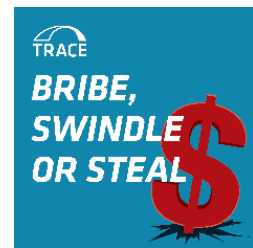


BRIBE, SWINDLE OR STEAL



Spotlight on India – Vasu Muthyala

[00:00:06] Welcome back to the podcast Bribe, Swindle or Steal. I'm Alexandra Wrage, and today, we're talking about anti-bribery challenges in India. My guest is an American lawyer and partner with Kobre & Kim. He's based in Hong Kong but with regional responsibility, including India. He's joined the podcast previously, and I'm delighted to have him back today. Vasu Muthyala, thank you for joining me.

[00:00:28] Alexandra, it's great to be back with you.

[00:00:30] It's really nice to chat with you about some of these regional challenges. You're there, you're working on them. How much of your time would you say you're spending on anti-bribery matters?

[00:00:38] Alexandra, I'd say it's around about a third of my work that's anti-corruption-related. The other, it's in the corruption realm — anti-money laundering and sanction-related work. We've seen a big uptick in that recently.

[00:00:51] Why don't you start by just giving an overview of the anti-corruption environment in India? A lot of people listening will have had some interaction with India — either travel or business — but more specifically on the anti-corruption landscape there.

[00:01:05] Sure. India is interesting. I'm sure you know, as well as most of your listeners: There's a lot of risk related to corruption. I know your score on the TRACE Matrix has India at 88. Other organizations also rate India as a difficult place to do business. That being said, it is a very important market in Asia, as you know. I think it was Tim Cook who recently said that India is what China was a few years ago, so I think we're expecting a lot of growth from India. I think this year, the OECD projected India to have a growth rate of around 7 percent, so it's a very important market. With that being said, there are risks, and as you've spoken about in many of these podcasts of yours, these risks can be associated to some very easily identifiable issues, specifically the government bureaucracy. There's so many places that people need to touch the government in order to get licenses, in order to get approvals, in order to get registrations. Then there's the use of agents to interface with these government agencies. In addition, there's a very, very low pay for civil servants and also the commonly accepted practice of gifts to government officials. In India, there's this term, it's called jugaad, which essentially is a fix or a hack. Essentially, what it means is that there is always a fix for any problem, and usually those fixes go outside the rules a little bit. What that means is that folks, when they can't get their way or they don't want some government action to happen, they can easily pay a couple of dollars to a government official to either have something happen or not.

[00:02:50] That's actually really interesting. There's a lot to unpack there. Let's start with the bureaucracy. You mentioned the TRACE Matrix, and India does currently rank 88 on that. We break the Matrix down into four domains, and India actually does reasonably well on government transparency and civil society oversight but really poorly on level of business interaction, and that is exactly what you've described. The level of bureaucracy, perennial complaint. I'm curious if you and your very regular travels to India are hearing anything from the government, from Prime Minister Modi's government,

about rolling back those many-layered bureaucratic touches to streamline government, perhaps move to e-government for business.

[00:03:42] Absolutely. It's not just the talk. You're actually seeing the action. Obviously, there's a very long way to go, but you're definitely starting to see some changes in India. I wouldn't call it the leapfrog effect. India didn't have a very good infrastructure, but it's going to succeed despite that infrastructure. When I say that, what I mean is that there are systems being put in place that are going to help India overcome these issues. We're talking about a decrease in number of touch points for the government. Let me back up for one second. The interesting thing about Modi was that his government was really, you could say, a result of people's frustration with the corruption in India. Modi, his ticket, he really rode in on this initiative to really change India and decrease the amount of corruption that we have in India. What you're seeing is that one, there's a first piece, which he's really concerned about: corruption. He's identified that as a risk for the country. Then, the technology. Modi, as you know, he's come out to the U.S. a few times. When he was out in Silicon Valley, he was really taken by the opportunities and the number of Indian Americans who were so involved in technology. He really has embraced technology. He actually doesn't use paper. He's gone to tablet the entire time, which is actually a little surprising for someone in India. But I think that's what we're seeing: that he wants India to take advantage of technology. One perfect sample is they created a program called a direct benefit transfer, DBT. What it is essentially is that rather than giving folks rations or subsidies, what they're doing is actually sending funds directly to folks' bank accounts. When that happens, what you're doing is removing the middleman. You said one of the big risk points in India is middlemen. That was one way to take advantage of technology. Another thing that they've done is they've created what's called the Aadhaar, a-a-d-h-a-a-r. Essentially, it's a biometrical, verifiable identification number, so it's a social security number, but you can verify it by using biometrical data. What that does, again, is that it gives each and every person the ability or the government the ability to track how it's interacting with each and every individual and, again, decreasing the ability to have fraud and abuse. Another thing they're doing is that in India there's this notorious way that government officials don't show up for work or show up late, and that really frustrates the residents when they're trying to go in line and wait for things. What they've done is that they've created retina scanners at some of these government offices so that when you punch in a time card, anyone can cheat and punch in anyone else's time card. But here, if you have a retina scanner, you kind of have to go into work.

[00:06:44] You have to be dealing with a very high level of public frustration if it takes retina scanning to reassure people that government officials are going to show up for work.

[00:06:53] That's what we're talking about. It's so entrenched in society where people just think, "It's OK. I don't have to go to work. I'm a government employee. If I just stop in, it's OK." I think what the government is doing as a whole is another story. I just don't think it's Modi. I think it's this new generation of Indians who are just frustrated and tired, and they want to make a difference. They're implementing these types of solutions because you can talk about these issues all you want — and we've been doing this in India. They've been doing this for years. But I think what you really need to do is make changes, and that's what we're seeing now. Another thing Modi tried to do, which I know there's a lot of criticism about, is the demonetization. The day we found out in America that our new president was Trump, Indians awoke to the fact that their 500-rupee note and 1000-rupee note — which essentially is like our five-dollar bill and 10-dollar bill in the US — you weren't allowed to use that anymore. Essentially, Modi, the night of the election, went into his parliament and told everyone that he was going to ban these bills. The idea behind it was to root out black money, which essentially is the underground, illicit funds

that were circulating through India. The idea was that people would have to bring in their 500- and 1000-rupee notes to a bank and collect new notes. People who had illicit funds who couldn't account for where they got this money from would not be able to go into a bank and explain, and they wouldn't then be able to get the new notes.

[00:08:23] The media coverage of that was absolute chaos. Did you hear different reports from within India?

[00:08:31] I was in India at the time. I was spending a lot of time in India. I was there, and it was very frustrating because even at the hotels, there were signs that said, "We do not accept 500- and 1000-rupee bills." Literally, what do you do with that? Think about if you walked into a Starbucks in America, and they said they won't take a five-dollar bill or a 10-dollar bill. The thing is that, we in America, we have credit cards, and so we'd be able to do that. But in India, a lot of folks don't have credit cards. I had my credit card, which was fine. I was able to use it, but there was a lot of criticism. The criticism was absolutely valid. My point in this is that what it's done — and this is kind of that leapfrog effect — it forced people into the digital economy. People that had no interest, no reason to go into the digital economy were forced into it. For example, when I was out there, we were just talking to people about how frustrated they were. Someone I know in India was explaining to me that he was always paying his helpers cash, but once the demonetization happened, he didn't have any money to give his helpers. He actually asked them and really said to them, "The only way I can get you money is if you open a bank account or if you get a Paytm account" — which is essentially like an Apple Pay account — "You sign up for that, and I'll be able to send you money from my Paytm to your Paytm." All of the sudden, now his helper is on the digital economy. Now it's been a year, a little more than a year, and he has not gone back to paying them cash.

[00:10:00] Sounds like a success story embedded in this, but that was sort of an unintended consequence, right? That wasn't Modi's goal — at least, not his stated goal.

[00:10:08] Yes. The stated goal was absolutely to try to root out illicit funds, and the general reporting is that he was unsuccessful in that because I think the jugaad came into effect. What happened was that 99 percent of Indian money was circulated, and new money was issued. They were hoping to get rid of a big chunk of change because of it being illicit funds, but what you saw was people using the same helpers that I was talking about that were brought into the digital economy. People were giving them money to go into banks to clean the funds. People found a workaround — the jugaad — in terms of how they were going to clean those funds. They suspect that all those illicit funds have now been washed.

[00:10:52] Never underestimate the creativity of criminals.

[00:10:55] Exactly. Exactly. I think the unintended consequence is that it's forced people now into the digital economy, and it's going to potentially have the long-term effect of decreasing touch points with government officials.

[00:11:09] That's clearly a good thing. Country after country, we see that if you can take the personalities out of it, minimize the interpersonal interactions in the business environment, then you can reduce the opportunity for a shakedown. That's very likely to have a positive impact. Going back to the civil servants, though, for a moment — we're going back and forth on this at TRACE as we continue to examine the best way to measure bribery risk. You said that they were poorly paid. Is that something

that Modi is addressing? I don't think we have good data for this, but intuitively, if your civil servants are really poorly paid, they are more likely to justify shakedowns than if they're making a living wage.

[00:11:55] I have not seen, either through interactions with folks or in reporting, whether that is being addressed just yet. That is an important issue to address, but I don't know if that's being addressed right now.

[00:12:08] Perhaps you could describe the enforcement climate because the Indian law against bribery is not being enforced with any rigor — certainly not extraterritoriality — but there are a number of U.S. cases that involve Indian entities.

[00:12:25] That is because they're still working on the framework of the law. Once they figure that out, there's going to be enforcement, but in the meanwhile, U.S. regulators are bringing FCPA cases. What we're seeing is that the multinationals are really paying attention to what foreign regulators are doing because that's hurting them in India. Then they're sending that message to the people that work for them saying, "Listen, we can't pay bribes. We can't engage in this conduct because there are global consequences." Then that's making its way to the Indian officials who understand that, "OK. This foreign company, this SEC-regulated company, is not going to pay a bribe. I need to move along and move to other companies, more local companies, because they don't have the same types of restrictions that these MNCs do." I think it's interesting to see that, and that is having a trickle down effect in India. I think there's always been — at least for the last 10 years — a constant flow of FCPA-related investigations in India, going back for almost a decade now. In the last year itself, there were three FCPA resolutions. There was a Cadbury-Mondelez case. There was the CDM Smith, which is an engineering and construction firm, and Alere, which is a medical device manufacturer. In the past, you'd see these types of cases, and you'd read about it in The New York Times or The Wall Street Journal, and even the local Indian newspapers would cover it, and that would be the end of it. There'd be foreign actions, but nothing would happen in India. What you're starting to see now is that there's, one, this awareness, as we discussed earlier, about these bribes. People are frustrated, and people realize that, when there's a story in The New York Times or a settlement with the DOJ or the SEC, someone in India solicited and accepted that bribe and received those funds because, as we all know, the U.S. is only prosecuting the bribe payer — the entity or individuals who paid the bribe and received the benefits of making that bribe payment. But they never go after the foreign official because they can't.

[00:14:48] Right. They have no jurisdiction over the official of a foreign sovereign state. There was the one unusual case in Haiti, but typically, they just they can't reach that far.

[00:14:58] Exactly, and rightfully so because that's really a local government's issue. We should see a corresponding local prosecution of that government official. We didn't see that in the past but what's been happening — this goes to our theme about how things are changing in India — what's happening is that now we're actually seeing the Indian government officials, the law enforcement, react and open investigations. For example, back in about 2015, you'll remember when The Wall Street Journal reported about the Wal-Mart story. The investigation may not be as large, or the bribe payments may not be as large as initially reported by The New York Times in 2012, but they were low-level, and some of them were in India. After that happened, the CVC, which is the Central Vigilance Commission, opened an inquiry. It was the first time the CVC opened an investigation involving a private company. Since that time, in 2015, when the Department of Justice resolved the matter with Louis Berger, the construction management consulting firm, the Goan state officials opened an investigation to determine who those

individuals were and potentially prosecute them. Similarly, just last year in the CDM Smith matter, the same thing happened where, more aggressively, the Indian embassy actually reached out to the U.S. and has been liaising with the Department of Justice to obtain information relating to their investigation. Showing sophistication, the Indian government has even gone back and canceled some of the contracts that it had with CDM Smith and is re-examining each and every single one of those contracts. Same thing with the Rolls Royce settlement that the UK SFO had with Rolls Royce. India has gone back, canceled those contracts and is looking at them on a case-by-case basis about whether it needs to renew them. You're really starting to see changes in India, both in the technology side and the way it's enforcing or thinking about enforcing its laws. I think that's the key, but it's still not in a place where it has the infrastructure, the sophistication to do it on its own. I think MNCs are constantly going to be paying attention to both foreign regulators, like the DOJ and the SEC and the SFO, more so now than before, and now slowly start paying attention to the Indian regulators.

[00:17:20] That's really interesting because all of these U.S. cases tell a story about bribery of a government official overseas, and very few of those countries pick that up and run with it. Very few. The case has been made that the bribe was paid, so the nature of a transaction means that there was somebody on the other side, so it sounds like India might be a little unusual in that respect. Do you chalk this up to just public demand? There was such outrage over high levels of corruption. We saw, a few years back now, the zero-rupee notes that they printed and the "I Paid a Bribe" website. Is that what's driving this, or is there something else?

[00:17:58] I think it's twofold. I think that is people's frustration with the way things have been, and I think, now, as you said, there's this awareness and this understanding that things can be better. I think in India, we're always compared to China and what's happened in China and how China's growing and, "Why isn't India growing?" I think there's this real desire within the young folks in India to be a better country. I think they want to be more successful, and they understand that these corrupt officials are just getting in their way. There is this real demand for things to change. I think that is definitely a result of people's demand. It's interesting because I lived in India as a child for a while, and there was this expectation that things were just slow. Government officials would never show up to appointments — you'd have to wait around forever. Now, when I go back to India, it is mind-boggling how when you get to meetings, the government officials are actually there before you. They're actually waiting for you. It's those little things. People aren't operating on — I'm sure you've heard the saying of "Indian Standard Time" before, where you make an appointment with an Indian, and they'll show up half an hour later. But things are changing. There's an awareness that, in order to operate in this global economy, there's certain standards you need to meet. I think people are demanding that India meet those standards. It's kind of the tone at the top if we're talking of corporate culture. When Modi is out there talking the talk but also walking the walk, we're seeing people falling into line a little bit the more. I think the key is that there's a desire to change. That is the key.

[00:19:45] That really echoes what I hear. I don't get there nearly as often as you do, of course, but I hear especially young executives saying, "There's an incredible sense of national pride. India is stepping onto the global stage." Then they'll add, "But we have to extricate ourselves from that old bakshish mentality. It's a drag on our commercial progress." I think there's a sense that India is just better than that, and that's really promising.

[00:20:15] It's a very interesting time to be here in the region and spending time in India because I think we're at a place where things are changing, and I think they're just going to continue to change. It'll be

interesting to see, as more and more foreign investment comes in, how things develop. But I think we're definitely moving in the right path.

[00:20:36] Let me end with two very practical questions. The first one is: The nature of bribery in every country is a little bit different — and you've already talked about the high levels of bureaucracy and the petty shakedowns and how that's shifting — but what other sorts of bribery do you see in India? Is it all very low-level, petty, day-to-day demands, or is it very high-leveled, where you could be working on a bid for three or four years and then be shaken down right at the end by somebody who is very senior? What does it look like to your clients?

[00:21:13] I would say it's a little bit of a pyramid where there is corruption at the top but, as you said, the lower you get, you're seeing more and more requests for payments and an expectation that you will be paid in order to do something. In the CDM Smith case, that was a multimillion-dollar fraud where it was the Indian Ministry of Road Transport and Highway Authority. They had to approve these construction projects in Goa, and what employees at CDM Smith had done was that they were increasing each contract by about 2-4 percent — so making those payments of 2-4 percent of each contract to a subcontractor that did no work. They also just gave US\$25,000 to the Goan state officials, and US\$25,000 in India is a lot of money. You see that kind of higher-level corruption, and then all the cases that we're talking about — Alere, CDM Smith, Cadbury, Anheuser-Busch, Louis Berger, Tyco, Oracle, Diageo — were all good-sized bribery cases. But then, as we said, we also see the low-level cases.

[00:22:31] A related question, but perhaps a more expansive question: If you were talking to a company that is a multinational that is heading into India for the first time, what is some advice you would give them on protecting themselves from the risk of bribery, as they set up and go through all the permitting, but all the way through to really establishing themselves in-country? I assume there would be the usual advice of "starting as you mean to go on" and "sending the right message" and "tone at the top," but as a practical matter, are there things that they can do at the outset that will reduce their risk?

[00:23:10] We talked about this last time. I think a lot of companies going into India need to understand that it is a risky environment and that there are a lot of touch points with government officials, and there is still this expectation that if you want things to be done quickly, they can be done quickly and will cost you, or if you just want things to be done on time, it can cost you. The attitude that MNCs entering India need to understand or need to have is that India is going to be a fruitful market for a very long time. Setting it up correctly and sending the message to the marketplace that you are a company that is not going to cut corners, not going to engage in shortcuts to get what they need and is going to follow the rule of law — even though that may take longer, even though it may end up being more expensive because it cuts into your timeline — if you're willing to work with that message, and you're willing to send that message to the marketplace, you will be successful. I think it's important to send that message to the marketplace because if you don't, as we're seeing with the cases that the DOJ, SEC, SFO and, soon, Indian regulators will be bringing, you'll end up paying a lot more in the long run.

[00:24:36] Good advice. Do you have any thoughts on use of good, vetted, local agents as opposed to putting employees on the ground? Obviously, not all companies are staffed or resourced to be able to put employees in every market, but is it possible to find good, ethical, local representatives who work on typically a commission basis for the company?

[00:25:02] If you look at most of the settlements that have been reached with regulators, it usually relates to third parties. In the region — not just in India, in the entire region — that is a high-risk area. But can you find folks? Absolutely. I think as the marketplace gets more sophisticated, as these third parties start realizing that there's a real value to doing it the right way and that people are willing to pay for those services to be done the right way — each industry is specific in terms of who you need and what you're looking for — but you will be able to find those third parties, but it will take a lot of effort.

[00:25:40] You had mentioned gifts and hospitality at the outset, and I just wanted to share an anecdote that I heard. Last week, I was talking to an Indian businessman about how schemes become more sophisticated so that they can be hidden from view obviously and not easily detected by companies. He said the old standby in India is jewelry, and very often, unset precious gems because they're portable and easily hidden. I'm just curious if that's something you come across. That seemed awfully old-school to me, some sort of linen cloth with precious gems bundled up in it, but each country has its peculiarities.

[00:26:21] You're right, and it's interesting because if you think about how people circumvent the systems, it's based on how aggressive law enforcement is. You see in some cases where folks are giving internships or jobs to relatives in order to convey the benefit to the government official. It's interesting in India. You see something one would say is unsophisticated or one would say very sophisticated — precious metals, gold coins or diamonds. I think, as you said earlier in the podcast, people will continue to be creative, and they will always try to find a way. I think what we can do in your world and in my world in the compliance side is have the policies and procedures and training in place so that, later, if you're ever questioned about what you did to stop this conduct, you'll be able to explain to a sophisticated regulator that, "We did everything we could. We identified the risk in the country. We knew the risks in India. We took our time when we went into India to ensure that our people followed the rules. We had the right training. We had the right checks in place to make sure that if anything happened, we caught it. Despite our best efforts, someone decided to use diamonds to make bribe payments or, maybe in China, decided to give a job to the son or daughter of a government official." I think you're always going to find people who are going to be creative and look for ways to circumvent the rules, but I think in our world, in terms of clients that we have, the key is to ensure that they've done enough to be able to defend the systems and data belt.

[00:28:17] Everything leaves a paper trail, even if you're moving diamonds around to pay people off. The money has to come from somewhere to buy those, so I think criminals are never quite as clever as they think. Thank you so much, and I look forward to speaking with you on the podcast again, Vasu.

[00:28:31] Thank you, Alexandra. I look forward to it as well.