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ABA INTERNATIONAL ANTI-CORRUPTION COMMITTEE

Spring 2019 NEWSLETTER

FEATURED ARTICLES

BE CAREFUL WHAT YOU WISH FOR: RECOMMENDATION 6 AS A RESPONSE TO THE PROLIFERATION OF INTERNATIONAL BRIBERY CASE SETTLEMENTS

By: Peter Y. Solmssen and Tina Søreide

American law enforcement has for years pressed other countries to prosecute public official bribery cases. Now that these prosecutions are in fact happening we are seeing a proliferation in both cases being brought and in multi-jurisdictional settlements of those cases. Settlements, or "non-trial resolutions" as they are increasingly called, have become the dominant form of concluding bribery cases all over the world.

The International Bar Association's Sub-committee on Non-trial Resolutions of Bribery Cases has just published a study of bribery settlements in 66 jurisdictions. The findings show that whether or not settlements are provided for in local law, they are practiced in almost all of the countries surveyed. The OECD has also just published a study of its member countries' practices which shows that non-trial resolutions are the prevailing means of ending corruption cases. Corporations operating in multiple countries report that they are finding increased enforcement of anti-bribery laws, and increasing use of non-trial resolutions.

Because there are no internationally applicable normative standards or rules for international settlements, chaos threatens. The United States

Department of Justice recognized this emerging problem in its "Piling On" policy (Policy on Coordination of Corporate Resolution Policies, Department of Justice Memorandum, May 9, 2018). But that policy is just a policy and affects only the behavior of the Department of Justice. More is needed.

Well before the Department of Justice "piling on" memorandum issued, the OECD had begun work on the topic. The OECD Secretary General's High Level Advisory Group recommended in March 2017, as its sixth recommendation out of a total of 22 recommendations, that the OECD "create and publish model guidelines for criminal and civil settlements and voluntary disclosure consistent with the requirement for effective, proportionate and dissuasive sanctions under the OECD Anti-Bribery Convention." (On Combating Corruption and Fostering Integrity, OECD Secretary-General's High Level Advisory Group (HLAG) on Anti-Corruption and Integrity, March 2017).

Taking up that recommendation, recommendation number six, a group of academics, lawyers and government officials formed an informal network to prepare a first draft of guidelines that the OECD might issue. Calling themselves the Recommendation 6 Network, the group had its initial in-person meeting at the OECD headquarters in Paris in March 2017. Approximately 20 members of the newly formed network appeared in person. Several government and OECD officials also attended the meeting and participated. In June 2017 the Network, represented by Tina Soreide and Peter Solmssen, addressed the full OECD Working Group on Bribery and introduced their work. The Working Group members were largely encouraging, so the work continued. Members of the Recommendation 6 Network met virtually and in person over the ensuing year and in October 2018 they delivered to Drago Kos, Chairman of the OECD Working Group on Bribery in International Business Transactions four documents. The documents can be found here: https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions.

The first document is a transmittal letter explaining the Network's formation and work. Importantly, it explains that many divergent points of view are reflected in the composition of the Network. The Network includes representatives of Civil Society (including Corruption Watch and Transparency International), academia, the private bar, corporations and law enforcement, from many different countries. Seeking to find common ground on which workable guidelines could be based required compromise by the participants. The Transmittal Memorandum states that some members may in other contexts take different positions, but for purposes of recommending useful guidelines, the members agreed on common positions. Indeed, after the Guidelines were delivered to the Working Group on Bribery, some organizations delivered comment letters that expanded on or differed slightly from the recommendations made in the Network's proposals.

The second document delivered by the Network is a form of resolution for the member states of the OECD to adopt. The core recommendation from the Network is that the 2009 OECD Recommendations to member states regarding the implementation of the OECD Treaty be supplemented with a new Appendix III (Appendix II describes what adequate compliance systems should be). The proposed language of a resolution would do that.

The third and fourth documents, the Principles and the Explanatory Notes form the core of the proposed guidelines.

The guidelines were written to be compatible with many different legal regimes and philosophies. The IBA survey of "structured settlements" noted above informed much of the work: the members of the Recommendation 6 Network knew that using different names and processes, countries had found ways to engage in negotiated settlements. Indeed the term, "non-trial resolutions" arose out of the need to adapt to local law. One prosecutor advised the Network, "You can't use the word negotiate. I don't negotiate." A practitioner who was present during that discussion had actually just concluded a settlement with that same prosecutor very recently. He reviewed for the meeting how they had come to a conclusion, and the Network drafters chose different language to accommodate that practice and local usage. The point was that settlements could be negotiated as long as local law and custom were observed.

Thus the third document, the Principles, is written in elastic, hortatory language. The fundamental elements are that non-trial resolutions offering the proper incentives, with the appropriate checks and balances and transparency, serve the purposes of the OECD Treaty. That alone is a considerable step. In many countries non-trial resolutions are perceived, like plea bargaining, to be illegal or immoral.

The Principles are accompanied by a fourth document, the Explanatory Notes, which describes how the Principles might or ought to be implemented and form the meat of the proposals. One national enforcement agency commented to the Network that when the Principles were adopted, in whatever form, they needed to be accompanied by the Explanatory Notes to be truly effective.

The Reporters of the Recommendation 6 Network work, Peter Solmssen and Tina Soreide described this in a conference call with the ABA Committee on Anti-Corruption on February 21, 2019 and solicited the Committee's support for this work.

Next steps? Tina Soreide and Peter Solmssen presented the finished documents in a discussion with the plenary of the Working Group on Bribery in Paris in February 2019 to considerable approval. The current expectation is that guidelines for non-trial resolutions will be included in the upcoming OECD revisions to its 2009 Recommendations to member states. ◆

Mr. Peter Solmssen practiced as a mergers and acquisitions lawyer at Morgan, Lewis & Bockius before joining his client General Electric Company as a corporate Vice President and General Counsel of GE Plastics. He went on to become the global General Counsel for Siemens AG, the German engineering company, where he also ran the company's operations in North and South America. After leaving Siemens he joined AIG as its Executive Vice President and General Counsel, retiring in 2017.

Professor Tina Søreide is a leading academic expert on international bribery matters. Her main interest is the interaction between governments and markets, and her research focuses on corruption, corporate liability and law enforcement. Professor Søreide is engaged in policy work, and has conducted projects for the OECD, the World Bank, the EU and the Norwegian Government..

ENHANCED GOVERNANCE AND ANTI-CORRUPTION POLICY OF THE INTERNATIONAL MONETARY FUND

By: Kirk A. Foster

On November 15, 2018, guest speaker Sebastiaan Pompe presented to the ABA SIL Anti-Corruption Committee on the enhanced Governance and Anti-Corruption policy of the International Monetary Fund (Fund).

Mr. Pompe, who is Senior Counsel at the Fund, explained that the 2018 policy builds on the existing 1997 document -- "The Role of the IMF in Governance Issues: Guidance Note," -- that has served as the basis for the Fund's anti-corruption and governance work for 20 years. The 2018 policy reflects a major effort by the Fund to focus on governance and anticorruption in its legal work and the use of Fund resources. Mr. Pompe's presentation provided background information on the Fund, and described the context and proposed implementation of the 2018 reforms.

Fund Background

The Fund is an organization of 189 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.

The Fund's primary purpose is to ensure the stability of the international monetary system—the system of exchange rates and international payments that enables countries (and their citizens) to transact with each other. The mandate is now understood to include macroeconomic and financial sector issues that bear on global stability.

The Fund pursues its mission using three main activities (a) surveillance of a member nation's economy, under Article

IV of the Fund's Articles of Agreement, which can include an annual "health check" of a nation's economy; (b) providing financing to support a member's reform programs and resolve its balance-of-payments difficulties ("Use of Fund Resources," or "UFR"), and (c) technical assistance to advise members on specific improvements to their legal and economic activities.

Context of the new policy

Concern about governance matters is not new to the Fund. The 1997 Guidance Note provided the basis for substantial work, for example, in Indonesia (2002) and more recently, in Ukraine (2014). It remains the Fund's bedrock policy and reflects the importance of sound governance and solid institutions for economic stability and growth. The Fund's governance work also includes substantial involvement in Anti-Money Laundering and Combatting the Financing of Terrorism (AML/CFT) which, in 2012, formally became part of the Fund's surveillance and other activities

The impetus to review and enhance the Fund policy stemmed from the growing realization of the pernicious economic effects of corruption and lack of sound governance. Similarly, there has been increased awareness that corruption can weaken a state's capacity to tax, leading to lower revenue collection, and it can also undermine spending programs through cost inflation and distorted, low-quality budget allocation. Other events, such as the revelations in the Panama Papers, and high-profile cases, such as Brazil's Petrobras and Odebrecht, also highlighted these problems.

As a result, in June 2017, the Fund engaged in a comprehensive review of its past governance engagement practices. In a "Stocktaking Paper," the Fund found that while basic policies and approaches were sound, it would be useful to articulate how a more intense focus could be implemented in light of the current environment.

The 2018 Policy Enhancement

The "Review of 1997 Guidance Note on Governance — A Proposed Framework for Enhanced Fund Engagement" was published in April 2018.As an overview, the new policy articulated an analytical framework focusing on the governance vulnerabilities and corruption in several key sectors that have substantial macroeconomic impact on the local economy: Fiscal, Central Bank, Banking Oversight, Market Regulation, Rule of Law, AML/CFT, and Corruption (also known as "the Six Sectors Plus One" model). Key sub-sectors will also be examined, e.g., fiscal covers revenue, expenditures, transparency, rule of law limitations, etc.

Under the framework, the economic vulnerabilities will be determined by the use of third party indicators, qualitative reports, and country-by-country assessments by Fund's country engagement teams along with other Fund experts.

Mr. Pompe explained that the analytical framework will be applied primarily in the context of the Fund's Surveillance and UFR, but will also be included in its technical assistance. There will be more consistent and in-depth review of these issues. As explained in detail in the above-mentioned paper, if the Fund's country assessment qualifies a nation as "critical," then governance vulnerabilities and corruption issues will be raised with the local authorities. There will be an increased focus on how governance and corruption vulnerabilities relate to reform programs that are supported

with use of Fund resources.

Next Steps? — Implementation

Mr. Pompe anticipates that changes will become apparent in at least four areas:

a) Article 4 Surveillance Reports. Expect future Surveillance Reports to contain a more pronounced focus on corruption, including supply-side corruption. Additionally, expect Fund-wide engagement and senior leadership support. There will also be strong engagement by country teams on these issues.

b) Programs. The new analytical framework (the "Six Plus One" model), will strengthen the focus and enhance the Fund's engagement in the sectors identified in the 2018 policy.

c) Enhanced approaches and tools. The Fund is developing response tools to analyze a nation's corruption challenges with possible solution sets. Engagement strategies will likely be tailored to address a nation's specific issues.

d) Cooperation. The new policy enhancements will likely result in increased cooperation with other agencies, e.g., the World Bank, OECD, private organizations, in order to align standards and efforts.

At the conclusion of his remarks, Mr. Pompe responded to questions about the origins of the 2018 Policy Enhancements, stressing that they reflect a change in attitude, especially by economists who increasingly recognize the linkage between sound laws and institutional foundations with stable markets, confidence in markets and economic growth. ◆

Sebastiaan Pompe is Senior Counsel at the IMF and has extensive experience supporting its efforts around the globe including serving as the Judicial Reform Advisor for the Greece and Portugal Programs, Manager of the National Legal Reform Program at the Fund, Advisor for the Indonesia Program for both the European Union and Australia AID, and Advisor on the Afghanistan Rule of Law Program for the World Bank. Mr. Pompe earned his PhD and Master's degrees in Law at Leiden University in the Netherlands, his BA and Master of Arts in Law at Cambridge University (Wolfson College), and a BA (with Honors) in Indonesian and Malay Studies at London University's School of Oriental and African Studies.

Kirk A. Foster is a former career U.S. Navy judge advocate, and currently a consultant. He resides in Alexandria, Virginia.

A BRIEF PRIMER ON ENGAGING IN CORPORATE POLITICAL ACTIVITY OUTSIDE THE U.S.

By: Severin Wirz

Multinational corporations (MNCs) are by nature impacted by a wide range of political decision-makers. In order to successfully operate in foreign environments, they must therefore learn to master effective corporate diplomacy. Before taking the plunge into corporate political activity outside the United States, however, corporations face a slew of questions. Which political activities best suit their aims and what are each of their associated risks? What laws and regulations apply, including both here in the United States as well as in the host country? This brief primer, written from an in-house, compliance perspective, is intended to help corporations think through these important and potentially serious questions.

The Sliding Scale of Overseas Political Influence

Corporations seeking to influence foreign political decision-makers should consider a range of options to achieve their aims. On one end of the scale lies lobbying of U.S. government officials who themselves have influence with their foreign counterparts. U.S. politicians, diplomats and other government officials will often advocate on behalf of American businesses if they believe that they are being treated unfairly in other countries. Google, for example, successfully lobbied a dozen Republican and Democratic lawmakers in 2014 to send letters on its behalf to Members of the European Parliament. At the time, Europe was preparing to vote on a resolution that would break up Google's online business into separate companies.

Alternatively, MNCs may decide to engage in overseas lobbying activities through home-state international business associations. Organizations such as the American Chamber of Commerce or The Transatlantic Business Council (TABC), for example, provide a platform for U.S. business executives to gain access to high-level, foreign officials. MNCs should note, however, that because these associations engage in lobbying activities on behalf of their members, they may be subject to local disclosure requirements. Under

Canada's 2008 Lobbying Act, for example, non-profit organizations are obligated to periodically identify their members in their lobbyist registration forms.

What about participating directly in overseas political advocacy, either through in-house lobbyists or external consultants? While it is difficult to know just how many companies engage in lobbying efforts overseas, one 2013 report by the Multilateral Investment Guarantee Agency (MIGA) found that 44% of surveyed companies investing in developing countries engaged in direct advocacy in their host country to mitigate political risks. Those corporations, accustomed to the highly developed lobbying culture of K Street, may be taken aback by the largely deregulated manner in which lobbying takes place in other parts of the world. Barring a few notable exceptions, most countries do not have any lobbying laws, and certainly few on par with the U.S. Lobbying Disclosure Act or the Foreign Agents Registration Act. Germany's voluntary public lobbying registry, for example, has more to do with obtaining a pass that allows access to the nonpublic parts of the Bundestag than it does with regulating lobbying activity. As a result, many U.S. MNCs engage in lobbying efforts abroad with far less regulatory oversight than what they experience at home.

That is not to say that American MNCs don't face other, non-legal risks when entering into the overseas political thicket. MNCs may be confronted with cultural perceptions and socio-political issues associated with corporate political activity that they do not face at home. In countries where lobbying is informal and uncommon, any lobbying activity by a foreign company may be misperceived as a form of corruption. Politicians who are sensitive to these public perceptions (especially in resource rich countries with histories of corruption), may quickly turn against MNCs when politically expedient. It is essential, therefore, that MNCs read the political climate where they are involved politically and engage with local PR consulting firms to help navigate these cultural tides.

On the far end of the scale are those companies engaging in direct political contributions overseas. In a great many countries, donations from foreign interests to candidates or political parties are outright banned. Note that in some, the ban applies to all foreign interests whereas elsewhere it may exclude local subsidiaries. In still others, foreign contributions may be allowed, but are limited in amount, such as in Germany where the threshold is EUR 1,000.

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Even where foreign contributions are legal, however, most countries ban corporate contributions. The net result is that there only a handful of host countries where foreign corporations are able to contribute funds either directly or indirectly to political candidates or parties. Before engaging in such activities, multinational corporations would do well to seek the advice of local, outside counsel.

Complying with Foreign Anti-Bribery and Ethics Laws

Underlying this patchwork of local lobbying and election laws is an equally broad array of cross-border anti-bribery laws. Most notable among these is the Foreign Corrupt Practices Act (FCPA), passed by Congress in 1977 to prohibit corporations falling under U.S. jurisdictional reach from making corrupt payments to foreign government officials. Penalties for companies found

violating the FCPA have been notoriously severe, totaling a whopping USD 2.89 billion in 2018. The FCPA also applies to officers, directors, employees and agents of corporations, and criminal liability may be imposed without regard to citizenship or nationality. Since passage of the OECD's Anti-Bribery Convention in 1997, more and more countries have passed FCPA-like laws. As a result, MNCs doing business overseas must now navigate a network of overlapping anti-corruption laws that criminalize bribery of foreign officials. To do so, most have invested in robust and expensive anti-bribery compliance programs.

In addition to these international statutes, MNCs must also be aware of local anti-bribery and ethics laws. What constitutes corruption varies considerably from jurisdiction to jurisdiction, and the murky grey area between acceptable corporate behavior and corruption can differ depending on the country. When is it okay to invite a local government official out for a drink or a meal? Does it matter the official's seniority level? The answer may vary widely based on country or even by municipality within a country. In Brazil, for example, federal officials are subject to different gifts and entertainment limits than local, city officials. Fortunately, many law firms have begun to develop and make publicly available online databases of gift guidelines for various countries.

Conclusion

Much like the decision to partake in political activity here in the United States, the decision to engage in overseas political activity should not be taken lightly. In fact, in most instances, it should only be made after discussion with the company's board of directors. Some companies may decide they have no choice but to engage their host countries in political advocacy. In either scenario, companies that engage in overseas political activity must do so with clear focus in order to proactively stay ahead of the legal and cultural changes taking place where they do business. As with most things, achieving a successful overseas political strategy requires nothing more and nothing less than careful planning and execution. ◆

Severin Wirz is the Senior Director of Anti-Corruption Compliance & Ethics at TIAA, a Fortune 100 financial services company. He is also co-chair of the ABA Section on International Law's International Anti-Corruption Committee.

ANTI-CORRUPTION NEWS YOU MAY HAVE MISSED

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By: Anne-Marie Zell

ASIA

INAUGURAL ANTI-CORRUPTION OMBUDSMAN APPOINTED IN INDIA

India has appointed its first anti-corruption ombudsman, or "Lokpal." In March, President Nath Kovind appointed former Supreme Court Justice Pinaki Chandra Ghose to the position. Despite the passage of the Lokpal and Lokayuktas Act in 2013, which called for the creation of anti-corruption ombudsman at both federal and state levels, no federal Lokpal had yet been established. As Lokpal, Ghose is authorized to investigate allegations of corruption against certain public officials, including current and former prime ministers, federal ministers, and members of parliament.

CORPORATE AND PERSONAL LIABILITY IN MALAYSIA

An amendment to the Malaysian Anti-Corruption Commission Act 2009 introduced corporate liability for bribery and corruption in the country. Under the amendment, a corporation's directors, officers, and managers also may also be subject to liability if they authorize, ignore, or fail to reasonably prevent the misconduct. The amendment also provides for increased sanctions for violations, up to 20 years in prison and approximately $245,000 in fines. The amendment took effect late last year and, shortly thereafter in December, Malaysia published guidelines on what constitutes adequate procedures for corporate compliance programs. These guidelines will enter into force in 2020.

EUROPE

BULGARIA INVESTIGATING OFFICIALS' LUXURY APARTMENTS

An investigation into a luxury apartment scandal in Bulgaria has ensnared the head of the country's anti-corruption commission, Plamen Georgiev. Federal prosecutors have alleged that Georgiev made false statements regarding his purchase of an apartment in Sofia. At issue is the source of the funds for the property acquisition. Although Georgiev disputes the charges, he has taken a leave of absence from his position on the anti-corruption commission. Several Bulgarian ministers have similarly been accused of acquiring luxury apartments in Sofia at below-market prices.

ITALY INTRODUCES "BRIBE DESTROYER" LAW

In January, Italy published a new law amending criminal and civil code provisions on anti-corruption. Among others, the law contains measures vesting Italian authorities with additional investigative powers related to crimes, including corruption, in public administration. Under the law, federal prosecutors are now authorized to use undercover agents, wiretapping, and "Trojan" spyware to investigate corruption. The law also expands the definition of foreign public official to cover individuals who perform functions akin to those performed by public officials and persons in charge of public services in international organizations; officials and judges of international courts; and members of international or supranational organizations and international parliamentary assemblies.

RUSSIA CONSIDERS EXEMPTING "UNAVOIDABLE" CORRUPTION

Russia's Ministry of Justice and other federal agencies are seeking to amend the country's anti-corruption laws. The country is reportedly considering a proposed rule change that would exempt public officials for so-called unavoidable corruption. The proposed rule was published online following an earlier decree by President Vladimir Putin.

MENA

IRAQI ANTI-CORRUPTION COUNCIL LAUNCHES

Iraq has formed a new anti-corruption body, the Supreme Anti-Corruption Council. The Council recently held its first meeting, during which Prime Minister Adil Abdul-Mahdi expressed a commitment to strengthening anti-corruption efforts in the country. The Council will support these efforts and provide centralized oversight of all anti-corruption matters. The former chief of Iraq's Commission on Public Integrity, Moussa Faraj, has questioned whether there is a legitimate will to address corruption and alleged the creation of the Council as a new anti-corruption body is illegal.

ISRAELI PRIME MINISTER BENAJMIN NETANYAHU TO FACE CORRUPTION CHARGES

In February, the Attorney General of Israel, Avihai Mandelblit, announced his intentions to indict Prime Minister Benajmin Netanyahu for criminal charges, including bribery, fraud, and breach of trust. Among other things, Prime Minister Netanyahu is alleged to have received lavish gifts in exchange for his influence of telecommunications and tax laws. Other bribery allegations relate to the telecom company, Bezeq, which purportedly provided positive media coverage for the prime minister in exchange for financially beneficial regulatory changes. Prime Minister Netanyahu has denied any wrongdoing and is set to begin his next term after narrowly prevailing in the recent election.

SOUTH AMERICA

FORMER BRAZILIAN PRESIDENT MICHEL TEMER ARRESTED FOR CONSTRUCTION BRIBE

Brazilian authorities arrested former President Michel Temer in late March for alleged corruption. Federal prosecutors alleged that President Temer helped orchestrate the award of a lucrative contract to build a nuclear power plant to Engevix, an engineering and construction company, in exchange for a $260,000 bribe. Inflated invoices for the renovation of the home of President Temer's daughter are said to have provided the means for laundering the bribe. Federal prosecutors indicated they have a spreadsheet showing payments promised to President Temer over 20 years, and that a criminal organization led by President Temer received upwards of $473 million in bribes. President Temer left office on January 1.

ARGENTINA PUBLISHES DECREE APPROVING NATIONAL ANTI-CORRUPTION PLAN

In April, Argentina published a decree in its official gazette approving the National Anti-Corruption Plan (the "NAP"), which identifies measures for combatting corruption over the next five years. The decree also provides for the creation of an advisory council of representatives from civil society and the private sector to address implementation of NAP initiatives and of public monitoring mechanisms.

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CALL FOR ARTICLES

Want to contribute an article to a future issue of the newsletter?

Submit an article between 500 and 3,000 words that addresses an international anti-corruption issue. No footnotes please (though hyperlinks to sources are encouraged). Please include a one sentence bio as well.

Submissions may be sent to Severin Wirz at Severin.Wirz@tiaa.org.

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