery"*. Corporate Compliance Insights. <https://www.corporatecomplianceinsights.com/the-illusion-of-no-victims-the-final-component-of-rationalizing-bribery/>

### **3. Remedies against Corporate Corruption**

All felony entail injury- bodily, monetary, or ethical, to others. It is the obligation of the wrongdoer to pay compensation the sufferer for the losses occasioned by his deeds and carelessness. Corruption in corporations has both criminal and civil consequences. Criminal charges are brought against the erring personnel and their employer by the state. When the criminal offence is proven beyond a reasonable doubt, the individual offender is found guilty and sentenced.

Victims and their families may also be compensated in accordance with the law in addition to the criminal prosecution of the perpetrator. Compensation and reparation for victims are important in the administration of justice. There is a wide range of restitution that includes compensatory damages, compensation for loss or injury, and restoration of rights. As a result of the state's enormous costs in administering justice, the criminal is also accountable for civil repercussions. In the restitution the wrongdoer pays reward to the sufferer, whereas compensation is paid to the sufferer from the public resources.

#### **Enforcement Mechanism Prevailing in U.S.A.**

Chapter II of this thesis discussed about the Foreign Corrupt Practices Act, 1977 and the Sarbanes Oxley Act, 2002. It is seen that US follows parallel proceedings of civil and criminal enforcement against a company for the same conduct. In US, the criminal enforcement actions are being taken by Department of Justice (DOJ), whereas the civil enforcement proceedings are taken by Securities Exchange Commission (SEC). In 2020, the US Department of Justice imposed about \$7.76 billion in penalties worldwide for foreign bribery, compared to the penalties of \$2.83 billion in 2019.<sup>7</sup>

In addition to penalties, non-prosecution agreements, pre-judgment interest, and a stop and desist order barring future breaches, the SEC utilises a variety of other non-criminal enforcement techniques. The DOJ introduced the Deferred

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<sup>7</sup> Tokar, D. (2020, December 4). Foreign Bribery Enforcement on Track for Record-Breaking Year. *The Wall Street Journal*. <https://www.wsj.com/articles/foreign-bribery-enforcement-on-track-for-record-breaking-year-11607114397>

Prosecution Agreement (DPA) in the year 1977 as an alternative to criminal prosecution with the following objectives:

- (i) divert certain offenders into community supervision and services to prevent future criminal activity.
- (ii) to save resources of prosecution and judiciary to concentrate on major cases.
- (iii) make compensation to communities and victims of crime when it is appropriate.
- (iv) in no event the period of supervision shall exceed 18 months.<sup>8</sup>

Now DPAs are seen as proportionate response to corporate corruption. The central strategy of the US prosecutors in forming the DPA is tackling of white-collar crime.<sup>9</sup>

As an alternative to criminal prosecution, DOJ and SEC may pursue:

- (i) Deferred Prosecution Agreements (DPA)
- (ii) Non-Prosecution Agreements (NPA)
- (iii) SEC ‘neither admit nor deny’ settlements.

#### **4.1 Non-Prosecution Agreements**

By agreeing on certain facts and legal conclusions, DOJ and the accused offender execute an NPA. NPA does not go through the legal system. As a condition of the agreement, both DOJ and a suspected violator provide consideration for the agreement, in which DOJ decides not to indict the suspected wrongdoer for its suspected wrongdoings, if the conditions of the agreement are fulfilled, and permits the corporate entity to continue to its business, whereas the suspected wrongdoer agrees to implement compliance activities and pay criminal or civil fines and penalties.

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<sup>8</sup> United States Department of Justice. US Attorneys’ Manual, Section 9-22.010, [https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program#:~:text=Pretrial%20diversion%20\(PTD\)%20is%20an,at%20the%20pre%2Dcharge%20stage](https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program#:~:text=Pretrial%20diversion%20(PTD)%20is%20an,at%20the%20pre%2Dcharge%20stage)

<sup>9</sup> Copland, J.R., & Gorodetski, I. (2014, March 3). The U.K.'s New (and Improved) Deferred-Prosecution Agreements. *National Law Journal*, <https://www.manhattan-institute.org/html/uks-new-and-improved-deferred-prosecution-agreements-4746.html>

## 4.2 Deferred Prosecution Agreements

DPAs are mechanisms by which the wrongdoer can avoid criminal investigation as well as criminal charges, with the approval of the court, in contemplation of their assurance to acknowledge the conditions of DPA including payment of fines and corrective actions.<sup>10</sup> DPA is filed with a court and are more like plea agreements. It contains agreed facts and legal conclusions, and the suspected wrongdoer promises to fulfil compliance activities and pay criminal penalties. DOJ offers to postpone the case against the accused for a certain time in exchange for an agreement that they will not pursue a case on them. The Department of Justice promises to dismiss all charges if the terms of the agreement are satisfied. a company or individual may avoid a formal guilty plea and convey the settlement to lenders, investors, and consumers through a DPA.

The elements of DPAs in the US are:

- (1) payment of a fine or penalty and compensation for those who were harmed.
- (2) requiring employees to undergo training on ethics, best practices, and legal obligations and
- (3) implement appropriate compliance programs and corporate governance mechanism to reform.

There may also be civil fines or corporate monitors or reporting requirements or prohibitions on public remarks considered suitable by the DPA.<sup>11</sup>

The amount, timeline, and mode of payment of a fine must all be taken into account when enforcing a fine under the US Crimes and Criminal Procedure Code. Additional measurements required are:

- (i) The earning capacity, financial resources, and income of the defendant.
- (ii) Burden that will be levied upon the defendant and his dependants.

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<sup>10</sup> *Deferred Prosecution Agreements and U.S. Approaches to Resolving Criminal and Civil Enforcement Actions A Regime Characterized by Limited Judicial Involvement (Notwithstanding the Efforts of Judge Rakoff)*. (2012, April). Clifford Chance, <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/05/deferred-prosecution-agreements-and-us-approaches-to-resolving-criminal-and-civil-enforcement-actions.pdf>

<sup>11</sup> Ferguson, G. (2017). *Global Corruption: Law, Theory and Practise* (2nd ed.). 6-77.

- (iii) Pecuniary loss imposed upon others because of offence.
- (iv) amount of restitution ordered.
- (v) the necessity to deprive the defendant of illegal gains.
- (vi) the anticipated costs of imprisonment, probation, or supervised release.
- (vii) Possibility of passing of expense of fine on to consumers or other persons  
and
- (viii) size of the company and the efforts taken by the organisation to punish the delinquent employee or agent guilty for the violation and steps taken to prevent a recurrence of the incident.

Despite the imposition of a fine or other punishment, the defendant's capacity to make restitution to the victim of the offence should not be impaired by the court.<sup>12</sup>

#### **4.3 SEC ‘neither admit nor deny’ Settlements**

For the expeditious settlement of the cases, ‘neither admit nor deny’ settlements are used. Without admitting or rejecting any of the SEC's charges, the businesses agree to pay civil penalties and establish a compliance structure. Corporations resolve the cases without publicly admitting any wrongdoing.

It is criticised that NPAs and DPAs lack transparency and the private negotiations are held behind closed doors and is a threat to the rule of law. Muscle clauses are incorporated in NPAs and DPAs which prevents companies from disclosing about the DOJ investigation, circumstances of the suspected offence, or subsequent NPAs. There is an imbalance involved in the negotiating power between DOJ and the suspected wrongdoer. The Department of Justice (DOJ) employs the “*carrots*” and “*sticks*” it has available to settle an enforcement case and pay fine. DOJ insulates its version of facts and enforcement theories since there is no judicial scrutiny of NPA. The process adopted to arrive at the settlement through DPA is opaque, *ad hoc*, and unpredictable. DPAs will be used as improper means to avoid prosecution and

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<sup>12</sup> 18 USC § 3572



allows the companies and individuals off the hook resulting in under prosecution.

DPA's are the preferred means of correcting the corporate ship. It allows the prosecutor and the company to work together to resolve past obstacles and paves the corporation on the path for good corporate citizenship. Deferred Prosecution Agreement provides punishment for the past misconduct but recognises the companies right to continue to do the business. Company may suffer loss due to the imposition of hefty fine but can avoid collateral consequences of a conviction.<sup>13</sup>

The researcher discusses some of the significant cases wherein DPA was used as a corrective measure.

#### **4.4 Vetco International**

The wholly owned subsidiaries of Vetco International Ltd. made approximate payment of \$2.1 million in fraudulent expenses over a two (2) year period to Nigerian public officials through customs clearing agency. In February 2001, Vetco was supplying the engineering and procurement services and construction equipment for the Bonga Project, Nigeria's first deep water oil drilling project. At least 378 illegal payments were made by customs agents in order to receive preferential treatment. Vetco and its subsidiaries pleaded guilty for the violations of the FCPA anti-bribery provisions and in the course of the deferred prosecution agreement, it consented to remit total criminal fine of \$26 million.<sup>14</sup>

#### **4.5 Technip FMC Plc**

TechnipFMC plc was allowed to resolve FCPA associated charge in Brazil and with Unaoil upon its agreement to remit \$301.3 million to U.S. and

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<sup>13</sup> Podgor, E.S. (2009). Educating Compliance. *American Criminal Law Review*, 46, 1523.

<sup>14</sup> Department of Justice. (2007, February 6). *Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines* [Press Release]. [https://www.justice.gov/archive/opa/pr/2007/February/07\\_crm\\_075.html](https://www.justice.gov/archive/opa/pr/2007/February/07_crm_075.html)

Brazilian enforcement authorities.<sup>15</sup> TechnipFMC would pay portion of the penalty amounted to \$82 million in U.S and the rest of its fines would be paid to enforcement agencies in Brazil.<sup>16</sup> The accusations come from Technip's bribery plan, in which payments were paid to Brazilian public authorities, and from FMC's plot to bribe Iraqi public officials. TechnipFMC committed to implement stringent internal control measures and agreed to cooperate with DOJ as part of its DPA.<sup>17</sup> Based on the company's remediation program, the DPA did not require TechnipFMC to appoint an independent compliance monitor.<sup>18</sup>

#### 4.6 Petrobras- Operation Car Wash

Petrobras, a Brazilian national oil corporation formed in 1953<sup>19</sup> is the world's sixth largest oil company by its assets and is the bedrock of the Brazilian economy.<sup>20</sup> Between 2004 and 2014, Brazil state oil company Petrobras engaged in corruption of around \$5.3 billion. Executives of Petrobras covertly formed a cartel to manage the bids and systematically overcharged the company.<sup>21</sup> The contracts were inflated to channel upto 3% of funds to political parties.<sup>22</sup> Federal agents and suspects revealed that contracts worth \$22 billion are regarded as suspicious.<sup>23</sup> In March 2014, 'Operation Car Wash' began

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<sup>15</sup> *TechnipFMC pays \$301.3M to settle Brazil bribery case.* (2019, June 26). Offshore Energy Today. <https://www.offshore-energy.biz/technipfmc-pays-301-3m-to-settle-brazil-bribery-case/>

<sup>16</sup> Tokar, D. (2019, June 25). TechnipFMC Agrees to Pay Around \$300 Million to Resolve Foreign Bribery Probes in U.S., Brazil. *The Wall Street Journal*. <https://www.wsj.com/articles/technipfmc-agrees-to-pay-around-300-million-to-resolve-foreign-bribery-probes-in-u-s-brazil-11561507288>

<sup>17</sup> Department of Justice. (2019, June 25). *TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Penalties to Resolve Foreign Bribery Case* [Press Release]. <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>

<sup>18</sup> *United States of America v TechnipFMC plc*, Case No. 19-CR-278. <https://www.justice.gov/opa/press-release/file/1177316/download>

<sup>19</sup> Leahy, J. (2016, April 1). What is the Petrobras scandal that is engulfing Brazil?. *Financial Times*. <https://www.ft.com/content/6e8b0e28-f728-11e5-803c-d27c7117d132>

<sup>20</sup> Barnato, K. (2014, November 24). Why the Petrobras scandal is shaking Brazil, *CNBC*. <https://www.cnb.com/2014/11/24/how-the-ptrobras-scandal-is-rocking-brazil.html>

<sup>21</sup> Beauchamp, Z. (2016, August 31). *Dilma Rousseff's impeachment, explained in 500 words*. Vox. <https://www.vox.com/2016/4/13/11416578/brazil-petrobras-rousseff-impeachment>

<sup>22</sup> Watts, J. (2016, August 31). Dilma Rousseff impeachment: what you need to know – the Guardian briefing. *The Guardian*. <https://www.theguardian.com/news/2016/aug/31/dilma-rousseff-impeachment-brazil-what-you-need-to-know>

<sup>23</sup> Costas, R. (2014, November). Petrobras scandal: Brazil's energy giant under pressure. *BBC News*. <https://www.bbc.com/news/business-30129184>

investigation into the allegation that officials of Petrobras accepted kickbacks in return for awarding of contracts at inflated price. Engineering firm OAS gave a beachfront apartment to the former President in return for winning a contract with Petrobras.<sup>24</sup> Everyone involved in the deal received inducement in cash, occasionally by means of cars, helicopters, yachts, costly art works, wine and huge amounts were deposited in Swiss bank accounts.<sup>25</sup> Brazilian government had charged 179 people with criminal offences and secured 93 convictions as of March 2016. As part of its efforts to recover costs caused by corruption, Petrobras is engaged in civil actions against businesses, as well.<sup>26</sup> Odebrecht admitted paying millions of dollars payoffs to public officials in twelve countries. A US Federal court, in April 2017, ordered Odebrecht to remit a fine of \$2.7 billion to agencies in USA, Brazil, and Switzerland.<sup>27</sup>

#### **4.7 Sentencing of Organisations**

Chapter 8 of the United States Sentencing Commission Guidelines Manual 2018 provide the general principles to be followed while sentencing an organisation. Whenever an employee commits any misconduct during his employment, despite it is inconsistent with company policy or instructions, the criminal liability would be imposed upon the organisation.<sup>28</sup> An organisation acts through its agents and are vicariously liable for the offences perpetrated by their representatives. The sanction imposed on the agent and the organisation to provide adequate deterrence, just punishment, and incentivise the organisation to devise and maintain the internal control mechanisms for the prevention, detection, and reporting of the criminal misconduct. The principles to be followed are:

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<sup>24</sup> Brazil corruption scandals: All you need to know. (2018, April 8). *BBC News*. <https://www.bbc.com/news/world-latin-america-35810578>

<sup>25</sup> Watts, J. (2017, June 1). Operation Car Wash: Is this the biggest corruption scandal in history?. *The Guardian*. <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>

<sup>26</sup> Supra 11, at 1-35 & 36.

<sup>27</sup> Felter, C. & Labrador, R.C. (2018, November 7). *Brazil's Corruption Fallout*, Council on Foreign Relations. <https://www.cfr.org/backgrounder/brazils-corruption-fallout>

<sup>28</sup> Desio, P. (n.d.). *An Overview of the Organizational Guidelines*. United States Sentencing Commission. Retrieved October 27, 2022, from <https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf>

- (i) Whenever possible the court should direct the remediation of the injury triggered by the offence committed by the organisation.
- (ii) The penalty imposed will be sufficiently large that the organisation will be deprived of all its assets.
- (iii) In order to impose a punishment on a legal person, consideration needs to be given to the organization's guilt and the severity of the offence. The severity of the offence will be represented in the monetary gain or loss. The following variables contribute to a harsher punishment for a company:
  - (a) participating in or tolerating criminal activities
  - (b) the organization's previous history
  - (c) disobedience to a court order and
  - (d) obstructing the administration of justice.

The mitigating circumstances to be considered at the time of punishing the organisation are:

- (a) the presence of an active compliance and ethics program
- (b) self-disclosure, support, or acknowledgement of accountability
- (iv) Probation is a suitable sentence for an organization if appropriate steps are taken by the organization to reduce the recurrence of future criminal conduct.

Sentencing Guidelines in the United States give incentives to reduce and eradicate criminal wrongdoing by the organisation by giving a structural foundation for self-policing its behaviour through a successful compliance and ethics programme. The compliance and ethics programme must help to prevent and identify criminal activity and promote ethical behaviour that conforms with all applicable laws.

#### **4.8 Principles of Prosecution of Business Organizations**

The Resource Guide to the FCPA<sup>29</sup> which sets out the principles of prosecution of legal persons recognizes non-prosecution and deferred prosecution agreements as a means for the resolution of corporate criminal cases

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<sup>29</sup> A Resource Guide to the U.S. Foreign Corrupt Practices Act. (2<sup>nd</sup> ed. 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download>

in certain circumstances. The things that are to be examined while conducting inquiry and deciding the charges to be framed against a corporation, and settling plea agreements:

- (i) injury caused to the public as well as the nature and significance of the offense.
- (ii) the prevalence of misbehaviour throughout the corporation, as well as management's acceptance of the misconduct
- (iii) the company's history of such misbehaviour, as well as previous civil, criminal, and regulatory actions
- (iv) the corporation's readiness to assist with the inquiry
- (v) the sufficiency and efficacy of the company's compliance and ethics programme at the time of the crime, as well as when a charging or resolution decision is made.
- (vi) self-reporting of wrongdoing in a timely manner
- (vii) corrective measures taken by the corporation, including implementation of adequate compliance program, disciplinary action taken against wrongdoers, and payment of restitution to the victims.
- (viii) collateral consequences, such as disproportionate harm caused to investors, workers, and others, and effect on the public resulting from the trial.
- (ix) the sufficiency of civil or regulatory actions, and cooperation rendered by the corporation with government agencies and
- (x) the effectiveness of the legal action taken against company employees who have committed crimes.

#### **4.9 Civil Penalties**

Under the FCPA, DOJ is the agency that pursues criminal prosecutions, whereas the authority to initiate civil prosecution vests with both DOJ and SEC. DOJ may bring civil lawsuits against domestic firms and their agents, as well as foreign people and companies, for anti-bribery crimes committed while in the United States. The violation of the accounting and anti-bribery provisions invites civil prosecution against issuers and their agents by SEC. The civil fines

to be levied by SEC for the violations of the accounting provisions, shall not go beyond the greater of

(a) the gross total of the monetary gain to the perpetrator because of the infringements or

(b) a specific dollar limitation.

SEC may initiate both actions before federal court and administrative proceedings to obtain civil penalties.<sup>30</sup> Corruption is a problem that may be prevented by civil enforcement procedures, which also compensate victims. Personal claims for reparation against wrongdoers are available to victims of corruption. Disgorgement of revenues is another weapon for penalizing wrongdoers.

#### **4.10 Financial Consequences**

Robust enforcement of the FCPA has sparked criticisms from MNCs that are mainly concerned about the potential costs associated with FCPA scrutiny. The financial exposure involved in case of FCPA enquiry are:

- (i) professional expenditure incurred as a consequence of any pre-enforcement actions taken by FCPA enforcement agencies.
- (ii) the FCPA enforcement authorities' imposition of fines, penalties, and the return of profit and
- (iii) Post-enforcement actions, professional fees, and expenditures.<sup>31</sup>

During pre-enforcement action, the FCPA enforcement authorities will investigate the possible misconduct that might have occurred in the company's business dealings, and it is highly expensive. The company has to incur expenses for engaging a team of attorneys, forensic auditors and other experts and the FCPA might pose question 'where else misconduct' for which travel must be undertaken the business places around the world. As part of the DPAs

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<sup>30</sup> Supra 11, at 7-16

<sup>31</sup> Koehler, M. (2014). *The Foreign Corrupt Practices Act in a New Era*. Edward Elgar Publishing.178.

and NPAs the company would be required to report compliance efforts for certain periods identified in the agreement.<sup>32</sup>

The FCPA's enforcement has turned into a cash cow for the government, bringing in billions of dollars in high settlement. Moreover, it appears that DOJ and SEC are double-dipping and collecting duplicative penalties.<sup>33</sup> Corruption enforcement brings substantial return to the US government as well as to other nations. Following FCPA action, the foreign law enforcement authorities also adopt carbon copy or tag along enforcement investigations and actions.<sup>34</sup>

#### **4.11 SEC Charging Policies**

In all SEC matters and FCPA offenses, the Seaboard Report<sup>35</sup> applies, and it recognizes four distinct measures requiring cooperation of a company:

- (i) Self-policing: Organisations shall do self-monitoring prior to the detection of misconduct, establish efficient compliance mechanism, and create suitable tone at the top.
- (ii) Self-reporting: Notify the public and regulatory agencies of any misconduct and launch a comprehensive investigation to determine the cause, type, extent, and repercussions of the violation immediately.
- (iii) Remediation: Punish those responsible for the misbehaviour, modify and enhance internal control systems to prevent it from happening again, and provide restitution to the victims; and
- (iv) Cooperation: Share the relevant information about violations and the remedial measures taken by the company and cooperate with the enforcement authorities.<sup>36</sup>

Self-reporting is the most essential of these four factors to both the SEC and the DOJ. The corporation reaps the benefits of self-reporting and

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<sup>32</sup> Supra 11, at 7-19

<sup>33</sup> Supra 31, at 186

<sup>34</sup> Id. at 261.

<sup>35</sup> *Accounting and Auditing Enforcement*. (2001, October 23). U.S. Securities and Exchanges Commission. <https://www.sec.gov/litigation/investreport/34-44969.htm>

<sup>36</sup> Supra 11, at 6-66.

cooperation by receiving a reduced penalty or, in rare cases, no penalty at all.<sup>37</sup>

### **Enforcement Mechanism Prevailing in U.K.**

The Bribery Act, 2010 (UKBA) is the main legislation governing bribery and corruption and it treats corruption as a strict liability criminal offence. UKBA includes four primary offences:

- (i) bribing another person
- (ii) being bribed
- (iii) bribing a foreign public official; and
- (iv) failure to prevent bribery.<sup>38</sup>

UKBA is enforced by the Serious Fraud Office (SFO) and the following penalties are imposed, if found guilty of violation of UKBA:

- (i) Considering the severity of the offence, individual may face imprisonment up to 10 years and unlimited fine.
- (ii) Companies will be asked to implement anti-bribery programs besides imposition of unlimited fine. The financial gain received as part of the bribery will also be forfeited and the responsible directors will be dismissed besides imposing a ban of holding directorship for 15 years.<sup>39</sup>

SFO is the primary agency that investigates and prosecutes overseas corruption cases and the bribery cases investigated by the police is prosecuted by Crown Prosecution Service (CPS). Consent from the Director of SFO (DSFO) or

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<sup>37</sup> Cassin, R.L. (2014, June 25). Mary Jo White dishes on FCPA self-reporting and cooperation. *The FCPA Blog*. <https://fcpablog.com/2014/06/25/mary-jo-white-dishes-on-fcpa-self-reporting-and-cooperation/>

<sup>38</sup> *Anti-Corruption Enforcement*. (2019-2020). Jenner & Block. <https://jenner.com/system/assets/publications/19709/original/Anti-Corruption%20Enforcement%202019-2020%20WEB.pdf?1585151710>

<sup>39</sup> Braine, K. (2019, August 6). *Comparing Two of the World's Largest Anti-Bribery and Corruption Laws*. Kroll. <https://www.kroll.com/en/insights/publications/compliance-risk/comparing-fcpa-uk-bribery-act>



Director of Prosecution (DPP) to be obtained for initiating proceedings to take cognizance of offences under UKBA.<sup>40</sup>

DSFO or DPP apply the two-stage test while making conclusions in conformity with the Code for Crown Prosecutors:

- (i) whether sufficient evidence is available to support reasonable expectation of conviction and
- (ii) whether a trial is in the public interest.<sup>41</sup>

UKBA covers the activity of individuals and companies conducted in UK as well as outside of UK. Activity outside of UK is covered provided the company or the individual has a close connection with UK. A 'close connection' includes:

- (i) a company incorporated in UK
- (ii) a company that does business in UK and
- (iii) a foreign company that has a UK based subsidiary.

A foreign company which has close connection with UK could be accused of its failure to stop bribery although the bribery that occurred outside UK and benefit, or reward gained is also outside UK.<sup>42</sup>

### **5.1 SFO Investigation against Petrofac**

Petrofac, a multinational oil company is under investigation by SFO for allegedly paying bribes in excess of 15 (fifteen) years to secure contracts in nine countries in the Middle East, Asia and Africa.<sup>43</sup> It was alleged that Petrofac

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<sup>40</sup> Pickworth, J. & Dimmock, J. (2021). *Bribery and Corruption 2021* (18<sup>th</sup> ed.). Global Legal Group. <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/united-kingdom>

<sup>41</sup> *Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions*. (2019, September). CPS. <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>

<sup>42</sup> Rahman, A. (2020, June 22). *UK: Anti-Corruption & Bribery Comparative Guide*. Mondaq. <https://www.mondaq.com/uk/criminal-law/864070/anti-corruption-bribery-comparative-guide>

<sup>43</sup> Evans, R. & Pegg, D. (2021, June 20). Oil firm led by Tory donor investigated over alleged bribes in nine countries. *The Guardian*. <https://www.theguardian.com/business/2021/jun/20/oil-firm-led-by-tory-donor-investigated-over-alleged-bribes-in-nine-countries>

created bogus financial records to disguise the disbursement of payoffs to foreign government officials.<sup>44</sup>

SFO started investigation into the corrupt practises committed by Petrofac Limited during the period 2012 to 2018 in the award of contracts worth approximately \$3.3 billion in United Arab Emirates. Bribe expenditures of nearly \$30 million were made through agents to persuade the award of EPC Contracts for the Upper Zakum UZ750 Field Development Project and FEED contract for the Bab Integrated Facilities Project.<sup>45</sup> Petrofac bribed two agents for USD \$2.2 million in February 2012 to influence the award of a USD \$329.7 million EPC contract in Iraq's Badra oilfield, a USD \$4 million bribe was paid to an agent for the award of an O&M contract worth USD \$400 million on Iraq's Fao Terminal project, and a USD \$45 million bribe was paid between July 2012 and November 2015 for the award of the following EPC contract (i) the Petro Rabigh Phase II Petrochemical Expansion Project worth USD \$463 million, (ii) Jazan Refinery and Terminal Project worth USD \$1.7 billion, and (iii) USD \$1.56 billion worth sulphur recovery plant as part of the Fadhili Gas Plant Project.<sup>46</sup> Petrofac pleaded guilty for its failure to prevent its senior executives from using agents to win contracts through bribery.<sup>47</sup> Petrofac was ordered to pay confiscation of \$31 million, a fine of \$64.2 million and \$9.5 million to cover investigation costs of SFO.<sup>48</sup> The employees involved in the charges left

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<sup>44</sup> Pegg, D., Davies, H., & Evans, R. (2019). Petrofac executive accused of keeping fake accounts to disguise bribes, *The Guardian*.

<https://www.theguardian.com/business/2019/nov/24/petrofac-accused-of-keeping-fake-accounts-to-disguise-bribes>

<sup>45</sup> *Former senior Petrofac executive pleads guilty to bribery offences*. (2021, January 14).

Serious Fraud Office. <https://www.sfo.gov.uk/2021/01/14/former-senior-petrofac-executive-pleads-guilty-to-three-further-bribery-offences/>

<sup>46</sup> *Petrofac Ltd*. (2021, May 17). Serious Fraud Office. <https://www.sfo.gov.uk/cases/petrofac/>

<sup>47</sup> *Serious Fraud Office secures third set of Petrofac bribery convictions*. (2021, October 4).

Serious Fraud Office. <https://www.sfo.gov.uk/2021/10/04/serious-fraud-office-secures-third-set-of-petrofac-bribery-convictions/>

<sup>48</sup> Cassin, H. (2021, October 4). Petrofac pays SFO \$105 million to settle 'deeply regrettable' bribe charges. *The FCPA Blog*. <https://fcpublog.com/2021/10/04/petrofac-pays-sfo-105-million-to-settle-deeply-regrettable-bribe-charges/>

the company, and the court and the SFO acknowledged Petrofac's corporate reform, while determining the penalty.<sup>49</sup>

Abu Dhabi National Oil Co. (ADNOC) has awarded in February 2020, two packages of Dalma Project worth around \$1.65 billion.<sup>50</sup> Dalma project awarded to Petrofac Emirates LLC, a joint venture of Petrofac and Sapura Energy Bhd., was cancelled by ADNOC.<sup>51</sup> In the wake of bribery charges, ADNOC suspended Petrofac from competing for upcoming contracts until further notice.<sup>52</sup>

## 5.2 Deferred Prosecution Agreement

Foreign bribery criminal proceedings against legal persons in the United Kingdom are resolved by plea deals or settlements. It allows the parties to agree on specific facts and the appropriate punishment or sentencing. After hearing both sides, the judge makes the final decision.<sup>53</sup> UK also introduced Deferred Prosecution Agreements as an alternate to criminal prosecution through Crime and Courts Act, 2013. DPA must be approved by the Court during the preliminary hearing as well as finalisation of the provisions of the settlement.<sup>54</sup> The conditions of the DPA shall be fair, reasonable, and proportionate<sup>55</sup> and the prosecutor shall not mislead, and the parties must arrive at an informed decision.<sup>56</sup> An agreement to assist with the investigation, payment of prosecutor's fees, a monetary order, a prohibition on the accused's participation in specified activities, and reporting requirements are all common features of

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<sup>49</sup> Nasralla, S., & Ridley, K. (2021, October 4). Petrofac shares surge after \$105 mln penalty draws line under bribery probe. *Reuters*. <https://www.reuters.com/business/petrofac-fined-105-mln-former-executive-jailed-bribery-2021-10-04/>

<sup>50</sup> Kulovic, N. (2020, April 16). *ADNOC cancels Petrofac's Dalma contract worth \$1.5 billion*. Offshore Energy. <https://www.offshore-energy.biz/adnoc-cancels-petrofac-dalma-contract-worth-1-5-billion/>

<sup>51</sup> Brelsford, R. (2020, April 16). ADNOC cancels contracts for Abu Dhabi gas mega project, *Oil & Gas Journal* <https://www.ogj.com/refining-processing/refining/construction/article/14174248/adnoc-cancels-contracts-for-abu-dhabi-gas-mega-project>

<sup>52</sup> John, I. (2021, March 16). Petrofac suspended from new Adnoc tenders. *Khaleej Times*. <https://www.khaleejtimes.com/business/energy/petrofac-suspended-from-new-adnoc-tenders>.

<sup>53</sup> *Supra* 11, at 6-70

<sup>54</sup> Deferred Prosecution Agreements -Code of Practice, Para 9.2 and 10.1

<sup>55</sup> Deferred Prosecution Agreements -Code of Practice, Para 7.2

<sup>56</sup> Deferred Prosecution Agreements -Code of Practice, Para 5.2

DPA in criminal cases.<sup>57</sup> DPA may require payment of compensation to the victim, disgorgement of profits, payment of penalty, or charitable donations.<sup>58</sup> DPAs in criminal cases sometimes include terms such as a commitment to cooperate with authorities, payment of prosecutor costs, a monetary order, a limitation on the accused participating in certain activities, and reporting requirements.<sup>59</sup> The prosecutor is accountable to the court to notify the breach of the terms of DPA.<sup>60</sup> In case of a material breach the court may terminate the DPA upon the application of the prosecutor for lifting the suspension of the indictment and reinstitute criminal proceedings.<sup>61</sup> In UK, the DPAs will be available in connection with economic offences committed by the corporations and not that of individuals.

At the time of negotiation of civil settlements instead of criminal sanctions, lenient treatment will be given to the Companies that self-report corruption offences. When negotiating a civil settlement, the SFO takes into account the following factors:

- (i) companies' commitment to improve corporate compliance and their repentance for the misconduct.
- (ii) willingness to cooperate with the SFO inquiry.
- (iii) to be able to resolve the case in an open and transparent manner, pay a civil penalty, and agree to the nomination of an independent monitor.

If directors of the company are personally involved or they have profited from corrupt conduct, regardless of the voluntary disclosure, the criminal prosecution will be initiated against the company.<sup>62</sup>

The design and execution of DPAs will be heavily reliant on court approval or oversight. DPAs should not be shielded from court review because doing so would harm the justice system and be counterproductive to the public good. The prosecutor's discretion is checked by the courts' objective decision.

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<sup>57</sup> Deferred Prosecution Agreements- Code of Practice, Para 7.2 and 7.10

<sup>58</sup> Deferred Prosecution Agreements- Code of Practice, Para 7.9

<sup>59</sup> Deferred Prosecution Agreements -Code of Practice, Para 7.12

<sup>60</sup> Deferred Prosecution Agreements -Code of Practice, Para 12.2

<sup>61</sup> Deferred Prosecution Agreements -Code of Practice, Para 12.5

<sup>62</sup> Supra 11, at 6-72

The court must assess DPAs to make sure they are reasonable, fair, and proportional. It's easier to see what's going on with the DPA since the court is involved.

In the public interest, DPA can be utilised to settle corruption and fraud issues by balancing the corporation's economic interests, employment security, and accountability. Restitution to victims and an internal compliance mechanism in the corporation through a DPA helps to meet the goals of criminal sentencing legislation. Greater penalties that are more appropriately proportionate to the nature of an offence are used by DPA to protect public policy and values. DPA helps to minimise the collateral damage and reduce harm to innocent people since it assists the prosecutors in tailoring the appropriate sanctions proportionate to the corporate criminality.

### **5.3 Sentencing Principles**

Punishment, prevention, rehabilitation, public safety, and reparation are all frequent goals in sentencing in the United Kingdom.<sup>63</sup> The court at the time of determining the seriousness of the offence must reckon both the wrongdoer's guilt and the damage or risk of damage.<sup>64</sup> The court before deciding the quantum of a penalty must investigate into the economic conditions of the wrongdoer and take into account other mitigating circumstances and levy a fine that echoes the gravity of the offence.<sup>65</sup>

Assuming a fine is imposed, the court should take into account the factors that suggest an adjustment in the quantum of fine. The court will factor the entire impact of its decisions. This should be accomplished by the combination of the court's rulings, including compensation, fines, and confiscation:

- (i) deterrence
- (ii) the removal of all gain and
- (iii) appropriate additional punishment.

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<sup>63</sup> *The Criminal Justice Act 2003*, s.142(1) (Eng.).

<sup>64</sup> *The Criminal Justice Act 2003*, s.143 (Eng.).

<sup>65</sup> *The Criminal Justice Act, 2003*. s.164 & *The Sentencing Code*, s.125 (Eng.)

The adjustment to the fine may be made to achieve the above objectives in a fair manner.<sup>66</sup>

#### 5.4 Sentencing Guidelines for Legal Persons

Sentencing guidelines were introduced by the UK Sentencing Council for corruption-related offences.<sup>67</sup> The sentencing guidelines helps to take a consistent approach in sentencing by the judges and magistrates across the courts in England and Wales. The deferred prosecution agreements (DPAs) has also been introduced by UK as an alternative disposition in fraud and bribery cases.

The Sentencing Council's Guidelines used for sentencing corporations<sup>68</sup> with respect to corruption offences are:

- (i) Compensation: Victims of the offence will be compensated in accordance with the severity of their injuries, losses, and damages. Sufficient reason shall be given by the court if no compensation is provided in the order. The victim's restitution should take precedence over any other financial penalty if the offender's resources are restricted.
- (ii) Confiscation: The court must order confiscation in relevant instances, taking into account any other monetary or financial judgement other than compensation, if applicable.
- (iii) Determination of offence category: The following criteria should be used by the court when assessing guilt and harm:
  - (a) Culpability: To prove guilt, the corporation's role and motivation must be proven.
  - (b) Harm: The following aspect to be considered as representing harm (i) the financial benefit gained or intended to be gained, (ii) loss evaded or intended to be evaded, (iii) the total return obtained from the

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<sup>66</sup> *Corporate offenders: fraud, bribery and money laundering*. (2014, October 1). Sentencing Council, <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/>

<sup>67</sup> Sentencing Council. (2014). *Fraud, Bribery and Money Laundering Offences – Definitive Guideline*. Sentencing Council. <https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf>

<sup>68</sup> Id. at 48 to 53

contract or sought because of corruption and (iv) cost savings realised as a result of not taking enough steps to combat corruption.

- (iv) Aggravating or mitigating features: The court should consider the aggravating or mitigating circumstances.
  - (a) Factors increasing seriousness of the crime are (i) previous conviction or enforcement actions, (ii) setting up of corporation or a subsidiary to commit crime, (iii) fraudulent activity prevalent within corporation. (iv) effort made to hide misconduct (v) harm suffered by the victims or third parties, (vi) harm caused to integrity of markets (vii) harm caused to the integrity of governments or its instrumentalities, (viii) cross border jurisdiction offences and (ix) money laundering offences.
  - (b) Factors mitigating seriousness of a crime are: (i) no previous conviction or enforcement actions, (ii) compensation made to the victims voluntarily, (iii) no actual loss to the victims, (iv) self-reporting and cooperation with the investigation, (v) no gain to the corporation by the corrupt activity, and (vi) offence committed by the previous directors or managers.
- (v) The court must factor the company's financial facts when calculating the penalty, and the fine must be proportional to the severity of the offence. Turnover, salary of directors; loan accounts; profit before tax; pension provision; and assets revealed in the balance sheet should be examined by the court. Adverse inference may be taken on the failure to produce relevant accounts by the company and order appropriate fine.
- (vi) Adjustment of fine: The court shall keep in mind the effect of fine, compensation and confiscation to achieve the objectives of punishment, removal of gain and deterrence. The fine shall be proportionate and have a real economic impact both on management and shareholders. The imposition of fine should influence the offenders to operate within the law. The capacity of the offending organisation to pay any financial penalty to be considered and time to be allowed for making payment. The court shall consider the effect of fine on the economy, employees, customers and on public or charitable functions. The court shall also

consider the ability of the offender to make restitution to victims and ability to implement effective compliance programmes.

- (vii) Assistance to the prosecution: Discounted sentence shall be offered to the defendant if he gives assistance to the prosecutor or investigator.
- (viii) Guilty pleas: Reduction in sentence shall be given for guilty pleas.
- (ix) Ancillary orders: The court must consider making of ancillary orders.
- (x) Totality principle: If wrongdoer is penalised for numerous offence, then court shall reckon whether the whole punishment is just and proportionate to the offence.
- (xi) Reasons: Court shall give reasons for the sentence and explain its effects.

Thus, the guideline system in UK provides for an effective system of sentencing for guiding the courts in determining the punishment to be granted to the offender.

### **World Bank Sanctions**

The World Bank is an international financial institute created by member states, and it consist of the International Development Association (IDA) and the International Bank for Reconstruction and Development (IBRD). The World Bank Group consists of the World Bank, the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). Billions of dollars in loans for funding large-scale infrastructure projects were arranged by the World Bank and their Group to developing countries every year. To fight corruption, the World Bank instituted its own set of sanctions, which includes the debarment of corrupt officials.

World Bank has reciprocal agreements with other Multilateral Development Banks (MDBs) and banning from World Bank funded projects would also results in exclusion from projects sponsored by other MDBs like the Asian Development Bank, African Development Bank Group, Inter-American Development Bank and the European Bank for Reconstruction and



Development. The consistent sanctionable practices followed by MDBs include fraud, corruption, coercion, and collusive practice.<sup>69</sup>

The World Bank Sanctioning Guidelines ensure that formal sanctions processes are predictable and consistent and the scale of five potential sanctions are:

- (i) Banning with Conditional Release: a minimum duration of debarment of three (3) years is imposed as a baseline or default sanction and restricted party may be released from deterrence upon compliance of certain defined conditions including fulfilment of integrity compliance mechanism agreeable to the Bank Group.
- (ii) Debarment for a Fixed Term: In the event sanctioned parties already implemented robust corporate compliance mechanism then debarment may be for a specified period, thereafter the sanctioned party is automatically released from debarment.
- (iii) Conditional Non-Debarment: If certain defined conditions are fulfilled within agreed time limits, then the restricted party is not debarred.
- (iv) Letter of Reprimand: Sometimes, considering proportionality principle a letter of admonition may be released.
- (v) Restitution: The restricted party is to undertake other remedial measures including making restitution to the victim or to the public good.<sup>70</sup>

The sanctions possibly exerted to the affiliates, successor and assigns of sanctioned parties.<sup>71</sup> Disclosure to the public shall be made concerning the identification of the sanctioned party and the sanction imposed on them.<sup>72</sup>

The following factors are considered while determining appropriate sanction:

- (i) seriousness of the misconduct.
- (ii) extent of the damage triggered by the misconduct.

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<sup>69</sup> *The World Bank Group Sanctions Regime: Information Note*.(n.d.). The World Bank. Retrieved October 27, 2022, from [https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/The\\_World\\_Bank\\_Group\\_Sanctions\\_Regime.pdf](https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/The_World_Bank_Group_Sanctions_Regime.pdf)

<sup>70</sup> Id. at 6

<sup>71</sup> Id. at 9

<sup>72</sup> The World Bank Sanctions Procedures, s.10.01(a), art. X, [https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBGSanctions\\_Procedures\\_April2012\\_Final.pdf](https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBGSanctions_Procedures_April2012_Final.pdf)

- (iii) intervention in the Banks investigation by the sanctioned party.
- (iv) antecedents of misconduct.
- (v) contravention of the confidentiality obligations with respect to sanction proceedings.
- (vi) mitigating circumstances like voluntary corrective action, cooperation in the investigation or resolution of the case, and minor role in the misconduct.<sup>73</sup>

The new procurement policy of World Bank permits award of contracts depending on standards besides lowest price. Value for money has been presented as an alternative to the lowest assessed compliance bid, taking into account factors like quality, cost, and more.<sup>74</sup>

## **6. Padma Multipurpose Bridge**

The World Bank, during the year 2006 and 2007, was to finance construction of Padma Multipurpose Bridge, a 6.51-kilometer road—rail bridge across the Padma River, with \$1.2 billion of credit.<sup>75</sup> The Padma bridge was aimed to connect principal sea ports of Bangladesh and link to the Dhaka-Chittagong Highway. It was expected to benefit 30 million people in the area from the new rail and road connection.<sup>76</sup> The world bank funding was critical both for the economic growth of Bangladesh and safety of hundred thousand residents who navigate the Padma River every day in packed perilous boats. There was an allegation of bribe in the awarding of contract to Canadian Construction company SNC-Lavalin. Senior officers of SNC-Lavalin sourced information through two (2) members of Bangladesh Bridge Project Evaluation Committee (BPEC) that SNC-Lavalin was behind another firm Halcrow. Two

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<sup>73</sup> The World Bank Sanctions Procedures, s.9.02, art.IX.

[https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBGSanctions\\_Procedures\\_April2012\\_Final.pdf](https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/WBGSanctions_Procedures_April2012_Final.pdf)

<sup>74</sup> The World Bank. (2016, July). *Value for Money Achieving VfM in Investment Projects Financed by the World Bank*. The World Bank.

<https://thedocs.worldbank.org/en/doc/274711479159288956-0290022017/original/GuidanceNoteonValueforMoney.pdf>

<sup>75</sup> Padma Bridge outshines alleged corruption scandal. (2020, December 10). *The Business Standard*. <https://www.tbsnews.net/bangladesh/padma-bridge-outshines-alleged-corruption-scandal-169954>

<sup>76</sup> World Bank cancels Bangladesh bridge loan over corruption. (2012, June 30). *BBC*. <https://www.bbc.com/news/world-south-asia-18655846>

top level executives of SNC-Lavalin International Inc. along with their local consultant had a face-to-face meeting with influential state minister for foreign affairs to seal the project. After the meeting, the senior executive from Canada penned in his notebook “PADMA PCC...4% Min...1% Secretary.” As per SNC-Lavalin parlance PCC means ‘project consultancy or commercial costs’ which denoted bribery payments to minister and secretary. Two weeks later the Padma Bridge construction contract was awarded to SNC-Lavalin.<sup>77</sup>

The competitor for the project Halcrow Group reported their suspicion to the World Bank and the World Bank launched an inquiry.<sup>78</sup> The World Bank suspended its funding in 2012 and later cancelled the loan agreement since no full and fair enquiry was conducted into the corruption.

SNC Lavalin Inc. and its 100 subsidiaries were sanctioned for 10 years and prevented from bidding on any World Bank-funded development projects as a result of a settlement reached between the World Bank and SNC Lavalin.<sup>79</sup> Royal Canadian Mounted Police (RCMP) raided SNC-Lavalin office in Canada in connection with the company’s work on Padma bridge.<sup>80</sup> Bribery charges were laid against senior executives of SNC-Lavalin,<sup>81</sup> however the Canadian court acquitted the former executives of SNC-Lavalin in the Padma bribery case.<sup>82</sup>

### **Enforcement Mechanism Adopted by India**

In the event of corporate corruption, two forms of remedies are available to the government: criminal penalties and blacklisting or debarment.

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<sup>77</sup> Supra 11, at 1-2

<sup>78</sup> Supra 11, at 6-44

<sup>79</sup> Cassin, R.L. (2014, October 30). Bangladesh court clears all Padma Bridge defendants. *The FCPA Blog*. <https://fcpablog.com/2014/10/30/bangladesh-court-clears-all-padma-bridge-defendants/>

<sup>80</sup> Rubinfeld, S. (2012, April 13). Mounties Raid SNC-Lavalin Offices Again. *The Wall Street Journal*. <https://www.wsj.com/articles/BL-CCB-6240>

<sup>81</sup> Former SNC-Lavalin VP charged in Bangladesh bribery probe. (2013, September 18). *CBC News*. <https://www.cbc.ca/news/former-snc-lavalin-vp-charged-in-bangladesh-bribery-probe-1.1858961>

<sup>82</sup> Bergman, D. (2017, February 16). Did a Canada Court Really Clear Bangladesh Officials of Corruption?. *The Wire*. <https://thewire.in/south-asia/did-a-canada-court-really-clear-bangladesh-officials-of-corruption>

## 7. Criminal Sanction

Corruption is a punishable offence in India, where the law does not allow it. India's anti-corruption laws include the Prevention of Corruption Act of 1988 (the PC Act), as well as the Indian Penal Code, 1860 (the IPC), the Code of Criminal Procedure, 1973 (the Cr.P.C), the Companies Act, 2013, and the Competition Act, 2002. Laws governing corporate corruption prevention and detection in India were explored in detail in Chapter II of the thesis.

India has adopted adversarial system of trial in criminal prosecution. Under the adversarial system, the duty to prove the accusation indubitably falls on the prosecutor who makes the accusation.<sup>83</sup> The Supreme Court of India in *Rabindra Kumar Dey v State of Orissa*<sup>84</sup> held that:

- (i) The prosecution shall prove the guilt beyond any doubt, and it cannot take advantage from the weakness or error of the defence argument.
- (ii) In a criminal prosecution, the suspect must be considered to be guiltless unless proved guilty
- (iii) the burden on prosecution never changes.

In case of corporate corruption, the company as well as the individual who perpetrated offence is arrayed as an accused. As a juristic person, a corporation is accountable for the activities of its employees and agents. Companies cannot avoid criminal punishment by claiming that they did not commit the offence because they lacked the *mens rea* to do so.<sup>85</sup> A corporation can commit a crime and can be held accountable for the said crime.

The Criminal Procedure code stipulates for the prosecution, fair trial, and conviction of offenders under the substantive criminal law. The corporation can appoint its representative in an inquiry or trial wherein the corporation is arraigned as an accused. Anything done before the representative of the corporation shall be presumed as done before the accused corporation.<sup>86</sup> All

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<sup>83</sup> Pillai, K.N.C. (2003). Burden of Proof in Criminal Cases and the Supreme Court- New Trends. *Supreme Court Cases Journal*, 8, 49.

<sup>84</sup> (1977) AIR 170 (In.).

<sup>85</sup> *Iridium India Telecom Ltd. v Motorola Incorporated & Ors.* (2011) AIR 20 (In.).

<sup>86</sup> *The Code of Criminal Procedure 1973*, s.305 (In.).

criminal trials must follow these regulations, as outlined by the Cr.P.C. Anyone claiming a legal right or obligation has the burden of proving their claims in court before a decision can be made.<sup>87</sup> In the event of a company being accused, the representative must present all necessary documents of the company, including an authorisation from the Board of the company appointing the representative to appear before the court. A person who desires the court to consider in the reality of any particular fact, shall prove that fact unless otherwise provided by law.<sup>88</sup> He has the duty of demonstrating the truth, even one that is well-known to others.<sup>89</sup> The judge is empowered to put questions and order production of documents at any time to find or to get proof of relevant facts.<sup>90</sup> The court has the ability to summon any individual as a witness or interrogate any one at any phase of the trial in order to give a fair decision in the case.<sup>91</sup> The questions may be put to the accused at any of the proceedings by the court to enlighten the situations emerging in the evidence.<sup>92</sup> The court shall determine various points in its judgment and elicit reasons for its decision.<sup>93</sup> Juristic persons legal right would be prejudicially affected if the wrongdoer himself acts as a representative. In a criminal proceeding, prior good character of the accused is relevant<sup>94</sup> and it is irrelevant to consider the preceding bad character unless testimony is offered of good character.<sup>95</sup> The courts are duty bound to consider the aggravating and mitigating circumstances in cases where the corporation is arraigned as an accused since the act of the agent is deemed to be the act of the corporation irrespective of prohibition of the misconduct by the code of ethics.

As per the proportionality principle, the punishment for a crime must be directly proportional to the crime to ensure that the offender is adequately prevented from repeating the offence. The gravity and nature of the offence

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<sup>87</sup> *The Indian Evidence Act 1872*, s.101 (In.).

<sup>88</sup> *The Indian Evidence Act 1872*, s.103 (In.).

<sup>89</sup> *The Indian Evidence Act 1872*, s.106 (In.).

<sup>90</sup> *The Indian Evidence Act 1872*, s.165 (In.).

<sup>91</sup> *The Code of Criminal Procedure 1973*, s.311 (In.).

<sup>92</sup> *The Code of Criminal Procedure 1973*, s.313(1)(a) (In.).

<sup>93</sup> *The Code of Criminal Procedure 1973*, s.354(1)(b) (In.).

<sup>94</sup> *The Indian Evidence Act 1872*, s.53 (In.).

<sup>95</sup> *The Indian Evidence Act 1872*, s.54 (In.).

must be considered while imposing the punishment. The court shall only impose appropriate punishment which is commensurate to the magnitude of the offence. The sentencing guidelines are required to support and uphold the principle of proportionality while convicting the accused.

The court while passing a judgment, can impose a sentence of fine to compensate the victims of crime.<sup>96</sup> A corporation can only be sentenced to fine considering its juristic personality and the court shall consider not only the seriousness of the offences but also the mitigating circumstances before deciding the quantum of fine.

The Cr.P.C. gives the court the authority to admonish or release an accused person on probation for good conduct.<sup>97</sup> Similarly, the Probation of Offenders Act, 1958 (PO Act) provides for the release of wrongdoers on probation or after due reprimand. However, the Cr.P.C, PO Act or any other legislation or guidelines does not specifically provide for consideration and assessment of the good conduct or corporate governance of the organisation prior to the conviction of the organisation for the wrongdoing of its agents. This indicates that the individuals and the legal persons are not treated in equal footing by the judicial system in India, even though the Constitution of India grants specific fundamental rights to the legal persons.

There is no law that recognizes the difference in commission of crimes by corporates and natural persons, and the difference required in the subsequent punishment of such crimes. Due to the overarching effects of corruption, there need to be sentencing guidelines that proportionately penalise corporates monetarily for the crime committed.

### **7.1 Sentencing Issues**

The Supreme Court of India observed lack of sentencing policy in India in *Soman v State of Kerala*<sup>98</sup> and held that in our nation, criminal justice administration is weakest when it comes to penalise the perpetrators of crimes.

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<sup>96</sup> *The Code of Criminal Procedure 1973*, s.357 (In.).

<sup>97</sup> *The Code of Criminal Procedure 1973*, s.360 (In.).

<sup>98</sup> (2013) 11 SCC 382 (In.).

After a prisoner has been found guilty of the allegations against him, the trial court has no guidelines to help it administer the appropriate penalty.

In the Indian legal system, the offender is solely taken into account within the context of the sentence framework. An adequate deterrent punishment must be applied if a business is found guilty of the criminal offences so that it does not commit any more. Only a fine can be imposed on an artificial person, such as a firm, because physical imprisonment cannot be inflicted on a company.<sup>99</sup>

The punishment of companies is not regulated by any precise rules. Indian sentencing policy should consider the corporation as a collective and as individuals in order to establish deterrence in relation to corporate crime.<sup>100</sup> No statute explicitly provides for imprisonment of corporation though corporation can commit grave offences. Deterrence of the crime is the sole objective of awarding of imprisonment and the juristic character of company defeats the purpose of imprisonment.<sup>101</sup>

The Malimath Committee in its report observed that wide sentencing discretion is exercised by judges while awarding sentence within the statutory limits. To determine the most appropriate punishment, no sentencing rules exist. Discretion is not desirable, and there is no uniformity here.<sup>102</sup> The Madhava Menon Committee has opined that more alternatives to be provided by criminal law in the matter of punishment instead of limiting option to fines and imprisonment and advocated for the specific sentencing guidelines.<sup>103</sup> The

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<sup>99</sup> Bhaskar, T.K. & Umakanth, V. (1996). Corporate Criminal Liability and Law. *Journal of the Indian Law Institute*, 38, 218.

<sup>100</sup> Id. at 228

<sup>101</sup> Rai, D. (2020, January 27). The scope of Corporate Criminal Liability. *I Pleadings*. <https://blog.ipleaders.in/the-scope-of-corporate-criminal-liability/>

<sup>102</sup> Malimath, V.S. (2003, March). *Committee Report on Reforms of Criminal Justice Systems*. Ministry of Home Affairs, Government of India. para 14.4, [https://www.mha.gov.in/sites/default/files/criminal\\_justice\\_system.pdf](https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf)

<sup>103</sup> Menon, M. (2007, July). *Report on Draft National Policy on Criminal Justice*. Ministry of Home Affairs, Government of India. para 5.5.3. <https://www.mha.gov.in/sites/default/files/DraftPolicyPaperAug.pdf>

criminal sanction should be reserved as last option and compounding, and plea bargaining should assume mainstream status in criminal proceeding.<sup>104</sup>

Plea bargaining is not recognised by the criminal jurisprudence in India but pleading guilty for the petty offences is provided in the statute.<sup>105</sup> The Law Commission of India<sup>106</sup> in its report weighed the pros and cons of the plea bargaining and concessional treatment of the offenders for their voluntary pleading as provisions relating to release on probation is effectively implemented by the statute. The scheme for concessional treatment would infuse the life in the reformatory provision contained in section 360 of Cr.P.C as well as PO Act. The highlights of the scheme recommended by the 142<sup>nd</sup> Law Commission is as follows:

- (i) Scheme can be invoked by the offender and prosecution agency has no role to play
- (ii) Competent Authority to be nominated by the High Court to try cases punishable with imprisonment below 7 years. Retired High Court judges to be nominated to try the cases punishable with imprisonment above 7 years.
- (iii) The Competent Authority shall have the power to grant compensation to the victim for compounding the offence.
- (iv) Scheme is not applicable to the socio-economic offences.

Plea bargaining is one of the options for resolving long-running criminal cases.<sup>107</sup> The legislation should consider extending plea bargaining to socio-economic offences like corporate corruption.

The burden of proof as well as sentencing issue taunts criminal prosecution against corporates for their criminal activity in their business operation.

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<sup>104</sup> Madhava Menon Committee Report on Draft National Policy on Criminal Justice. para 11.5.1

<sup>105</sup> *The Code of Criminal Procedure 1973*, s.206 & *The Motor Vehicles Act 1988*, s.208 (In.).

<sup>106</sup> Thakkar, M.P. (1991). *Concessional Treatment for Offenders who on their own initiate choose to plead guilty without Bargaining* (142). Law Commission of India. para 7.6. <https://lawcommissionofindia.nic.in/101-169/Report142.pdf>

<sup>107</sup> Reddy, K.J. (1973). *The Code of Criminal Procedure, 1973* (154). Law Commission of India <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080878-1.pdf>



## 8. Blacklisting or Debarment

In Parliament, Public Procurement Bill was introduced with the aim of bringing transparency and accountability in the public procurement process and the same was not passed by the Parliament.<sup>108</sup> However, some of the states have enacted laws to regulate state public procurement and the state laws which regulate public procurement are:

- (i) *The Karnataka Transparency in Public Procurements Act 1999*
- (ii) *Rajasthan Transparency in Public Procurement Act 2012*
- (iii) *The Punjab Transparency in Public Procurement Act 2019*
- (iv) *The Tamil Nadu Transparency in Tenders Act 1998*
- (v) *The Assam Public Procurement Act 2017*

The laws of state of Rajasthan<sup>109</sup>, Punjab<sup>110</sup> and Assam<sup>111</sup> provide for the debarment of the bidder for indulging in corrupt practices during the procurement process. As of right now, no legislation governs the process of public procurement in the oil and gas industry. It is the binding agreement between the Procuring Entity and the EPC Contractor, which provides for the blacklisting or debarment of the bidder or the Contractor for the corrupt practices.

In UK, the Public Contracts Regulations 2006 provide for debarment provisions. Contracting authority shall not select a company and treat as ineligible for public procurement process if the company or directors or any other associated with has been convicted *interlia* for the offences of corruption, bribery, fraud, conspiracy to defraud, offence of cheating the revenue, money laundering, and destroying, defacing, or concealing of documents.

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<sup>108</sup> Rajah, N.L. (2019, June 17). In the Absence of Good Law. *The Hindu*.  
<https://www.thehindu.com/opinion/op-ed/in-the-absence-of-good-law/article27957849.ece>

<sup>109</sup> *The Rajasthan Transparency in Public Procurement Act 2012*, s.46 (Raj.)

<sup>110</sup> *The Punjab Transparency in Public Procurement Act 2019*, s.56 (Pun.)

<sup>111</sup> *The Assam Public Procurement Act 2017* s.46 Ass.).

Organization can be disqualified from contracts on account of extortion, fraud, and comparative mistakes.<sup>112</sup> The convicted corporation or individual may be debarred for a specific period from bidding on government contracts. Blacklisting prevents a party from participating in a lawful association with the government or its instrumentalities for the purposes of gains. The ineligibility to bid is a significant additional punishment for the company's business that rely upon public contracts and tenders. It lowers one's prospects of generating money and damages one's reputation. Company may lose clients after debarment, suffer reputational damage, go out of business, and face insolvency. A decline in the business with clients causes financial hardship. The Government or its instrumentalities, prior to the imposition of punishment of blacklisting or debarring, ensure and comply with the following two principles:

1) Principles of Natural Justice and

2) Doctrine of Proportionality.<sup>113</sup>

The Supreme Court of India in *Erusian Equipment and Chemicals Ltd v State of West Bengal*<sup>114</sup> in Para 12 of the judgment held that:

*“Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the*

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<sup>112</sup> Goyal, S. (2020, November 4). *Blacklisting and Debarment of Contractors by the Government Authorities*. Bail Me Out. <https://bailmeout.in/blacklist-debar-contractor-government/>

<sup>113</sup> Gupta, Y. (2019, January 23). *Blacklisting of Contractors by the Government and Public Sector Undertakings*. iPleaders. <https://blog.ipleaders.in/blacklisting-rule-for-government-contractors/>

<sup>114</sup> (1975) AIR 266 (In.).

*Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has Printed by licensee.”*

No public official shall act in an arbitrary manner to place an organization on blacklist and should act in a fair manner. Constitution mandates State not to discriminate and act fairly, without fear or favour. Order of blacklisting cannot be for an indefinite period and it must mention the period for which the contractor is put on blacklist.<sup>115</sup>

Rule of law mandates that the principles of natural justice to be followed by public officials prior to issuance of any order having civil consequences. Blacklisting a business venture has civil consequences upon the future business of the organization and the affected party shall be given the right of being heard.<sup>116</sup>

*In Kulja Industries Limited v Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Others*<sup>117</sup> Supreme Court of India declared on the competence of public official to blacklist a company based on the terms of the original contract. Even in contractual circumstances, a public official's judgement is dependent upon judicial review on the basis of natural justice, non-discrimination, equality, fairness, and proportionality. Permanently blacklisting of an organization from entering supply contracts tantamount to rendering the firm jobless and economically defunct. The punishment imposed on the company shall be proportionate to the severity of the violation alleged against it. As a prerequisite, a fair hearing shall be afforded to the party being blacklisted and the decision of public official shall be available for examination on the doctrine of proportionality and natural justice.

## **9. Instances of Corporate Corruption**

The researcher intends to look into specific incidents of Indian corporate corruption in order to illustrate the lack of deterrent legal mechanisms to fight

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<sup>115</sup> Markanda, P.C. (2016). *Blacklisting of Contractors – Effect*. Markanda Law. <http://www.markandalaw.com/wp-content/themes/twentyxteen/pdf/Blacklisting.pdf>

<sup>116</sup> *Raghunath Thakur v State of Bihar & Ors.* (1989) AIR 620 (In.).

<sup>117</sup> (2013) 12 Scale 423 (In.).

corporate crime in India. All of these episodes of corruption occurred in India, but the perpetrators were brought to justice elsewhere, and the Indian government took no action as a result, save in rare occasions.

## 9.1 Walmart

Allegations that Walmart bribed governmental officials in India, Brazil, China, and Mexico to get business licences were examined by the US Department of Justice (DOJ) and Securities Exchange Commission (SEC). DOJ stated that Walmart permitted third-party intermediaries to make illegal sums to public officials aimed at obtaining permits and licences for Walmart stores.<sup>118</sup> In order to operate wholesale hypermarket, Walmart put together a joint venture with Bharti Enterprises<sup>119</sup> whose major priority in India was store growth.<sup>120</sup> Walmart's local business partner in India responded to the corruption there with a “wink and nod”.<sup>121</sup> According to the Department of Justice, Walmart was unsuccessful in the implementation of anti-corruption processes in India from 2009 to 2011, and senior Walmart workers were aware of these failings.<sup>122</sup> Details like “misc fee, professional fees, government fees” were used in the ledger to record illicit expenses to public officials to get store permissions and licences.’<sup>123</sup> Convicted merchant agreed to pay \$282.7 million in settlement,

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<sup>118</sup> Bose, N. (2019, June 20). Walmart to pay \$282 million to settle seven-year global corruption probe. *Reuters*. <https://in.reuters.com/article/us-walmart-fcpa/walmart-to-pay-282-million-to-settle-seven-year-global-corruption-probe-idINKCN1TL27J>

<sup>119</sup> Walmart admits paying speed money for licence, penalised. (2019, June 21). *The New Indian Express*. <https://www.newindianexpress.com/business/2019/jun/21/walmart-to-pay-over-usd-282-mn-for-violating-us-anti-corruption-regulations-in-four-countries-1993290.html>

<sup>120</sup> Bailay, R. & Chakravarty. C. (2013, July 25). Walmart's India fallout started with allegations of bribery in Mexico. *The Economic Times*. <https://economictimes.indiatimes.com/industry/services/retail/walmarts-india-fallout-started-with-allegations-of-bribery-in-mexico/articleshow/21319156.cms?from=mdr>

<sup>121</sup> Corkery, M. (2019, June 20). A ‘Sorceress’ in Brazil, a ‘Wink’ in India: Walmart Pleads Guilty After a Decade of Bribes. *The New York Times*. <https://www.nytimes.com/2019/06/20/business/walmart-bribery-settlement.html>

<sup>122</sup> Sharma, M. (2019, June 22). Hefty fine! Walmart to pay Rs 1,962 crore for bribing officials in India, 3 other countries. *Business Today*. <https://www.businesstoday.in/current/world/walmart-to-pay-rs-1962-core-to-us-dept-of-justice-sec-for-bribing-officials-in-india-brazil-china/story/358178.html>

<sup>123</sup> Walmart to pay \$283 mn fine in US over bribery charges in India, other countries, mint. (2019, June 21). *Livemint*. <https://www.livemint.com/companies/news/walmart-to-pay-283-mn-fine-in-us-over-bribery-charges-in-india-other-countries-1561086810397.html>

including \$137.96 million to the DOJ, and \$144.69 million in disgorgement of earnings and interest to the SEC.<sup>124</sup>

The Central Vigilance Commission (CVC) commenced an inquiry into the suspected bribery disbursement by Walmart to the numerous customs officials to accelerate transportation of goods and to obtain real estate approvals.<sup>125</sup> However, Walmart India Pvt Ltd. questioned the power of the CVC to carry on enquiry, on the basis of a newspaper report, under Section 8 of the CVC Act.<sup>126</sup> The Delhi High Court ruled that a newspaper article cannot be interpreted as a complaint for the sake of leading investigation under Section 8 of the CVC Act. Newspaper story is only information and not a complaint and it does not allege any employee specified under Section 8(2) of the CVC Act has committed offence under the *Prevention of Corruption Act 1988*.

## 9.2 Alere Medical

As a wholly owned Indian subsidiary of Alere Inc., Alere Medical Private Ltd. develops and markets medical diagnostic testing equipment. Alere India made unauthorised payments to government officials through distributors or consultants in order to gain or keep business.<sup>127</sup> Alere paid a 4% fee to its distributors when it expanded the order for medical testing kits from 200,000 to 1,000,000 as part of the tender.<sup>128</sup> Local government officials were meant to benefit from the higher commission paid to distributors, but the company misquoted the payments in its books and accounts. For the accounting fraud accusations, Alere consented to pay \$9.2 million in penalties, disgorge \$3.3

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<sup>124</sup> Supra 119

<sup>125</sup> Venkatesh, M. (2016, February 19). Bribery case: CVC rejects Walmart India's arguments. *Hindustan Times*. <https://www.hindustantimes.com/business/cvc-seeks-help-of-un-anti-corruption-body-over-walmart-bribery-case/story-fNKm6wZBUSn0MPwuJRgqBI.html>

<sup>126</sup> *Walmart India Pvt. Ltd. v Central Vigilance Commission*, (2018) SCC Online 11005 (Delhi).

<sup>127</sup> U.S. Securities and Exchanges Commission. (2017, September 28). *Medical Manufacturer Settles Accounting Fraud Charges* [Press Release]. <https://www.sec.gov/news/press-release/2017-178>

<sup>128</sup> Cassin, R.L. (2017, September 28). Alere pays \$13 million to resolve accounting fraud and FCPA offenses. *The FCPA Blog*. <https://fcpa.blog.com/2017/09/28/alere-pays-13-million-to-resolve-accounting-fraud-and-fcpa-o/>

million in profits, and pay an interest payment of \$495,000, totalling \$13 million.<sup>129</sup>

### 9.3 Stryker Corporation

The SEC accused Stryker of FCPA violations after its companies paid healthcare experts in five countries illegal sums totalling \$2.2 million.<sup>130</sup> Officials received illegal payments disguised as genuine consulting and service contracts, travel expenditures, charity gifts, or commissions in the books and records. An orthopaedic product was supplied to dealers, who then sold it to a private hospital via Stryker India, which is completely controlled by Stryker Corporation. As a result, the hospitals passed on the inflated invoice issued to it by Stryker appointed dealers to the patient's insurance companies. The price disparity between Stryker's overstated payments and the agreed price with private hospitals was retained by the latter. Health care providers received inappropriate payments from the dealers because they did not keep adequate financial records.<sup>131</sup> Despite the lack of supporting documentation, Stryker paid commissions to its dealers. A compliance monitor was imposed by the SEC as part of Stryker's agreement to pay \$13.2 million to settle the SEC charges.<sup>132</sup>

### 9.4 Oracle Corporation

During the years 2005-2007, Oracle Corporation's Indian subsidiary withdrew funds from the company's accounts in order to pay fictitious Indian vendors.<sup>133</sup> More than \$2.2 million in unauthorised side funds were allegedly

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<sup>129</sup> Burugula, P. (2019, April 16). Uber not alone in facing US probe for India 'graft'. *The Economic Times*. <https://economictimes.indiatimes.com/news/company/corporate-trends/uber-not-alone-in-facing-us-probe-for-india-graft/articleshow/68898109.cms#:~:text=Massachusetts%2Dbased%20healthcare%20company%20Alere,to%20a%20total%20%2413%20million>

<sup>130</sup> Sullivan, T. (2018, May 6). *Stryker Corp. Pays \$13.2 Million to SEC to Settle FCPA Allegations, Policy & Medicine*. Policy & Medicine. <https://www.policymed.com/2013/12/stryker-corp-pays-132-million-to-sec-to-settle-fcpa-allegations.html>

<sup>131</sup> Volkov, M. (2018, October 1). Stryker Suffers "Strike Two" and Settles SEC FCPA Case. *Volkov*. <https://blog.volkovlaw.com/2018/10/stryker-suffers-strike-two-and-settles-sec-fcpa-case/>

<sup>132</sup> Cassin, R.L. (2018, September 28). Stryker hit with second FCPA enforcement action. *The FCPA Blog*. <https://fcpublog.com/2018/09/28/stryker-hit-with-second-fcpa-enforcement-action/>

<sup>133</sup> Cassin, R.L. (2012, August 16). Oracle Settles SEC Charges. *The FCPA Blog*. <https://fcpublog.com/2012/08/16/oracle-settles-sec-charges/>

kept by employees of the India subsidiary in coordination with the Indian government, according to the SEC.<sup>134</sup> On 14 different circumstances, some additional margins were included while trading with the distributors, during performance of eight government contracts.<sup>135</sup> Unauthorized bribery and embezzlement were carried out using the sale proceeds covertly parked with the Indian government.<sup>136</sup> The Oracle Corporation consented to pay \$2 million to settle the dispute since it breached the FCPA's books and records and internal control standards.<sup>137</sup>

### **9.5 Anheuser-Busch Inbev (AB InBev)**

Crown Beers India Private Limited (Crown) is a fully owned subsidiary of AB InBev, a Belgium based multinational brewer. The marketing and distribution of Crown Beer was handled by InBev India International Private Limited (IIPL), a joint venture in which InBev holds 49 percent. In India, states govern the sale of alcoholic beverages, and in Tamil Nadu, the state's instrumentality controls both wholesale and retail sales. Third parties were engaged. from 2009 to 2012. to pay unlawful sums to Indian government officials for beer supply orders as well as to enhance the manufacturing hours at Crown Brewery. The payment made by the Crown to IIPL was reflected in its accounts as legal promotional costs.<sup>138</sup> According to the SEC, the corporation had forbidden its workers from contacting the agency about possible anti-bribery offences.<sup>139</sup> To settle the FCPA accounting provision and whistleblower allegations, AB InBev agreed to pay \$6 million.

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<sup>134</sup>U.S. Securities and Exchanges Commission. (2012, August 16). *SEC Charges Oracle Corporation With FCPA Violations Related to Secret Side Funds in India* [Pres release]. <https://www.sec.gov/news/press-release/2012-2012-158htm>

<sup>135</sup> Oracle fined \$2mn for bribery in India. (2012, August 12). *Hindustan Times*. <https://www.hindustantimes.com/business/oracle-fined-2mn-for-bribery-in-india/story-CkN7HOxu473bZsYt0AQaaM.html>

<sup>136</sup> Boggs, S.P. (2012, August 21). Oracle Corporation Agrees to Pay \$2 Million to Settle Books and Records and Internal Controls Violations of the FCPA. *The Anti-Corruption Blog*. <https://www.anticorruptionblog.com/foreign-corrupt-practices-act/oracle-corporation-agrees-to-pay-2-million-to-settle-books-and-records-and-internal-controls-violations-of-the-fcpa/>

<sup>137</sup> Id.

<sup>138</sup> Release no. 78957. (2016, September 28). <https://www.sec.gov/litigation/admin/2016/34-78957.pdf>

<sup>139</sup> Barlyn, S. (2016, September 28). AB InBev to pay SEC \$6 million to settle bribery charges. *Reuters*. <https://www.reuters.com/article/us-a-b-i-sec-fine-idUSKCN11Y21R>

## 9.6 Beam Suntory Inc

Beam Global Spirits & Wine (India) Private Ltd., owned by Chicago based Beam Suntory Inc., has been accused of bribing Indian government officials between 2006 and 2012 in order to secure retail business in India. By using third-party promoters and distributors, the bribe was paid disguised as a commission expenditure.<sup>140</sup> In exchange for the bribes, the orders were won for Beam products at government outlets, obtained prominent place at retail outlets and acquired and renewed license for company's brands and trademarks.<sup>141</sup> In one incident, Beam bribed an Indian official ten lakhs to authorize a bottling licence.<sup>142</sup> Besides paying bribes, Beam manipulated its financial records to hide its bribery activities. Internal procedures to prevent bribery were deliberately ignored by Beam, and the company collaborated with others to break the FCPA. According to a DOJ news statement, the Indian official or officials who allegedly accepted bribes were not identified.<sup>143</sup> Beam committed \$8.2 million to the SEC in July 2018 to resolve civil allegations relating to the case.<sup>144</sup> By signing a three-year Deferred Prosecution Agreement (DPA) with the DOJ in October 2020, Beam has agreed to pay \$19.6 million and resolve the allegations.<sup>145</sup>

## 9.7 Diageo

Diageo India Pvt Ltd (DIL) is owned by Diageo plc, a London based largest producer and distributors of high-end spirits, beer, and wine. More than 900 government officials in India were bribed out of \$1.7 million by Diageo's third-party distributors between 2003 and 2009. The reimbursement of illegal

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<sup>140</sup> Cassin, H. (2020, October 27). DOJ fines 'uncooperative' Beam Suntory \$19.6 million for FCPA offenses. *The FCPA Blog*. <https://fcpublog.com/2020/10/27/doj-fines-uncooperative-beam-suntory-19-million-for-fcpa-offenses/>

<sup>141</sup> Jha, L.K. (2020, October 28). US company bribed Rs 10 lakh to Indian official for license approval: Department of Justice. *Outlook*. <https://www.outlookindia.com/newscroll/us-company-bribed-rs-10-lakh-to-indian-official-for-license-approval-department-of-justice/1965459>

<sup>142</sup> Tokar, D. (2020, October 27). Beam Suntory to Pay \$19 Million to Settle Bribery Probe. *The Wall Street Journal*. <https://www.wsj.com/articles/beam-suntory-to-pay-19-million-to-settle-bribery-probe-11603836951>

<sup>143</sup> Supra 141

<sup>144</sup> Supra 142

<sup>145</sup> Supra 140



payments made by distribution companies is disguised as “market scheme settlement, deposit with excise department, miscellaneous expenses, travel expenses, incentives, business promotion expenses” by the companies' books and records. To hide the illegal payments, Diageo failed to install and sustain effective internal accounting controls.<sup>146</sup> Underhanded payments to Indian, Thai, and South Korean government officials were concealed by Diageo companies with the aid of third parties, false invoices, and other deceptive methods.<sup>147</sup> Diageo has been fined \$16 million by the SEC for violating the FCPA.<sup>148</sup> The Department of Justice (DOJ) unexpectedly decided not to pursue Diageo with violating the FCPA.<sup>149</sup>

### **9.8 Pride International Inc.**

Delaware-based Pride International Inc. owns and operates a number of offshore oil and gas drilling rigs around the world. Allegedly, Pride paid \$500,000 to influence Indian customs processes on the transport of drill rigs, according to the charges.<sup>150</sup>

Pride consented to pay a fine of roughly \$32.6 million to the DOJ and a civil penalty of \$23.5 million to the SEC as part of its FCPA settlement, totaling \$56.1 million.<sup>151</sup> For the resolution of the FCPA criminal allegations, Pride completed a deferred prosecution agreement with the DOJ.

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<sup>146</sup> Release no. 64978. (2011, July 27). <https://www.sec.gov/litigation/admin/2011/34-64978.pdf>

<sup>147</sup> Cassin, R.L. (2011, July 28). Diageo Pays \$16.4 Million In SEC Settlement. *The FCPA Blog*. <https://fcpablog.com/2011/07/28/diageo-pays-164-million-in-sec-settlement/>

<sup>148</sup> Diageo fined \$16-million by SEC for Bribing officials in India, Thailand, South Korea. (2011, July 30). *The Economic Times*. <https://economictimes.indiatimes.com/industry/cons-products/liquor/diageo-fined-16-million-by-sec-for-bribing-officials-in-india-thailand-south-korea/articleshow/9414372.cms?from=mdr#:~:text=BANGALORE%3A%20The%20US%20Security%20and,sales%20and%20earn%20tax%20benefits>

<sup>149</sup> Boggs, S.P. (2011, July 30). Drink to This: Diageo Settles FCPA Administrative Enforcement Action. *The Anti-Corruption Blog*. <https://www.anticorruptionblog.com/foreign-corrupt-practices-act/drink-to-this-diageo-settles-fcpa-administrative-enforcement-action/>

<sup>150</sup> *SEC v Pride International Inc.* <https://www.sec.gov/litigation/litreleases/2010/lr21726.htm>

<sup>151</sup> Goldsmith, B. (2010, December 8). Pride settles with DOJ, SEC in bribery case. *The Business Journal*. <https://www.bizjournals.com/houston/news/2010/12/07/pride-settles-with-doj-sec-in-bribery.html>

## 9.9 Dow Chemicals

Dow AgroSciences India Pvt. Ltd. (formerly known as DE-Nocil Corp Protection Ltd.) is a wholly owned subsidiary of the Dow Chemical Company. DE-Nocil improperly paid more than \$2,000,00,000 to Indian government officials between 1996 and 2001. Three DE-Nocil products were allegedly registered more quickly as a result of corrupt payments to Central Insecticides Board employees in India. The contractors were the conduits for the bribes and they submitted fake invoices adding fictitious charges to DE-Nocil.<sup>152</sup> Payments were made to public officials through distributors to promote, sell and distribute De-Nocil products.<sup>153</sup> Dow Chemicals was fined \$325,000 by the SEC for settling accusations of FCPA offenses.<sup>154</sup>

## 9.10 CDM Smith

CDM Smith, Inc., a privately held engineering and construction corporation based in Boston, Massachusetts, owns 100 percent of CDM Smith India Private Limited. A total of Rs 7.5 crore in bribes were paid by CDM Smith between 2011 and 2015 to governmental authorities in order to get contracts and avoid paying service tax.<sup>155</sup> In Goa, the NHAI illegally granted CDM Smith contracts for highway construction supervision and design as well as a separate water project.<sup>156</sup> DOJ alleged that through corrupt subcontractors CDM paid 2-4 percent of the contract price as bribes.<sup>157</sup> CDM Smith has agreed to pay \$4 million in compensation for the unlawfully acquired contracts in India that it

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<sup>152</sup> *Securities and Exchange Commission v The Dow Chemical Company*.

<https://www.sec.gov/litigation/litreleases/2007/lr20000.htm>

<sup>153</sup> Dubey, S. (2007, March 15). *US fines Dow Chemicals for bribery by Indian subsidiary*.

Down To Earth. <https://www.downtoearth.org.in/news/us-fines-dow-chemicals-for-bribery-by-indian-subsidiary-5631#:~:text=Published%3A%20Saturday%2004%20July%202015,Indian%20subsidiaries%2C%20De%2DNocil.&text=Dow%20also%20denied%20knowledge%20or%20approval%20for%20these%20payments>

<sup>154</sup> Dow fined in US for bribes in India: NGO. (2007, February 16). *Hindustan Times*.

<https://www.hindustantimes.com/india/dow-fined-in-us-for-bribes-in-india-ngo/story-iiy4awEO4pbWhXfEfOf8mO.html>

<sup>155</sup> Singh, D. (2018, February 10). ET Investigation Part I: How an American firm bribed its way to lucrative contracts in India. *The Economic Times*.

<https://economictimes.indiatimes.com/news/politics-and-nation/et-investigation-how-us-company-bribed-indian-officials-to-win-contracts/articleshow/62701302.cms?from=mdr>

<sup>156</sup> In Re: CDM Smith Inc. <http://fcpa.stanford.edu/enforcement-action.html?id=664>

<sup>157</sup> U.S. Department of Justice. (2017, June 21)., <https://www.justice.gov/criminal-fraud/page/file/976976/download>

benefited from.<sup>158</sup> CVC formed a special investigation team (SIT) to look into the case, and the CBI eventually filed a FIR based on the SIT findings.<sup>159</sup>

### **9.11 Embraer S.A.**

Embraer, a Brazilian aircraft manufacturer, paid a fictitious corporation \$5.76 million in bribery in 2009 for a deal worth \$208 million to supply three planes to the Indian Air Force. An agency arrangement signed in January 2005 with a shell business registered in the United Kingdom allowed it to use the services of an unknown agent to complete the transaction. According to the deal, it committed to pay the agency 9% of the value of the Indian defence contract. A deal to provide three Embraer-145 aircraft was signed between Embraer and the Defense Research and Development Organization on February 8, 2005.<sup>160</sup> Embraer cooperated with the Department of Justice's inquiry despite not voluntarily reporting the violation of the FCPA. As part of the three-year DPA to settle the FCPA allegation, Embraer decided to pay more than \$107 million.<sup>161</sup> The Indian government requested that the CBI investigate allegations of corruption<sup>162</sup> and as a result, a case was filed against 87-year-old defence expert Vipin Khanna for taking payments in connection with the acquisition of aircraft.<sup>163</sup> The most recent information about the inquiry is unknown at this time.

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<sup>158</sup> Id.

<sup>159</sup> Srivas, A. (2018, April 18). Widespread Bribery at NHAI Penalised by US Authorities, but Remains Un-investigated at Home. *The Wire*. <https://thewire.in/political-economy/illegal-tax-refunds-nhai-bribery-concerns>

<sup>160</sup> Embraer paid \$5.76 million to shell company for Indian Air Force plane deal. (2015, October 25). *Deccan Chronicle*. <https://www.deccanchronicle.com/nation/current-affairs/251016/embraer-paid-576-million-to-shell-company-for-indian-air-force-plane-deal.html>

<sup>161</sup> Department of Justice. (2016, October 24). *Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges* [Press Release]. <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>

<sup>162</sup> Raghuvanshi, V. (2016, September 15). India Begins Corruption Investigation Against Embraer of Brazil. *Asia Pacific*. <https://www.defensenews.com/global/asia-pacific/2016/09/15/india-begins-corruption-investigation-against-embraer-of-brazil/>

<sup>163</sup> Unnithan, S. (2016, November 2). Bribes from Brazil. *India Today*. <https://www.indiatoday.in/magazine/special-report/story/20161114-embraer-embraer-deal-india-cbi-drdo-iaf-emraer-bribery-scandal-829812-2016-11-02>

## 9.12 Mondelez International

The central government has provided exemption from excise tax to the expanded units of industrial businesses in Himachal Pradesh. Production units must have been formed before to March 2010 in order to be eligible for excise duty exemption for a duration of 10 years.<sup>164</sup>

A Virginia-based firm, Mondelez International, Inc., purchased Cadbury plc, an English company, as well as Cadbury India Limited, in February 2010.

The SEC made accusation of insufficient internal controls and breach of FCPA in India in January 2017.<sup>165</sup> Deepak Chandel, a tile and marble merchant in Baddi, Himachal Pradesh, was employed by the company to work with the state to secure permits and licences for a chocolate plant.<sup>166</sup> More than INR 600 Crores in excise and income tax benefits were sought by the firm by designating the 5-star and Gems manufacturing lines at the Baddi facility as a distinct entity (Unit II). In exchange of bribe, retrospective approval secured for a manufacturing expansion unit in Baddi and the same was hastily erected to benefit from tax discounts.<sup>167</sup> Cadbury might earn a 58.5 percent internal rate of return as a result of this.<sup>168</sup>

Excessive fees were allegedly paid to the agency by Cadbury India because it failed to undertake proper due diligence or oversee the agent,

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<sup>164</sup> Shrivastava, A. (2017, September 13). CVC refers Cadbury tax evasion case to CBI. *India Today*. <https://www.indiatoday.in/pti-feed/story/cvc-refers-cadbury-tax-evasion-case-to-cbi-1043735-2017-09-13>

<sup>165</sup> Narayanan, D. (2017, April 21). Mondelez India bribery case may see top guns face off in the US. *The Economic Times*. <https://economictimes.indiatimes.com/news/company/corporate-trends/probe-into-seven-year-old-mondelez-india-bribery-case-likely-to-conclude-by-month-end/articleshow/58287616.cms?from=mdr>

<sup>166</sup> Narayanan, D. (2017, January 9). Mondelez to pay \$13 million to settle India FCPA violation charges. *The Economic Times*. <https://economictimes.indiatimes.com/industry/cons-products/food/mondelez-to-pay-13-million-to-settle-india-fcpa-violation-charges/articleshow/56422345.cms?from=mdr>

<sup>167</sup> Srivastava, S. (2017, April 26). Cadbury's worms of graft: Whistleblower reveals all. *Forbes India*. <https://www.forbesindia.com/article/special/cadburys-worms-of-graft-whistleblower-reveals-all/46821/1>

<sup>168</sup> Supra 116

according to the SEC.<sup>169</sup> There was a possibility that money provided to the agency were misappropriated because of the lack of compliance controls.

The agent filed five bills totaling \$110,446 between February 2010 and July 2010 for consultation services, preparation of papers for submission to public authorities for specific licences, and statutory clearances. The company did not enter into a formal contract with the agency and paid the agent \$90,666 after withholding tax was deducted from the invoices. Cadbury was not provided with any documentation to back up their position of service. As a result of these permits and clearances, Cadbury was able to identify the Unit II land as separate from the current production plant and start construction on it.<sup>170</sup>

Without acknowledging and/or repudiating the allegations that its subsidiary made payment to an agent to get permits and licences for a chocolate manufacturing plant in Baddi, Himachal Pradesh, Mondelez's agreed to pay \$13 million (approximately about Rs 90 crores) to settle the FCPA charges.<sup>171</sup> In spite of resignation from Mondelez in January 2013, the whistleblower has continued to provide assistance in investigations to this day.<sup>172</sup> The inquiry by the Department of Justice is ongoing.

Against Mondelez, CBI is also conducting inquiry into possible contravention of the provisions of the P.C.Act.<sup>173</sup> In response to recommendations from the CVC, an inquiry was launched into the alleged escape of excise tax of Rs.580 Crores by corrupt officials. Cadbury India is under investigation by the Directorate General of Central Excise Intelligence (DGCEI) for alleged abuse of an area-based exemption at its Baddi facility Unit II.<sup>174</sup> When Mondelez claimed an excise duty exemption for Unit II, the

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<sup>169</sup> Cassin, R.L. (2017, January 9). Mondelēz pays \$13 million to settle FCPA charges. *The FCPA Blog* <https://fcpablog.com/2017/01/09/mondelz-pays-13-million-to-settle-fcpa-charges/>

<sup>170</sup> Release no. 79753. (2017, January 6). <https://www.sec.gov/litigation/admin/2017/34-79753.pdf>

<sup>171</sup> Supra 165

<sup>172</sup> Supra 167

<sup>173</sup> Supra 165

<sup>174</sup> Supra 164

authorities determined that the company had not yet formed as a corporation at the time in question.<sup>175</sup>

### 9.13 PricewaterhouseCoopers

Independent auditors for Satyam Computer Services Limited were PricewaterhouseCoopers' five India-based network firms. Fraudulent financial accounting by Satyam falsified sales, income, and profits per share as well as cash and interest-bearing deposits. As a result, PwC's audits of Satyam did not comply with Public Company Accounting Oversight Board (PCAOB) standards and missed a \$1.7 billion fraud, according to the audit reports.<sup>176</sup> A total of \$17.5 million in fines will be paid by PwC in the United States.<sup>177</sup>

### 9.14 Louis Berger International

Louis Berger International Inc., a New Jersey-based construction management firm, paid \$3.9 million in bribery to acquire water projects in Goa and Guwahati.<sup>178</sup> The company has consented to pay \$17.1 million to DOJ to settle criminal charges that it paid public officials in India and three other countries between 1998 and 2010. Under the terms of a deferred prosecution agreement, it consented to hire a compliance monitor for three (3) years.<sup>179</sup> The names of the bribe takers were not made public by either the Company or the DOJ.<sup>180</sup>

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<sup>175</sup> Central Vigilance Commission refers Cadbury tax evasion case to CBI. (2017, September 13). *Business Standard*. [https://www.business-standard.com/article/current-affairs/central-vigilance-commission-refers-cadbury-tax-evasion-case-to-cbi-117091300668\\_1.html](https://www.business-standard.com/article/current-affairs/central-vigilance-commission-refers-cadbury-tax-evasion-case-to-cbi-117091300668_1.html)

<sup>176</sup> Release No. 64184. (2011, April 5), <https://www.sec.gov/litigation/admin/2011/34-64184.pdf>.

<sup>177</sup> Satyam and PwC are fined in US for accounting fraud. (2011, April 6). *BBC News*. <https://www.bbc.com/news/business-12981738>

<sup>178</sup> Chowdhury, A. (2015, August 11). Louis Berger fears bribery scam may cost it some work. *The Economic Times*. <https://economictimes.indiatimes.com/news/politics-and-nation/louis-berger-fears-bribery-scam-may-cost-it-some-work/articleshow/48417758.cms?from=mdr>

<sup>179</sup> Department of Justice. (2015, July 17). Louis Berger International Resolves Foreign Bribery Charges [Press Release]. [https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges#:~:text=\(LBI\)%2C%20a%20New%20Jersey,to%20secure%20government%20construction%20management](https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges#:~:text=(LBI)%2C%20a%20New%20Jersey,to%20secure%20government%20construction%20management)

<sup>180</sup> Indian Bribe Takers Not Named In \$3.9 Mn Louis Berger Bribery Scam. (2015, July 21). *Mid-day*. <https://www.mid-day.com/articles/indian-bribe-takers-not-named-in--3-9-mn-louis-berger-bribery-scam/16388167>

A public interest litigation was filed before the Guwahati High Court<sup>181</sup> asking CBI probe into the suspected bribery which is registered as Dispur Police Station case no.1498/2015 under section 7 r/w 13 of the Prevention of Corruption Act, 1988. The High Court directed the CBI to assume the case and take the case into natural consequence.

## **10. Failure of Corporate Criminal Sanction in India**

The aforementioned examples demonstrate that corruption occurred in India and that the government took no enforcement action. As a result, the DOJ and SEC gained extraterritorial jurisdiction under the FCPA to prevent corporate wrongdoing and to impose penalties. As part of the agreement, the organisations agreed to pay a fine. One of the many problems with Indian law is that it does not effectively prosecute or deter corporate corruption that occurs on Indian soil. Because the corporates agreed to a plea deal and resolved the matter outside of India, it's ironic that they were implicated in the wrongdoing in India. In most situations, the Indian legal system does little to dissuade corporate corruption by either initiating criminal prosecutions or enforcing penalties.

The participation of a public official or state authorities in the alleged crime is required to keep India's legal system turning, according to Indian law.

The Companies Act of 2013 does not include corporate corruption in its definition of "fraud," even if it is used to gain or keep business. Under the Companies Act, section 447, an act or omission must harm the firm, shareholders, creditors, or any other person in order to be considered fraud. As of 2016-17, SFIO has investigated 312 cases and prosecuted 1237 people in different courts around the country since its creation in 2003.<sup>182</sup>

## **11. Advantages of Civil Enforcement**

Only if the accused are convicted upon proving the allegations beyond a reasonable doubt, the assets can be recovered from them. As a result, India

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<sup>181</sup> *Bhaben Handique & 2 Ors. v State of Assam & 6 Ors.*(2017) PIL No.85/2015.,(Gauhati).

<sup>182</sup> Mathur, S. (2018, August 23). *Treating the SFIO as a Joke is Costing the Country Dear.* Money life. <https://www.moneylife.in/article/treating-the-sfio-as-a-joke-is-costing-the-country-dear/55101.html>

has significant difficulties when it comes to seizing, forfeiting, and recovering the assets of public officials or the profits of corruption. Mechanisms of non-criminal enforcement help the wise use of limited prosecution resources and minimise income loss. Good working connection and collaboration with the business sector is possible by providing multiple enforcement options. Criminal prosecution has the unintended effect of discouraging firms from cooperating fully with investigations, making it difficult to discipline individuals who have broken laws, and leaving victims with little hope of redress. Anti-corruption policies are more successful when they are implemented by a variety of people. Anti-corruption enforcement is more effective when it is enforced by multiple agencies, which allows for a better relationship with the corporations. It also lessens the workload of the courts and keeps them from becoming overwhelmed. In addition to criminal charges, extrajudicial enforcement processes make it easier to recoup assets from public officials and punish the bribe-giving organisation because they don't require the filing of a criminal charges first.<sup>183</sup>

Both society's resources and the offender's productive ability are wasted by imprisonment.<sup>184</sup> Fines do not need the use of the jail system, which saves money for society and allows victims to be reimbursed for their losses.<sup>185</sup> Compared to corporate civil responsibility, corporate crime laws are less frequently enforced, and the penalties they impose are generally less severe.<sup>186</sup> The Department of Justice enforces corporate criminal responsibility, whereas civil liability is enforced by both government agencies and private litigants.<sup>187</sup>

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<sup>183</sup> Solomon, E. (2013). Targeting Corruption in India: How India Can Bolster its Domestic Anticorruption Efforts Using Principles of the FCPA and The U.K. Bribery Act. *University of Pennsylvania Journal of International Law*, 34, 901.

<sup>184</sup> Coffee, J.C.Jr. (1980). Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions. *American Criminal Law Review*, 17, 419-442.

<sup>185</sup> Id. at 424

<sup>186</sup> Khanna, V.S. (2004). Corporate Crime Legislation: A Political Economy Analysis. *Washington University Law Quarterly*, 82, 95.

<sup>187</sup> Id.



Many businesses are wary of taking on FCPA lawsuits for fear of their reputation, financial risk, and legal ambiguity.<sup>188</sup> FCPA probe targets are more likely to engage into non-prosecution deals or plea bargains because of prosecutorial autonomy and the threat of serious criminal penalties. Those who cooperate with the inquiry, whether through self-reporting, cooperating with police, or other, face a lighter penalty.<sup>189</sup>

There is a prohibition on double jeopardy in criminal cases, but in civil cases, a preponderance of the evidence is enough to prove guilt.<sup>190</sup> In contrast to criminal prosecution, the standard of evidence is less severe, and other parties, such as facilitators, may be held accountable. If the plaintiff so chooses, he or she may enforce recovery in any jurisdiction independent of state. There is a deterrent effect to civil enforcement tactics since there is a degree of uncertainty in regard to the time and expense of possible civil actions. In criminal proceedings, penalties and predetermined punishments may be readily factored in when determining whether or not to pay a bribe.<sup>191</sup>

## **12. Challenges in Implementing Civil Enforcement**

Private litigants may file frivolous or dubious lawsuits against businesses in order to generate money.<sup>192</sup> To maximise convictions, prosecutors use their limited resources to avoid frivolous criminal charges, preferring to focus on cases that are actually in the public's interest.<sup>193</sup> Because corporations can persuade criminal enforcement authorities but not private plaintiffs to impose civil responsibility, they are more likely to pursue criminal charges.<sup>194</sup>

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<sup>188</sup> Ross, L.A. (2012). Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act. *Duke Law Journal*, 62, 445. <https://www.jstor.org/stable/23364855>

<sup>189</sup> Torre, M.J. (2016). The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets *Cornell International Law Journal*, 49, 469.

<sup>190</sup> Supra 186

<sup>191</sup> Supra 11, at 5-23

<sup>192</sup> Supra 186

<sup>193</sup> Cavanagh, E.D. (1987). Detrebling Antitrust Damages: An Idea Whose Time Has Come?. *Tulane Law Review*, 61, 777.

<sup>194</sup> Supra 186

The rarity of criminal law enforcement handled by state instrumentalities makes it more appealing to corporations to have it.<sup>195</sup>

In civil litigation, investigatory authority and access to information are severely restricted. Incompetence alone may not be enough to hold a third party liable, thus the claimant may need to show that the people involved were being dishonest. Investigators in criminal cases have special access to evidence at the national and international levels. Mutual legal aid is required in criminal procedures, but not in civil cases.

There is no significant potential for judicial review of unresolved legal issues under the FCPA that arise through plea deals, deferred prosecution agreements, or non-prosecution settlements.<sup>196</sup> The courts' approval of a settlement agreement serves as a check and balance mechanism for the enforcement agency's discretion. Disclosure of the settlement agreement on the company's website promotes openness and uniformity, as well as the voluntary disclosure of anti-corruption efforts.

### **Implementation of Anti-Corruption Measures**

As there is no crime scene, no fingerprints, and no eyewitnesses to pursue, corruption became the most hardest crime to investigate. There is no motive to reveal the truth since it affects two people who are already pleased. Even if a witness is there, they are frequently complicit in the crime, raising questions about integrity of the prosecution witness. The offenders can be powerful, and they silence the related persons through intimidation. The offenders also utilise the loopholes in the legal system across jurisdictions and take advantages to launder their corrupt proceeds.<sup>197</sup>

### **13. Independent Investigation and Prosecution**

Corruption is an organised crime and rarely exists alone. Independent investigation and effective complaint mechanism are the prerequisites of

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<sup>195</sup> Id.

<sup>196</sup> *Virginia Chavez Romano, Extraterritoriality and US Corporate Enforcement.* (2019, September 9). White & Case.

<https://www.whitecase.com/publications/article/extraterritoriality-and-us-corporate-enforcement>

<sup>197</sup> *Supra* 11, at 6-45 & 46

effective corruption investigation. Investigation shall be conducted independently and shall be free from undue interference. The complaint system shall encourage quality complaints from the public and deter frivolous or malicious complaints. The complainant shall be assured of the confidentiality of their report, and they should be offered protection. The reporting channel shall be convenient to report corruption and there shall be a swift response system to take prompt action.<sup>198</sup>

Prosecution and investigation are two aspects of the criminal justice system and there should be co-operation and coordination between the two agencies. Administration of the criminal justice system is deteriorated due to the lack of coordination between the police and prosecution as it adversely affects the quality of the trials. The prosecution by the state plays an important role in balancing the interest of the victim and the accused. State and the institutions of criminal justice system should not use arbitrary force or resort to illegal means to maintain stability and orderliness in the society. The prosecution should be able to balance the law enforcement and administration justice in the society and create public trust.

In the Padma Multiple Bridge scam, the World Bank conducted two investigation and provided the evidence to the Bangladesh Prime Minister, Finance Minister and Anti-Corruption Commission (ACC). World Bank urged the authorities of Bangladesh to conduct investigation and sought following actions: (i) place the suspected public officials on leave till completion of investigation, (ii) ACC to appoint a special enquiry team for investigation and (iii) world bank to be provided with full and adequate access to all investigation information to understand the adequacy, fairness, and progress of the investigation.<sup>199</sup>

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<sup>198</sup> Id. at 6-46 & 47

<sup>199</sup> The World Bank. (2012, June 29). *World Bank Statement on Padma Bridge* [Press Release]. <https://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge>

ACC investigated the case and found the suspected public officials and politicians innocent.<sup>200</sup> Refusal to undertake an inquiry in a comprehensive and fair manner led to the cancellation of the World Bank's Padma bridge loan deal. In the end, Bangladesh withdrew its funding request for the Padma project from the World Bank. After a few delays, the bridge was expected to open in 2014. Bangladesh used domestic finance to implement the Padma Project.<sup>201</sup> The Padma bridge project achieved 84% progress in January 2021<sup>202</sup> and the project deadline extended to June 2022.<sup>203</sup>

The Government has accepted the claims of the contractors for the delay in completion of the work. The work started in November 2014 was supposed to have been completed in four years, i.e., by 2018. The Government has borne the entire responsibility for the time and costs impact on the Padma bridge project. In 2007 Bangladesh Executive Committee of the National Economic Council (ECNEC) approved the estimated cost of \$1.2 billion<sup>204</sup> and the estimated Padma bridge project costs as per final design is \$3.69 billion<sup>205</sup> implying almost 184 percent or 2.8 times increase over the 2007 estimate.<sup>206</sup> There are also allegations that increase in expenditure is due to corruption.<sup>207</sup>

The Padma bridge corruption scandal shows that ACC was not independent in their investigation, and they succumbed to political pressure. It also highlights the proactive role played by competitor to bring the corruption issues to the forefront and investigation of the bribery.

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<sup>200</sup> Court throws out Padma Bridge case. (2017, February 11). *Dhaka Tribune*.  
<https://www.dhakatribune.com/bangladesh/corruption/2017/02/11/3-snc-lavalin-officials-acquitted-padma-bridge-graft-case>

<sup>201</sup> Supra 11, at 1-3

<sup>202</sup> Padma Bridge Multipurpose Project, Bangladesh Bridge Authority,  
<http://www.padmabridge.gov.bd/cstatus.php>

<sup>203</sup> Byron, R.K. (2021, May 6). Padma bridge deadline now June next year. *The Daily Star*.  
<https://www.thedailystar.net/frontpage/news/padma-bridge-deadline-now-2088921>

<sup>204</sup> Hossain, A. (2020, October 21). Padma bridge: Time and cost both increasing. *English*.  
<https://en.prothomalo.com/bangladesh/padma-bridge-time-and-cost-both-increasing>

<sup>205</sup> Supra 202

<sup>206</sup> Rahman, A & Khondker, B.H. (2006) *Economic Cost-Benefit Analysis: Padma Bridge Project*. Copenhagen Consensus Center.  
[https://www.copenhagenconsensus.com/sites/default/files/khondker\\_padma\\_bridge.pdf](https://www.copenhagenconsensus.com/sites/default/files/khondker_padma_bridge.pdf)

<sup>207</sup> Haider, A.H. (2021, February 19). Padma Bridge: Its huge impact on economy. *The Financial Express*. <https://www.thefinancialexpress.com.bd/views/padma-bridge-its-huge-impact-on-economy-1613752119>

## 14. Judicial Activism

Proactive role is assumed by the judiciary in India to prevent corruption and to ensure good governance. The Supreme Court of India in *Vineet Narain v Union of India*<sup>208</sup> remarked that it is the responsibility of the court to implement the rule of law and make sure that inquiry into corruption is done in conformity with law and is not thwarted by anybody. The court noted that:

*“the holders of public offices are entrusted with certain powers to be exercised in public interest alone and, therefore, the office is held by them in trust for the people. Any deviation from the path of rectitude by any of them amounts to breach of trust and must be severely dealt with instead of being pushed under the carpet. If the conduct amounts to an offence, it must be promptly investigated and the offender against whom a prima-facie case is made out should be prosecuted expeditiously so that the majesty of law is upheld and the rule of law vindicated. It is the duty of the judiciary to enforce the rule of law and, therefore, to guard against erosion of the rule of law.”*

The Supreme Court adopted an innovative procedure called the writ of continuing mandamus to ensure effective investigation of anti-corruption cases. Court asserted its authority to monitor investigation till the filing of police report in Court for taking cognizance of charge. Investigative agencies were held continuously liable by way of interim orders passed at regular intervals. An *amicus curiae* was appointed as counsel for the petitioner and permitted impleading of NGOs and all other interested parties. Major structural reforms were carried to the State anti-corruption machinery by an expansive interpretation of Article 32 and 142 of Indian Constitution. Equality under Article 14 of Constitution was violated by the government's failure to initiate an investigation against this person. The Supreme Court has issued many directives under Articles 32 and 142 of the Indian Constitution to ensure the CBI's

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<sup>208</sup> (1998) 1 SCC 226 (In.).

accountability and to reform its executives. Operational independence of the CBI Director was ensured by the Supreme Court in its directions issued to the government in the appointment process as well as working conditions and afforded him maximum insulation from the government.<sup>209</sup>

In the absence of safeguards, the investigating agencies might influence the witnesses and hide or destroy the evidence as there are long delays in investigation and trial. The court started monitoring the investigation in grand corruption cases to prevent misuse of public office.<sup>210</sup> Constant monitoring of the corruption-related investigation by the court transformed the nature of the investigative machinery and helped to remedy the irregularities in anti-corruption investigation.<sup>211</sup>

Constitution of India has put in place checks and balance system wherein the Supreme Court has been the conscientious objector to the unrestrained behaviour of executive and lacunae in the legislation. Supreme Court takes an activist role and fills deficit in governance.<sup>212</sup>

## **15. Political will**

The countries shall unite and enforce anti-corruption measures globally to prevent and detect corporate corruption. When the preventive measures fail, the investigation and punishment of offender is essential to instil confidence of the public. The state shall not sit idle and permit its citizens to pursue illegal activities. Anti-corruption measures that are effectively implemented increase public trust and serve as a potent deterrent to corruption. Corruption is discouraged when there is a high probability of being detected and prosecuted.

A strong political will is required for the effective implementation of the anti-corruption measures. A narrow-minded approach or focussing on domestic concern alone would be detrimental to the public good. Negative effect of corruption and global cost of corruption should be given primacy for the successful anti-corruption measures. Along with the political will, there shall be

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<sup>209</sup> Sengupta, A. (2016, March). *Anti-Corruption Litigation in the Supreme Court of India*. Open Society Foundations. <https://www.justiceinitiative.org/uploads/a50aaa52-4f0a-4f77-abd9-aa9a4d07c140/legal-remedies-2-sengupta-20160202.pdf>

<sup>210</sup> *Samaj Parivartan Samudaya v State of Karnataka* (2012) 7 SCC 407 (In.).

<sup>211</sup> *Supra* 209

<sup>212</sup> Shroff, S.S. (2013, February 25). *Judicial Activism to Curb Corruption*. Legal Era., <https://www.legaleraonline.com/articles/judicial-activism-to-curb-corruption>

adequate human and materials resources, effective legal framework and public support and an anti-corruption strategy is required for the fight against corruption.<sup>213</sup>

Political will and human agency are crucial elements for reform.<sup>214</sup> The government leader must provide their political will to address the corruption issues and to gain changes to the society and achieve reform.<sup>215</sup> In order to fight against corruption, a strong political will is required to establish a fiscal institution that encourages integrity and accountability throughout the organisation.<sup>216</sup> A poor performance of anti-corruption program is identified due to the lack of political will. Countries top level political system acts a source of motivation for mobilising the resources in its fight against corruption.<sup>217</sup>

For instance, British government signed Al-Yamamah oil-for-arms contract with Kingdom of Saudi Arabia and BAE Systems is the contractor to sell 120 tornado aircraft, hawk trainer jets, and other military equipment.<sup>218</sup> BAE Systems paid huge payments and gifts to Saudi royal family and government officials for the \$80 billion arms deal between BAE and Saudi Arabia. As a result of the plea agreement, BAE admitted conspiracy to make false claims, but did not acknowledge any real bribery. Accused of violating the Arms Control Act, the SEC fined a \$79 million civil penalty and imposed a statutory debarment from US government procurement.<sup>219</sup> US DOJ investigated into the Al-Yamamah contracts as US bank accounts were used for the illegal payments

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<sup>213</sup> *Reinforcing Political Will to Fight Corruption in Eastern Europe and Central Asia*. (2012, December 10). Organisation for Economic Co-operation and Development.

[https://www.oecd.org/corruption/acn/ACNHighLevelMeeting\\_10Dec2012\\_Report.pdf](https://www.oecd.org/corruption/acn/ACNHighLevelMeeting_10Dec2012_Report.pdf).

<sup>214</sup> Wathne, C. (2021). Understanding corruption and how to curb it A synthesis of latest thinking. U4, 3, 34. <https://www.u4.no/publications/understanding-corruption-and-how-to-curb-it.pdf>

<sup>215</sup> *Prevention: An Effective Tool to Reduce Corruption*. (1999, December). UNODCCP. [https://www.unodc.org/documents/corruption/Publications/1999/Prevention\\_An\\_Effective\\_Tool\\_to\\_Reduce\\_Corruption.pdf](https://www.unodc.org/documents/corruption/Publications/1999/Prevention_An_Effective_Tool_to_Reduce_Corruption.pdf)

<sup>216</sup> Gaspar, V., Mauro, P., & Medas, P. (2019, April 4). Tackling Corruption in Government. *IMF Blog*. <https://blogs.imf.org/2019/04/04/tackling-corruption-in-government/>

<sup>217</sup> Unpacking the concept of political will to confront corruption. (2010, May). U4, 1. <https://www.cmi.no/publications/file/3699-unpacking-the-concept-of-political-will-to.pdf>

<sup>218</sup> Timeline: Allegations of corruption at BAE Systems. (2009, October 1). *Reuters*.

<https://www.reuters.com/article/us-baesystems-timeline-sb-idUSTRE5904OW20091001>

<sup>219</sup> *Supra* 11, at 1-97

to be made to Saudi Royal family.<sup>220</sup> Criminal fine of \$400 million was sanctioned on BAE Systems for the violation of FCPA.<sup>221</sup>

Prince Mohammed bin Salman threatened BAE with cancelling the \$80 billion arms agreement, as well as withholding security and intelligence support for British troops in Iraq. British prosecutors were forced to drop their investigation into the corruption allegation on Saudi considering loss of strategic support to British soldiers, loss of contract and loss of job at home state. UK focussed on domestic concerns rather than showing its political will to enforce anti-corruption measures.<sup>222</sup>

Commitment of the political leadership is a pre-requisite for the initiation and sustenance of anti-corruption reforms. Common good can be achieved only when power holders act against their self-interest. The power holders allocate manpower and funds for the effective implementation of the laws, and they can change the culture of corruption in a country. The success and failure of the governance and anti-corruption measures depends upon the existence or lack of political will.<sup>223</sup> Political will and vested interest cannot be underestimated even for technical reforms.

*‘one should not underestimate the importance of political will in driving reforms, even those that appear to be merely technical. Nor should one underestimate the power of vested interests to block them’*

*Jesper Johnson*<sup>224</sup>

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<sup>220</sup> Williams, S. (2008, January). The BAE/Saudi Al-Yamamah Contracts: Implications in Law and Public Procurement. *The International & Comparative Law Quarterly*, 57, 200. <https://www.jstor.org/stable/20488197>

<sup>221</sup> Wagoner, N. (2011, April 19). Was BAE Too Big To Debar?. *The FCPA Blog*. [Was BAE Too Big To Debar? | The FCPA Blog](#)

<sup>222</sup> Supra 11, at 6-3.

<sup>223</sup> Kukutschka, R.M.B. (2014). *Building Political Will Topic Guide*. Transparency International. [https://www.transparency.org/files/content/corruptionqas/Topic\\_Guide-Political\\_Will.pdf](https://www.transparency.org/files/content/corruptionqas/Topic_Guide-Political_Will.pdf)

<sup>224</sup> Johnson, J. (2012, October). Theories of change in anti-corruption work A tool for programme design and evaluation. *U4*, 6, 37. <https://www.u4.no/publications/theories-of-change-in-anti-corruption-work-a-tool-for-programme-design-and-evaluation.pdf>



## 16. Conclusion

Capital flows, market stability, and foreign investment are all disrupted by corruption. As a result, the business climate is made more unpredictable, which has a negative impact on economic development. Corruption is a serious hindrance to the growth of the nation and its progress because it results in incompetence, economic deficit, and loss of prospects. In order to combat corporate corruption, the public sector must become more open and transparent.

It is presumed that the rights of the victims of corporate corruption in India will be protected if their offenders are brought to justice by the state. In India, civil enforcement actions against corporate corruption are not specifically authorised by law, as they are under the FCPA. Deterrence and prevention of corporate corruption in India need new legislation authorising civil enforcement actions as an extra tool in the fight against corruption among corporates. Availability of multiple legal options helps to prevent corporations from engaging in unethical commercial activities. Abuse of power, and other anti-competitive actions may be punished by heavy penalties under the Competition Act, 2012. In order to investigate and take action, *suo moto* or upon receipt of information or complaint, against corporations for unethical and corrupt business activities, statutory body analogous to Competition Commission of India to be set up.

Only an efficient legislation backed by independent investigating agencies, fair prosecutions, and an active court that acts as a check and balance system can prevent corrupt actions. Furthermore, a political will is needed to enforce anti-corruption measures for the benefit of the public without looking into the face of the offender.

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## **CHAPTER VII**

### **CONCLUSION AND SUGGESTIONS**

*A code of corporate governance cannot be imported from outside, it has to be developed based on the country's experience. There cannot be any compulsion on the corporate sector to follow a particular code. An equilibrium should be struck so that corporate governance is not achieved at the cost of the growth of the corporate sector.*

*Sir Adrian Cadbury*

The fiscal growth of India as well as the energy demand, especially the oil and gas sector are closely related. Energy is the catalyst of socio-economic change, and it brings more job opportunities, thereby drive the socio-economic growth. Among the oil consuming countries, India is placed third in the world and as far as refining is concerned, it is placed second in Asia after China. Oil and gas are the main sources to meet the energy demands in the country and hence sustainable development of the oil and gas industry is required. Oil and gas perform a major role in the development of other industries like manufacturing, infrastructure, utilities, and commercial services.

The oil and gas sector in India is largely State controlled and highly regulated. Though few large private sector companies are in the field of exploration, production, and marketing of petroleum products, it is being dominated by the public sector companies. The scaling up of the exploration and production activities and the reduction in import of oil would help India to attain energy security. The EPC Contract is the one of the models used by the

PSUs to build infrastructure for the developmental activities in the oil and gas sector, with a change from EPCM.

Despite the progress and growth in the sector, issues and challenges in the sector pertaining to fairness has impacted this sector as depicted in the body of the thesis; and based on this the Indian Oil and Gas Sector as well has not been untouched from corruption despite plethora of legislation both at international and domestic level to reduce corruption.

However, the present study reveals that despite various laws against corruption, corruption continues to thrive. It causes inept people to power thereby undermining performance and governance. Governance capacity is reduced by increased corruption, which in turn increases poverty.

The capability of the government to support citizens and poor is reduced since the public funds accessible for the sustenance of economic development activity is reduced by corruption. Corruption distorts the composition of public expenditure and the funds for the essential sectors such as health and education are diverted to other sectors which is easy to disguise corruption. Tax revenue collection is reduced in exchange of payoffs to public officials which hinders economic growth.

Transparency and fairness in public procurement process is a key for the prevention and detection of corrupt practices. It is the duty of all the stakeholders to comply to these principles because public procurement involves public money and there is a higher level of accountability when it is in relation to public money.

The identification of causes of corruption is important to prevent the corrupt activities. Cause for corporate corruption is many and some common causes are:

1. Lack of articulated code of conduct
2. Lack of control, supervision, and auditing
3. Broad discretionary power given to public officials
4. Lack of rules, regulations, transparency, and accountability of public service systems
5. Loopholes in law

6. Weak enforcement of anti-corruption laws
7. No proper functioning of the vigilance wing department

As the proverb says, '*charity begins at home*' it is the responsibility of the organisation to take internal control measures to detect and prevent corrupt activities. There shall be an effective internal control measures and checks and balance system within the organisation to prevent abuse of power and combat corruption. Audit Committee and independent directors shall uphold corporate governance principles and ensure compliance of applicable laws. There shall be a periodical evaluation of the internal control measures and compliance checks to identify the deficiencies and implement control measures. As the Board is the one which directs the management for its effective operation, corporate governance is also managed by them, and therefore, they are responsible for ensuring ethical conduct within the organisation. Apart from this, internal auditors are required to be efficient in determining any misstatements in the financial statements and bring it to the knowledge of the management for its action to resolve the issue at the earliest. There shall be an effective channel for the communication of the misconduct and ensure no retaliation against the complainant.

Corporate Governance is not a guarantee against corruption and bribery by individuals and the organisations, however it does play a role in the reduction and prevention of corruption. As observed, the first tool against corruption is the behaviour of the organisation itself. The organization's leadership and management play a crucial role in avoidance and early reporting of corporate frauds. If the leaders and managers indorse ethics and integrity, the employees are influenced to uphold the same. In order to set the right tone within the organization, the leaders and the management have to implement these measures: communicate to employees what the managements expects from them; lead by example; provide a safe mechanism for reporting frauds; and give proper rewards for reporting frauds.

Code of conduct established by the company shall be dynamic and it must be regularly updated considering the changing needs. Company shall make certain that all the employees are notified about the code of ethics to be followed

by them in their business activities. Regular and continuous training shall be given to the employees to embed an ethical culture within the organisation.

One size fits all solution is not available for corruption. Making proper assessment of probable corruption risks and placing appropriate preventative mechanism is simpler and more economical than attempting to alleviate corruption after it is originated. Organisation must make policies and roadmap based upon the risks found. The proverb '*prevention is better than cure*' aptly applies to corruption.

Reasonable attention must be taken while devising an anti-corruption system and it must be employed, monitored, and assessed every now and then. First stage in the growth of an efficient anticorruption compliance program is the risk assessment. Circumstances leading to occurrence of corruption, nature and magnitude of harm occasioned by corruption, and the cost effectiveness of elimination of corruption risk shall be considered during the risk assessment. Anti-corruption program should be tailor made to the risks the company faces and evaluated on an ongoing basis. Reduction in the opportunities for employee participation in the corrupt activities as well as likelihood of incident of corrupt transaction should be in place as part of internal control measures.

Compliance program shall be consistent with applicable laws, adapt to individual needs, promote involvement of all the stakeholders, provide for sharing of responsibility, accessible, promote trust-based internal culture, deliver continuity and efficiency. Compliance policy shall address the conflicts of interest issues. The organisations shall transmit and educate their employees of their ethical and compliance policies and anti-corruption laws. There shall be a regular monitoring and supervision of the compliance program. The regulators shall implement the statutory provisions, rules, regulations and order in its letter and spirit.

Companies shall implement adequate financial controls and follow accepted accounting standards. It must prohibit and prevent creation of off-the-book accounts, unknown transactions, posting of unreal expenses, use of bogus and frivolous documents, registering of charges with inaccurate classification and deliberate and unauthorized spoiling of book-keeping data. In India, the

accounting and bookkeeping commitments of the companies are not exploited in its real sense to stop and identify corporate corruption.

Organisations can strengthen their accountability by enhancing internal control measures such as greater reach to documents, acting against unethical workforce, and blacklisting corrupt business partners. Organisations shall encourage and support their employee to work against corruption.

The external stakeholders also play a vital role in the corporate governance process. There should be widespread promotion of the importance of maintaining an ethical environment within the corporation. Publicity of both good and bad deeds can influence the actions of the corporation and pave the way for reduction in corrupt activities.

Corruption cannot be curtailed without the participation of the public and the citizens perform a vital role in the exposure and prevention of corruption by whistleblowing. Whistleblowing is one of the effective tools to combat corruption. Whistleblowing is unique in a way that it gives authority to everyone in the organisation to report their concern regarding corruption or unethical management of the trade by the organisation. It is not atypical that whistleblowers are often victimised, harassed and retaliated against. Therefore, it is imperative to have a robust policy to shield whistleblower against victimisation and harassment and to encourage more people to come forward and report their concerns against corruption. Whistleblowers should be afforded protection to facilitate investigation of corporate corruption.

The whistleblower laws shall foster prevention and resolution of wrongdoing by encouraging the potential whistleblower to disclose information and protect them from reprisals in any form. The legislations shall be reviewed regularly to determine the influence of the laws in boosting the reporting and protecting the whistleblowers. Public sector employees shall be encouraged to disclose the wrongdoing.

**In the present study, the EPC contract execution have been examined based on the hypothesis**

### **1.1 Hypothesis 1**

*There is lack of corporate governance mechanism in the oil and gas sector companies in India to prevent and detect corruption.*

The EPC Contracts of three public sector companies were examined on the touchstone of transparency, fairness, accountability, conflict of interest, compliance, checks and balances, ethics and values, and risk assessment. The principle of fairness is not incorporated in the EPC Contract. The guidance given in the Manual for Procurement of Works is discarded and EPC Contract unilaterally favours the PSUs. Arbitrary and unreasonable clauses are incorporated in the Contract to deny legitimate claims of the contractor. EPC Contract does not meet the test of reasonableness and it is tilted in favour of Owner. The weaker bargaining power of the contractor is exploited by the Owner and some of the illustrations given below high lights the unfair contract terms in the EPC Contract. Unequal bargaining power coupled with unfair terms in the EPC Contract force contractors to succumb to the demand of bribery or use unethical means to overcome the disadvantageous situations.

The Owner does not give warranty for the site conditions including subsoil conditions and the contractor is denied change order for the variation in subsoil conditions. The Owner is given wide discretion to decide about the responsive bid and participation of the bidder in the tender process is at the mercy of the Owner. The Owner is given the right to amend, modify, alter the plans or drawing at any time during performance of the contract and the Contractor is mandated to perform the work without additional compensation. The Owner does not give any warranty for the free issue materials (FIM) and the contractor is expected to give warranty for the works including FIM during the defect liability period. The Owner started using the term 'price adjustment' or 'price reduction' instead of liquidated damages which is nothing but circumvention of law of the land and denies the benefit Section 74 of the Contract Act, 1872. The Owner takes advantage of the financial stress of the Contractor and mandates submission of 'No Dues Certificate' for the release of payment. Such a certificate is misused during the dispute resolution process to deny the legitimate claim of the Contractor.

There is no timeframe prescribed under the contract for the approval or certification of documents and the contractor is fastened with the time and cost impact arising out of delay in the approval process. The contract provides for sequential handing over of land and the contractor is denied compensation as well as time extension arising out of the delay in handing over of the land. Unfair, unreasonable, and arbitrary exercise of power by the Owner is visible in the contract. A fair and reasonable contract shall provide for revision in price as well as time schedule on occurrence of events arising out of causes attributable to the Owner or changes in law and extension of time for the force majeure events. The EPC Contract lacks such fair and reasonable clauses and also provides for exceedingly high obligations during defect liability period.

The judgment given by the supreme court is not honoured and a broad-based panel of arbitrators is not given to the contractor in the dispute resolution process. The statutory right of the arbitral tribunal to decide about its jurisdiction is taken away and the General Manager of the Owner is given the right to decide about the maintainability of the dispute. The Owner is not in favour of referring all the disputes arising out of contract to arbitration. Only 'notified claim' is referred to arbitration. The intent of the Parties should be amicable settlement of all the disputes and substantial time and cost is wasted in the appointment of arbitrator as well as the arbitrability of the dispute. The dispute resolution section specified in the Contract is unfair, arbitrary, and unreasonable.

The responsibility for each risk shall be with the party best equipped to handle it as this will help to lower the risk perception of the contractor and as a result, offer better competitive price for the project. Lower risk perception enables the contractor to submit a competitive bid and hence a fair price escalation clause should be inserted in the contract. The Manual for Procurement of Works clearly states that the Owner shall bear the risks relating to delay in handing over of land, approval from statutory authorities, approval in respect of engineering plans and shifting of utilities. It provides for extension of time for the delays occasioned or attributable to the Owner, force majeure and change of scope of work. The Manual mandates that an appropriate formula shall be prescribed in the tender documents to adjust the rise or fall in price in



respect of labour, oil, and other materials where the period for completion of project work is eighteen months or more. It also provides for the revision in price in case of increase or decrease in the cost due to changes in law, regulation, or bylaws, after submission of the proposal. When the delay events attributable to the contractor and Owner overlap each other, the extension of time shall be ascertained by plotting every contributing concurrent delay on the critical path. The tenders floated by the Owner contain no incentive clause to motivate the bidders but rather it contains liquidated damages clause for penalising the contractor for delay in performance. Fair and reasonable provisions incorporated in the Manual for Procurement of Works are not adhered to in the EPC Contract and the public sector undertaking floats tenders with the terms and conditions that favours the Owner.

Not only Manual for Procurement of Works, the General Financial Rules (GFR) also provides that if the delivery period extends beyond 18 months, then price variation clause can be provided in the contracts. The GFR clearly states that Procuring Entity shall follow a fair, transparent, and reasonable procedure and clearly spell out the quality as well as the quantity of goods to be procured. The change of design, plan, and scope work by the Owner without additional compensation violates GFR guidelines. GFR clearly states that uncertain or indefinite liability should not be involved in the terms of the contract.

There is no restriction on the subcontracting of works by the contractor and there is no checks and balance mechanism available in the contract to prevent misuse of subcontracting provision by the contractor.

The Owner abuses its dominant position and tries to derive unfair advantage of the unilateral clauses incorporated in the EPC Contract. The unfair clauses in the EPC Contract acts as a catalyst for rent seeking. No guidelines have been spelled out for the usage of discretionary power by the public official.

Adoption of unfair means or methods destroys healthy competition in the EPC sector and there is no policy which prohibits the same. No policy is adopted to prevent abuse of dominant position by the procurement entity.

The company does not give any guidance to its employees with respect to keeping of correct and accurate records. It does not prescribe what are all the documents to be maintained or kept in order to foster ethical practices.

The vigil mechanism of the company should provide confidence to the whistleblower about their safety, security, and delivery of justice. The communication of the outcome of the complaint is important as it enables the whistleblower to take suitable remedy. An effective whistleblower policy encourages the potential complainants to blow the whistle. Whistleblower mechanism provides an opportunity to the company to prevent corrupt activities.

Corruption and bribery flourishes on secrecy and an insider's information is required to bring it into light. Whistleblower mechanism is one of the sources to bring unethical behaviour to the outside world. The Whistle Blowers Protection Act as well as the policies implemented by the company is an important factor to enable the stakeholder to lodge a complaint about the misconduct. The ongoing training shall be given to the employees to increase the internal reporting mechanism which helps the organisation to gather the information and to monitor the progress of corruption prevention activities.

In order to prevent the corruption in EPC Contract, the cause of corruption needs to be identified. It is very clear from the research study that there is lack of fairness, reasonableness, and checks and balances in the EPC Contract. Unfair clauses in the EPC Contract favour the public official to exercise his discretionary power in an arbitrary manner and assist in rent seeking. The EPC Contract does not incorporate the principles and guidelines prescribed under the Manual for Procurement of Works, Manual for Procurement of Goods and General Financial Rules in its letter and spirit. In many ways it deviates from the policy issued by the Central Government as well as CVC and abuses its dominant position to make profit. State or its instrumentalities shall not act arbitrarily or unreasonably in their contractual dealing with private parties. It is the duty of the State and its instrumentalities to act in a fair and transparent manner. Profit cannot be sole motive of PSUs in their contractual obligations. If the State or its instrumentalities in its contractual

obligations acts unfairly, unreasonably, or unjustly, then it violates Article 14 of the Constitution of India. The research proves that there is no adequate and effective corporate governance mechanism in the oil and gas sector companies in India to prevent and detect corruption.

## **1.2 Hypothesis 2**

*There is lack of legislations in India to take civil enforcement action against corporates for their corrupt practices.*

In India, corruption is a criminal offence, and the company is answerable for the wrongdoing perpetrated by its agents. The courts have expansively interpreted the word 'agent' and the 'intent to benefit' and company is liable for the low-level employees working within their scope of employment whilst he is committing an act forbidden by the internal policies of the company. The company as well as every one during the course of commission of the violation, was accountable for the oversight of its business and administer the activities of the company shall be supposed to be answerable for the crime.

A corporation is accountable for the actions of its representatives under the doctrine respondeat superior, alter ego or doctrine of identification, vicarious liability, organic theory of corporate liability and theory of aggregation. A company can be punished for an offence for which fine as well imprisonment is prescribed by the statute. A company cannot be sued or punished for a violation where only imprisonment is prescribed as punishment.

If a corporation is sentenced for the criminal charges, then efficient deterrent punishment must be inflicted to inhibit the corporation from perpetrating more crimes. Penalty is the sole recourse open before the court as bodily incarceration cannot be inflicted on juristic person like company. Deterrence of the crime is the sole objective of awarding of imprisonment and the juristic character of company defeats the purpose of imprisonment.

The imposition of criminal liability entails testimony beyond reasonable doubt and the prosecutor must prove the accusation beyond reasonable doubt in the adversarial system of legal procedure. The burden of proof as well as

sentencing issue taunts criminal prosecution against corporates for their criminal activity in their business operation.

The criminal prosecution can only be initiated under *the Prevention of Corruption Act 1988* or *Indian Penal Code 1860*. Nourishing of corrupt pursuits by the corporates for acquiring or maintaining business is not included within the scope of 'fraud' under *the Companies Act 2013*. The research proves that there are no legislations in India to take civil enforcement action against corporates for their corrupt practices.

### **1.3 Hypothesis 3**

*Lacunae in the legal framework in India and the prevalent compliance policies do not foster competition and reduces the quality of services in the oil and gas sector.*

Prevention of corruption is necessary to increase competition in the public procurement process. Lack of competition due to collusive bidding is against public policy and is detrimental to the public interest. Fair and transparent public procurement process increases efficiency and competition. Manual for Procurement of Works and General Financial Rules are only available to improve the transparency in public procurement process. In the absence of a law governing public procurement, the procuring entities are supposed to follow the rules and regulations stipulated under the Manual for Procurement of Works as well as GFR in addition to the guidelines issued by the CVC. In practise, the PSUs do not strictly follow the guidelines issued by the Manual for Procurement of Works or the GFR. The thesis clearly indicates that EPC Contract executed by PSUs do not comply with the Manual for Procurement of Works, Manual for Procurement of Goods and GFR.

Establishment of vigil mechanism by the companies helps to prevent corruption. *The Whistle Blowers Protection Act 2014* is not notified by the government and the potential whistleblower has to rely upon the policies established by the PSUs to file a complaint. In IOCL, the Functional Director is the Competent Authority under the whistleblower policy and written complaint signed by the whistleblower can be given to the Competent Authority. The

independence and impartiality of the Competent Authority will prejudicially impact the whistleblowing mechanism. Only employees are permitted to submit whistleblower complaints and other stakeholders like vendors, contractors, etc are not permitted to blow the whistle. The main objective of compliance is detection and prevention of corruption and the whistleblowing policy prevalent in PSUs do not achieve the objects of detection and prevention. The reply received for the RTI application filed by the researcher shows that there were no whistleblower complaints filed for the corrupt practices in the company for the last ten years. The vigil mechanism does not give comfort or safety in the minds of the whistleblower to enable them to file a complaint about the misconduct, if any, noticed. This itself is an indication that there is no effective whistleblower policy present in the PSUs. There are multiple criminal investigations initiated against the employees of PSUs and the FIR has been lodged.

There is no law prevailing in India governing public procurement process. If a bidder indulges in corrupt practices during the procurement process, then debarment of the bidder is possible only under the contract. The support of law is *sine qua non* for the effective discharge of anti-corruption programs by the procuring entities.

A newspaper statement cannot be taken as a complaint to bring about enquiry under Section 8(2) of the CVC Act. Newspaper article is purely for knowledge and not a complaint.

The research proves that there is lack of legislations to support anti-corruption practices and lacunae are there in the existing legislations. Moreover, the PSUs does not implement the compliance policies in its letter and spirit to deter and detect corrupt activities.

## **2. Suggestions**

Based on the analysis, the researcher would like to put forth following suggestions for the prevention and detection of corrupt practices:

## **2.1 Creation of Ethical Culture**

The nation can raise higher levels and make achievement only upon the excellence of individuals and their collective activity for the common good. The objective underlying in Article 51A(j) of the *Constitution of India* can be achieved only in a corruption free environment and the State should foster a culture that values integrity in society. The State shall enforce ethical principle in the governance to encourage welfare of its citizens and to secure social, economic, and political justice in all walks of life including the institutions. Inculcation of ethical culture is required to achieve the objectives mentioned in the Preamble and Article 38 of *Constitution of India*. Article 39 (f) of the Constitution casts an obligation upon the state to establish an atmosphere for the healthy growth of the children and protect youth against exploitation. The said objectives can be achieved only in a corruption free world and the foundation for the same must be laid from school education. The researcher is of the view that an ethical pledge can be mandated in the schools and colleges to develop good citizens of future. The seeds of honesty and integrity shall be sown in the minds of budding students and build inroads against corruption. The schools and colleges shall include value education and ethics as part of its curriculum.

## **2.2 Tone at the Top**

CEO and the leadership team acts as a role model for the employees and their actions should show commitment and accountability. Management shall lead by example, and they should walk the talk. A positive work environment and ethical culture shall be created in the organisation. Management shall frequently discuss about the ethical values and help the employees to resolve the ethical dilemmas. During the performance of the EPC Contract, there will be situations wherein public officials might seek uncalled favours while exercising their discretionary powers. The leadership team shall identify the situations and guide the employees. Instead of focussing on instant benefit, the employees shall be encouraged to take ethical decisions without fear of sanction. The company shall always support ethical decision making which

subserve the common good and reward the employees for their integrity. The employees shall not feel alone, and they shall be supported by their peers.

Leadership shall regularly monitor the conduct of the employees to make sure that they are not indulging in any collusive practices during performance of obligations under the EPC Contract. Company shall take strict disciplinary action against the employees who indulge in corrupt practices. Company shall desist from employing a person or an agent who has been convicted for the corrupt practices in the course of employment.

Unreasonable financial targets or expectation shall not be imposed on the employees which will prompt them to indulge in corrupt practices. The company shall not waive its ethical practices, either at home or abroad, for any reason whatsoever and ethical conduct is to be treated as absolute.

### **2.3 Code of Conduct**

Code of conduct plays a vital part in the prevention of corruption. The basic values such as honesty, integrity, and fairness shall be identified in the code of conduct of an organisation. It shall be made available to all the employees, and they shall be provided with regular training in an ongoing basis to positively influence the ethical culture within the organisation.

The training shall create awareness about the ethical values, workplace priorities, principles behind everyday decisions, procedures, and channels for communication of ethical concerns and complaints and consequences of misconduct.

The record keeping obligation of the employees shall be specifically mentioned in the code of conduct. Code of conduct shall provide guidance to the employees w.r.t keeping of correct and accurate records. It shall prescribe what are all the documents to be maintained or kept by the company to foster ethical practices. Code of conduct shall provide for the auditing of works, documents, monitoring of the employees and the due diligence procedure to be followed by the employees while dealing with third party vendors, suppliers, and customers.

Code of conduct shall prohibit employees to keep off the record money or assets for the illegal purposes and prohibit employees from adopting any methodology for the purpose of evading of taxes. It shall prohibit employees from using artificial structures or letterbox companies to gain tax advantages. It shall provide for sharing of transparent information about business activities to the tax authorities. The employees shall not create any undisclosed, secret, or unrecorded funds, liabilities, or assets.

Code of conduct shall prohibit pre-payment, transfer funds to offshore accounts or third parties, payment of unusually high commission, and service fee not in consonance with the services without plausible business reasons.

The company policy shall expressly prohibit employees from obtaining or disclosing competitor or customer information through illegal means. Code of conduct shall prohibit abuse of dominant position by the company in its business dealings.

Code of conduct shall mandate the employees to do reputational, technical, and financial due diligence of the third-party vendors, suppliers, and customers prior to making any business relationships with them.

## **2.4 Compliance**

Company shall regularly monitor their compliance activity and assess the same. The employees shall be regularly communicated about the significance of the compliance. The compliance program shall cover the business partners like subcontractors, vendors, customers, agents, and service providers. The company shall not give discretionary power to any person who has engaged in any prior illegal activities.

A successful compliance program shall foster abidance of the legal and ethical obligations of the organisation. The corporate leadership shall oversee the compliance training program. There shall be a regular monitoring and supervision of the compliance program. Company shall desist the practise of incentivising the non-compliant behaviour.



## **2.5 Checks and Balance**

Appropriate checks and balance mechanism shall be set up in the company to prevent conflict of interest. The independence and impartiality of the independent directors, audit committee and internal auditor to be ensured since they act as checks and balance mechanism within the organisation. Audit Committee and independent directors shall uphold corporate governance principles and ensure compliance of applicable laws. There shall be a periodical evaluation of the internal control measures and compliance checks to identify the deficiencies and implement control measures.

## **2.6 Whistleblower Policy**

The whistleblowing mechanism is an ‘early warning system’ to identify the misconduct and minimise the damage. Whistleblowing policy shall be conveyed to all the stakeholders and employees shall be guided regarding their rights at the time of their joining. An ethical and moral environment should be established within the oil and gas sector companies where actions are taken against any wrongdoing or wrong practices. Employees of the oil and gas companies should be motivated to convey their ethical concerns both internally as well as externally.

The organisation shall conduct regular training on an ongoing basis for its employees about their privileges and safeguards under whistleblower mechanism. Those who receive disclosures or work with whistleblowers shall also be taught about their duties under the law.

The effective channel for the intimation of the transgression shall be provided. Multiple channels of communications such as hotline, email, web complaint, anonymous complaint, etc to be provided for the disclosure of information by the whistleblowers. Giving multiple channels of communication would encourage and foster trust among the whistleblowers. It shall provide for whistleblowing by the business partners, agents, vendors, subcontractors, and customers.

The whistleblowing mechanism shall not only protect the whistleblower from victimisation but also provide a fair hearing to the alleged wrongdoer. The whistleblowing mechanisms shall ensure independent investigation of disclosures in a time bound manner. Wherever possible, organisations shall permit or authorise an independent agency to handle the whistleblowing facility as well as investigation to prevent conflict of interest situations and to keep confidentiality of the information. The vigil mechanism shall induce a sense of trust in the minds of the potential whistleblower that the concerns put forward by them will be tackled honestly without any prejudice to the complainant. The consequence of the whistleblower complaint shall be conveyed to the whistleblower and the wrongdoer.

## **2.7 EPC Contract**

The State or its instrumentalities shall encourage prevention of corruption at the planning phase, address corruption risks in execution especially during awarding of contracts, execution of the project, and post-corruption review including aid to prosecutions.

Evaluation of precise cost and estimation of advantages at the planning and approval stage is required to curb corruption. Underestimating the project costs as well as exaggeration of the benefits in processing of incorrect tender rewards few individuals. If a contract is awarded below the reasonable costs of the project, then the contractor might compromise on quality and tend to use inferior materials to complete the project within the budget and make profit out of the same.

## **2.8 Fairness in the EPC Contract**

Though the Manuals for Procurement of Goods, Manuals for Procurement of Works and General Financial Rules are binding on the CPSUs, they are not incorporated in the EPC Contract in its spirit. The EPC Contract drafted by the Owner unilaterally favours the Owner and unfair contract terms are incorporated in the contract. The unfair terms and the arbitrary exercise of discretionary power gives an opportunity to indulge in unethical practices. The

dominant position of Owner in the contract is misused or abused to seek favours from the contractor.

Unequal bargaining power coupled with unfair terms in the EPC Contract force contractors to succumb to the demand of bribery or use unethical means to overcome the disadvantageous situations.

The Owner shall not invent new ways, means and concepts to circumvent the law of the land and impose unreasonable conditions in the EPC contract for its benefit. Owner shall not take benefits of its own fault and the contractor shall be given reasonable extension of time or costs benefit to the contractor, resulting from the act or omission of the Owner. The denial of compensation for the act or omission of Owner is unfair, unreasonable, and arbitrary exercise of power by the Owner.

The Owner shall not derive unfair advantage and abuse its rights by insisting on adherence to the words of the unilateral contract. The EPC Contract executed by a PSU shall meet the test of reasonableness and public interest. The contract of adhesion executed by contractor shall not be arbitrary, unreasonable or against public policy. The standard form of contract should be fair and abide by the principle of good faith. The inequality in bargaining power of the contractor in the EPC Project cannot be abused to take advantage in the standard form of contract.

The EPC Contract shall provide for referring of all disputes arising out of contract and shall not be restricted to notified claims.

## **2.9 Transparency**

A strong corporate governance policy ensures that there is transparency and accountability in the operations of a company's activities. Corporate governance requires adopting moral and ethical ways of carrying out the company's activities. Owner must publicly disclose not only the contract award price, but also final contract price paid to the contractor. The justification for the escalation of costs as well as extension of time shall be disclosed to the public. Transparency demands that there is no misuse of change order mechanism to increase the contract price during execution stage. The awarded contract value to be compared with final execution price as the same will act as

a deterrence. Post execution monitoring or intimation of the contract price would create fear in the minds of the public official before indulging in corrupt practice.

## **2.10 Discretionary Power**

Try to eliminate as many discretionary powers as possible given to the EIC or other representatives of Owner as it acts as breeding grounds for acts of corruption. The discretionary power shall be exercised in a transparent manner and the person shall be accountable for his acts. Always document the exercise of discretionary power with reasoning for the decision as it improves accountability and fosters transparent decision making. The organisation shall not grant discretionary power or significant authority to any person to whom it knows or should know, has indulged in unlawful activities. Individual shall be prohibited from exercising discretionary powers if there is a conflict of interest and it affects the impartiality while performing the duties. The discretionary power shall not be exercised on unjustifiable grounds or in an unreasonable manner. The making of decision shall not be arbitrary, biased or convey reasonable perception of bias and procedural fairness shall be observed. Discretionary power shall be used for proper purpose, exercised in good faith, and there shall not be any discrimination on any grounds whatsoever.

The procurement authority shall develop an appropriate policy and guidelines to assist the executive management in using discretionary powers. The policies and procedures shall be fair, reasonable, and comply with the legal requirements. The decision maker shall consider the relevant factors including the context and adopt an openness in decision making process. The policy shall be consistently applied and communicated to the relevant stakeholders along with justifications for the decision taken.

Instead of concentration of power in one individual, the exercise of discretionary power can be vested with a committee of three including Chief Vigilance Officer and Compliance Officer of the Owner. As a checks and balance mechanism the exercise of discretionary power can be reviewed by IEM. This should be made applicable for the entire life cycle of a project from

RFQ or ITB stage till the completion of the defect liability period under the contract. The policy guidelines and the authorities tasked with resolution should be made available to the EPC contractor at the very initial stage. In order to keep the progress of the contract in schedule, a dedicated team of such authorities should be made available at the contract site. This practice is popular in FIDIC contracts which provide for Dispute Avoidance/Adjudication Boards (DAAB) who are independent domain experts tasked with resolving disputes at very initial stages in a reasoned fashion. This practice will allow generation of records after much due diligence and will deter the EIC or the Owner from indulging in malpractices.

## **2.11 Appointment of an Agent**

Intermediaries are always used for making payment of bribery, which helps the contractor to hide the payment. The scope of services to be performed by the agent will often be false or exaggerated and the payment may not commensurate with the value of the services mentioned in the agreement. A percentage of the contract price will be provided as consideration in the agreement and the success fee will be paid to an agent upon awarded of the contract to the company. Hence it is necessary to verify all the service contracts executed by the EPC contractor to ascertain the nature of service and appropriateness of the consideration paid for the services performed by the agent.

*The Competition Act 2002* mandates filing of notice with Competition Commission of India regarding combination based on asset or turn over. Similarly, a statutory body can be created before whom all the EPC Contractors shall be mandated to file the service contract including contract for supply of materials along with service. Penalty can be imposed on the Contractor who fails to submit contract copy with the competent authority. The mandatory filing of contract copy would prevent using of agents as middlemen for payment of bribe to the public officials to secure the EPC contracts or manipulating the acceptance of variation orders.

## **2.12 Public Procurement Legislation and Debarment**

Transparency and fairness in public procurement process is a key for the prevention and detection of corrupt practices. There is no law governing public procurement and it is the contract between the parties that deals with integrity to be followed in the procurement process. Contractor can be debarred or blacklisted by the Owner for the indulgence of corrupt practices by the contractor during the bidding process and execution. There is no statutory guidance available to the Owner to exercise its right of backlisting the Contractor. The Owner is at disadvantageous position while taking appropriate remedial action or imposing punishment of blacklisting or debarring the contractor for their corrupt practices.

## **2.13 Independent Investigation**

Anti-corruption investigation agency shall be independent of government, and they shall be given authority to investigate all corruption charges against both private and public individuals and institutions. Such an agency should have the power to conduct both civil and criminal prosecutions against corporations. The agency should have the rights to scrutinize the books of accounts, contracts, and transactions of the company.

## **2.14 Political Will**

Effective implementation of anti-corruption laws requires a strong political will. The success and failure of the governance and anti-corruption measures depends upon the existence or lack of political will.

## **2.15 Follow Up and Support of Enforcement**

Regular monitoring of the implementation of anti-corruption measures and follow up of enforcement mechanism is required to prevent corrupt practices. The follow up mechanism will create a fear in the minds of the wrongdoer and act as deterrent mechanism.

## ***2.16 The Prevention of Corruption Act 1988***

The Union Government has not yet prescribed guidelines under subsection (5) of section 9 of the PC Act to be put in place by the organisations for compliance to prevent bribery by persons associated with the commercial organisation. The researcher suggests implementation of the following guidelines as part of anti-corruption measures by the commercial organisations.

2.16.1 Code of Conduct: The compliance of the applicable law and integrity in action shall be necessitated in the code of conduct of the company. It shall provide for (a) the due diligence of the employees as well as business partners, (b) maintenance of appropriate records, (c) establishment controls over gifts, hospitality, and entertainment, and (d) restrictions on employment of former public officials. The code of conduct shall prohibit employees from obtaining or disclosing competitor or customer information through illegal means. It shall forbid use of unfair means or methods for the distortion of competition and abuse of dominant position in the business transaction.

2.16.2 Training and Monitoring: Companies must impart trainings to all employees at all levels on the code of conduct and other internal policies. The training should ensure that corporate policies and procedures are applied by the employee in their day-to-day work. The training should enable them to identify red flags, knowing how to report suspicious activities and create awareness that non-compliant behaviour shall not be tolerated. The companies shall periodically monitor informal communication, perform surveillance, and enforce penalties for contraventions of the code of conduct and internal policies. The companies shall periodically assess and check the efficacy of compliance and ethics program.

2.16.3 Commitment from the Top: The leadership shall promote an organisational culture that encourage ethical conduct and responsibility to compliance with law. Assign a high-level person of the organisation with responsibility and supervision for implementation of effective compliance and ethics program. The organisation shall not give any discretionary power or substantial authority to any individual whom organisation knows or should

know, has participated in unlawful activities. If civil or criminal sanctions are imposed on any employee or business partner for their corrupt activities, then the organisations shall prohibit re-employing or re-engaging such person or the business partner. The organization shall provide appropriate incentive for ethical performance and initiate disciplinary measures for criminal conduct of its employees.

2.16.4 Account and Record Keeping: The organisation shall establish and maintain checks and balances over the financial, accounting and record keeping practices. It shall prohibit making or receipt of payment to or from a jurisdiction unconnected to the business transaction. The overpayment from a third party or refund to a third party in their business activity shall be prohibited. The organisation shall mandate employees to prepare and keep accurate records of accounts. The policies of the company should mandate that the employees shall not create any undisclosed, secret, or unrecorded funds, liabilities, or assets. The organisation shall not demand or permit pre-payment of any sum of money without plausible business reasons, transfer funds to offshore accounts or third parties, pay or receive unusually high commission, or service fee not in consonance with the services. Company shall make payments only for those transactions whose materiality can be verified, and costs justified and only to those third parties with which the company has proper agreements and contracts.

2.16.5 Business Partners and Agents: Company shall conduct due diligence of business partners, make proper documentation of the relationship, pay justifiable remuneration through *bona fide* channels for the legitimate services, monitor and oversee the services, and seek reciprocal commitment of compliance from business partner.

2.16.6 Reporting: The company shall establish multiple whistleblowing channels to report breaches and periodically review the effectiveness of the same.

2.16.7 Investigation: Investigate the misconduct when encountered or reported or discovered.



2.16.8 Remediation: The organisation shall pay compensation to the victim for the harm caused and develop a robust internal control measures to prevent repetition of similar misconduct. Any person found indulging in anti-compliance activities shall be subject to strict punishment including termination, demotion, change in remuneration, etc since the sanction process ensures the accountability of employees.

2.16.9 Contract: The tender or any contract documents executed by the organisation shall not contain any arbitrary, unfair, and unreasonable clauses. Unfair contract terms shall not be incorporated to the detriment of the other party to the contract. Unequal bargaining power coupled with unfair terms in the business relationship force parties to succumb to the demand of bribery or use unethical means to overcome the disadvantageous situations.

## **2.17 Sentencing Policy**

The sentencing policy is not uniformly applied in India. The aggravating and mitigating factors involved in the commission of the crime are to be balanced by the judiciary at the time of giving the proportional punishment to the accused. There is no law or guidelines prescribed to help the judiciary while convicting the corporate for its acts or omissions. Indian law does not provide for corporate probation and the benefit of probation is not given to the corporates. There shall not be any discrimination between individual and legal persons while granting the benefit of probation and the legislature shall prescribe guidelines for corporate probation.

## **2.18 *The Arbitration and Conciliation Act 1996***

The Owner abuses its dominant position and incorporates unilateral and unfair terms in the EPC Contract to the detriment of the contractor. The contract executed by the State shall pass the test of reasonableness and shall not be arbitrary. The arbitral tribunal shall always be given the power to decide a dispute in a just and fair manner. Section 17(ii)(e) of *the Arbitration and Conciliation Act 1996* (A&C Act) empowers the arbitral tribunal to pass interim measures of protection as may appear to the arbitral tribunal to be just and convenient in the circumstance. However, restrictions are imposed on the

arbitral tribunal under Section 28 of the A&C Act and the tribunal cannot make an arbitral award based on fair and just principles unless the parties have explicitly permitted it to do so. Hence it is advisable to delete the words “*only if the parties have expressly authorised it to do so*” in Section 28(2) of the A&C Act since it restricts the power of the arbitral tribunal to render complete justice. Section 16(1) of the A&C Act empowers the arbitral tribunal to rule on the validity of the arbitration agreement and declare the contract as null and void. Similarly, Section 28 of the A&C Act shall explicitly permit or authorise the arbitral tribunal to declare the provisions of the contract as void or invalid considering incorporation of unfair, arbitrary, unreasonable, and one-sided term by the state or its instrumentalities in their contracts.

### **2.19 *The Indian Contract Act 1872***

The Delhi High Court in *Kesar Enterprises. v Union of India and Others*<sup>1</sup> held that the arbitral tribunal being creature of the contract, cannot declare the contract as void or voidable. The arbitral tribunal cannot amend, alter, or vary the express terms of the contract between the parties and cannot invoke the public law principles while making an award. The arbitral tribunal has been confined within the contours of a contract having unfair or one-sided terms and is bound to render arbitral award within such contours. Hence it is highly necessary that a workable explanation of ‘*public policy*’ shall be included in Section 23 of the *Indian Contract Act 1872* like the explanation given in Section 34 of the A&C Act for ‘*public policy of India.*’ The Contract Act shall vest the power on the arbitrator to interpret the contract at the touchstone of ‘*public policy*’ and incorporate a provision like Section 16 (1) of the A&C Act to declare the clause under the contract as void or invalid.

### **2.20 Accounting Provision under *the Companies Act 2013***

Chapter IX of the *Companies Act 2013* only mandates companies to prepare and keep books of accounts and financial statements to give a true and fair view of the state of the affairs of the company. *The Companies Act 2013* shall make

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<sup>1</sup> (1994) SCC Online 337 (Delhi).

false accounting a criminal offence and an offence of false accounting is committed when a person with intent to cause loss to another:

- (i) knowingly generates or manages any account, or document for any purpose which to his knowledge is false, misleading, or deceptive in any material way.
- (ii) destroys, damages, hides, or falsifies any account or document made or required for any accounting purpose.

Company or its agents shall not bypass or intentionally act up to implement internal control measures or intentionally falsify books of account or any document. No company shall, either directly or indirectly, offer, authorise to pay, or promise to pay any money, or offer, gift, promise to give, or authorise to give anything of value to any public official to obtain or retain any business or any advantage in the conduct of business for such organisation.

## **2.21 Civil Enforcement**

Indian legal system deems corruption as a criminal offence and participation of public official in the purported offence is mandatory to operate the wheels of legal regime in India. There is no civil enforcement mechanism prevailing in India. Multiple avenues of enforcement mechanism enhance the efficiency of the anti-corruption measures. The legislature in India should legislate a new statute for bringing civil enforcement action which will serve as an supplementary mechanism in the inhibition of corporate corruption.

## **2.22 Requirement of New Legislations**

The domestic law should support the blacklisting of a contractor for the breach of contract, which will reduce the court interference. There legislature shall bring in a law to govern the public procurement system to enable greater transparency and certainty in the government contracts.

Like UK and Singapore, India should enact an Unfair Contract Terms Act *inter alia* addressing negligence liability, unreasonable indemnity obligation, and the requirement of fairness and reasonableness in the contract.

There is a requirement to have a legislation to uphold the ethical practices in the business as well as administration by the State. The Ethical Practices Act shall *interalia* provide for the following:

- Create an Ethical Commission of India (ECI) as competent authority to prevent corrupt practices.
- A contractor engaged by the public procurement authority shall submit to ECI all the service contracts as well as supply contracts and service contract executed by it while performing its obligations under the public procurement contract.
- Substantial penalty shall be levied on the contractor who fails to submit service contract with ECI.
- A Company shall nominate a director to act in its behalf to ECI and the director shall be personally liable for the violation of the Ethical Practices Act by the company.
- Director General Investigation shall be appointed to investigate the violation of the Ethical Practices Act.
- Civil penalty shall be imposed on the company for the violation of Ethical Practices Act.
- The provision of the Ethical Practices Act is in addition to and not in derogation of the provision of any other law.

The draft of the Ethical Practices Act, 2023 is annexed as **Appendix 7.1**.

The above suggestions have been made based on an in-depth analysis of laws and behaviour governing corruption and the data collected from various organisations. As suggested, there needs to be a primary change in the behaviour of the organisation and the management, and such a change must be supported by the law and the government to ensure the sustainability of compliance and anti-bribery.

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**STATUTES AND REGULATIONS**

1. *The Arbitration and Conciliation Act 1996*
2. *The Central Vigilance Commission Act 2003*
3. *The Code of Criminal Procedure 1973*
4. *The Commission of Enquiries Act 1952*
5. *The Companies Act 2013*
6. *The Competition Act 2002*
7. *The Constitution of India*
8. *The Drugs and Cosmetics Act 1940*
9. *The Essential Commodities Act 1955*
10. *The Indian Contract Act 1872*
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12. *The Indian Penal Code 1860*
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14. *The Limited Liability Partnership Act 2008*
15. *The Maharashtra Witness Protection and Security Act 2017*
16. *The Negotiable Instruments Act 1881*
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24. The Companies (Accounts) Rules 2014
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33. General Financial Rules 2017
34. Manual for Consultancy and Other Service 2018
35. Manual for Procurement of Works 2019
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37. Vigilance Manual 2017
38. *The Bribery Act 2010*
- 39 *The Criminal Justice Act 2003*
40. *The Foreign Corrupt Practices Act 1977*
41. *The Sarbanes–Oxley Act 2002*
42. *The Theft Act 1968*

43. The United Nations Convention against Corruption
44. United States Sentencing Commission Guidelines Manual 2018
45. Deferred Prosecution Agreements Code of Practice
46. Public Contracts Regulations 2006

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## APPENDICES

### Appendix 4.1

#### QUESTIONNAIRE ON CORPORATE GOVERNANCE PRACTICE

Name of the Company

Type of Company

Country of operation

Industry: (drop down menu to include - Oil & Gas, Consumer, FMCG, Construction, IT, Manufacturing, Aviation, Pharma, Hospitality, Bank, Insurance & Others)

Name and Title of Representative Signing this Questionnaire (optional)

E-mail (optional)

Telephone (optional)

Note 1: “**Public Official**” means anyone employed by or acting on behalf of, whether on a full or part time basis, a national, regional or local government; government owned or controlled company or other instrumentalities of state; employees or agents of public international organizations (such as the United Nations, European Union, World Bank and other international development organizations); political parties, political party officials and candidates for public office; and anyone else acting in an official capacity for or on behalf of a government agency or instrumentalities of state, including persons holding a legislative, administrative or judicial post and members of the military and police.

Note 2: “**Bribery or Corruption**” includes ‘active bribery,’ i.e., offering, promising or giving bribery and ‘passive bribery,’ asking for, consenting to get or receiving bribery directly or indirectly.

Using a scale from 1 to 5 where 1 means “Strongly Disagree” and 5 means “Strongly Agree”, please select the appropriate numerical given along the side



of the statement / assertion to depict the extent to which your employing Company agrees with the following statements:

(1. Strongly Disagree      2. Disagree      3. Neutral      4. Agree      5. Strongly Agree)

S.no.	Statement	1	2	3	4	5
<b>A. CORPORATE GOVERNANCE/PREVENTIVE VIGILANCE MECHANISM</b>						
1.	Employee Code of Conduct as well as policies, governing and regulating various supply chains is regularly updated in compliance with new regulations and laws.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
2.	Company conducts frequent Compliance and corporate governance training program for its employees to understand their responsibilities and is sufficient for the education of employees.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
3.	The training program also guides employees on relationship building with third parties without indulging in any corrupt practises or bribery.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
4.	Company permits cash payments to employees or business partners for any purpose.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5.	Company requires its employees and agents to provide itemized invoices and receipts in order to be reimbursed for all expenses, including hospitality and entertainment.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
6.	The employee involved, either directly or indirectly, in the incidence bribery or corruption	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

was terminated immediately on proof of corruption or relieved from responsibilities till completion of investigation.

7. Company gives maximum punishment to the employee who indulges in corrupt activity, without looking into the position of employment.

8. Company has taken measures to prevent repetition of the incidence of bribery or corruption.

9. Company has re-employed an individual or re-engaged the business partner on satisfaction or completion of civil or criminal sanctions imposed on them for corrupt practices.

10. Preventive vigilance mechanism in the company is sufficient to check the corruption.

## **B. COMPLIANCE**

11. Company receives whistleblower complaint alleging corruption in any form.

12. Whistleblower is given safe and secured environment to give evidence in a bona fide corruption allegation complaint.

13. Company intimates the outcome of the investigation relating to the corruption to the whistleblower and/or other stakeholders.

14. Company protects a whistle blower from victimization.

**C. AUDIT**

15. Company conducts periodical compliance audits of its managers.

16. Company reports any instances of corruption or bribery to the concerned government authorities.

17. There is an internal policy or monitoring mechanism to oversee the settlement of disputes, if any, with government entities or public sector undertakings.

**D. CHANGE AGENTS (BUSINESS PARTNERS)**

18. Company has a separate code of conduct applicable to the business partners/agents/vendors/service provider.

19. Company conducts regular due diligence on every business partner/agent/vendor/service provider/contractor.

20. Anti-bribery compliance is a part of the Contract with business partners/vendors/subcontractors/agents/service provider/contractor.

21. Company takes self-declaration from the business partners/contractor/service provider, including former public official engaged for business purpose, stating that (i) no conflict of interest in the business transaction and (ii) no influence will be exerted on public official based on his contacts or past experience. ○ ○ ○ ○ ○

22. The business partner or service provider or contractor engaged by the company has requisite experience, pre-qualification or manpower for providing the services envisaged under the contract. ○ ○ ○ ○ ○

23. The amount of compensation paid to the business partner or service provider or contractor is commensurate with the service(s) provided or as per the prevalent practice in the industry. ○ ○ ○ ○ ○

**E. CODE OF CONDUCT**

24. Company sometimes makes payment fees or service charges, in part or full, without obtaining any form of security, to the service provider/agent/vendor/contractor prior to the performance of service. ○ ○ ○ ○ ○

25. Company uses third party intermediary business partner (agents, representatives, brokers, distributors, consultants, service providers, etc.) ○ ○ ○ ○ ○

either directly or indirectly, who interact with public officials on behalf of the organization.

26. Company selects/appoints a business partner/service provider/contractor despite their involvement in corruption investigation and/or litigation (past or present).

27. Company has joint venture partners who have been selected for their contact with public official.

28. Company appoints or appointed in the past (last 5 years) Success Fee based agent or business partner or service provider for its business purpose.

29. Company permits facilitation payment/tips to expedite the administrative process by public official.

30. In the books of accounts, the improper payments made to public officials, either directly or indirectly, is recorded using vague description like “miscellaneous payment, professional fees, incidental fees, business promotion, incentives, special incentives, etc”

**Covering Letter**

I am presently doing research on the topic “Managing Corruption Risks through Corporate Governance”

As you are aware that a company is a juristic entity with perpetual succession and it acts through employees, who may come and go from time to time. There is every possibility that the employees and agents engaged by the companies may indulge in illegal and corrupt activities for their personal gain. Company may be held vicariously liable for the acts of its employees and agents.

Corporate governance and compliance are the preventive vigilance mechanism available to deter and detect the corrupt activities. The present research is being carried out to identify the effectiveness of the present legal mechanism to prevent corporate corruption. The researcher is of the view that the outcome of the research would benefit the companies to fix the loopholes in their policies and contracts, and thereby prevent corruption.

Researcher wishes to collect data from the employees w.r.t utility of the corporate governance policies in preventing and detecting corrupt activities. It will also help to identify the lacunas, if any, in the corporate governance policy adopted by the companies.

Researcher gives assurance that the data collected from the individuals will be KEPT CONFIDENTIAL. The research work will NOT DISCLOSE the name of the company or the name of the individual who gave the information.

If the respondent has any queries, the researcher can be contacted at +91 8879542051 or *nedunghatravi@gmail.com*

The questionnaire contains 30 multiple choice questions under five subheadings, which uses a scale from 1 to 5 where 1 means “Strongly Disagree” and 5 means “Strongly Agree.” Request you to fill the questionnaire using the following link

<https://docs.google.com/forms/d/1bKYYzdPt4eNV85-2MoFTD-UGWHijhRts5HCaNI-JOhM/edit>

The questionnaire may be filled up before 20<sup>th</sup> January 2021.

**HPCL**

Appendix-I

**SELF-CERTIFICATION**

I, \_\_\_\_\_ S/o/D/o \_\_\_\_\_ of  
\_\_\_\_\_, working as  
CEO/CFO/Company Secretary/any functional Director of Board of Directors  
(indicate, as applicable) of the Company \_\_\_\_\_  
having its registered office at  
\_\_\_\_\_ certify  
that all the details including documents pertaining to Bidder Qualification  
Criteria signed by undersigned vide our offer reference \_\_\_\_\_  
against your Enquiry document  
\_\_\_\_\_, are true, authentic, genuine  
and exact copy of its original.

It is certified that none of the documents are false/forged or fabricated. All the documents submitted has been made having full knowledge of (i) the provisions of the Indian laws in respect of offences including, but not limited to those pertaining to criminal breach of trust, cheating and fraud and (ii) provisions of bidding conditions which entitle the Owner/EIL to initiate action in the event of such declaration turning out to be a misrepresentation or false representation.

I further certify that further documents, if any, required to be submitted by our company, shall be submitted under my knowledge and those documents shall also be true, authentic, genuine, exact copy of its original and shall not be false/forged or fabricated.

**DECLARATION**

I, \_\_\_\_\_ S/o/D/o \_\_\_\_\_ of  
\_\_\_\_\_, working as  
CEO/CFO/Company Secretary/any functional Director in Board of Directors  
(indicate, as applicable) of the Company \_\_\_\_\_



having its registered office at \_\_\_\_\_ with reference to our bid \_\_\_\_\_ against your Enquiry document \_\_\_\_\_, declare that in case, at a later date, any of the document submitted in our bid referred above is found to be false/forged or fabricated, I, shall be held responsible for the same and EIL/Owner has every right to take action against me and my company, as deemed fit as per the provisions of the bidding documents including EIL/Owner's right to put our company in the Holiday/Black List for future business with EIL/Owner.

Specimen Signature of authorized representative

Signature

Name & Designation (CEO or CFO or Company Secretary/any functional Director in Board of Directors)

HPCL

FORM E

**COMPLIANCE TO BID REQUIREMENT  
(TO BE SUBMITTED ON THE LETTERHEAD OF BIDDER)**

**NAME OF WORK :** \_\_\_\_\_

**BIDDING DOCUMENT. :** \_\_\_\_\_

We -----(\*) hereby agree to fully comply with, abide by and accept without variation, deviation or reservation all technical, commercial and other conditions of the Bidding Document and its Technical & Commercial Amendments, issued by EIL on behalf of HPCL.

We confirm that during detailed engineering, we will review and recommend the required Special tools & tackles and Commissioning spares, wherever specified in the enquiry document and supply the same without any additional cost and time implication to Purchaser.

We further hereby waive, withdraw and abandon any and all assumptions, deviations, variations, objections or reservations whatsoever hereto set out, given or indicated in our offer, clarifications, correspondence, communications, or otherwise with a view that the price bid and price implication (if any) submitted may be treated to conform to, in all respects, with the terms and conditions of the said Bidding Document including all Technical and Commercial Amendments.

We further hereby confirm that the price quoted in the price bid are as per the provisions of the Bidding document and there is no deviation to the provisions in the price bid.

\*\*

For and on behalf of  
Authorised signatory

(Name and signature of authorized signatory)

Date:

\* Here fill in the name of bidder.

\*\* The bid compliance letter must be signed by the person (s) authorized to sign.

HPCL

FORM I

**PROFORMA OF CERTIFICATE OF  
NON-INVOLVEMENT OF AGENT**

**NAME OF WORK :** \_\_\_\_\_

**BIDDING DOCUMENT. :** \_\_\_\_\_

Where Indian Agent/Consultant/Representative/Retainer/Associates is not involved, the bidder shall certify in the proforma given below on their letterhead.

This is to Certify that we have not engaged/involved any Indian Agent/Representative/ Consultant/Retainer/Associates who is not our employee for the purposes of accompanying bid or any resultant contract and therefore no Agent's/Retainer's/Representative's/Consultant's /Associate's commission is payable in India or abroad against or in connection with any resultant Contract.

**SIGNATURE OF THE BIDDER :** \_\_\_\_\_

**NAME OF THE BIDDER :** \_\_\_\_\_

**DATE:**

**HPCL**

**FORM Q**

**DECLARATION OF BLACKLISTING/ HOLIDAY LISTING**

In the case of company:

We hereby declare that we , M/s\_\_\_\_\_, have not been placed on any holiday list or black list declared by Hindustan Petroleum Corporation Limited or its Administrative Ministry (presently the Ministry of Petroleum & Natural Gas) or any Government Department / Quasi Government agencies/Public Sector, except as indicated below:

(Here give particular of blacklisting or holiday listing, and in the absence thereof state “NIL”

It is understood that if this declaration if found to be false in any particular of blacklisting or holiday listing, Hindustan Petroleum Corporation Limited or its Administrative the bid has resulted in a contract, the contract is liable to be terminated.

SIGNATURE OF BIDDER : \_\_\_\_\_

NAME OF BIDDER : \_\_\_\_\_

COMPANY SEAL : \_\_\_\_\_

**IOCL**

**SELF-CERTIFICATION & DECLARATION BY  
CEO/CFO/COMPANY SECRETARY**

**SELF-CERTIFICATION**

I, \_\_\_\_\_ S/o/D/o \_\_\_\_\_ of  
\_\_\_\_\_, working as CEO/CFO/Company  
Secretary (indicate, as applicable) of the Company \_\_\_\_ having its registered  
office at \_\_\_\_\_certify that all the details including documents pertaining to  
Bidder Qualification Criteria signed by undersigned vide our offer reference  
\_\_\_\_\_against your Enquiry document\_\_\_\_\_, are true, authentic, genuine  
and exact copy of its original.

It is certified that none of the documents are false/forged or fabricated. All the  
documents submitted has been made having full knowledge of (i) the provisions  
of the Indian laws in respect of offences including, but not limited to those  
pertaining to criminal breach of trust, cheating and fraud and (ii) provisions of  
bidding conditions which entitle the OWNER/CONSULTANT to initiate action  
in the event of such declaration turning out to be a misrepresentation or false  
representation.

I further certify that further documents, if any, required to be submitted by our  
company, shall be submitted under my knowledge and those documents shall  
also be true, authentic, genuine, exact copy of its original and shall not be  
false/forged or fabricated.

**DECLARATION**

I, \_\_\_\_\_ S/o/D/o \_\_\_\_\_ of  
\_\_\_\_\_, working as CEO/CFO/Company  
Secretary (indicate, as applicable) of the Company \_\_\_\_ having its registered

office at \_\_\_\_\_ with reference to our bid \_\_\_\_\_ against your Enquiry document \_\_\_\_\_, declare that in case, at a later date, any of the document submitted in our bid referred above is found to be false/forged or fabricated, I, shall be held responsible for the same and CONSULTANT/OWNER has every right to take action against me and my company, as deemed fit as per provisions of the bidding documents including CONSULTANT/OWNER's right to put our company on Holiday/Black list for future business with CONSULTANT/OWNER.

Specimen Signature of authorized representative

Signature

Name & Designation (CEO or CFO or Company Secretary)

**THE ETHICAL PRACTICES ACT, 2023**

ACT No. \_\_\_\_\_ of 2023

[ \_\_\_\_\_ 2023.]

Article 39 (f) of the Constitution casts an obligation upon the State to create an environment for the healthy development of the children and protect youth against exploitation and stability & security of society, sustainable development, rule of law and good governance can be achieved only in a corruption free world. Similarly, the objective underlying in Article 51A(j) of the Constitution of India can be achieved only in a corruption free environment and the State should foster a culture that values integrity in society. Inculcation of ethical culture is required to achieve the objectives mentioned in the Preamble and Article 38 of the Constitution of India to promote welfare of the people. This Act is to enforce ethical principle in the governance to promote welfare of the people and to secure social, economic, and political justice in all walks of life including the institutions. The Act establishes a Commission to enforce anti-bribery and anti-corruption practices, to inquire or cause an inquiry into the disclosure made in relation to corrupt practices, create a corruption free environment and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Seventy Fourth Year of the Republic of India as follows:—

**CHAPTER I****PRELIMINARY**

**1. Short title, extent and commencement.**—(1) This Act may be called the Ethical Practices Act, 2023.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act and any reference in any provision



to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

**2. Definitions.**—In this Act, unless the context otherwise requires,—

(a) “agreement” includes any arrangement or understanding or action in concert,—

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

(b) “bid rigging” means any agreement, between persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(c) “Chairperson” means the Chairperson of the Ethical Commission appointed under sub-section (1) of section 11.

(d) “Commission” means the Ethical Commission of India established under sub-section (1) of section 10;

(e) “Corruption” includes giving or accepting bribes or inappropriate gifts, double-dealing, under-the-table transactions, manipulating, diverting funds, laundering money, and defrauding investors, etc.

(f) “Corrupt practice” means the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the action of a public official or foreign official in the procurement process or in contract execution.

(g) “Director General” means the Director General appointed under sub-section (1) of section 19;

(h) “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(i) “Fraud” includes any act or omission, concealment of any fact or abuse of position committed by any person with the connivance in any manner, with

intent to deceive, to gain undue advantage from or to injure the interest of, the public, state, any person, or creditors whether or not there is any wrongful gain or wrongful loss.

“Government undertaking” includes public sector enterprise, central public sector undertakings, state public sector undertaking, undertaking owned or controlled by a union territory.

(j) Government includes Central Government, State Government, and Government in a Union Territory.

(k) “person” includes,—

- (i) an individual
- (ii) a Hindu undivided family,
- (iii) every department or office,
- (iv) every organisation established or constituted by Government,
- (v) every local authority within the territory of India,
- (vi) a company, firm and association of individuals,
- (vii) trust constituted under an Act,
- (viii) every co-operative society, constituted under an Act,
- (ix) every other society registered under the Societies Registration Act, 1860 (21 of 1860);

(l) “Procurement contract” means a contract entered into between the procuring entity and a successful bidder concerning the subject matter of procurement.

(m) “Procuring entity” means

- (i) Any department of the Government or its attached or subordinate office
- (ii) Any government undertaking
- (iii) Any entity established or constituted by the Constitution of India whose expenditure is met from the consolidated fund of India or state.
- (iv) Any entity or board corporation or authority or society or trust or autonomous entity (by whatever name called) established or constituted by an Act of Parliament or State Legislature.
- (v) Any other entity which the Government may by notification specify to be procuring entity for the purpose of this Act, being an entity that receives substantial financial assistance from the Government in so far

as the utilisation of such assistance towards the procurement is concerned.

(vi) Any procurement support agency or procurement agent or procurement consultant involved in procurement on behalf of the procuring entities.

(vii) Public international organisation

(viii) Any foreign government or department, agency, or instrumentality thereof

(n) “Procurement or public procurement” means the acquisition by purchase, lease, license, or otherwise of works, goods, or services, including award of Public Private Partnership projects, Built Own and Operate Projects, Built Own, Operate and Transfer projects, by a public procuring entity whether directly or through an agency with which a contract for procurement of service is entered into.

(o) “Public international organisation” means an organisation whose members are any of the following—

(i) countries or territories,

(ii) governments of countries or territories,

(iii) other public international organisations,

(iv) a mixture of any of the above.

(p) “Public Private Partnership” means an arrangement between the Central Government, State Government, statutory entity or any other government owned entity or department on one side and a private sector entity on the other, for the provision of public assets or public services or both, through investments being made and management being undertaken, by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector entity and Central Government, State Government, statutory entity or any other government owned entity or department as the case may be, and the private entity receives performance linked payments that conform (or are benchmarked) to specified and re-determined performance standards, measurable by Central Government, State Government, statutory entity or any other government owned entity or department, as the case may be or its representative.

- (q) “public official” means—
- (i) any person in the service or pay of the Government or remunerated by the Government by fees or commission for the performance of any public duty;
  - (ii) any person in the service or pay of a local authority;
  - (iii) any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 2(45) of the Companies Act, 2013.
- (r) “service” means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as engineering, procurement, construction, management, consultancy, advisory services, negotiation, liaising with government or procuring entity, agency, supply chain, pre-commissioning, commissioning, transport, storage, material treatment, processing, supply of electrical or other energy, and repair;
- (s) “Service agreement” includes any agreement or understanding made in pursuance of performance of service in relation to procurement contract or Public Private Partnership agreement.
- (t) “statutory authority” means any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto;
- (u) “turnover” includes value of sale of goods or services;
- (v) “wrongful gain” means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (w) “wrongful loss” means the loss by unlawful means of property to which the person losing is legally entitled
- (x) words and expressions used but not defined in this Act and defined in the Companies Act, 2013 shall have the same meanings respectively assigned to them in that Act.

## **CHAPTER II**

### **JURISDICTION**

3. This Act is applicable when

- (i) An act or omission which is prohibited under Act takes place within the territory of India,
- (ii) a person's acts or omissions done or made outside of India would come within the ambit this Act, if done or made in India
- (iii) that person has a close connection with India

For the purposes of this Act a person has a close connection with India if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

- (a) an Indian citizen,
- (b) Overseas Citizen of India
- (c) an individual ordinarily resident in India,
- (d) a body incorporated under the law of India
- (e) an entity controlled or managed, either directly or indirectly, by a citizen of India or a body incorporated under the laws of India

Act is applicable irrespective of whether the acts or omissions which is prohibited hereunder take place in India or elsewhere.

## **CHAPTER III**

### **PREVENTION OF BRIBERY AND CORRUPTION**

4. It shall be unlawful for any person or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any public official or foreign official for purposes of--

- (A) (i) influencing any act or decision of such public official or foreign official in his official capacity, (ii) inducing such public official or foreign official to

do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such public official or foreign official to use his influence with the government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any public official or foreign official for purposes of-

(A) (i) influencing any act or decision of such public official or foreign official in his or its official capacity, (ii) inducing such public official or foreign official to do or omit to do any act in violation of the lawful duty of such public official or foreign official, or (iii) securing any improper advantage; or

(B) inducing such public official or foreign official to use his or its influence with the government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

Provided that it shall be a defence for a juristic person to prove that it had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.

### **Prohibition of Agreements**

5.(1) No person or association of persons shall enter into any agreement, either directly or indirectly, in respect of supply, or providing of service, which foster or is likely to foster bribery, corrupt practices or bid rigging.

For the purpose of this section, the prohibited agreements include

- (i) Agreement of any description wherein the consideration is payable on achieving a result with an intent to receive or gain undue advantage in procurement contract.
- (ii) Agreement of any description wherein the consideration is payable on success fee basis.
- (iii) Agreement of any description which authorises a third party to interact or facilitate interaction with a public official or foreign official, either directly or indirectly, with a view to obtain or retain procurement contract or Public Private Partnership agreement.
- (iv) Any agreement to provide any service, irrespective of the nomenclature used in the document, wherein the consideration is payable as a fixed percentage of the procurement contract or Public Private Partnership agreement, or substantial consideration is offered or paid for the minimal scope of services to be provided in relation to procurement contract or Public Private Partnership agreement.

(2) It shall be the primary duty of the person to prove that:

- (i) The service provider has the requisite experience and manpower to provide the service contemplated under the agreement.
- (ii) The consideration or service fee is commensurate with the services to be provided under the agreement.
- (iii) No advances payment or upfront payment is made to the service provider without sufficient cause.
- (iv) The invoice raised by the service provider clearly depicts the identifiable services provided as per the agreement.
- (v) The relation between the scope of service to be procured from a third-party service provider and the procurement contract or Public Private Partnership agreement.
- (vi) The service agreement is not intended for the wrongful gain for the person, or wrongful loss to the procuring entity or government.

6. Every person shall make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions in relation to the procurement contract or Public Private Partnership agreement.

#### **Submission of Agreement by Persons**

7. Every person shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the prevention of corrupt practises and encourage ethical culture:

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information, documents, understanding, and agreements pertaining to supply of services, either partially or in full, directly or indirectly, in relation to procurement contracts or Public Private Partnership agreements, the estimated value of the same is above rupees 10 crore. The copy of the agreements shall be submitted by all persons prior to the submission of proposal for securing procurement contract or Public Private Partnership agreement.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission and such quarterly reports (and such copies thereof), as the Commission may prescribe.

#### **Prohibition of re-employment or re-engagement**

8. No person shall re-employ an individual or re-engage a business partner in case of imposition of sanction in civil or criminal proceedings for their corrupt activity irrespective of any jurisdictions.

Explanation 1: For this section sanction indicates corrupt practice committed by an individual or business partner to obtain or retain business or any improper advantage for the said person.

Explanation 2: business partner includes any person who provides service in relation to procurement contract or Public Private Partnership agreement.

9. It shall be unlawful for any person to render any assistance including financial support, either directly or indirectly, to any person or a business partner who is accused or convicted for corrupt practice for securing or retaining business or any improper advantage.



**CHAPTER IV**  
**ETHICAL COMMISSION OF INDIA**

**Establishment of Commission**

10.(1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the “Ethical Commission of India”.

(2) The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the Commission shall be at such place as the Central Government may decide from time to time.

(4) The Commission may establish offices at other places in India.

**Composition of Commission**

11.(1) The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

(2) The Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, and public affairs, which in the opinion of the Central Government, may be useful to the Commission.

(3) The Chairperson and other Members shall be whole-time Members.

12. (1) The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

- a) the Chief Justice of India or his nominee - Chairperson;
- b) the Secretary in the Ministry of Corporate Affairs - Member;
- c) the Secretary in the Ministry of Law and Justice - Member;
- d) two experts of repute who have special knowledge of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, or public affairs.

(2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed.

**Term of office of Chairperson and other Members**

13.(1) The Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment:

Provided that the Chairperson or other Members shall not hold office as such after he has attained the age of sixty-five years.

(2) A vacancy caused by the resignation or by death or otherwise shall be filled by fresh appointment.

(3) The Chairperson and every other Member shall, before entering upon his office, make and subscribe to an oath of office and of secrecy in such form, manner and before such authority, as may be prescribed.

(4) In the event of the occurrence of a vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(5) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

**Resignation, removal and suspension of Chairperson and other members**

14. (1) The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, by order, remove the Chairperson or any other Member from his office if such Chairperson or Member, as the case may be,—

(a) is, or at any time has been, adjudged as an insolvent; or

(b) has engaged at any time, during his term of office, in any paid employment;  
or

(c) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest; or

(f) has become physically or mentally incapable of acting as a Member.

(3) Notwithstanding anything contained in sub-section (2), no Member shall be removed from his office on the ground specified in clause (d) or clause (e) of that subsection unless the Supreme Court, on a reference being made to it in this behalf by the Central Government, has, on an inquiry, held by it in accordance with such procedure as may be prescribed in this behalf by the Supreme Court, reported that the Member, ought on such ground or grounds to be removed.

**Restriction on employment of Chairperson and other Members in certain cases**

15. The Chairperson and other Members shall not, for a period of two years from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of any legal person which has been a party to a proceeding before the Commission under this Act:

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in sub-section 45 of section 2 of the Companies Act, 2013.

### **Administrative powers of Chairperson**

16. The Chairperson shall have the powers of general superintendence, direction, and control in respect of all administrative matters of the Commission:

Provided that the Chairperson may delegate such of his powers relating to administrative matters of the Commission, as he may think fit, to any other Member or officer of the Commission.

### **Salary and allowances and other terms and conditions of service of Chairperson and other Members**

17.(1) The salary, and the other terms and conditions of service, of the Chairperson and other Members, including travelling expenses, house rent allowance and conveyance facilities, sumptuary allowance and medical facilities shall be such as may be prescribed.

(2) The salary, allowances and other terms and conditions of service of the Chairperson or a Member shall not be varied to his disadvantage after appointment.

### **Vacancy, etc. not to invalidate proceedings of Commission**

18. No act or proceeding of the Commission shall be invalid merely by reason of—

- (a) any vacancy in, or any defect in the constitution of, the Commission; or
- (b) any defect in the appointment of a person acting as a Chairperson or as a Member; or
- (c) any irregularity in the procedure of the Commission not affecting the merits of the case.

### **Appointment of Director General, etc.**

19.(1) The Central Government may, by notification, appoint a Director General, and Additional, Joint, Deputy and Assistant Directors General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.

(2) The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant

Directors General or such officers or other employees shall be such as may be prescribed.

(3) Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall exercise his powers, and discharge his functions, subject to the general control, supervision, and direction of the Director General.

(4) The salary, allowances and other terms and conditions of service of the Director General and Additional, Joint, Deputy and Assistant Directors General or, such officers or other employees, shall be such as may be prescribed.

(5) The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

**Appointment of Secretary, experts, professionals and officers and other employees of Commission**

20.(1) The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

(2) The salaries and allowances payable to and other terms and conditions of service of the Secretary and officers and other employees of the Commission and the number of such officers and other employees shall be such as may be prescribed.

(3) The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in, economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act.

**CHAPTER V**  
**DUTIES, POWERS AND FUNCTIONS OF COMMISSION**

**Duties of Commission**

21. Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate corrupt practices, prevent bid rigging, foster competition in public procurement, create level playing field in the tender process of procurement contract or Public Private Partnership agreement, and promote integrity, fairness, and ethical culture.

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

**Powers and Functions**

22. The Commission shall have the following powers and functions:

- (i) Formulate policies and recommendations on issues concerning ethical practises to be followed by persons.
- (ii) The Commission may inquire into any alleged contravention of the provisions this Act on its own motion or on receipt of information or a reference made to it by the Government, government undertaking or a statutory authority.
- (iii) Inquire or cause an inquiry or investigation to be made on a reference made by the Government wherein allegation of bribery or corruption is made in a public procurement contract or Public Private Partnership agreement.
- (iv) Inquire or cause an inquiry or investigation to be made into any complaint against any person wherein allegation of bribery or corruption is made in a public procurement contract or Public Private Partnership agreement.
- (v) Inquire or cause an inquiry or investigation upon information received or otherwise, the Commission has a reason to suspect that

bribery or corruption is made in a public procurement contract or Public Private Partnership agreement.

- (vi) Tender advice to the Government, government undertaking, and statutory authority.
- (vii) Hear and decide cases involving schemes, agreements or devices adopted by persons to defraud or do any act detrimental to the interest of public.
- (viii) Issue cease and desist orders to prevent fraud, corruption, or injury to the public
- (ix) Regulate, investigate, or supervise the activities of persons to ensure compliance of applicable laws and regulatory requirements.
- (x) Issue summons witnesses to appear in any proceedings of the Commission and in appropriate cases, order the examination, search and seizure of all documents, papers, files and records, tax returns, and books of accounts of any person or enterprises under investigation as may be necessary for the proper disposition of the cases before it.
- (xi) Appoint a compliance monitor when there is a concern that a defendant does not have effective internal compliance programmes or internal control systems to prevent corrupt practises.
- (xii) Inquire into service agreement that has adverse effect on competition, affect level playing field in the tender process of procurement contract or Public Private Partnership agreement.
- (xiii) Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

### **Meetings of the Commission**

23. (1) The Commission shall meet at such times and places and shall observe such rules and procedure in regard to the transaction of business at its meetings as may be provided by regulations.

(2) The Chairperson, if for any reason, is unable to attend a meeting of the Commission, the senior-most Member present at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Commission shall be decided by a majority of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the Member presiding, shall have a second or/casting vote: Provided that the quorum for such meeting shall be three Members.

### **Procedure for Inquiry**

24. (1) On receipt of a reference from the Government or a statutory authority or on its own knowledge or information received from any source, the Commission may:

(A) close the matter forthwith if it is of the opinion that there exists no prima facie case, and pass such orders as it deems fit and send a copy of its order to the Government or the statutory authority or the parties concerned, as the case may be; or

(B) issue a notice to show cause to the parties calling upon them to respond within thirty days of the receipt of the notice, as to why investigation should not be conducted; or

(C) direct the Director General to cause an investigation to be made into the matter if in the opinion of the Commission there exists a prima facie case for the violation of Chapter III of this Act.

(2) After receipt of the response of the parties under Section 24(1)(B), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.

(3) The Commission may forward a copy of the report referred to in sub section (2) to the parties concerned.

(4) If the report of the Director General referred to in of Section 24(1)(C) or Section 24(2) recommends that there is no contravention of the provisions Chapter III of this Act, the Commission may invite objections or suggestions



from the Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(5) If, after consideration of the objections and suggestions referred to in subsection (4), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Government or the statutory authority or the parties concerned, as the case may be.

(6) If, after consideration of the objections or suggestions referred to in subsection (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

#### **Orders by Commission after Inquiry**

25. Where after inquiry the Commission finds that there is a violation of Chapter III of this Act, it may pass all or any of the following orders, namely

- (i) direct any persons, involved in such agreement, to discontinue and not to re-enter such agreement;
- (ii) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- (iii) impose such penalty, as it may deem fit which shall be not more than ten percent of the average of the turnover for the last three preceding financial years of such legal person;
- (iv) direct the person concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
- (v) Debar any persons from participating in any public procurement contract or Public Private Partnership agreement for a period not exceeding three years commencing from the date on which the person was debarred;
- (vi) direct legal person to implement anti-bribery and compliance programs;
- (vii) direct forfeiture of financial gain received as part of bribery and corruption;
- (viii) direct disqualification of an individual under section 164 of the Companies Act, 2013 for the appointment as a director of a company for a period of 15 years;
- (ix) reporting of violation of this Act in the annual report of the Company;

(x) pass such other order or issue such directions as it may deem fit.

### **Appearance before Commission**

26. A person or the Director General may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission.

### **Power of Commission to regulate its own procedure**

27. (1) In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure.

(2) The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses or documents;

(e) requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office.

(3) The Commission may call upon such experts, from the fields of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.

(4) The Commission may direct any person:

(a) to produce before the Director General or the Secretary or an officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any service, the examination of which may be required for the purposes of this Act;

(b) to furnish to the Director General or the Secretary or any other officer authorized by it, as respects the service or such other information as may be in his possession in relation to the service, as may be required for the purposes of this Act.

(5) Adverse inference may be drawn on the failure to produce relevant documents or accounts by the person and the commission may order appropriate penalty.

#### **Rectification of orders**

28. (1) With a view to rectifying any mistake apparent from the record, the Commission may amend any order passed by it under the provisions of this Act.

(2) Subject to the other provisions of this Act, the Commission may make—

(a) an amendment under sub-section (1) of its own motion;

(b) an amendment for rectifying any such mistake which has been brought to its notice by any party to the order.

Explanation- For the removal of doubts, it is hereby declared that the Commission shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

#### **Execution of orders of Commission imposing monetary penalty**

29.(1) If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations.

(2) In a case where the Commission is of the opinion that it would be expedient to recover the penalty imposed under this Act in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), it may make a reference to this effect to the concerned income-tax authority under that Act for recovery of the penalty as tax due under the said Act.

(3) Where a reference has been made by the Commission under sub-section (2) for recovery of penalty, the person upon whom the penalty has been imposed shall be deemed to be the assessee in default under the Income Tax Act, 1961 (43 of 1961) and the provisions contained in sections 221 to 227, 228A, 229, 231 and 232 of the said Act and the Second Schedule to that Act and any rules made there under shall, in so far as may be, apply as if the said provisions were

the provisions of this Act and referred to sums by way of penalty imposed under this Act instead of to income-tax and sums imposed by way of penalty, fine, and interest under the Income Tax Act, 1961 (43 of 1961) and to the Commission instead of the Assessing Officer.

Explanation 1 – Any reference to sub-section (2) or sub-section (6) of section 220 of the income-tax Act, 1961 (43 of 1961), in the said provisions of that Act or the rules made thereunder shall be construed as references to sections 43 to 45 of this Act.

Explanation 2 – The Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act, 1961 (43 of 1961) shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer for the purposes of recovery of sums imposed by way of penalty under this Act and reference made by the Commission under sub-section (2) would amount to drawing of a certificate by the Tax Recovery Officer as far as demand relating to penalty under this Act.

## **CHAPTER VI DUTIES OF DIRECTOR GENERAL**

### **Director General to investigate contravention**

30.(1) The Director General shall, when so directed by the Commission, assist the Commission in investigating into any contravention of the provisions of this Act or any rules or regulations made thereunder.

(2) The Director General shall have all the powers as are conferred upon the Commission under subsection (2) of section 27.

## **CHAPTER VII PENALTIES**

### **Power to impose penalty for execution of agreement and non-furnishing of service agreements**

31.If any person enter into any agreement prohibited under section 5 or fails to provide copy of service agreements to the Commission under sub- section (1) of section 7, the Commission shall impose on such person a penalty which shall not be less than the consideration mentioned in such agreement but may extend

upto value of the procurement contract or Public Private Partnership in relation to such agreement.

### **Contravention of orders of Commission**

32. (1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

(2) If any person, without reasonable cause, fails to comply with the orders or directions of the Commission issued under the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, may deem fit:

Provided that the Chief Metropolitan Magistrate, shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it.

### **Penalty for failure to comply with directions of Commission and Director General**

33. If any person fails to comply, without reasonable cause, with a direction given by—

(a) the Commission under sub-sections (2) and (4) of section 27; or

(b) the Director General while exercising powers referred to in sub-section (2) of section 30, such person shall be punishable with fine which may extend to rupees one lakh for each day during which such failure continues subject to a maximum of rupees one crore, as may be determined by the Commission.

### **Penalty for making false statement or omission to furnish material information**

34. If any person,

(a) makes a statement which is false in any material particular, or knowing it to be false; or

(b) omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

**Penalty for offences in relation to furnishing of information**

35.(1) Without prejudice to the provisions of section 34, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,—

(a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular; or

(b) omits to state any material fact knowing it to be material; or

(c) wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to rupees one crore as may be determined by the Commission.

(2) Without prejudice to the provisions of sub-section (1), the Commission may also pass such other order as it deems fit.

**Power to impose lesser penalty**

36. The Commission may, if it is satisfied that any person, which is alleged to have violated chapter of III of this Act, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such person a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 24 has been received before making of such disclosure.

Provided further that lesser penalty shall be imposed by the Commission only in respect of a person who has made the full, true, and vital disclosures under this section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such person had in the course of proceedings, —

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or

(b) had given false evidence; or

(c) the disclosure made is not vital,

and thereupon such person may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

37. (1) At the time of imposition of penalty on any legal person under this Act, the Commission shall consider the following:

(a) the existence of an effective compliance and ethics program

(b) self-reporting, cooperation, or acceptance of responsibility

(c) remediation measures taken by the legal person including restitution to the victims

### **Compounding of Offence**

38. (1) A person desirous of making composition of offence under chapter III of this Act, may make an application to the Commission.

(2) The Commission shall on receipt of such application, satisfy itself as to whether the offence is compoundable or not and if the Commission is of the opinion that the offence is compoundable then the offence shall be compounded for a sum of not less than the financial benefit derived by the person or rupees 10 crore fine whichever is higher and the same shall be paid by the person within the time specified in the order of composition issued by the Commission. The Commission may in its discretion impose such additional conditions while compounding of offences under chapter III of this Act.

(3) Nothing contained in sub-section (2) shall apply to an offence committed by a person for the second time or thereafter within a period of three years from the date—

(i) of commission of a similar offence which was earlier compounded; or

(ii) of commission of similar offence for which such person was earlier convicted.

(4) The Commission shall exercise the powers to compound an offence, subject to the direction, control and supervision of the Central Government made or framed under this Act.

(5) Every application for the compounding of an offence shall be made in such form and in such manner as may be prescribed by the Central Government.

(6) Where any offence is compounded before the institution of any proceedings before the Commission, no proceedings shall be instituted by the Commission in relation to such offence, against the offender in relation to whom the offence is so compounded.

(6) Where the compounding of any offence is made after the institution of any proceedings before the Commission, such compounding shall be brought to the notice of the High Court having jurisdiction over the matter, and on such notice of the compounding of the offence being given to the High Court, the person against whom the offence is so compounded shall be discharged.

(7) No offence under this Act shall be compounded except as provided by this section.

#### **Crediting sums realised by way of penalties to Consolidated Fund of India**

39. All sums realised by way of penalties under this Act shall be credited to the Consolidated Fund of India.

#### **Offences by companies and power of Commission to publish name, place of business, etc., for companies convicted**

40. (1) Where an offence under this Act has been committed by a company,—

(a) (i) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as a person responsible); or  
(ii) where no person has been nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and

(b) the company,

shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was



committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Commission or any authorised officer in this behalf in such form and in such manner as may be prescribed, that it has nominated such director as the person responsible, along with the written consent of such director for being so nominated.

(3) The person nominated under sub-section (2) shall, until—

(i) further notice cancelling such nomination is received from the company by the Commission or authorised officer; or

(ii) he ceases to be a director of the company; or

(iii) he makes a request in writing to the Commission or authorised officer under intimation to the company, to cancel the nomination, which request shall be complied with by the Commission,

whichever is the earliest, continue to be the person responsible:

Provided that where such person ceases to be a director of the company, he shall intimate the fact of such cessation to the Commission or the authorised officer:

Provided further that where such person makes a request under clause (iii) the Commission or the authorised officer shall not cancel such nomination with effect from a date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to the neglect on the part of, any director, manager, secretary or other officer, not being a person nominated under sub-section (2), such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(5) Where any company is convicted under this Act for contravention of any of the provisions thereof, it shall be competent for the Commission or the court to cause the name and place of business of the company, nature of the contravention, the fact that the company has been so convicted and such other

particulars as the Commission or court may consider to be appropriate in the circumstances of the case, to be published at the expense of the company in such newspaper or in such other manner as the Commission or court may direct.

(6) The expenses of any publication under sub-section (5) shall be recoverable from the company as if it were a fine imposed by the Commission or court.

*Explanation.*—For the purposes of this section,—

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) “director”, in relation to a firm, means a partner in the firm but excludes nominated directors, honorary directors, Government nominated directors.

## **CHAPTER VIII MISCELLANEOUS**

### **Restriction on disclosure of information**

41. No information relating to any person, being an information, which has been obtained for the purposes of this Act, shall, without the previous permission in writing of the person, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.

### **Protection of action taken in good faith**

42. No suit, prosecution or other legal proceedings shall lie against the Central Government or Commission or any officer of the Central Government or any authorised officer under this Act for anything which is in good faith done or intended to be done under this Act or the rules or regulations made thereunder.

### **Act to have overriding effect**

43. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

### **Application of other laws not barred**

44. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

### **Exclusion of jurisdiction of civil courts**

45. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission is empowered by or under this Act

to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

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## **RAVIDASAN N.S**

### **EDUCATION**

- **Master of Laws (LL.M)** from **Cochin University of Science and Technology** (2001-03)- Constitution and Criminal Law
- **Bachelor of Law (B.L)** from **TN Dr.Ambedkar Law University** (1998-2001) Govt. Law College, Coimbatore
- **Bachelor of Arts (B.A)** in Philosophy from **Calicut University** (1995-98)- Govt College Chittur

### **WORKING EXPERIENCE**

- **Larsen & Toubro Ltd.** working as **Deputy General Manager- Legal** (from February 2022)
- **L&T Hydrocarbon Engineering Ltd.** Working as **Deputy General Manager- Legal** (January 2019 to January 2022)
- **L&T Hydrocarbon Engineering Ltd.** Worked as Asst. General Manager (July 2016 to December 2018)
- **L&T Hydrocarbon Engineering Ltd.** Worked as Manager (July 2015 to June 2016)
- **Larsen & Toubro Ltd.,** Mumbai (11/07/12 to 31/05/15) worked as Manager
- **Samsung India Electronics Pvt. Ltd.,** Chennai Plant (Sep 2011 to July 2012) worked as Manager-Legal and Compliance
- **MRF Ltd.** Chennai (Nov 2007 to Aug 2011) worked as Asst. Manager-Legal
- **Shaw Wallace & Co. Ltd., UB GROUP, Chennai** (Sep 2006 to Nov 2007) (Presently the company is known as **United Spirits Ltd-Diageo Group**) worked as Manager-Legal.
- **Advocate,** Cochin (Jan 2002 to Sep 2006) at High Court of Kerala and Subordinate Courts

### **COMPETENCIES & SKILLS**

- In-house legal professional having 20 years of experience in many big national and multinational conglomerates including manufacturing industry, EPC, liquor industry and consumer electronics

- Started career as an advocate and experienced in writ, civil, criminal and labour cases which were utilized while working for the corporate organizations
- Contract drafting, contract negotiation and management, standardization of contracts & processes, review & process multiple agreements, contract interpretation and training employees on Corporate Governance and Compliance
- Evaluate the potential magnitude of various risks with legal implications, take risks backed by sound judgment and communicate their analysis to protect business interest.
- Logical and innovative thinking, take decisions quickly and communicate the decision with confidence, clarity and concisely
- Good understanding of laws, regulations, and enforcement practices. Maintenance of up-to-date knowledge of the areas of law
- Effective time management skills by prioritizing critical, urgent, and important activities to increase efficiency and meet deadlines
- Ability to gather and distil information quickly from a range of sources and take decisions to solve problems
- Manage, delegate, supervise, and give guidance to other inhouse counsels to meet the deliverables and requirements of the business
- Maintain good network with senior counsels, lawyers, and law firms for effective legal management
- Setting a system of Legal department monthly MIS, reviewing the MIS data and presenting the MIS data to management

## **PUBLICATIONS**

1. Ravidasan N.S and Vijay Kumar Singh, Civil Enforcement Action against Corporate Corruption: A Legislative Lacunae in India, 2020(6) IJTAJ 83
2. Ravidasan N.S, Discretion is a Tool of Corruption: Critical Analysis of an EPC Contract in the Oil and Gas Sector, Rostrum's Law Review Vol. VI Issue II



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