

Dispute Resolution Hotline

July 14, 2014

FCPA: US COURT OF APPEALS GIVE A MUCH NEEDED DEFINITION TO 'INSTRUMENTALITY' OF A FOREIGN GOVERNMENT

- US Court of Appeals after considering United States obligations under the OECD Anti-Bribery Convention, clarifies the ambit of the term 'instrumentality' under FCPA definition of 'foreign official';
- US Court of Appeals provides guidance on the indicative factors which would construe public 'control' and 'function';
- US Court of Appeals has affirmed the finding of Florida Court and therefore this is the longest sentence ever imposed under the FCPA;

Recently, the United States Court of Appeals (Eleventh Circuit) ('**US Court of Appeals/Court**') in *United States of America v. Joel Esquenazi/Carlos Rodriguez*, in an appeal from United States District Court for the Southern District of Florida ('**Florida Court**'), has interpreted the word 'instrumentality' in 'The Foreign Corrupt Practices Act, 1977' ('**FCPA**') definition of 'foreign official'¹, which includes 'any officer or employee of a foreign government or any department, agency, or instrumentality thereof'.

FCPA came into being in 1977 for restraining certain classes of persons and entities to make payments to foreign government official to assist in obtaining or retaining business. The FCPA prohibits 'any domestic concern' from 'mak[ing] use of the mails or any means . . . of interstate commerce corruptly in furtherance of a bribe to 'any foreign official', or to '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 foreign official', for the purpose of 'influencing any act or decision of such foreign official . . . in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person'.²

FACTS

In 2011, a jury in Florida Court sentenced Joel Esquenazi, former president of Terra Telecommunications Corporation ('**Terra**') to 15 years imprisonment for his involvement in a scheme to pay bribes to Haitian government officials at Telecommunications D'Haiti S.A.M. ('**Teleco**'), a state-owned telecommunications company. Also, the former vice president of Terra, Carlos Rodriguez, was sentenced to seven years' imprisonment. The Defendants were convicted of one count of conspiracy to violate the FCPA and wire fraud; seven counts of FCPA violations (including bribing a *foreign official*); one count of money laundering conspiracy; and 12 counts of money laundering.

Esquenazi and Rodriguez **argued** on appeal that Florida Court's view of 'foreign official' was overly expansive and beyond Congress's intent for the statute's coverage. They argued that Teleco wasn't an 'instrumentality' under the FCPA and that its directors, officers, and employees therefore weren't 'foreign officials' under FCPA. Therefore, they argued, bribes paid to anyone at Teleco would not trigger the provisions of FCPA.

ISSUE

FCPA does not define the term 'instrumentality', and US Court of Appeal had not opined on it earlier. Therefore, the central question was the ambit of the term 'instrumentality' in the definition of 'foreign official' under the FCPA and consequently whether Teleco is a Haitian instrumentality.

JUDGMENT

The US Court of Appeals affirmed the decision of the Florida Court and concluded that an 'instrumentality' under section 78dd-2(h)(2)(A) of the FCPA is an entity controlled by the government of a foreign country that performs a *function*, the *controlling* government treats as its own. Further, the Court opined that 'control' and 'function' are fact bound questions which would vary depending on the circumstances.

Proud Moments

Benchmark Litigation Asia-Pacific: Tier 1 for Government & Regulatory and Tax
2020, 2019, 2018

Legal500 Asia-Pacific: Tier 1 for Tax, Investment Funds, Labour & Employment and TMT
2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012

Chambers and Partners Asia Pacific: Band 1 for Employment, Lifesciences, Tax and TMT
2020, 2019, 2018, 2017, 2016, 2015

IFLR1000: Tier 1 for Private Equity and Project Development: Telecommunications Networks.
2020, 2019, 2018, 2017, 2014

AsiaLaw Asia-Pacific Guide 2020: Tier 1 (Outstanding) for TMT, Labour & Employment, Private Equity, Regulatory and Tax

FT Innovative Lawyers Asia Pacific 2019 Awards: NDA ranked 2nd in the Most Innovative Law Firm category (Asia-Pacific Headquartered)

RSG-Financial Times: India's Most Innovative Law Firm
2019, 2017, 2016, 2015, 2014

Research Papers

Privacy & Data: India's Turn to Bat on the World Stage
May 31, 2020

Introduction to Cross-Border Insolvency
April 30, 2020

Don't Mind: You've been Acquired!
April 28, 2020

Research Articles

Chambers Global Practice Guide: Gaming Laws
December 19, 2019

The Tips and Traps to Avoid When Investing in India
December 31, 2018

Evolving HR Law: Giving GCs

Before arriving at the definition of *'instrumentality'*, the Court relied on several precedents and the text of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**"OECD Anti-Bribery Convention"**) which United States ratified in 1998.³ In particular, the Court relied on the following:

a) First, the Court looked at various dictionary definitions: Under Black's Law Dictionary, an instrumentality is *'[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body'*.⁴ Webster's Third New International Dictionary says the word means *'something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body'*.⁵

b) Second, the Court took note of the fact that United States has ratified OECD Anti-Bribery Convention without any reservations and therefore interpreted *'instrumentality'* under the FCPA in tune with United States obligations under OECD Anti-Bribery Convention (i.e. to prevent officials domestically from bribing foreign officials). The Court relied on precedents and was mindful of the fact that in 1998, the Congress amended the FCPA to comply with the duties, the United States assumed under the OECD Anti-Bribery Convention and left intact the FCPA's language outlawing bribery for the purpose of *'obtaining or retaining business'*, and therefore a narrow construction of the FCPA *"would likely create a conflict with our international treaty obligations"*.

c) Thereafter, US Court of Appeals went on to decide what would constitute *'function'* and *'control'* under the term *'instrumentality'*. The Court held that in order to decide if the foreign government *'controls'* an entity the following should be borne in mind:

- foreign government's formal designation of that entity;
- whether the government has a majority interest in the entity;
- the government's ability to hire and fire the entity's principals;
- the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and
- the length of time these indicia have existed.⁶

d) Further, in order to qualify as government function, the US Court of Appeals looked at OECD Anti-Bribery Convention and listed a number of indicative factors:

- whether the entity has a monopoly over the function it exists to carry out;
- whether the government subsidizes the costs associated with the entity providing services;
- whether the entity provides services to the public at large in the foreign country; and
- whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.⁷

e) The Court of Appeal affirmed the finding of the Florida Court that in determining whether Teleco is an instrumentality of the government of Haiti, the following has to be considered:

- whether it provides services to the citizens and inhabitants of Haiti;
- whether its key officers and directors are government officials or are appointed by government officials;
- the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans or revenue from government mandated fees;
- Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions;
- whether Teleco is widely perceived and understood to be performing official or governmental functions;

f) Relying on the above factors and after considering the following circumstances, US Court of Appeals concluded that Teleco is a Haitian instrumentality and therefore the officials at Teleco come under the definition of *'foreign official'*:

- Since the inception of Teleco, Haiti granted the company a monopoly over telecommunications service and gave it various tax advantages;
- Haiti's national bank owned 97 percent of Teleco;
- the Company's Director General was chosen by the Haitian President with the consent of the Haitian Prime Minister and the ministers of public works and economic finance;
- Haitian President appointed all of Teleco's board members;
- government, officials and everyone considered Teleco as a public administration;
- Teleco was controlled by the Haitian government and performed a function Haiti treated as its own, namely, nationalized telecommunication services.

ANALYSIS

This judgment came to the limelight because it is perceived that Esquenazi's sentence of 15 years, as decided by the Florida Court and later affirmed by US Court of Appeals, was two times greater than the longest sentence previously imposed for substantive violations of the FCPA. Similarly, Rodriguez's sentence of seven years in one of the three longest sentences imposed for FCPA violations.

This is a very well-reasoned judgment by the US Court of Appeals. Indeed, to come under the radar of *'instrumentality'* the key element would be to see whether the foreign government exercises sufficient

Sleepless Nights?

June 01, 2017

Audio

Seminar: Possible Last Window for the Start-Up Community's Say on Proposed Privacy Law

February 19, 2020

Webinar: India Budget 2020: Implications for the International Community

February 05, 2020

Webinar: A New Dawn for Privacy in India: the Personal Data Protection Bill, 2019

December 17, 2019

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

[Click here to view Hotline archives.](#)

Video

NDA cCep - Client Continuing Education Program

Big Deal: Experts discuss how Facebook-Jio deal could impact FDI inflows into India (May 01, 2020)

CNBC TV18 Startup Street

control over the official in question and also he ought to be discharging public function or any function which is in public interest. The clarity provided by the US Court of Appeals will help the officials in United States to ascertain their liability, as they would now know the scope of the foreign officials and would therefore exercise abundant caution.

In Indian context, a parallel could be drawn to interpretation of the term '*instrumentality*' commonly used to define of '*State*' under Article 12 of the Indian Constitution. The Indian jurisprudence on the term '*instrumentality*' is on the similar lines to what has been decided by the US Court of Appeals.

Indian Supreme Court in Ramananda Dayaram Shetty v. International Airport Authority of India⁸ has held that

- factors such as pattern of shareholding (i.e. if the entire share capital of the corporation is held by the government, it would be indicative of the fact that the corporation is an instrumentality or agency of the government);
- existence of deep and pervasive state control may accord an indication that the corporation is an agency or instrumentality; and
- if the functions of the corporation are of public importance and closely related governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or an agency of the government.

The expansive stand taken by the US Court of Appeals is indeed commendable. It provides much needed guidance to contracts draftsmen and legal advisors as well as clarity to the US entities and their business counterparts in foreign countries to determine whether or not such counterparts would be considered "*instrumentality*" of a foreign government.

– Alipak Banerjee, Moazzam Khan & Vyapak Desai

You can direct your queries or comments to the authors

¹ A "*foreign official*" is "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof...". 15 U.S.C. §§ 78dd-2(h)(2)(A).

² See Page 9 of the judgment. 15 U.S.C. §§ 78dd-2(a)(1), (3) provides for prohibited foreign trade practices by domestic concerns; 15 U.S.C. §§ 78dd-2 (g) provides for penalties for breach of 15 U.S.C. §§ 78dd-2(a)(1), (3).

³ OECD Anti-Bribery Convention came into force in 1999 and establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.

⁴ Black's Law Dictionary at 870 (9th ed. 2009).

⁵ Webster's Third New International Dictionary at 1172 (3d ed. 1993).

⁶ See Page 21 of the Judgment.

⁷ See Page 23 of the Judgment

⁸ (1979) 3 SCC 489; AIR 1979 SC 1628

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.